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Why Impoverished Discourse Gets A Slap On The Wrist: The Causes And Challenges Of Sexual Harassment of Women In The Legal Profession

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WHY IMPOVERISHED DISCOURSE GETS A SLAP ON THE WRIST: THE CAUSES AND CHALLENGES OF SEXUAL HARASSMENT OF WOMEN IN THE LEGAL PROFESSION

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INTRODUCTION

In 2018, the American Bar Association ("ABA") journal surveyed 3,000 businesses and law firms and found that sixty-eight percent of women respondents have experienced sexual harassment.[1] The rate of sexual harassment amongst women in the legal field is almost twice as high as that of the general workforce, which experiences sexual harassment at a rate of thirty-eight percent.[2] Despite these findings, sexual harassment of women in the legal profession has not been mitigated.[3] To mitigate this issue in the legal profession and offer remedies to victims, two actions are required: (1) stricter federal regulations of sexual harassment, and (2) a cultural shift within the legal profession, which can be achieved through education, training, and holding accountable those who commit legal and ethical violations.

Federal legislation often falls short in providing an adequate legal remedy; thus, many individual state legislations, the ABA, and state bar associations should aim to pick up the slack.[4] To start, states should adopt ABA Model Rule 8.4(g), which tightens professional sanctions for sexual harassment misconduct and provides guidance on mitigating sexual harassment for state bar associations.[5] State bar organizations should also be at the forefront of a cultural shift, in which professionals are accountable for and prevented from turning a blind eye to sexual harassment. This can be accomplished by first addressing the current masculine culture within the legal profession.

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[1] Hannah Hays, *Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond*, AM. BAR ASS'N (Jan. 17, 2019), https://www.americanbar.org/groups/diversity/women/publications/ perspectives/ 2018/december-january/is-time-really-for-sexual-harassment-the-workplace-companies-and-law-firms-respond/.sh.

[2] Robert C. Jarosh & Erin E. Berry, *The Current Status of Sexual Harassment in the Legal Profession*, WYO. LAW., Apr. 2019, at 30–33.

[3] *Compare* Hays, *supra* note 1 (providing statistics on the prevalence of sexual harassment today), *with* Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1463–67 (1987) (providing a perspective of sexual harassment in the legal workplace in the 1980s).

[4] *See* Schoenheider, *supra* note 3 (arguing that Title VII of the Civil Rights Act does not provide adequate legal protection for sexual harassment).

[5] *See* Dennis Rendleman, The Crusade Against Model Rule 8.4(g), AM. BAR ASS'N (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-modelrule-8-4-g-/ (analyzing states adoption of ABA Model Rule 8.4(g)). Twenty-five states have made it an ethical violation for employers to harass or discriminate even prior to the ABA Model Rule. An ethical violation is professional misconduct, as sexual harassment is a form of discrimination.

Part I of this Note examines the definition of sexual harassment, the different types of workplace sexual harassment and its trigger. Part II discusses the development of the law on sexual harassment. Part III examines the hierarchy of laws and regulations and associated inadequacies that impact the scope of the claims of sexual harassment. This segment of the Note focuses on the role of the Equal Employment Opportunity Commission ("EEOC") as an enforcer of discrimination and harassment laws, claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), and professional misconduct claims. Lastly, Part IV proposes essential reforms aimed at changing the legal profession's current culture and providing a more robust set of legal remedies to victims of workplace sexual harassment. This segment also argues that reforming the sexual harassment culture must include education, prevention, and deterrence through punishment.

I. SEXUAL HARASSMENT IS SEX DISCRIMINATION

Sexual harassment is sex discrimination that furthers inequality among the sexes.[6] Nearly three decades ago, federal courts recognized sexual harassment as a form of sex discrimination. Since then, sexual harassment, particularly in the legal profession, has remained prevalent. In order to best understand how to address sexual harassment in the legal field, it is important to know how it is defined, the different types, and its triggers.

A. Sexual Harassment Defined

Section 1604.11(a) of the Code of Federal Regulations (CFR), defines sexual harassment as both verbal and physical conduct of a sexual nature as well as unwelcome sexual advances or requests for sexual favors.[7] The CFR further specifies that sexual harassment is: (1) agreeing to conduct that is made either explicitly or implicitly a term or condition of employment; (2) agreeing or rejecting conduct that is used as the basis for employment decisions that do or will affect that individual; or (3) such conduct that has the purpose or effect of unreasonably interfering with the individual's work performance or creates an intimidating, hostile, or offensive work environment.[8]

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[6] U.S. EEOC FACT SHEET: SEXUAL HARASSMENT (describing sexual harassment as a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964).
[7] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC REGULATIONS, https://www.eeoc.gov/laws/regulations/index.cfm (last visited July 25, 2020); 29 C.F.R. § 1604.11(a) (1993).
[8] 29 C.F.R. § 1604.11(a) (1993).

B. Types of Sexual Harassment Claims

The goal of Title VII of the Civil Rights Act, is to remedy victims of workplace sexual harassment.[9] There are two types of sexual harassment claims—*quid pro quo* and hostile environment—that an individual can bring as a cause of action under Title VII.[10] No single factor is determinative of what constitutes sexual harassment, but often relevant factors relating to the conduct at issue include: frequency, severity, whether conduct is physically threatening or humiliating, unreasonably interferes with an employee's work performance, or causes psychological harm to the victim.[11] The determination is based on the perspective of a reasonable person under the circumstances, but many federal appellate courts have used a more relevant standard of a "reasonable woman" in determining sexual harassment.[12]

1. Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment in the workplace is when an employer explicitly or implicitly makes a term or condition of employment dependent upon the employee's submission or rejection to sexual harassment.[13] Under *quid pro quo* sexual harassment, the plaintiff bears the burden of proof to show that she suffered a tangible job detriment.[14] A tangible job detriment is found when the plaintiff can prove a threat of termination or actual termination of employment.[15] *Quid pro quo* sexual harassment is also present when an employee's submission or rejection of

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[9] *EEOC Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/remedies.cfm (last visited July 25, 2020) (explaining the EEOC's goal to provide a remedy to victims of employment discrimination and harassment by putting them in the same, or nearly the same, position that he or she would have been in had the conduct not occurred).

[10] *Id.*

[11] Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 183 (1994).

[12] *Id.* at 1487; Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (stating that the reasonable woman standard asks whether a reasonable woman would consider the conduct sufficiently severe or pervasive to alter the conditions of the employment or create a hostile or abusive work environment).

[13] § 1604.11(a)(1); Pfenninger, *supra* note 11, at 184 ("'[Q]uid pro quo' sexual harassment, the employee must show that submission to unwelcome advances was an express or implied condition for receiving job benefits or that refusal to submit to the advances resulted in tangible job detriment.").

[14] Highlander v. KFC Nat'l Mgmt. Co., 805 F.2d 644, 648 (6th Cir. 1986).

[15] *Id*. at 644 (holding that the use of a fluctuating work week method of compensation for overtime did not constitute a tangible job detriment). Stockett v. Tolin, 791 F. Supp. 1536, 1536 (S.D. Fla. 1992) (finding a tangible job detriment with a threat to fire the plaintiff if she did not submit to sex with her employer).

the conduct determines an employment decision.[16] For example, in *Stockett v. Tolin*, the United States District Court for the Southern District of Florida found *quid pro quo* sexual harassment after an employer sexually harassed the plaintiff by threatening to fire her if she did not have sex with him.[17]

2. Hostile Environment Sexual Harassment

Hostile environment sexual harassment involves sexual harassment by an employer or employee with the purpose or effect of unreasonably interfering with the victim's work performance or creating a hostile, intimidating, or offensive work environment.[18] For example, in *Boyd v. James S. Hayes Living Health Care Agency, Inc*., the United States District Court for the Western District of Tennessee found a hostile environment after a male supervisor insisted that a female employee come to his hotel room while he provided her with wine and subjected her to a sexually explicit movie, attempted to keep her from leaving, and slammed the door behind her when she left.[19] For a finding of hostile environment sexual harassment, the conduct must be directed at the plaintiff and be pervasive or severe. A single instance is traditionally insufficient to bring a claim under Title VII.[20] However, if the incident is severe enough, it may alone establish hostile work environment.[21]

C. The Trigger of Sexual Harassment

Though *quid pro quo* and hostile environment are two different types of sexual harassment, the trigger is similar—power.[22] Sexual harassment is an expression of

[16] § 1604.11(a).
[17] 791 F. Supp. 1536. In this case, the employer was found to have used sexually explicit, degrading, and vulgar language, as well as committed repeated acts of physical abuse.
[18] § 1604.11(a).
[19] 671 F. Supp. 1155 (W.D. Tenn. 1987).
[20] Kuhn v. Philip Morris U.S.A., 814 F. Supp. 450 (E.D. Pa. 1993); Pfenninger, *supra* note 11, at 185 ("As a rule, joking, teasing, and conversation that may include sexual connotations may not necessarily rise to the level of 'hostile work environment' sexual harassment under Title VII.").
[21] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[I]solated incidents, unless extremely serious, will not amount to [harassment]."); Daniel v. T & M Prot. Res*., LLC*, 689 F. App'x 1 (2d Cir. 2017) ("[I]solated incidents usually will not suffice to establish a hostile work environment." However, holding "a single episode of harassment can establish a hostile work environment if the incident is sufficiently severe."). Rivera v. Rochester Genesee Reg'l Transp., Auth., 743 F.3d 11, 24 (2d Cir. 2014) (recognizing the possibility that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet" by an employer or supervisor.").
[22] Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 745 (1997) (arguing that sexual harassment lies in its power as a regulatory practice of sexism).

power, privilege, or dominance, which is motivated more by control than sexual desire.[23] According to scholars, the subconscious view of sex as an element of power over another is not biological but socially constructed by cultural stereotypes and gender norms of both men and women.[24] The gender norms and stereotypes of women include several subtypes: "sexy," "traditional," and "nontraditional."[25] "Sexy" women may experience harassment as a result of the aggressor's hostile desire.[26] "Traditional" women, so long as they do not also fit into the "sexy" subtype, fall within the social norms of feminine family roles and usually assume subordinate work roles in society, making them the least likely of the three subtypes to experience workplace sexual harassment.[27] "Nontraditional" women may experience sexual harassment as a result of the aggressor's attempt to reassert both male dominance and traditional gender roles, i.e., that women are primarily sexual and should be subordinates in the workforce of men.[28]

A woman's occupation is strongly associated with her respective subtype.[29] Specifically, women in the legal profession are often associated with the "nontraditional" subtype.[30] Nontraditional women threaten the culture of the legal profession and the self-esteem of men whose gender-identity is tied to their job.[31] Historically the legal field is a male-dominated occupation and as such cultural stereotypes and gender norms have merged with workplaces themselves and roles within workplaces.[32] The more influenced the job culture is by stereotypes and gender norms the greater likelihood of sexual hostility toward women because women are seen as a disruption of the "brotherhood" of the occupational culture.[33] Although women who attempt to appear less threatening by conforming to traditional gender roles may reduce their risk of sexual harassment, they may also be looked at as less devoted to their careers.[34]

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[23] McLaughlin et. al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77(4) AM. SOC. REV. 625, 625–26 (2012). Franke, *supra* note 22, at 745 ("[S]exual harassment is best understood as the expression, in sexual terms, of power, privilege, or dominance.").
[24] McLaughlin et. al, *supra* note 23, at 626.
[25] Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 102—05 (1995).
[26] *Id.* at 103.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 105.
[30] *Id.*
[31] Fiske & Glick, *supra* note 25, at 106.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 105.

Understanding that power is the trigger of workplace sexual harassment highlights the need for reconstruction.[35] Recognizing the dynamic between cultural stereotypes and gender norms is key to reforming the culture.[36] These dynamics are engrained within the legal profession and increase the likelihood and instances of sexual harassment.[37] Through education, training, and professional discipline, changing the sexually hostile culture of the legal profession can be achieved.[38]

II. DEVELOPMENT OF THE LAW ON SEXUAL HARASSMENT

In the United States, the Civil Rights Act of 1964 laid the groundwork for establishing federal sexual harassment laws and eventually made sexual harassment illegal in the workplace.[39] The Act prohibits discrimination on the basis of race, color, religion, sex, or national origin.[40] Initially, courts followed the statute's plain language to determine the scope and meaning of "sex."[41] Although sexual harassment is a form of sex discrimination, it took many years to define sex discrimination and create legislation to protect victims of sexual harassment.[42] The first time the Supreme Court recognized sexual harassment as a violation of Title VII was 1986.[43] The landmark decision, *Meritor Savings Bank v. Vinson*, ruled that sexual harassment was always discrimination "because of sex."[44] This decision put

[35] *Id.*
[36] *Id.*
[37] Franke, *supra* note 22, at 739 ("[M]ale sexuality as eroticized domination: power is sexualized, sex is power.").
[38] Kristy D'Angelo-Corker, *Don't Call me Sweetheart! Why the ABA's New Rule Addressing Harassment and Discrimination is so Important for Women Working in the Legal Profession Today*, 23 LEWIS & CLARK L. REV. 263 (2019) (examining state bar associations varying methods of implementation of state laws on workplace sexual harassment).
[39] 42 U.S.C. § 200e-2(a) (1964).
[40] § 200e-2(a) (stating employment discrimination "because of . . . race, color, religion, sex, or national origin" is prohibited).
[41] *See, e.g.,* Christine J. Back & Wilson C. Freeman, Cong. Research Serv. R45155, *Sexual Harassment and Title VII: Selected Legal Issues* (2018) (stating Title VII does not expressly prohibit sexual harassment).
[42] *EEOC Remedies for Employment Discrimination*, *supra* note 9.
[43] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (holding sexual harassment is actionable under Title VII, even when it does not lead to economic injury it creates a hostile work environment).
[44] *Id*. (recognized sexual harassment as sex discrimination under Title VII).

the wheels in motion for establishing how sexual harassment is interpreted now.[45] Today, sexual harassment—verbal and physical—is actionable under Title VII.[46]

In the late 1980s, the Supreme Court interpreted Title VII to recognize sexual harassment as a form of sex discrimination that applies to private employers with fifteen or more employees, as well as government and labor organizations.[47] Title VII and the establishment of the EEOC imposed a duty on employers to eliminate, and work to prevent, sexual harassment in the workplace.[48] Under Title VII, it is unlawful for an employer to discharge any employee or otherwise discriminate against him or her with respect to his or her compensation, terms, conditions, or privileges of employment on the basis of the employee's sex.[49] Thus, sexual harassment is a form of sex discrimination that violates Title VII.[50]

Although sexual harassment is prohibited under Title VII, there is meager federal law in place for incidents of sexual harassment in the workplace.[51] Currently, federal statutes protect individuals from acts of sexual harassment that unreasonably interfere with the individual's work performance or acts that create a hostile or offensive work environment.[52] However, Title VII often falls short in compensating a victim of sexual harassment in the workplace and places strict limits on any recovery of punitive damages.[53] Because of the lack of federal

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[45] *See, e.g.,* Back & Freeman, *supra* note 41 (stating that Meritor Sav. Bank formulated employer liability for workplace harassment).

[46] *EEOC Remedies for Employment Discrimination, supra* note 9 (defining sexual harassment as "unwelcome sexual advances, request for sexual favors, and other verbal or physical harassment of a sexual nature").

[47] NAT'L CONFERENCE OF STATE LEGISLATURES, SEXUAL HARASSMENT IN THE WORKPLACE (2019), http://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx (describing how Title VII applies to private employers).

[48] 42 U.S.C. § 2000e-2(a) (1964) (United States Code on unlawful employment practices includes sexual harassment).

[49] § 2000e-2(a) (arguing it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of . . . sex.").

[50] *EEOC Remedies for Employment Discrimination*, *supra* note 9 (stating that sexual harassment is sex discrimination).

[51] Schoenheider, *supra* note 3, at 1462 (arguing that Title VII of the Civil Rights Act does not provide adequate legal protection for sexual harassment).

[52] § 1604.11(a).

[53] Schoenheider*, supra* note 3, at 1462 (stating punitive damages often impose a powerful deterrent on an offending party. Tort law is the only body of law that provides a private remedy for personal harm and can award punitive damages. However, if the plaintiff, who experienced the sexual harassment, cannot show a threat of physical injury or other conduct that a court determines is sufficiently outrageous, then the plaintiff will not be adequately compensated); *EEOC Remedies for Employment Discrimination*, *supra* note 9 (allowing punitive damages to be recovered for "especially malicious or reckless act of discrimination" up to $50,000 - $300,000 depending on

involvement, many states are looking beyond federal law to minimize workplace harassment.[54] Some states have specifically included "sex" in their discrimination laws as a protected class.[55]

A. The Role of the Equal Employment Opportunity Commission (EEOC)

The EEOC is the enforcer of federal workplace discrimination laws and has the authority to investigate and prevent sex-based discrimination against an employee.[56] The sexual harassment litigation process includes: (1) filing a claim with the EEOC and, eventually, the federal court; (2) attempting to settle the claim; (3) conducting discovery and a trial if the parties are unable to settle; and then (4) enforcing the judgement.[57] Victims of sexual harassment must file a charge of employment discrimination with the EEOC prior to filing a lawsuit for unlawful discrimination.[58] When filing a charge with the EEOC, a claimant must: (1) file within the strict deadline of 180 days from the date of the incident; and (2) attend an interview with a staff member of the EEOC.[59] All of these steps must occur before the EEOC office will investigate the discrimination and determine if filing a charge is the appropriate path for the victim.[60] If the EEOC determines that filing a charge is appropriate, the claimant has the opportunity to file a lawsuit at her federal district court alleging sexual discrimination and harassment in violation of Title VII in their complaint.[61]

B. State Regulation of Sexual Harassment

Forty-seven states and Washington, D.C., have gone beyond federal law to implement anti-discrimination statutes to prohibit sexual harassment in the

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the size of the employer's business. However, in order for victim to qualify for punitive damages the employer must employ a minimum of 15 employees.)

[54] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 47 (providing examples of the preventative measures states have done to go beyond federal regulations to prevent workplace sexual harassment).

[55] *Id*. ("Some states have included 'sex' in their discrimination laws as a protected class.").

[56] *EEOC Remedies for Employment Discrimination*, *supra* note 9.

[57] Jay Marhoefer, *The Quality of Mercy Is Strained: How the Procedures of Sexual Harassment Litigation Against Law Firms Frustrate Both the Substantive Law of Title VII and the Integration of an Ethic of Care into the Legal Profession*, 78 CHI.-KENT L. REV. 817, 858 (2003) (describing the role of the EEOC in sexual harassment litigation).

[58] *EEOC Remedies for Employment Discrimination*, *supra* note 9 (describing the role of the EEOC in sexual harassment litigation).

[59] *Id*. (describing guidelines for filing a charge with the EEOC).

[60] *Id.*

[61] Marhoefer, *supra* note 57, at 842–43 (stating the scope of sexual harassment litigation).

workplace.[62] The remaining states rely on tort law.[63] Many states have established their own Fair Employment Practices Agencies ("FEPA"), which is responsible for enforcing geographic-specific anti-discrimination laws.[64] FEPA can go beyond federal regulations of the EEOC and provides another avenue for employees to bring a cause of action for sexual harassment.[65] Many states include "sex" in their discrimination laws as a protected class.[66] By including sex as a protected class, states explicitly prohibit sexual assault in the workplace.[67]

In addition to including sex as a protected class, several states require employers to take affirmative action to prevent sexual harassment.[68] State regulations include requirements for employers to provide training, formally written policies, posting signs, and taking all reasonable measures to prevent workplace sexual harassment.[69] Further, some state sexual harassment statutes cover employers with fewer than fifteen employees, and seventeen states cover all employers with just one employee.[70]

In 1991, Connecticut was the first state to depart from federal regulations of sexual harassment in the workplace.[71] Connecticut law requires employers to instruct new supervisors and employees on sexual harassment prevention through

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[62] Farkas et. al., State Regulation of Sexual Harassment, GEO. J. GENDER L. 421, 424–25 (2019) ("To supplement federal law, forty-seven states and Washington, DC have implemented anti-discrimination statutes that either expressly or impliedly prohibit sexual harassment in the private workplace.").

[63] Schoenheider, *supra* note 3, at 1475–85 (Torts of assault and battery, intrusion, interference with contractual relations, and intentional infliction of emotional distress all fall short in adequately compensating a victim of workplace sexual harassment and proposes a new tort of sexual harassment). "[T]ort law is the only body of law that provides a private remedy for personal harm caused by sexual harassment." *Id*. at 1462.

[64] Farkas et al., *supra* note 62, at 431 (stating employees can either bring a cause of action for sexual harassment through the EEOC or FEPA).

[65] Schoenheider, *supra* note 3 (FEPAs often enforce statutes that offer greater protection than Title VII; they also often have different deadlines, standards, and relief available to the employee).

[66] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 47 (examining states response to sexual harassment).

[67] *Id*. ("Depending on the specific state, "sex" protections can cover the prohibition of sexual harassment in the workplace. Other states have explicitly included a prohibition of sexual assault in the workplace in their employment discrimination laws.").

[68] *Id.* (distinguishing implementation of state law on sexual harassment to apply to more private employers than under Title VII, which requires 15 employees to bring a claim).

[69] *Id*. (states have implemented many forms of sexual harassment regulations).

[70] *Id*. (distinguishing implementation of state law on sexual harassment to apply to more private employers than under Title VII, which requires 15 employees to bring a claim).

[71] Katherine Yon Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57, 69 (2019) (describing states that have considered or required sexual harassment training in the workplace); NAT'L CONFERENCE OF STATE LEGislatures, *supra* note **Error! Bookmark not defined.**7 (describing differing state laws on sexual harassment).

a two-hour training and education session.[72] Seven other states followed suit by requiring or encouraging employers to provide training on sexual harassment to their employees and supervisors.[73] Massachusetts, Rhode Island, and Vermont enacted laws that encourage employers to conduct an education and training program on sexual harassment prevention for new employees and new supervisors.[74] Maine goes even further and requires sexual harassment prevention training for all new employees.[75] Similarly, New York requires employers to provide interactive sexual harassment prevention training to all new employees but adds that this must be done annually.[76] Delaware also requires employers to provide interactive training and education to new *and* existing employees *and* supervisors every two years.[77]

California and Vermont have the most specific and regulative policies on sexual harassment prevention training.[78] California has one of the most elaborate laws which requires employers to provide at least two hours of classroom or other effective interactive training and education to all new supervisory employees and at least one hour of instruction to all new nonsupervisory employees, both required every two years.[79] California also requires temporary employees to have training on sexual harassment.[80] Further, in Vermont, the attorney general's office has put in place regulations that specifically require employers to provide educational training programs on sexual harassment prevention to all employees annually for up to three years; this regulation is in addition to Vermont's state legislation enacted to prevent workplace sexual harassment.[81] Vermont comprises only 0.1% of the total sexual harassment charges filed in the United States, while ranking among the seventh highest in the number of employed lawyers per capita in the United States.[82] Further, employers at the Vermont Attorney General's Office must either

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[72] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7 (showing chart that describes all of Connecticut law on sexual harassment.)
[73] *Id*. (describing state specific training for sexual harassment).
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.
[78] *Id*.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 – FY 2018,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_fepas_by_state.cfm (Last visited Feb. 25, 2020)* (stating the total charges filed in 2019 with the EEOC and FEPA was 11,283 and Vermont's total charges filed in 2019 by women was 10, compromising 0.1% of the

agree to state regulated sexual harassment inspections or conduct an anonymous working-climate survey annually for up to three years.[83]

Federal law does not require training on sexual harassment prevention, but states have still enacted laws requiring employers to provide sexual harassment training in the workplace.[84] However, a few states have no additional laws or regulations in place to protect victims of sexual harassment in the workplace.[85] States like Kansas, Massachusetts, New Mexico, New York, Ohio, and Washington have implemented sanctions for attorneys engaging in any conduct that negatively reflects fitness to practice law.[86] On the other hand, because federal regulations do not provide uniform punishment standards for attorneys who have committed workplace sexual harassment, states have enacted their own rules for attorney sanctions that make sanctioning an attorney for sexual harassment more difficult.[87]

C. Private Regulation of Sexual Harassment

In addition to federal and state laws, private remedies are also available to victims of sexual harassment, at least in theory.[88] In an effort to minimize sexual harassment in the legal workplace, the ABA has established the Model Rules of Professional Conduct and enacted multiple resolutions to guide lawyers on what they can and cannot do in the workplace.[89] However, ABA model rules are merely advisory—not legally binding. [90]

Every state has adopted some form of the ABA model rules, and the state bar disciplinary committees have the power to discipline legal professionals for

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total sexual harassment charges filed in the U.S.); Matt Leichter, *Lawyer Per Capita By State*, LAST GEN X AM., https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/ (last visited July 25, 2020).

[83] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.

[84] *Id.*

[85] *Id.*

[86] Ebright*, supra* note 71, at 66 (analyzing states that have implemented sanctions for attorneys engaging in conduct that adversely effects the fitness to practice law); Mass. Rules of Prof'l Conduct R. 8.4 cmt. 7 (2018) (conduct does not need to constitute a criminal act).

[87] Ebright, *supra* note 71 (describing that fitness to practice law is not clear).

[88] *See About Us*, AM. BAR ASS'N, https;//www.americanbar.org (last visited July 25, 2020). The ABA is the national representative of the legal profession and its focus is to promote equality, liberty, and justice through the Association, legal profession, and justice system.

[89] *Id.*

[90] *ABA Standing Committee on Professional Regulation*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/disciplinecommittee/ (last visited July 25, 2020).

violating the ABA model rules they have opted to follow.[91] However, Vermont is the only state that has adopted ABA Model Rule 8.4(g), which explicitly makes sexual harassment a form of professional misconduct.[92] Only approximately twenty-five states have a provision in their Rules of Professional Conduct that make it an ethical violation for a lawyer to discriminate or harass another, but do not explicitly include discrimination or harassment on the basis of sex.[93] Since 1997, Vermont has had one of the lowest rates of sexual harassment charges filed with the EEOC.[94] In 2018, only eleven of the 11,342 EEOC charges originated from Vermont, supporting the view that strong language and strong sanctions ameliorate the workplace environment and lessen the potential number of claims.[95]

Rule 8.4(g) asserts that it is professional misconduct for a lawyer to commit any acts which adversely reflect on his or her honesty, trustworthiness, or fitness to practice law, or to engage in sexual harassment that the lawyer knows or reasonably should know is sexual harassment or sex discrimination related to the practice of law.[96] Additionally, the comments to Rule 8.4(g) define sexual harassment to include unwelcome sexual advances, requests for sexual favors, and any other unwelcome verbal or physical conduct of a sexual nature.[97] This rule provides that crimes involving violence or serious interference with the administration of justice, such as sexual harassment, impacts that attorney's fitness to practice law.[98] Fitness to practice law does not necessarily mean a lawyer is in jeopardy of sanction or disbarment for any violation of criminal law, only that a lawyer should be professionally accountable for offenses that indicate a lack of those characteristics relevant to the practice of law, such as violence, dishonesty, breach of trust, or serious interferences with the administration of justice.[99] Sexual harassment by lawyers undermines confidence in the legal profession and impacts a lawyer's fitness to practice law.[100]

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[91] *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (last updated Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/.
[92] Rendleman, *supra* note 5.
[93] *Id.*
[94] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 – FY 2018*, *supra* note 82 (charting all charges filed from 1997–2018 on sexual harassment sorted by state).
[95] *Id.*
[96] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (2016).
[97] MODEL RULES OF PROF'L CONDUCT R. 8.4(g).
[98] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) cmt. 2.
[99] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) cmt. 2.
[100] MODEL RULES OF PROF'L CONDUCT R. 8.4(g) cmt. 3.

Opponents of this perspective may argue, as some did in response to the allegations of sexual assault against Judge Kavanaugh in 2018, that a man's history of gender violence does not have a bearing on his fitness to practice law.[101] However, the current ABA Model Rule on sexual harassment provides guidelines for state bar associations to adopt and implement this rule.[102] The rule has evolved and expanded in response to the need for cultural reform.[103] Beginning in 1992 and continuing to 2018, the ABA has progressively updated the Model Rule on sexual harassment with the objective to change the sexually hostile culture of the legal profession.[104]

1. ABA 1992 and 2016 Resolution

In response to many women leaving the legal profession as a result of experiencing sexual harassment, the ABA passed the 1992 Resolution.[105] The 1992 Resolution was a recognition of the serious problem of sexual harassment in workplaces within the legal profession.[106] Unfortunately, the 1992 Resolution merely detailed and discussed the elements of a sexual harassment policy, including implementation and response to complaints, but it failed to produce a rule explicitly deeming sexual harassment professional misconduct.[107] Over two decades later, the ABA passed the 2016 Resolution, which amended Rule 8.4(g) to explicitly include conduct that a lawyer knows or reasonably should know is sexual harassment or sex discrimination.[108] Due to the amendment, sexual harassment became a form of professional misconduct.[109] Despite the broadening of the rule in the 2016

[101] Ebright, *supra,* note 71, at 58. ("A common response to the Kavanaugh allegations was that even if true, they should not matter. A man's history of committing acts of gender violence should have no bearing on his elevation to the most exalted and influential position in the legal profession.").
[102] *ABA Standing Committee on Professional Regulation*, *supra* note 90 (describing the enforcement of ABA Model Rules).
[103] Pfenninger, *supra*, note 11, at 191.
[104] A.B.A. RES. 302 (2018).
[105] Pfenninger, *supra,* note 11.
[106] A.B.A. RES. 302 (citing A.B.A. RES. 109 (2016)) (comparing 1992 ABA resolution with 2016 ABA resolution on sexual harassment).
[107] Pfenninger, *supra*, note 11, at 192-98.
[108] A.B.A. RES. REVISION 109 (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.
[109] *Id.*

Resolution, the problem of sexual harassment in the legal profession did not subside.[110]

2. ABA 2018 Resolution

In 2018, the ABA shifted its approach to fighting against sexual harassment in the legal field.[111] The 2018 Resolution created new guidelines and also encouraged employers to adopt and enforce the rule to prevent and prohibit sexual harassment.[112] The rule was expanded beyond conduct during the representation of a client and included a variety of roles considered to be part of the practice of law, such as being a manager of a firm, an officer of the court, a public citizen, a mentor, and a participant in social activities.[113] The reformed rule also became broader in describing what constitutes sexual harassment[114] and included derogatory or demeaning verbal or physical conduct of a sexual nature[115]—for example, when an employer or coworker comments on how an attorney looks in her clothing.[116] Additionally, the rule changed from a subjective to an objective standard of reasonableness.[117] Unlike the 2016 Resolution's "reasonably-should-know-better" standard in which a lawyer's misconduct depends on a particular lawyer's actual state of mind, the 2018 Resolution adopted an objective standard which asks whether a reasonably prudent, competent lawyer would have acted in the same or a similar manner.[118]

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[110] Hays, *supra* note 1; Philip Bogdanoff, *Me Too: Eliminating Sexual Bias and Harassment at Your Law Firm*, 33 MAINE BAR J. 23 (2018) (analyzing surveys of reported sexual harassment in the legal profession).
[111] A.B.A. RES. 302 (setting forth components for enforcing policies and procedures to prevent sexual harassment).
[112] *Id.*
[113] D'Angelo-Corker, *supra* note 38, at 294 (citing MODEL RULES OF PROF'L CONDUCT R 8.4 cmt. 4) (describing current ABA Model Rule).
[114] *Id.* at 266.
[115] *Id.* at 290–93.
[116] Hays, *supra* note 1.
[117] A.B.A. RES. 302.
[118] D'Angelo-Corker, *supra* note 38, at 295; H.D. Revised Res. 109 & Rep., AM. BAR ASS'N (Aug. 2016) (stating that the standard is "whether a lawyer of reasonable prudence and competence would have comprehended the facts in question.").

III. LEGAL FRAMEWORK AND APPLICATION: CURRENT CHALLENGES IN DEALING WITH SEXUAL HARASSMENT CLAIMS

Over several decades, women have earned and asserted their place at the proverbial table of the legal field.[119] However, as sexual harassment remains pervasive, women are continuing to leave the profession.[120] Going back several decades to 1988, there was an even larger gender divide and unequal power dynamic of those working in the legal profession than there is today.[121] At that time, nearly ninety-five percent of all law firm partners were men, while nearly fifty percent of the lawyers entering into the practice were women.[122] In 1993, a nationwide survey reported that in the past five years fifty-six percent of female litigators experienced sexual harassment by law firm colleagues or opposing counsel.[123] Fast forward to 2018, an ABA survey of 3,000 business and law firms found that sixty-seven percent of women respondents had experienced sexual harassment in the workplace compared to thirty-eight percent of women in the general workforce.[124] The same survey found that only thirty percent of women at the businesses and law firms actually reported the harassment.[125]

Despite the prevalence of sexual harassment in the legal field, especially compared to the general workforce, attorneys rarely receive professional sanctions for committing sexual harassment.[126] Forty-seven percent of women respondents in the 2018 ABA survey believed sexual harassment was tolerated in their

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[119] D'Angelo-Corker, *supra* note 38, at 265; *The Wage Gap: The Who, How, Why, and What to Do*, NAT'L WOMEN'S L. CTR. (Sept. 19 2017), https:nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/ (arguing women have "earned a place at the table" but are "still paid less, harassed, and discriminated against regularly.").

[120] Jarosh & Berry, *supra* note 2, at 30–33 (comparing surveys of sexual harassment in the legal profession to that of other careers). The reason the rates of sexual harassment are so much higher than the general workforce is, at least in part, because the nature of the legal profession involves long hours, frequent travel, workplace autonomy, and the entry of large numbers of women at junior levels.

[121] Pfenninger, *supra* note 11, at 174 (citing Women Litigators' Survey Results Reported, THE COMPUTER LAW., Apr. 1993, at 32).

[122] *Id. See* Franke, *supra* note 22, at 726–27 (describing post regulations on sexual harassment); AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *A Current Glance at Women in the Law*, AM. BAR ASS'N (Apr. 2019), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf. (The ABA calculated that, currently, about 20% of partners in law firms in the U.S. are female. This is an increase of approximately 15% of female partners at law firms in the last thirty years).

[123] Pfenninger, *supra* note 11, at 174 (citing Women Litigators' Survey Results Reported, THE COMPUTER LAW., Apr. 1993, at 32).

[124] Hays, *supra* note 1.

[125] *Id.*

[126] Ebright*, supra* note 71, at 59.

workplace, and forty-five percent expressed no confidence in their senior leadership to address the issue.[127]

Scholars argue that the power imbalance between men and women in the legal profession creates an intimidating working environment that leads to non-traditional forms of sexual harassment,[128] for example, when a partner tells an associate that she needs to flirt with a client to keep that client happy.[129] Another non-traditional form of sexual harassment is shown when an employer, client, or vendor acts in a sexually inappropriate way to a woman associate or staff member, and a supervisor knows of the harassment and does nothing to stop it from happening.[130]

Stephanie Scharf, a partner in the law firm of Scharf Banks Marmor LLC and Chair of the ABA Commission on Women in the Profession, believes that sexual harassment is linked to an abuse of power in which both lawyers and legal administrators can be victims too.[131] This imbalance of power is supported by a 2009 survey conducted in Utah which provided anecdotal evidence.[132] In the survey, one woman attorney described being told by her male supervisor that if the receptionist was not available the attorney herself would be responsible for answering the phone because men should not answer phones.[133] Another woman attorney was encouraged by a coworker to have sex with two of her supervisory attorneys as a thank you for giving her a job.[134]

The sexual hostility rooted in the legal profession's culture constrains the ability of victims of workplace sexual harassment to obtain an adequate in-house remedy.[135] The power imbalance creates the fear in women legal professionals that the law firm will believe the perpetrator instead of them, they will lose their careers, or they will face retaliation in the workplace. As a result, women in the legal profession are reluctant to report sexual harassment.[136]

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[127] Hays, *supra* note 1.
[128] *See* Franke, *supra* note 22 (arguing that sexual harassment lies in its power as a regulatory practice of sexism); Pfenninger, *supra* note 11, at 175 (arguing enforcement of sexual harassment is the root of the problem); Bogdanoff, *supra* note 110, at 23 (arguing that sexual harassment is an abuse of power over another that lawyers and legal administrations can be victim to in the legal profession).
[129] Jarosh & Berry, *supra* note 2, at 30–33; D'Angelo-Corker, *supra* note 38, at 265–66.
[130] Pfenninger, *supra* note 11, at 190–91 (quoting Guess v. Behlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990)).
[131] Bogdanoff, *supra* note 110, at 23.
[132] *Id.* (citing a 2009 Utah survey).
[133] *Id.*
[134] *Id*.
[135] Fiske & Glick, *supra* note 25, at 104–06.
[136] Bogdanoff, *supra* note 110, at 24.

A. Inadequacy of In-House Remedies

If women cannot obtain an in-house remedy for sexual harassment, they will likely arbitrate, litigate or abandon their claims.[137] Only some firms have removed arbitration clauses in partnership or hiring agreements that require victims of sexual harassment to arbitrate their claims.[138] One of the weaknesses of arbitration as a means for addressing sexual harassment claims is that arbitrators are typically men, specifically, high-profile white men,[139] who often fail to readily identify the dynamics of workplace culture replete with sexual innuendos and hostility.[140] In 1985, ninety-one and a half percent of all arbitrators were male, and ninety-six and a half of all arbitrators were white, meaning only eight and a half percent of arbitrators were women.[141] Today, the percentage of women arbitrators is around fifteen to twenty-five percent, which is extremely low considering women have represented nearly fifty percent of all lawyers for the last twenty-five years.[142]

Sexual harassment litigation in the legal field is unique in that it is one of the only professions that, once a suit is filed under Title VII, looks to the same profession that was the source of the litigation to provide the remedy.[143] This reality causes an even greater disadvantage for women who bring a claim of sexual harassment because the case will be judged and determined by individuals of the same male-dominated and intimidating profession that was the root cause of the claim at issue. Additionally, the structure of "Big Law" firm partnership upholds

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[137] Marhoefer, *supra* note 57, at 834.
[138] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POLICY INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.
[139] Kathryn R. Meyer, *Why Victims Deserve the Right to Choose How to Resolve Their Sexual Harassment Claims*, 10 PENN. ST. ARB. L. REV. 164, 175–76 (2018).
[140] *Id.* (stating arbitration clauses force victims to bring claims in a "secretive, private arbitration process that is stacked against them," and arbitrators are often reluctant to award generous damages to prevailing parties).
[141] *Id.*
[142] Hannah Hays, *Where Are the Women Arbitrators? The Battle to Diversify ADR*, AM. BAR ASS'N (Mar. 1, 2018), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/winter/where-are-women-arbitrators-battle-diversify-adr/.
[143] Marhoefer, supra note 57, at 826 (citing Rochester v. Fishman (No. 95-CV-3896) (1998), Transcript of Proceeding before the Honorable Joan B. Gottschall and a Jury at 927-1077) (discussing the challenges and limitations of Title VII for claims of sexual harassment in the legal profession).

the ideology that partners who share profits protect each other, leading to tolerating and covering up misconduct.[144]

Rochester v. Fishman offers an example of the unique difficulty many women victims of sexual harassment face.[145] For nearly a year, the plaintiff, Rochester, a woman and associate attorney at defendant Fishman's firm, was sexually harassed and assaulted by her employer.[146] The plaintiff responded by talking to her employer about his inappropriate and unwanted contact.[147] Despite her efforts, the conduct continued.[148] The plaintiff eventually requested the firm create a formal harassment policy and for a third-party to always be present while she was required to be with her employer.[149] The defendant responded by threatening to fire her if she reported the actions to the authorities and threatening to change her performance evaluation review.[150] The plaintiff continued to work for the firm while cut off from assignments and firm resources until she filed a sexual harassment claim with the EEOC and Illinois Human Rights Commission and was subsequently fired.[151]

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[144] Ashley Badesch, *Current Developments 2017–2018: Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 508 (2018) (citing Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, 225 N.Y. L. J. 1 (2016)) (arguing that in "Big Law" partners who share profits protect each other and "fail to acknowledge patterns of abuse, especially among rainmakers."). If a victim of sexual harassment does report harassment from superiors, associates or partners may respond by no assigning work to the accuser to make it difficult for her to meet billable houses or force her out of the firm. *See id.*

[145] Marhoefer, *supra* note 57, at 826 (citing Rochester v. Fishman (No. 95-CV-3896) (1998), Transcript of Proceeding before the Honorable Joan B. Gottschall and a Jury at 927-1077) (discussing the challenges and limitations of Title VII for claims of sexual harassment in the legal profession).

[146] *Id.* at 824 (citing Rochester v. Fishman (No. 95-CV-3896) (1998), Transcript of Proceeding before the Honorable Joan B. Gottschall and a Jury at 440–449, 476–485) (providing a fact summary of the case); The sexual harassment conduct included kissing her, groping her breasts, masturbating in front of her, and nonconsensual battery of inserting his finger into her vagina. *See id.* (citing Rocher (No.1), Complaint at 13–16).

[147] *Id.* at 825 (stating when the plaintiff reported this conduct to principals of the firm, one them was already aware of the conduct).

[148] *Id*.

[149] *Id.*

[150] *Id*. (stating that during Rochester's performance review, the defendant changed her evaluation for the chance to become a partner, from "excellent" to "too soon to judge" even though she had billed the most hours in the firm).

[151] *Id.* (citing Rochester v. Fishman (No. 95-CV-3896) (1998), Transcript of Proceeding before the Honorable Joan B. Gottschall and a Jury at 522–28). Rochester waited the 180-day waiting period required by the EEOC, and was held up by the Defendant's Motion for a Temporary Restraining Order seeking to keep the complaint out of public record, which was denied *Id*. at 827 (citing

Sexual harassment often creates a barrier in obtaining leadership positions and greatly impacts job satisfaction.[152] While the defendant in *Rochester* retained a large and prestigious law firm, the plaintiff struggled to find an attorney willing to take her case.[153] Once she found an attorney and before the trial had even begun, she had exceeded $110,000 in legal fees.[154] At trial, the Federal District Court of the Northern District of Illinois allowed records of spousal violence by her ex-husband as well as evidence of her history of parental abuse, alcoholism, and an eating disorder from twenty years prior.[155] The jury found in favor of the plaintiff, awarding an initial verdict of $1.4 million, but a federal judgment remitted damages to $980,000 after finding that many of the damages attributable to Fishman could not be assigned to the firm.[156] Additionally, damages were limited because, based on the company's size, Title VII limited the punitive and compensatory damages recoverable to the plaintiff.[157] In this case, defendant's law firm employed between 14 and 101 people, thus, the limit for punitive damages was capped at $50,000, and compensatory damages for future loss, emotional pain, suffering, and other nonpecuniary losses was capped at $50,000.[158] However, this verdict was not received until eight years after the first incident of sexual harassment.[159] The plaintiff did not receive a portion of her judgment from the now bankrupt law firm until four years after the verdict.[160] Furthermore, the defendant did not receive any professional disciplinary action until three years after the jury verdict—eleven years after the offensive conduct first began.[161] As a result of the defendant firm's failure to pay anything to the plaintiff, or their own counsel's attorney fees, the plaintiff returned to court to place the firm in involuntary bankruptcy as a matter of

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Rochester, Motion for Temporary Restraining Order)). She then filed a claim and was subsequently fired after she was informed by a senior principle at the defendants firm, three years after the sexual harassment began, that the firm would not provide an in-house remedy. *Id*. (citing Rochester v. Fishman (No. 95-CV-3896) (1998), Transcript of Proceeding before the Honorable Joan B. Gottschall and a Jury at 521).

[152] Badesch, *supra* note 144, at 503 (citing Jeanne M. Carsten & Paul E. Spector, *Unemployment, Job Satisfaction, and Employee Turnover: A Meta-Analytic Test of the Muchinski Model*, 72 J. APPLIED PSYCHOL. 374 (1987)).

[153] Marhoefer, *supra* note 57, at 828. (stating that Rochester struggled to find an attorney that did not insist on having settlement authority). When Rochester finally found an attorney willing to represent her, she was told, two weeks before trial and four years after filing her complaint, that if she did not prevail on her Title VII action, she would be subject to paying defendant's costs, including expert fees. *Id*. (citing 42 U.S.C. § 2000e-5(k) (2003)).

[154] *Id.*

[155] *Id*.

[156] *Id.*

[157] *EEOC Remedies for Employment Discrimination*, *supra* note 9.

[158] Marhoefer, *supra* note 57, at n. 66.

[159] *Id.* at 831.

[160] *Id.*

[161] *Id.* at 820 (citing In re Gerald Lee Fishman (No. 01CH0109)).

law.[162] This in turn required the plaintiff to hire bankruptcy counsel while lead members of defendant's firm set up a new firm and the defendant, who sexually harassed and assaulted the plaintiff, joined the new firm as a partner.[163] Thirteen years after the sexual harassment and assault began, the plaintiff received a total amount of $423,801.[164]

Victims of workplace sexual harassment in the legal profession are often unable to receive an adequate in-house remedy.[165] Often this is due not only to the sexual harassment culture, but also the legislative construction of the only federal law on workplace sexual harassment.[166] Title VII does, however, allow for use of the vicarious liability rule, expanding the scope of liability for employers;[167] but there are limits to the rule.[168]

B. The Contours and Limitations of the Vicarious Liability Rule

Under Title VII, an employer is vicariously liable for any instances of sexual harassment by their employees in the course of their employment unless an employer can demonstrate that it took reasonable steps to prevent and correct the harassing conduct.[169] The vicarious liability rule requires that the employer either knew of the sexual harassment or reasonably should have known.[170] Additionally, the vicarious liability rule turns on the employment relationship and job functions performed by the supervisor in circumstances of supervisor sexual harassment.[171] In order for an employer to be liable for the sexual harassment, the conduct must

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[162] *Id.* at 829 ("[I]nvoluntary bankruptcy was necessary because defense counsel's lien would have enjoyed senior status to Rochester's claim without it."). Fishman's law firm gave their defense counsel in this case a security interest on all its receivables and perfected the lien, which "forced Rochester to place the firm in involuntary bankruptcy under Chapter 7" of the bankruptcy code. *Id*. The author notes that had Rochester not placed the firm in involuntary bankruptcy within ninety days of the day of the defendant's defense counsel's Security Agreement, the trustee could not have avoided granting secured statute to the defendant's defense counsel. *See id.*

[163] *Id*.

[164] *Id.* at 831.

[165] *Id.* Rendleman, *supra* note 5.

[166] *Id.*

[167] 29 C.F.R. § 1604.11(d) (1999).

[168] § 1604.11(d).

[169] *Sex-Based Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/sex.cfm (last visited July 25, 2020).

[170] *Faragher*, 524 U.S. at 775 (finding an employer did not exercise reasonable care to prevent or respond to the sexual harassment); Perry v. Ethan Allen*,* 115 F.3d 143, 149 (2d Cir. 1997) (explaining the standard for *reasonability should have known* to encompass the idea that an employer will be liable if the plaintiff demonstrates that the employer provided no reasonable avenue for a sexual harassment complaint).

[171] § 1604.11(d).

have been committed by that employer's employee or agent, and the conduct must have taken place in connection with the employment or duties of that employee or agent.[172]

If an employer took all reasonable steps to prevent the conduct or facilitated a just resolution, then the employer can escape liability.[173] For example, in *Faragher v. Boca Raton*, the United States Supreme Court held that for an employer to avoid liability, an employer must raise an affirmative defense showing that they took reasonable steps to prevent or correct the harassing conduct.[174] The affirmative defense looks not only to the employers conduct, but also looks to the reasonableness of the victim's conduct in seeking to avoid harm.[175] In this case, the employer was found liable for violating Title VII by failing to exercise reasonable care after several employees informally expressed to their employer instances of sexually harassing conduct by their supervisors, and the employer responded by doing nothing to stop the conduct from happening.[176]

In *Burlington v. Ellerth*, the Supreme Court found the defendant violated Title VII even though the victim suffered no tangible job consequences because the defendant failed to exercise reasonable care to prevent and promptly correct the sexually harassing behavior of its employees and the hostile work environment.[177] In this case, the plaintiff sought to impose vicarious liability based on the supervisor's misuse of delegated authority without showing the employer itself was

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[172] *Perry*, 115 F.3d at 149; Patricia Easteal & Skye Saunders, *Revisiting Vicarious Liability in Sexual Harassment Cases Heard Under the Sex Discrimination Act*, 0(0) ALT. L. J. 1, 1–4 (2019); *See* Rule 1.5(a).

[173] 524 U.S. at 775, 778.

[174] *Id.*

[175] *Id.* at 778 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, and demonstration of such failure will normally suffice to satisfy the employer's burden" to show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.").

[176] *Id.* at 783.

[177] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (holding the employer vicariously liable for an action of hostile environment sexual harassment created by a supervisor with authority over the plaintiff). In this case, a supervisor made, on at least three different instances, sexually offensive comments to the female employee, including "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." *Id.* at 748. However, the plaintiff never informed anyone in an authoritative position about the conduct and quit her job after fifteen months, filing a sexual harassment suit against her employer. *Id.*

negligent or otherwise at fault for the supervisor's actions.[178] The Supreme Court held that an employer is vicariously liable for a hostile work environment created by a supervisor if an existing agency relationship aided the supervisor's ability to commit harassment.[179] An existing agency relationship can be found where the offending supervisor had immediate or successively higher decision-making authority over the plaintiff.[180]

C. Professional Misconduct Claims

In the event a plaintiff does not find an adequate legal remedy under Title VII, she still has the opportunity to file a claim for misconduct to the state bar association in order to discipline the offending attorney.[181] Unless the ABA finds an attorney in violation of the state's code of conduct, the attorney will not be professionally sanctioned.[182] If a claimant believes an attorney has violated the state's code of conduct, she must file a complaint with that state's lawyer discipline agency—the state bar association.[183] Each state has adopted its own professional ethics rules—commonly adopting the model rules of the ABA.[184]

After a claimant files a complaint with the state bar association, a disciplinary board that enforces the ethical rules for lawyers has the authority to interpret the ethical rules, investigate claims, conduct evidentiary hearings, and administer discipline to an attorney.[185] Discipline can include disbarment, suspension, ordering the lawyer to pay restitution, or ordering the lawyer to issue a public or private reprimand.[186] However, the sanctions for an attorney are often minimal in claims of sexual harassment brought by an employee.[187] In order for the disciplinary committee to impose professional sanctions on an attorney, a claimant must prove

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[178] *Id.* at 748.
[179] *Id.* at 764.
[180] *Id.*
[181] MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 10, AM. BAR ASS'N (2017) (listing the types of sanctions for lawyer misconduct).
[182] *ABA Standing Committee on Professional Regulation*, *supra* note 90 (explaining that the ABA is responsible for "developing, promoting, coordinating, and strengthening professional disciplinary and regulatory programs and procedures throughout the nation.").
[183] *Resources for the Public,* AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/ (last visited July 25, 2020).
[184] *State Implementation of ABA MJP Policies,* AM. BAR ASS'N (last updated 2010), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/ recommedations.pdf (providing a list of ABA Model Rules adopted by states).
[185] MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 10, AM. BAR ASS'N, *supra* note 181.
[186] *Id.*
[187] Rendleman, *supra* note 5 (describing the opposition to Model Rule 8.4(g)).

sexual harassment occurred by clear and convincing evidence.[188] The standard of clear and convincing evidence is higher than the standard of proof used in civil court proceedings—preponderance of the evidence—contributing to the reason for minimally or rarely ordered professional sanctions.[189]

There are also seldom professional sanctions for legal professionals who have sexually harassed an employee because many of these professionals are themselves members of the state bar and courthouse.[190] *In the Matter of Randolph M. Subryan*,[191] a law clerk for a judge on the Supreme Court of New Jersey filed a complaint against the judge to the Advisory Committee on Judicial Conduct.[192] The complaint alleged that the judge sexually harassed his law clerk, and thus violated the canons of the *Code of Judicial Conduct* by failing to conduct himself according to a high standard of integrity and impartiality.[193] In this case, the judge routinely made inappropriate comments about gender and sex to his law clerk in the judge's chambers and made unwanted advances toward her, including rubbing her shoulders, kissing her, and showing her sexually explicit photographs.[194]

According to the *Code of Judicial Conduct* judges are prohibited from engaging in conduct prejudicial to the administration of justice, and are required to uphold the integrity and independence of the judiciary as well as respect and comply with the law in order to promote public confidence in the integrity and impartiality of the judiciary.[195] Although the New Jersey Supreme Court found that the judge made unwanted advances and inappropriate comments toward his law clerk that were improper in the courthouse setting, the court did not find his conduct rose to the level of a violation of judicial misconduct under the *Code of Judicial Conduct*.[196] The court considered that the judge had many personal and professional

[188] Badesch, *supra* note 144, at 507.
[189] *Id.*
[190] Marhoefer, *supra* note 57, at 843, 858; *In the Matter of Randolph M. Subryan*, 187 N.J. 139, 143 (2006).
[191] 187 N.J. 139.
[192] *Id.* at 143.
[193] *Id.*
[194] *Id.* at 146–47. The inappropriate comments included saying an attorney was "hot" and that he might rule in her favor for that reason, and that the "hot" attorney would turn him into Judge Seaman, who sexually harassed his law clerk in 1993. *Id.* at 146–47. Judge Seaman was disciplined by the Court for sexually harassing his law clerk. *In re Seaman* 133 N.J. 67, 627 A.2d 106 (1993)). Additionally, the defendant in *Subryan* attempted to show his clerk sexually explicit photographs after she told him she had no desire to see them, to which he joked about her being "too young and innocent." *Id.* at 147.
[195] *Id.* at 152–53.
[196] *In re Subryan*, 187 N.J. at 148.

achievements,[197] and that the goal of professional discipline was not about punishing the offending judge for his conduct, but about maintaining honor in the judicial position.[198] The court determined that the judge should not be publicly disciplined or removed from his office for the conduct and instead, the judge was suspended without pay for two months.[199]

Even when the court does not consider the defendant's personal achievements or contributions to the legal field, the punishment for defendants who have committed workplace sexual harassment often does not fit the crime.[200] In most cases, the state bar association permits attorneys to continue the practice of law despite a court or regulatory body determining that sexual harassment did in fact occur.[201] In *Cincinnati Bar Association v. Young*, an attorney received a two-year suspension from the practice of law for professional misconduct after several victims joined the Cincinnati Bar Association in filing a complaint alleging the attorney sexually harassed several of his assistants.[202] In one circumstance, the attorney hired a law student as a clerk and told her, if she behaved as he wanted her

[197] *Id.* at 154–55 (stating that the judge led an "admirable life of hard work and public service and a role model for others.").
[198] *Id.* at 153 (citing In re Seaman, 133 N.J. 67, 97, 627 A.2d 106 (1993)).
[199] *Id.* at 156.
[200] Cincinnati Bar Ass'n v. Young, 89 Ohio St.3d 306 (2000) (holding that a lawyer was subject to a two-year suspension from the practice of law for sexually harassing several of his assistants); Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990). In this case, while the plaintiff was on a temporary assignment for her employer, and employee picked her up under her arms, set her down, and forced her face against his crotch, she hit him, cursed at him, and ran crying while he laughed with other male employees. *See id*. at 464. The employer did not receive any punishment for the conduct of his/her employee toward plaintiff because the court found that the employer took sufficient remedial action upon discovering the harassment by returning the plaintiff to her original position of employment *after* she completed the temporary assignment. *See id*. at 465.
[201] *Rochester,* No. 95 C 3896.
[202] *Cincinnati Bar Ass'n*, 89 Ohio St.3d at 308. In this case, there are multiple plaintiffs–Elizabeth Crowe, Jessica Henn, Emma Seta, and Monica Miller. This analysis will focus on Plaintiff Crowe. However, Henn alleged that the attorney told her she was cute, asked if she had a boyfriend, and hugged her often after yelling at her. *See id.* at 310–11. Seta alleged the attorney asked her if she had a boyfriend, wanted her to sit in his office all day and do no legal work, told her he did not want her near the computer equipment, and that he would give her a bad reference when left work for him and had told him she would not sit in his office all day and perform no legal assistant duties. *See id.* at 311. Miller alleged the attorney would not take calls from men seeking employment, would yell at her, use foul language toward her, told her she was stupid after saying that everyone on his staff was stupid and "needed the shit knocked out of them." *Id.* at 312. The panel found sexual harassment, discrimination, and professional misconduct for all plaintiff's except Miller. *See id.* However, the Supreme Court found that only Crowe was subject to sexual harassment and discrimination. *See id.* at 317–30.

to, he would be an advantage to her career.[203] During a job interview, in front of his wife, the attorney told the law student that her assistant duties were non-negotiable and that while he had everything to lose, she had everything to gain.[204] He then asked the law student if she was a virgin and whether she was wearing a bra and panties.[205] The attorney also said that she would make a good mistress, that he wanted a mistress, that she should sleep around, and then began calling her "Perky."[206] The attorney then, in front of her, asked his office manager to find out what kind of drink she liked so he could go away with her, sleep with her, and take advantage of her.[207] Though the Supreme Court of Ohio found that the plaintiff was subject to a hostile work environment, the attorney was only disciplined with a two-year suspension from the practice of law.[208]

IV. Essential Reform in the Legal Workplace

Federal, state, and private professional regulations have failed to mitigate the sexual harassment of women in the legal profession.[209] Title VII and state regulations do not provide adequate legal remedies to victims of sexual harassment in the workplace.[210] Further, the majority of state bar associations do not impose appropriate sanctions on attorneys who have been found, by either a court or regulatory body, to have sexually harassed a colleague, which can be seen as promotion of sexual harassment.[211] A slap on the wrist sends one message;

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[203] *Id.* at 308. In this case, the attorney said, "the advantage is that when you apply to take the bar exam, you'll have to say you worked with me and I'll have to give a recommendation and because of that, I can be sure you'll behave the way I want you to." *Id.* He also told her, prior to hiring her, "I wasn't looking for a girlfriend but you seem to fill that position better than any other," to which she assumed he was joking. *Id.*

[204] *Id.* (providing the attorney said, "so tell me, are you a virgin?" She said "no." He said "oh, you shouldn't have answered that question, . . . so if I asked you if you were wearing a bra . . . or if you were wearing panties . . . you wouldn't have to answer." He claimed, was his way of teaching her "nifty lawyering.").

[205] *Id.* at 309.

[206] *Id.*

[207] *Id.* at 310.

[208] *Cincinnati Bar Ass'n*, 89 Ohio St.3d at 318, 320.

[209] *Compare* Hays, *supra* note 1 (providing statistics on the prevalence of sexual harassment in 2019), *with* Schoenheider, *supra* note 3, at 1461 (providing statistics on sexual harassment in the legal workplace in the 1980s).

[210] Schoenheider, *supra* note 3, at 1462-63.

[211] *Cincinnati Bar Ass'n*, 89 Ohio St.3d at 320 (holding that a lawyer was subject to a two-year suspension from the practice of law for sexually harassing several of his assistants); *In re Subryan*, 187 N.J. at 156 (holding that suspending a judge for two months after he sexually harassed his law clerk was sufficient).

removing one's license to practice sends another.[212] This remedial disarray leaves victims fearful and reluctant to report instances of sexual harassment.[213] Women in the legal profession deserve better.

Education can offer reform, which in turn can evolve into greater opportunities for justice for women in the legal profession.[214] By standardizing education and adopting training requirements, states can address the root causes of sexual harassment.[215] Legal entities, such as firms, courthouses, arbitrators, etc., should begin by educating themselves on the current sexual harassment culture in the legal profession, including the dynamics between sexual harassment and power.[216] Additionally, legal entities should provide anonymous employee and staff surveys to illuminate their strengths and weaknesses as they work to address sexual harassment.[217] Furthermore, legal entities should mandate sexual harassment training for all new and current employees and staff.[218]

In addition to the these educational reforms, the burden placed on plaintiffs to show a tangible job detriment should be shifted to the defendant to provide a more robust legal remedy for victims of sexual harassment.[219] Also, or in the alternative, a showing of tangible job detriment should be broadened to include the emotional and psychological effects of sexual harassment on victims since a single circumstance of sexual harassment can have a significant and adverse effect on a person's employment status or work conditions.[220] Finally, states should adopt the ABA Model Rule 8.4(g) on sexual harassment, and disciplinary committees should commit to holding lawyers who commit sexual harassment accountable by imposing more stringent sanctions.[221]

A. Education and Training

Feminist scholars argue that understanding sexual harassment merely in terms of sexual desire is ignorant; similar to the myth that rape is primarily a crime of

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[212] Pfenninger, *supra* note 11, at 191–94.
[213] Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* 51 J. SOC. ISSUES 117, 121–24 (1995) (discussing a common reason for not reporting sexual harassment is because of fear of retaliation).
[214] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.
[215] *Cf.* Ebright*, supra* note 71, at 73-74.
[216] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.
[217] *Id.*
[218] *Id.*
[219] Marhoefer, *supra* note 57, at 843, 858.
[220] *Id.*
[221] *ABA Standing Committee on Professional Regulation*, *supra* note 90.

passion or lust.[222] Essential to change, is the education of legal professionals on how and why sexual harassment occurs.[223] Sexual harassment in the legal field is often not understood or defined in the traditional sense of sexual desire and can be subconsciously done based on the social construction of the culture of the profession.[224] State bar associations need to educate legal entities on how to recognize the dynamic between sexual harassment and power in their own workplace culture.[225]

Education, along with training, will help create a cultural shift in the legal profession.[226] Evidence of the potentiality for a larger cultural shift is seen by looking to Vermont. Vermont is also the *only* state to adopt ABA Model Rule 8.4(g).[227] Vermont has even gone further than the ABA Model Rules and federal law by enacting laws that encourage employers to conduct education and training programs on sexual harassment for all new and current employees,[228] a practice adopted by Vermont's Attorney General's Office, which conducts the training for up to three years.[229] Vermont's Attorney General's Office also requires firms to conduct anonymous work-climate surveys or to submit to state regulated harassment inspections.[230] As a result of the tightened regulations, sexual harassment claims make up a total of 0.1% of claims failed in Vermont with the EEOC despite Vermont ranking seventh in the number of employed lawyers per capita in the United States.[231]

Delaware's regulations on sexual harassment offer another suitable approach.[232] Delaware requires employers to provide interactive training and education on sexual harassment to new and existing employees and supervisors every two years.[233] As a result, sexual harassment claims make up a total of 0.3% of claims filed in Delaware with the EEOC despite ranking fourth in the number of employed lawyers per capita in the United States.[234]

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[222] Franke, *supra* note 22, at 740.
[223] Ebright*, supra* note 71, at 70-72.
[224] Franke, *supra* note 22, at 740.
[225] Ebright, *supra* note 71, at 70-72.
[226] *Id.*
[227] Rendleman, *supra* note 5.
[228] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.
[229] *Id.*
[230] *Id.*
[231] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 – FY 2018*, *supra* note 82; Leichter, *supra* note 82.
[232] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7.
[233] *Id.*
[234] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 – FY 2018*, *supra* note 82; Leichter, *supra* note 82.

States like Vermont and Delaware have paved the way for cultural reform of the legal profession.[235] Both represent examples of how all state bar associations should train their employees.[236] State mandated education and training will be the first step to reframing the legal profession's culture, but federal regulations should also do more to aid in the fight by shifting the current law to allow for a more robust legal remedy for plaintiffs bringing a claim of workplace sexual harassment.[237]

B. Stricter Federal Regulations of Workplace Sexual Harassment

Under Title VII, *quid pro quo* sexual harassment, though more straightforward than that of hostile work environment sexual harassment, is too limiting for victims of sexual harassment in the workplace.[238] *Quid pro quo* sexual harassment requires that the conduct be the determining factor in an employment decision based on the employee's submission or rejection.[239] The elements of *quid pro quo* sexual harassment are difficult to meet for many victims because the law implies conscious recognition of discrimination by the employer and requires proof that the plaintiff suffered an economic or tangible job detriment.[240]

A tangible job detriment is incredibly difficult to prove without a threat of termination or actual termination of employment.[241] This standard assumes that the sexual harassment itself cannot constitute a significant employment status change.[242] The burden should be shifted to the defendant or the tangible job detriment requirement should be broadened to include the emotional and psychological effects of sexual harassment on victims, with the understanding that

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[235] NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note **Error! Bookmark not defined.**7 (comparing states training requirements for prevention of workplace sexual harassment).
[236] *Id.* (examining state laws that require sexual harassment training).
[237] Marhoefer, *supra* note 57, at 843, 858 (arguing that all stages of litigation of workplace sexual harassment claims disadvantage the woman plaintiff and will likely do almost anything to avoid litigation of their claims).
[238] *See, e.g.*, *Stockett*, 791 F. Supp. at 1536 (holding an employer liable for *quid pro quo* sexual harassment).
[239] 29 C.F.R. § 1604.11 (2021).
[240] *Highlander*, 805 F.2d 644 (holding that the use of a fluctuating work week method of compensation for overtime did not constitute a tangible job detriment). *Stockett*, 791 F. Supp. at 1536 (finding a tangible job detriment with a threat to fire the plaintiff if she did not submit to sex with her employer).
[241] *Stockett,* 791 F. Supp at 1536 (stating that *quid pro quo* sexual harassment is found only when the plaintiff suffered an economic or tangible job detriment); *Highlander,* 805 F.2d at 648 ("In a *quid pro quo* action, the employee bears the burden of proof to support charges that submission to the unwelcomed sexual advances of supervisory personnel was an express or implied condition for receiving job benefits or that a tangible job detriment resulted from the employer's failure to submit to the sexual demands of supervisory employees.").
[242] C.F.R. § 1604.11.

a single circumstance can have a significant and adverse change on a person's employment status or conditions.[243] Because of the limited instances that would qualify as *quid pro quo* sexual harassment, plaintiffs in the legal profession are often left having to prove hostile work environment sexual harassment.[244]

Hostile work environment sexual harassment is the typical type of sexual harassment claim that plaintiffs will bring against their employer, but it requires the conduct to be pervasive or serious.[245] This type of sexual harassment permits employers to make crude or sexually explicit jokes without the repercussions of liability even though the allowance of every crude joke contributes to the sexually hostile, male-dominated culture in the legal profession.[246] In order to succeed in this claim, an employer must have known or should have known about the conduct.[247] The legal requirement of an employer's knowledge encompasses the need for that employer to provide a reasonable avenue for victims of harassment to file a complaint.[248] Additionally, under a hostile work environment claim, the defendant can escape liability by showing they took remedial action for the conduct.[249] This defense should be eliminated and employers should be strictly liable for hostile work environment sexual harassment because employers are able to escape liability and leave plaintiffs with no adequate legal remedy.[250]

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[243] Marhoefer, *supra* note 57, at 843, 858.

[244] *E.g.,* Pfenninger, *supra* note 11, at 185 (stating *quid pro quo* sexual harassment requires more than hostile work environment in proving a tangible job detriment). *See, e.g.*, *Stockett*, 791 F. Supp. at 1536.

[245] *Faragher*, 524 U.S. at 788 ("[I]solated incidents (unless extremely serious) will not amount to [harassment]."). *Daniel*, 689 F. App'x 1 ("[I]solated incidents usually will not suffice to establish a hostile work environment." However, holding "a single episode of harassment can establish a hostile work environment if the incident is sufficiently severe," (quoting Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004)); *Rivera*, 743 F.3d 11, 24 (2d Cir. 2012) (recognizing the possibility that "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet by an employer or supervisor").

[246] Pfenninger, *supra* note 11, at 187 (citing Fox v. Ravinia Club, Inc., 761 F. Supp. 797, 801 (N.D. Ga. 1991), *aff'd*, 948 F.2d 731 (11th Cir. 1991)) ("As a rule, joking, teasing, and conversation that may include sexual connotations may not necessarily rise to the level of 'hostile work environment' sexual harassment under Title VII.").

[247] *Perry,* 115 F.3d at 149 (explaining the standard for reasonability should have known to encompass the idea that an employer will be liable if the plaintiff demonstrates that the employer "either provided no reasonable avenue for a complaint or knew of the harassment but did nothing about it." (citing Murray v. New York University College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995).

[248] *Id.* at 149.

[249] Pfenninger, *supra* note 11, at 185.

[250] *Guess,* 913 F.2d 463, 465 (7th Cir. 1990) (holding that the employer took proper remedial action following the sexual harassment by transferring an employee to another unit to work, away

All types of sexual harassment in the workplace force women into a catch-22 given that they face the possibility of losing a job because of the conduct of others or must remain in a male-dominated environment of intimidation and disrespect.[251] The power imbalance and fear that women in the legal profession have of losing their careers is why many are reluctant to report sexual harassment.[252] Many fear that the law firm will believe the perpetrator instead of them, that their careers will end, or they will face retaliation in the workplace.[253]

Procedural federal regulations under the EEOC disadvantage victims of employment sexual harassment.[254] The requirements placed on victims of sexual harassment in the legal profession make it very difficult, intimidating, costly, and time consuming to bring a claim against an employer after incidents of sexual harassment.[255] Additionally, the plaintiff's case arises from the same body which she must seek relief—legal professionals.[256]

Women who are subordinate attorneys or support staff at a firm who bring a claim against a known, and especially against a high-ranking superior, are at a disadvantage before the case is even filed.[257] Lawyers in supervisory and senior positions often have connections with members of the state bar and the courthouse. This disadvantages a plaintiff who brings a claim for sexual harassment against that lawyer because plaintiffs are often associates or lower-ranked employees that do not have a large legal network.[258]

When victims proceed with EEOC requirements, current federal law makes it difficult to obtain an adequate legal remedy.[259] Shifting the burden of proof in proving a tangible job detriment to the defendant or by including emotional and psychological effects of sexual harassment in cases of *quid pro quo* sexual

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from the perpetrator); Marhoefer, *supra* note 57, at 843, 858; Schoenheider, *supra* note 3, at 1462-63 (stating if a plaintiff, who experienced the sexual harassment, cannot show a threat of physical injury or other conduct that a court determines is sufficiently outrageous, then the plaintiff will not be adequately compensated in tort law).

[251] Marhoefer, *supra* note 57, at 858.

[252] Bogdanoff, *supra* note 110, at 24.

[253] *Id.*

[254] Marhoefer, *supra* note 57, at 845-46.

[255] *Id.* at 842.

[256] *Id.*

[257] *Id.* at 844; *Id.* at 820 n. 14.

[258] Marhoefer, *supra* note 57 (providing case analysis of Rochester v. Fishman). *In Re Subryan*, 187 N.J. at 155 (providing the judge presiding over the case considered the attorneys personal and professional achievement and said he led an "admirable life of hard work and public service and a role model for others" while still finding the attorney made unwanted sexual advances on his law clerk).

[259] Marhoefer, *supra* 57, at 844 (arguing that victims of workplace sexual harassment in the legal profession are at a disadvantage when pursuing litigation).

harassment will give plaintiffs a greater opportunity to recover damages.[260] This burden shift has the effect of changing the law to eliminate the plaintiff's *requirement* to show a tangible job detriment, into a *defense* for the defendant to argue that there was no tangible job detriment.[261]

Shifting the burden of proof for *quid pro quo* sexual harassment presupposes there was an inherent tangible job detriment after the sexual harassment occurred.[262] This change is vital because the current requirement is too narrow and assumes that sexual harassment in the workplace does not always create a tangible job detriment to the plaintiff when in reality it does.[263] Even if a victim is not fired or threatened to be fired, and there is no economic detriment due to the sexual harassment, there are still significant employment impacts that cannot be ignored.[264] The victim's employment status immediately changes, even if it is not reflected on her paycheck or spoken as a threat, because the conduct is an element of power over the victim.[265] Sexual harassment impacts job satisfaction and creates a barrier to obtaining leadership positions.[266] Shifting the burden will help account for these job detriments after an incident of *quid pro quo* sexual harassment.

Job detriments that result from sexual harassment, like decreased job satisfaction, decreased opportunity to obtain a leadership position, or adverse psychological effects, are easier for the court to find in hostile work environment

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[260] *Id.* at 858 (arguing plaintiffs in sexual harassment litigation will do almost anything to avoid litigation, including "leaving a profession in which they have invested a great deal.").

[261] Pfenninger, *supra* note 11, at 184 (explaining that the burden to show a tangible job determent is on the victim). To find "'quid pro quo'" sexual harassment, the employee must show that submission to unwelcome advances was an express or implied condition for receiving job benefits or that refusal to submit to the advances resulted in tangible job detriment." *Id.*

[262] *Id.* (arguing a tangible job detriment must be shown with evidence by the victim).

[263] *See, e.g.*, *Stockett,* 791 F. Supp. at 1536 (finding a tangible job detriment with a threat to fire the plaintiff if she did not submit to sex with her employer). *See, e.g.*, *Highlander,* 805 F.2d at 644 (holding that the use of a fluctuating work week method of compensation for overtime did not constitute a tangible job detriment).

[264] *See, e.g.*, Marhoefer, *supra* note 57, at 858 (arguing the plaintiffs in sexual harassment litigation will do almost anything to avoid litigation, including "leaving a profession in which they have invested a great deal.").

[265] Franke, *supra* note 22, at 739–45 (arguing that workplace sexual harassment is due to power as a regulatory practice of sexism); Fiske & Glick, *supra* note 25, at 104–05 (arguing sexual harassment in the workplace is due to the culture of women stereotypes and corresponding male motives).

[266] Badesch, *supra* note 144, at 503 (explaining that experiencing sexual harassment has a negative impact on job satisfaction, "harassers create barriers to woman lawyers obtaining leadership positions, retaliating for rejections of advances or accusations of misconduct by refusing to give work to victims, turning partners in the firm against victims, and firing or refusing to promote victims.")

sexual harassment.[267] However, victims who have only experienced one incident of sexual harassment during their employment can only prove hostile environment sexual harassment if the conduct meets the high bar for severity.[268] If there is more than one incident, the plaintiff can likely bring a suit under hostile environment sexual harassment, but an employer can escape liability by showing the employer took remedial action to correct or prevent the conduct.[269] The use of the remedial action defense should be eliminated because victims of workplace sexual harassment are left with no adequate legal remedy.[270] The goal of Title VII is to provide a remedy to a victim of sexual harassment by putting the victim in the same, or nearly the same, position that he or she would have been in had the conduct not occurred.[271] The remedial action defense is inconsistent with the goal of the law.[272]

Under the remedial action defense, federal law allows an employee to endure physical and verbal sexual harassment without any employer liability.[273] For example, a perpetrator can go so far as to physically assault and force another employee's face against their crotch during a required work assignment without receiving any punishment under Title VII so long as the employer moves the victim to a separate position in the company upon completion of the current assignment.[274] This situation leaves a victim without an adequate legal remedy and sends the message that moving a victim of sexual harassment to a different employment position, instead of perhaps punishing or moving a perpetrator, is an adequate and effective remedial action for an employer to take to avoid liability.[275] The remedial action defense furthers inequality in the workplace and allows for a victims of sexual harassment to be limited by her employer in professional career positions merely because of the conduct of another.[276]

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[267] *See, e.g.*, *id.* at 184 (stating *quid pro quo* sexual harassment requires more than hostile work environment in proving a tangible job detriment).
[268] *Faragher*, 524 U.S. at 788.
[269] Pfenninger, *supra* note 11, at 194.
[270] *Id.*
[271] *EEOC Remedies for Employment Discrimination*, *supra* note 9.
[272] *See id.*
[273] *Guess*, 913 F.2d 463 (7th Cir. 1990) (finding that the employer took proper remedial action following the sexual harassment by transferring an employee to another unit to work, away from the perpetrator).
[274] *Id.* (describing that after a coworker picked up Mrs. Guess's "arms, set her down, and forced her face against his crotch" the court still found sufficient remedial action because the employer returned the plaintiff to her original job position with the company after she completed the temporary assignment).
[275] *Id.* (holding the employer not liable for workplace sexual harassment under Title VII).
[276] Cf., *id.* (offering an example of how victims are disadvantaged in their professional development when an employer moves a victim to a different employment position after experiencing sexual harassment in her current position).

C. Tightening Professional Sanctions

Punishment often serves as a deterrent for misconduct, however, many state bar associations fail to provide adequate guidelines on what constitutes sexual harassment and what the professional sanctions are for the conduct.[277] The states that have made any rules and regulations on sexual harassment misconduct constitute only about fifty percent, and only twelve states have implemented any additional rules or regulations.[278] This is shockingly low in light of the decades of data showing the ongoing problem of sexual harassment in the legal field compared to other professions.[279] State bar associations should adopt the ABA Model Rule on sexual harassment and disciplinary committees should commit to more stringent sanctions regarding sexual harassment. Accountability for sexual harassment claims in the legal profession must be more than a recommendation by the ABA, and change should not be left up to the law firms to resolve.

The need for rules regarding professional misconduct and the enforcement of harsher sanctions stems from the fact that the legal profession reports experiencing sexual harassment at a rate nearly double that of the general workforce.[280] The structure of legal work is, in part, why the legal profession is highly susceptible to workplace sexual harassment.[281] Unlike many careers, lawyers have a high degree of autonomy, work long hours, and travel frequently.[282] There are also many women in subordinate work roles, which makes women in the profession even more susceptible to workplace sexual harassment.[283] Though the structure of the legal work does not need to change, the profession's culture does.[284]

State bar associations should begin by adopting Model Rule 8.4(g) on sexual harassment, thus demonstrating their commitment to justice and deterrence. Adopting the current ABA Model Rule on sexual harassment allows states' disciplinary committees to impose appropriate, fair, and just sanctions for misconduct.[285] The ABA 2018 Resolution sets forth a model rule that includes derogatory or demeaning verbal or physical conduct of a sexual nature as sexual

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[277] Rendleman, *supra* note 5.
[278] *Id.* Ebright*, supra* note 71, at 69.
[279] Hays, *supra* note 1 (examining rates of sexual harassment in the legal profession).
[280] Jarosh & Berry, *supra* note 2, at 30–33 (comparing 2018 surveys of sexual harassment in the legal profession at 68% to that of other careers at 38%).
[281] Pfenninger, *supra* note 11, at 173.
[282] *Id.*
[283] *A Current Glance at Women in the Law*, *supra* note 129 (explaining that the ABA calculated that, currently, about 20% of partners in law firms in the U.S. are women, which is an increase of approximately 15% of woman partners at law firms in the last thirty years).
[284] Franke, *supra* note 22, at 739–45; Fiske & Glick, *supra* note 25, at 104–05.
[285] Rendleman, *supra* note 5.

harassment and evaluates whether an attorney knows or reasonably should know that the conduct is sexual harassment by an objectively reasonable standard rather than subjective.[286]

Changing the knowledge standard to an objectively reasonable standard may prevent another miscarriage of justice such as the one which occurred in *In re Subryan*.[287] In this case, the Supreme Court of New Jersey analyzed the misconduct through a subjectively reasonable standard rather than an objectively reasonable standard as required by the ABA Model Rule.[288] Using this standard led the court to suspend a judge for only two months after he sexually harassed his law clerk by nonconsensual rubbing of her shoulders, kissing her, showing her sexually explicit photographs, calling her "too young and innocent," and verbally objectifying another attorney in conversation with her.[289] A subjective evaluation fails to justly punish legal professionals or serve as a deterrent for attorneys that sexually harass or abuse their subordinates.[290] The ABA's objective standard provides hope for victims of workplace sexual harassment, and all states should adopt this standard to avoid the judicial error from *In Re Subryan*.

To adequately address sexual harassment in the legal profession, it is crucial that attorneys understand workplace sexual harassment will not be tolerated.[291] Once all state bar associations adopt the ABA Model Rule, state disciplinary committees will be in a better position to enforce harsher sanctions. Presently, an attorney is still permitted to practice law if he asks about an employee's sexual history, what is under her clothes, if she has a boyfriend, name-call her in a sexual nature, tell her to behave how he wants her to, tell her he needs a mistress instead of an assistant, yell at her, swear at her, and threaten to give her a bad reference if she does not agree to sit in his office all day and do no legal work.[292] If state disciplinary committees commit to the ABA Model Rule and impose harsher

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[286] A.B.A. REVISED RES. 109 (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf (revising the ABA Model Rule on sexual harassment).

[287] 187 N.J. 139 (2006) (holding that a two-month suspension was just after a judge was found to have sexually harassed his law clerk).

[288] *Id.*

[289] *Id.*

[290] A.B.A. REVISED RES. 109.

[291] *See e.g.*, *Rochester*, (No. 95-CV-3896) (1998) (showing that the court failed to impose professional sanctions until three years after a jury verdict*); Cincinnati Bar Ass'n*, 89 Ohio St.3d at 306 (held a two-year suspension was adequate for an attorney who sexually harassed several of his assistants); *In Re Subryan*, 187 N.J. at 139 (holding that suspending a judge for two months after he sexually harassed his law clerk was sufficient).

[292] *Cincinnati Bar Ass'n*, 89 Ohio St.3d at 306 (providing facts of the case resulting in a two-year suspension for an attorney who sexually harassed several of his assistants).

sanctions on attorneys for sexual harassment, attorneys may no longer be able to sexually harass employees and keep their licenses to practice law.[293] Without harsher sanctions, including the possibility of disbarment, states will only be condoning the behavior for decades to come.

D. Drawbacks of Reform and Hope for the Future

Although opposition to resolving the issue of sexual harassment in the legal profession through education and transformative federal, state, and private policies should be a widely held position, the legal structures and cultural norms are highly likely to create a pushback.[294] One argument is that a man's history of sexual harassment has no bearing on his fitness for a particular position in the legal profession.[295] For example, in response to the sexual assault allegations against Justice Brett Kavanaugh in 2018, supporters commonly responded that allegations of sexual assault should not matter.[296] In fact, one poll found that 55 percent of Republican respondents believed that a *proven* assault would not disqualify Kavanaugh from being a Supreme Court Justice.[297] Male leaders in the legal profession are also conditioned to accept past sexual misconduct and mistreatment of women because it is often viewed as normal conduct.[298]

Opponents may also argue that sexual harassment is not professionally significant because the conduct is seen in attorneys and judges,[299] meaning that those in a field responsible for upholding Title VII and protecting victims are themselves failing to take sexual harassment seriously. For example, in "Big Law,"

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[293] MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 10, AM. BAR ASS'N, *supra* note 181 (explaining the possible attorney sanctions for misconduct).
[294] Ebright, *supra* note 71, at 59.
[295] *Id.* at 58. (explaining relationship between gender violence and fitness to practice law).
[296] *Id.* ("A common response to the Kavanaugh allegations was that even if true, they should not matter, A man's history of committing acts of gender violence should have no bearing on his elevation to the most exalted and influential position in the legal profession.").
[297] *Id.*
[298] This concept can be demonstrated by looking at how Senator Orrin Hatch responded to allegations of sexual misconduct by Supreme Court nominee, Brett Kavanaugh, publicly stating that the victim must be "mistaken," and that even if the allegations are true, Kavanaugh is a "good man" and senators should judge Kavanaugh based on who he is now. *See, e.g.*, Thomas Burr, *Nearly Three Decades After Anita Hill Came Forward, Sen. Orrin Hatch Again Sides with the Accused*, THE SALT LAKE TRIBUNE (2018), https://www.sltrib.com/news/politics/2018/09/23/nearly-three-decades/ (highlighting the concept that legal professionals will still view another male legal professional who commit sexual assault as a "good man" and judge their fitness to practice law apart from their history with sexual violence against women).
[299] Ebright, *supra* note 71, at 59.

the structure of achieving firm partnership creates an interest for partners who share profits to protect each other, leading to an environment that tolerates and covers up misconduct.[300] If a victim of sexual harassment reports being sexually harassed by a superior, associates or partners may respond by not assigning work to the accuser to make it difficult for her to meet billable hours or to force her out of the firm.[301] As a result of the "Big Law" firms' skewed idea of firm unity, firms must be required to take a step back to truly evaluate their firm's culture.[302] This reevaluation of firm culture can occur by anonymously surveying employees regarding sexual harassment and the firm's culture.[303]

Another opposing argument stems from the disbelief of accusers.[304] Many will question victims because the perpetrator already has the support of his good character through his professional achievements.[305] For example, *In the Matter of Randolph M. Subryan*, even the impartial court considered the defendant's many personal and professional achievements resulting in professional sanctions of a two-month suspension.[306] Because cases of sexual harassment are often a he-said-she-said circumstance, there is ample room for a judge, jury, or disciplinary body to believe the perpetrator over the victim.[307] Even though sexual harassment claims likely stem from he-said-she-said circumstances, victims must still overcome the high standard of proof of clear and convincing evidence required by disciplinary authorities to bring lawyers to justice for ethical violations.[308] Clear and convincing evidence is a higher standard than a preponderance of the evidence used by the majority of courts in civil proceedings and is difficult to establish with he-said-she-said evidence.[309]

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[300] Badesch, *supra* note 144, at 508 (citing Wendi S. Lazar, *Sexual Harassment in the Legal Profession: It's Time to Make It Stop*, 225 N.Y. L. J. 1 (2016)) (arguing that in "Big Law" partners who share profits protect each other and "fail to acknowledge patterns of abuse, especially among rainmakers.").

[301] *Id.* ("Victims fear reporting when harassers and their superiors, and agreed associates or partners may respond to knowledge of complaints by not assign quality work to the accuser, making it difficult for accusers to meet billable house requirements, or even quietly settling with the accuser such that she is forced to leave the firm.").

[302] Ebright, *supra* note 71, at 74 (advocating for anonymous reporting and whistleblower protection for employees without fear of lawful retaliation).

[303] *Id.* at 74.

[304] *Id.* at 59 (explaining delay in reporting and non-reporting contributes to the disbelief of victims).

[305] *Id.* (providing example of Brett Kavanaugh allegations and response).

[306] *In Re Subryan*, 187 N.J. at 154–55 (stating that the judge led an "admirable life of hard work and public service and a role model for others.").

[307] Badesch, *supra* note 144, at 507.

[308] *Id.*

[309] *Id.*

In addition to the social drawbacks, the right to free speech under the First Amendment to the United States Constitution presents another argument against workplace sexual harassment reform.[310] Opponents may argue that adoption of the ABA Model Rule and use of harsher attorney sanctions for sexual harassment will create a chilling effect on lawyers' speech.[311] Lawyers may fear a bar complaint being filed for statements made during bar association social events.[312] Broadening the scope of sexual harassment claims could mean any individual may find a lawyer's comments to be sexual harassment even when such comments are not about or intended to be said to the offended person.[313] While freedom of speech is among the highest of the government's interest, so is the government's interest in safeguarding society's confidence in the justice system.[314] The chilling effect on free speech is primarily based on a political agenda to protect lawyers' speech, which the benefits of reform on sexual harassment substantially outweigh.[315]

V. CONCLUSION

Sexual harassment is an alarmingly common experience for women in the legal profession and has a considerable negative impact on the profession as a whole. The negative impacts are likely to cause many members in the legal profession to leave their workplace altogether. Women deserve to be treated as equals in the legal profession.

Sexual harassment in the legal workplace presents an enormous challenge for women. Current federal, state, and private laws and regulations are not enough to curb instances of workplace sexual harassment. It is past time for state bar associations and all legal professionals to take the lead in reforming the legal field. Regulatory bodies, as well as all legal entities, must work together to do more than

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[310] Rendleman, *supra* note 5 (analyzing arguments of scholar's arguing for protection under the First Amendment for freedom of speech and religion against an adoption of the new ABA Model Rule). A full analysis on the drawbacks of reform based on the right to free speech under the First Amendment to the U.S. Constitution are outside the scope of this Note.

[311] *Id.* (stating that the chilling effect is particularly an issue at CLE events or conversations at bar association social events, and a lawyer will fear a complaint on statements made at that event).

[312] *Id.* (examining arguments by scholar that ABA Model Rule 8.4(g) is an unconstitutional "one-to-many" harassment rule).

[313] Rendleman, *supra* note 5 (stating that the scholar "argues that a lawyer speaking at a CLE or another lawyer gathering could violate the rule if someone—anyone—in an audience feels discriminated against or harassed by the lawyer's statement").

[314] Badesch, supra note 144, at 506.

[315] *Id.* ("Given the startling revelations that have continued since the Fall of 2017 regarding revelations of sexual harassment by a number of public figures in entertainment, government and news media, it is hard to fathom that anyone could reasonably object to Rule 8.4(g) prohibiting such conduct in connect with the practice of law.").

simply acknowledge this ongoing issue. Instead, they must work to change the inappropriate workplace culture through education, training, and accountability. It is only then that the legal profession, specifically women in the legal profession, will witness a decline in sexual harassment.