THE SEXUAL HARASSMENT SILO

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ABSTRACT

The #MeToo movement exposed the pervasiveness of sexual harassment in employment and made clear that legal remedies were sorely lacking. Federal and state lawmakers responded by passing laws broadening access to courts and enhancing remedies; requiring training, policies, and data collection; and modifying substantive harassment law, most commonly by rejecting the requirement that victims prove they were subject to "severe or pervasive" conduct. Although some of these reforms apply to harassment or discrimination on the basis of any protected trait, many create special rights for victims of sexual harassment. Collectively these laws establish what I term "the sexual harassment silo."

This Article offers the first comprehensive assessment of legislative reform sparked by #MeToo, as well as the salience of the new laws in the current—much changed—political environment. In addition to providing an overview of the new laws, the Article uses the most prominent federal response to #MeToo, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), as a case study to explore in depth the potential (and limits) of this siloed approach. This is the first detailed analysis of caselaw interpreting EFAA. It demonstrates that courts are properly applying key features of the statute—a flexible definition of sexual harassment and a provision that specifies it applies to any "case" that includes such harassment—that broaden EFAA's impact. By contrast, other #MeToo laws codify an outdated definition of harassment limited to unwelcome sexual advances or touching, while excluding other common forms of sexual harassment, such as insults, vulgar epithets, or sabotage of work.

Upon taking office, President Trump issued executive orders repudiating the application of sex discrimination law to discrimination based on gender identity and calling for the dismantling of diversity, equity, and inclusion initiatives. Because legislation cannot be swept aside by presidential fiat, the #MeToo laws can help safeguard protections for victims of harassment. But the popular debate over President Trump's actions has highlighted the resentment that policies perceived as providing "special" treatment can engender. The Article concludes by suggesting that in addition to enforcing policies addressing harassment, employers should take steps to actively promote civility and respect within workplaces. Research suggests that effectively addressing bullying or offensive behavior, regardless of whether it is based on protected traits, can help reduce unlawful harassment—and it can make workplaces more welcoming for all.

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THE SEXUAL HARASSMENT SILO

Deborah A. Widiss*

"Marching in the streets can inspire, hashtags can galvanize,
but legislation is the only action that lasts."
– Gretchen Carlson, former Fox News host[1]

INTRODUCTION

On March 3, 2022, President Joe Biden, Vice President Kamala Harris, and former Fox News host Gretchen Carlson, flanked by an array of flags in the East Room of the White House, expressed their appreciation to Congressional leaders for enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA).[2] President Biden, who was about to sign the bill into law, characterized it as a "momentous day for justice and fairness in the workplace," noting more than half of women report experiencing harassment, and that this legislation would ensure they could not be forced out of court into the secrecy of arbitration.[3] Gretchen Carlson, herself a victim of harassment who had been subject to a mandatory arbitration agreement, explained she was standing "alongside millions of others to say that it's not OK for companies to hide harassment

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1 PBS NEWSHOUR, *WATCH LIVE: President Biden Signs Ending Forced Arbitration of Sexual Assault Act*, at 6:17 (YouTube, Mar. 3, 2022), https://www.youtube.com/watch?v=KEMOhzwYd9Q [*https://perma.cc/X6MS-SGCR*].

2 *See generally id.*

3 *Id.* at 13:53.

and assault."[4] All three speakers praised the bipartisan nature of the legislation; as Carlson put it, EFAA proved "both parties can come together to get something good done."[5] And all three speakers expressed their hope that Congress would pass a more comprehensive bill, which was also then pending, that would prohibit forced arbitration for *any* kind of workplace dispute.[6] As this Article goes to print, almost four years later, that bill has yet to advance, and it has virtually no chance of passing in the current—radically changed—political environment.[7]

EFAA is the most prominent example of how #MeToo spurred Congress and state legislatures to enact special protections for victims of sexual harassment or assault. The #MeToo movement was sparked in October 2017, when actress Alyssa Milano, adopting a phrase coined by activist Tarana Burke a decade earlier, encouraged followers to tweet #MeToo if they had experienced sexual harassment or assault.[8] The response was overwhelming—reportedly one million tweets in the first twenty-four hours and more than nineteen million in the first year.[9] The tweets, and subsequent media coverage, exposed the pervasiveness of sexual harassment in employment and made clear that legal remedies were sorely lacking.[10]

Advocates harnessed the outrage, calling on legislators to remedy the shortcomings of existing law. Lawmakers responded. Since 2017, more

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4 *Id.* at 5:26.

5 *Id.* at 3:46; *see also id.* at 1:53 (Harris praising the "bipartisan group of legislators" that passed the bill); *id.* at 9:37 (Biden indicating he is "proud to sign another bipartisan bill into law").

6 *See id.* at 2:15 (Harris indicating that the "administration will work with Congress on broader forced arbitration legislation"); *id.* at 6:38 (Carlson indicating she will "continue fighting . . . for other disenfranchised groups in the workplace so they can also seek justice"); *id.* at 13:12 (Biden indicating that he "support[s] legislation . . . that would prohibit mandatory arbitration of all types of employment disputes").

7 *See infra* text accompanying note 232.

8 *See, e.g.*, Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 374 (discussing the use of the phrase prior to 2017 as well as the larger movement initiated in 2017); *see also* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 230-31 (2018) (similar).

9 Williams et al., *#MeToo As Catalyst*, *supra* note 8, at 374-75.

10 *See generally, e.g.*, Tippett, *supra* note 8, at 241-49 (discussing potential legal reforms to respond to problems identified by #MeToo).

than eighty laws addressing workplace harassment have passed at the state level and at least twenty-eight laws have passed in Congress.[11] The new laws address a variety of obstacles to attaining relief. For example, in Arizona and Texas, the prohibition on sexual harassment now applies to all employers, while the law addressing other forms of harassment or discrimination only applies to employers with at least fifteen employees.[12] In Vermont, independent contractors are now protected against sexual harassment, but not from other forms of discrimination or harassment.[13] In New York, victims of sexual harassment now have three years to initiate a lawsuit, while other discrimination or harassment claims must be filed within a year.[14] Numerous states now require employers to adopt policies, conduct training, and collect statistics specifically on sexual harassment.[15] And on the federal level, in addition to the ban on forced arbitration,[16] and a similar ban on nondisclosure agreements for victims of sexual harassment or assault,[17] Congress passed several laws requiring federal agencies and recipients of federal funding to take steps to mitigate sexual harassment and providing other new protections to victims.[18]

The advocates pushing for these new laws often made clear that they also supported more comprehensive reform,[19] just as President Biden, Vice President Harris, and Gretchen Carlson indicated they hoped Congress would pass a law prohibiting forced arbitration for all workplace disputes. In a few liberal-leaning states, this incremental strategy worked; provisions that were initially limited to sexual harassment victims were

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11 *See infra* Part II.

12 *See* AZ. REV. STAT. § 41-1461(7)(a) (LexisNexis 2025); TEX. LAB. CODE ANN. § 21.141(1) (West 2025) (defining "employer" for purposes of a subchapter on sexual harassment); TEX LAB. CODE ANN. § 21.002(8) (West 2025) (defining "employer" for discrimination law chapter generally).

13 *See* VT. STAT. ANN. tit. 21, § 495h(a)(2) (2025).

14 *See* N.Y. EXEC. LAW § 297(5) (Consol. 2025).

15 *See infra* subsection II.B.2.

16 *See* 9 U.S.C. § 401 *et seq.*

17 *See* 42 U.S.C. § 19401 *et seq*.

18 *See infra* Appendix, Table 2 (summarizing new federal provisions).

19 *See generally*, Andrea Johnson, Samone Ijoma & Da Hae Kim, *#MeToo Five Years Later: Progress and Pitfalls in State Workplace Anti-Harassment Laws*, NAT'L WOMEN'S L. CTR. (Oct. 4, 2022) [hereinafter NWLC, *#MeToo Five Years Later*] (celebrating progress but also calling for more substantive and comprehensive reforms).

subsequently broadened.[20] Additionally, a handful of state legislatures used the impetus of #MeToo to reform laws governing harassment or discrimination more generally. For example, some states rejected the requirement that victims show they were subject to "severe or pervasive" abusive conduct[21] or eliminated caps on damages.[22] But many of the laws passed in response to #MeToo provide special protections, rights, and obligations related to solely sexual harassment, a phenomenon I characterize as the "sexual harassment silo."

The construction of the sexual harassment silo reifies a new—and potentially troubling—distinction between "sexual harassment" and other forms of harassment or discrimination. Federal employment law does not explicitly prohibit "sexual harassment." Rather, the doctrine is an interpretation of the general prohibition on "discrimination" in the "terms [or] conditions" of employment on the basis of sex, race, national origin, and other protected traits.[23] Victims of harassment also sometimes rely on state statutes, local laws, or common law for relief, but again, prior to #MeToo, this was typically based on interpretations of more general protections.[24]

By contrast, many of the #MeToo laws create statutory definitions for "sexual harassment."[25] Some, including EFAA, do so by referencing the body of federal, state, tribal, and local law that collectively address sexual harassment.[26] Others spell out prohibited conduct, and many provide that only *sexualized* conduct, such as unwelcome sexual advances or sexual touching, can constitute harassment. These new laws often borrow language from interpretive guidance that the Equal Employment Opportunity Commission (EEOC), the agency charged with implementing

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20 *See, e.g.*, 2019 N.Y. Laws ch. 160, sec. 1, § 296(d) (amending several provisions that had been initially enacted to be specific to sexual harassment to apply to "unlawful discriminatory practices" generally).

21 *See infra* text accompanying notes 169-171.

22 *See infra* text accompanying note 147.

23 *See infra* Section I.A.

24 *See id.*

25 *See infra* Section II.C.

26 *See id; see also infra* subsection III.B.1.

federal employment discrimination law, issued back in 1980, when the agency was first grappling with whether harassment claims were viable.[27]

The Supreme Court has since explicitly rejected the idea that sexual harassment is limited to sexualized conduct, and it is now well established that insults, physical aggression, sabotage of work, and other forms of non-sexualized harassing conduct based on sex can be unlawful.[28] In fact, research suggests non-sexualized harassing conduct based on sex, sometimes referred to as "gender harassment" or "sex-based harassment,"[29] is more prevalent than sexualized conduct, and that it often accompanies and/or precedes sexualized abuse.[30] In light of these developments, the EEOC has formally broadened its conception of actionable harassment. Since 1990, the agency has recognized that non-sexualized conduct can give rise to sexual harassment claims,[31] a proposition reaffirmed in comprehensive guidance that the agency issued in April 2024.[32]

#MeToo laws that use language from the EEOC's 1980 guidance are thus resurrecting and codifying an outdated conception of sexual harassment. In other words, they create what could be considered a *silo*

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27 *See infra* text accompanying note 90.

28 *See, e.g.,* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); *see also infra* text accompanying note 73.

29 In the abstract, the phrase sex-based harassment might better capture the full range of harassment recognized in caselaw and discussed in research. However, since "sexual harassment" is the term that has been used for more than forty years, and the language that has now been codified in legislation, I think it is preferable to clarify that the term encompasses both sexualized and non-sexualized conduct than to suggest a shift in language. *See* Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 252-58 (discussing this issue and reaching a similar conclusion).

30 *See infra* text accompanying note 101.

31 *See* EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, at C.4 (Mar. 19, 1990), available at *https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment* [*https://perma.cc/DX97-HHXQ*]; *see also infra* text accompanying notes 97-98 (discussing the guidance).

32 *See* EEOC, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), at II.A.5, available at *https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace* [perma.cc/RU36-S6PT][hereinafter "*2024 EEOC Guidance"*]; *see also infra* text accompanying notes 112-115 (discussing the guidance's interpretation of harassment including sexualized and non-sexualized conduct based on sex, including harassment based on sexual orientation, gender identity, pregnancy, childbirth or related medical conditions); text accompanying notes 374-396 (discussing challenges to the guidance's conclusion regarding harassment based on sexual orientation or gender identity).

within a silo: they provide special protections for victims of sexual harassment, as compared to victims of any other kind harassment or discrimination, *and* they define "sexual harassment" narrowly as limited to sexualized conduct, such as unwelcome propositions or groping, rather than included the full spectrum of harassing or abusive conduct based on sex. In this sense, laws using this definition have the (likely unintended) effect of curtailing the conception of sexual harassment, even as they seek to provide more robust support to victims.

That said, there have been profound shifts in the political landscape since the #MeToo movement began. In 2017 and 2018, scores of public officials were forced out of office following allegations of sexual harassment, sexual assault, or other sexual misconduct.[33] In the 2024 campaign, by contrast, President Trump and his surrogates embraced tropes of "brash" masculinity,[34] and he was elected, despite having been found civilly liable for sexual abuse.[35] Several of President Trump's cabinet picks were also credibly accused of abusing women, but most were nevertheless confirmed.[36] Immediately upon taking office, President Trump issued sweeping executive orders repudiating agency regulations and guidance that had interpreted sex discrimination laws to address discrimination on the basis of gender identity and dismantling diversity, equity, and inclusion initiatives.[37] In the current political climate, the

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33 *See After #MeToo, Over 100 Public Officials Out of Office*, GEORGETOWN LAW (Nov. 9, 2018), https://www.law.georgetown.edu/news/after-metoo-over-100-public-officials-out-of-office/ [perma.cc/QS5F-H3KV] (summarizing report authored by Georgetown Law Professor Jamillah Bowman Williams reporting more than 100 public officials either resigned or were pushed out of elected offices).

34 Ashley Morgan, *Trump Represents a Specific Type of Masculinity—and It's Dangerous for Women*, THE CONVERSATION (Nov. 15, 2024).

35 *See* Kara Scannell, *Federal Appeals Court Upholds Sexual Abuse Verdict Against Trump*, CNN (Dec. 30, 2024), *https://www.cnn.com/2024/12/30/politics/federal-appeals-court-upholds-sexual-abuse-case-against-trump* [perma.cc/9YZW-BFQJ].

36 *See, e.g.*, Grace Panetta, *Trump's First Term Ignited #MeToo. Will His Second Extinguish It?*, THE 19TH (Jan. 22, 2025), *https://19thnews.org/2025/01/trump-me-too-movement-sexual-misconduct-accountability/* [perma.cc/CD9T-KV2D] (discussing allegations of sexual misconduct against several of President Trump's cabinet nominees).

37 *See generally, e.g.*, Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615-17 (Jan. 30, 2025) [hereinafter "*Gender Ideology*"]; Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8633-35 (Jan. 21, 2025) [hereinafter "*Ending Illegal Discrimination*"]; Exec. Order. No. 14,151, 90 Fed. Reg. 8339

durability of legislation, as compared to other forms of government policy, is crucially important. Despite their limitations, the #MeToo laws may serve as a bulwark against efforts to erode key discrimination protections.

This Article provides the first comprehensive assessment of the legislative reform inspired by #MeToo[38] and one of the first detailed analyses of caselaw applying EFAA.[39] The Article makes both descriptive

(Jan. 29, 2025) [hereinafter "*Ending Government DEI*"]; *see also infra* Part IV.B (discussing the executive orders and subsequent actions).

38 In 2018, Elizabeth Tippett published an extremely helpful overview recommending potential reforms. *See* Tippett, *supra* note 8, at 287-93; *see also generally* Sarah D. Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 69 (2019) (article written by the Director of the TIME'S UP Legal Defense Fund and a legal fellow at the National Women's Law Center outlining proposed legislative reforms); Jamillah Bowman Williams, Elizabeth C. Tippett & Anu Ramdin, *Mind the Gap(s): Mitigating Harassment in a Post-#MeToo Workplace*, 98 S. CAL. L. REV. 881 (2025) (empirical study investigating #MeToo's effects on federal and state legislative activity regarding broad range of gender equity concerns, including not only harassment-related bills, but also pay equity, leave, pregnancy accommodations, and other topics). There has, of course, been a large body of legal scholarship discussing #MeToo more generally. For example, in 2018, *The Yale Law Journal* and *Stanford Law Review* collaborated on a collection of essays by several leading scholars, which also included a collective statement setting forth "Ten Principles for Addressing Sexual Harassment." *See* Vicki Schultz (for Rachel Arnow-Richman, Ian Ayres, Susan Bisom-Rapp, Tristin Green, Rebecca Lee, Ann McGinley, Angela Onwuachi-Willig, Nicole Porter, Vicki Schultz, and Brian Soucek), *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018). *See generally #MeToo and the Future of Sexual Harassment Law*, YALE L.J., *https://www.yalelawjournal.org/collection/MeToo* [perma.cc/9U49-55JQ]; *#MeToo and the Future of Sexual Harassment Law*, STAN. L. REV. ONLINE, *https://www.stanfordlawreview.org/online/type/symposium-metoo/* [perma.cc/43YM-KCYM].

39 In October 2025, as this article was being finalized for publication, David Horton posted a draft of a forthcoming article that also provides detailed analysis of EFAA caselaw, based on a study of all electronically-accessible EFAA cases decided through August 2025. *See* David Horton, *The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and Textualism*, 94 GEO. WASH. L. REV. (forthcoming 2026) [hereinafter Horton, *EFAA and Textualism*], available on SSRN at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5578370* [perma.cc/ZFH8-F7NN]. There are also a few published articles that include brief discussions of the very earliest cases decided under EFAA. *See* Myriam Gilles, *Arbitration's Unraveling*, 172 U. PA. L. REV. 1063, 1074-77 (2024) (analyzing early jurisprudence under EFAA); Sandra F. Sperino, *The Early Days of the Ending Forced Arbitration Act*, in THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM, 175, 176-79 (Richard A. Bales & Jill I. Gross, eds. 2024) (similar); Michael Snyder, Note, *The Super Statute's Kryptonite: The FAA After EFASASHA*, 38 NOTRE DAME J. L. ETHICS & PUB. POL'Y 435, 454-63 (2024) (analyzing early EFAA cases addressing disputes over the interpretation of EFFA's effective date language). Additionally, there are several articles that were published shortly after EFAA was enacted assessing strengths and weakness of the new law. *See generally* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. FORUM 1 (2022); Sandra Sperino, *Escaping Arbitration and Class Action Waivers for Harassment Because of Pregnancy,*

and normative contributions. It identifies and critiques the siloed approach of much of the #MeToo legislation, particularly the new laws that narrowly define sexual harassment to include only sexualized conduct. EFAA, by contrast, adopts a broad definition of "sexual harassment dispute," which encompasses the full scope of harassing conduct recognized by courts and the substantive reforms enacted by legislatures.[40] Under EFAA, if a complaint alleges conduct that fits within this definition (or within the definition of a sexual assault dispute), the entire "case" is exempt from mandatory arbitration.[41] Employees have thus been able to seek relief in court not only for harassment or assault, but also for other workplace violations, such as pay discrimination, denial of medical leave, and discriminatory firings.[42] In this respect, EFAA has a broader impact than many of the other laws passed in response to #MeToo, even as it also highlights the ongoing need for more comprehensive reform.

The Article also considers developments that have occurred in recent years *outside* the sexual harassment silo that may impact the efficacy of the new laws. First, the #MeToo legislation generally assumes, either explicitly or implicitly, that "harassment" is distinct from "discrimination." However, a 2024 decision by the Supreme Court, *Muldrow v. City of St. Louis*, suggests that this distinction is tenuous, or potentially completely illusory, under federal employment discrimination law.[43] Second, President Trump's executive orders castigating so-called "gender ideology extremism" and diversity, equity, and inclusion initiatives, as well as actions federal agencies have taken to enforce those orders and litigation challenging those actions, could significantly alter understandings of what constitutes "sexual harassment" and the measures employers may take to combat it. The #MeToo laws offer a buffer against some potential changes, solidifying protections for at least certain kinds of

Sexual Orientation or Gender Identity, 84 OHIO ST. L.J. ONLINE 18 (2023); Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J.L. & SOC. POL'Y 1 (2023).

40 *See infra* subsections III.B.1, III.C.1.

41 9 U.S.C. § 402(a); *see infra* subsections III.B.2., III.C.2.

42 *See infra* subsections III.B.2, III.C.2.

43 *See infra* Section IV.A.

harassment.[44] That said, the most substantive reforms in response to #MeToo were enacted in liberal-leaning states, contributing to a more general divergence between red states and blue states in the scope of employment protections.[45] This gap will widen even further as states vary in their response to new policies on the federal level.

Finally, the Article suggests that the seismic shifts unfolding in equality law, as well as the limits of some of the #MeToo legislation, raise the salience of a major report issued by the EEOC almost a decade ago that advocated a more comprehensive approach to preventing harassment.[46] Among other recommendations, the report suggested that employers take steps to affirmatively promote respectful interactions at work, rather than simply proscribing inappropriate conduct. Title VII, it is often said, is not a "general civility code,"[47] and not all incidents of rude behavior should give rise to legal actions. But effectively addressing bullying or offensive behavior, regardless of whether it is based on sex or other protected traits, could make the workplace more welcoming for all.

The Article proceeds as follows. Part I explains how courts have interpreted general antidiscrimination laws to address harassing conduct, and evolving understandings of what constitutes "sexual harassment." Part II provides an overview of the state and federal laws enacted in response to #MeToo. Part III provides a detailed case study of EFAA. Part IV explores how recent developments in employment law more generally may alter the impact of the #MeToo legislation.

I. HARASSMENT BEFORE #METOO

#MeToo highlighted the shocking pervasiveness of sex-based harassment within modern American workplaces and galvanized calls for reform. Legislators at the federal and state levels passed legislation that addressed shortcomings of harassment law, as developed in the courts. However, many of the new laws resurrected administrative guidance

44 *See infra* Section IV.B.
45 *See infra* Section IV.C.
46 *See infra* Section IV.C.
47 *See e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S 75, 81 (1998).

issued more than forty years ago; that guidance suggested only "sexualized" conduct could give rise to sexual harassment claims, a limitation later rejected. This section first describes case law at the federal and state level establishing the scope of actionable harassment; it then explains the historical context for the EEOC's 1980 guidelines and how subsequent developments in theory and research have broadened the conception of sexual harassment.

A. CASELAW

Under federal employment law, there is no statutory claim for "harassment." Rather, to be actionable, harassing conduct must be shown to be unlawful discrimination under Title VII of the Civil Rights Act, which prohibits discrimination based on sex, race, color, national origin, or religion,[48] or similar statutes prohibiting discrimination on the basis of disability,[49] age,[50] and other traits.[51] The relevant provision in Title VII states that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of any protected trait.[52]

The Supreme Court first recognized the viability of a "harassment" claim in a 1986 decision, *Meritor Savings Bank v. Vinson*.[53] By the time #MeToo erupted, more than thirty years later, the Supreme Court had parsed the applicable statutory language in several subsequent cases.[54] This body of caselaw collectively develops an almost statute-like standard, with key words from the early decisions being further refined in later

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48 *See* 42 U.S.C. § 2000e-2(a)(1).

49 *See* 42 U.S.C. § 12112(a).

50 *See* 29 U.S.C. §623(a).

51 *See, e.g.*, 42 U.S.C. § 2000ff-1 (prohibiting discrimination because of genetic information).

52 42 U.S.C. § 2000e-2(a)(1).

53 477 U.S. 57 (1986).

54 *E.g.*, Vance v. Ball State Univ., 570 U.S. 421 (2013); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

decisions and ultimately holding talismanic significance for lower courts. This feature of the doctrine was made particularly evident when the Court released on the same day two different decisions regarding vicarious liability and included identical language in both opinions.[55]

Under these judge-made rules, a plaintiff must show that she was subject to harassing conduct because of a protected trait that includes a "tangible employment action," such as demotion or termination, or that is "severe or pervasive" enough to "alter the conditions" of employment by creating an "abusive working environment."[56] Claims that do not include a tangible employment action are typically known as "hostile environment" claims.[57] The standard is both objective and subjective. A plaintiff must establish that a "reasonable person" would find the conduct to be "hostile or abusive," and that she herself found it so, but not necessarily that she suffered grave psychological harm from the conduct.[58] Because this standard is an interpretation of the general statutory prohibition on "discrimination" with respect to the "terms, conditions, or privileges" of employment, it applies to harassment on the basis of sex, race, or any other protected trait.

Even if harassing conduct occurs, an employer is not necessarily legally liable. Drawing on principles from agency law, the Supreme Court has held that an employer is vicariously liable if the harassment included a tangible employment action.[59] In a hostile environment claim, if the harassment was perpetrated by a "supervisor," the employer is liable *unless* it can show, as an affirmative defense, that it "exercised reasonable care to prevent and correct promptly" the harassing behavior and that the employee "unreasonably failed to take advantage" of such measures.[60] If

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55 *See Burlington Indus.*, 524 U.S. at 765 (300-word passage explaining affirmative defenses that the Court established for some harassment cases); *Faragher*, 524 U.S. at 807-08 (including precisely the same 300-word passage).

56 This basic standard was first articulated in *Meritor Savings Bank*, 477 U.S. at 67 (quotations omitted); in *Burlington Industries*, 524 U.S. at 753, 765, the Court began using the phrase "tangible employment action" to identify actions for which the employer is automatically vicariously liable.

57 *See e.g.*, *id.* at 754.

58 *Harris*, 510 U.S. at 21.

59 *See Vance*, 570 U.S. at 424; *Burlington Indus.*, 524 U.S. at 765.

60 *Burlington Indus.*, 524 U.S. at 765.

the harassment was perpetrated by a non-supervisor, the employer is liable only if the worker can prove the employer was negligent.[61] A "supervisor," for purposes of this test, is someone empowered to take tangible employment actions against the employee.[62]

The Court has made clear that sexual harassment can include non-sexualized conduct, such as insults, slurs, or physical aggression, as well as unwanted sexual advances. This issue was discussed most explicitly in *Oncale v. Sundowner Offshore Services, Inc.*, where the Court considered whether sexual harassment is actionable when the harasser and the victim are the same sex.[63] In an opinion by Justice Scalia, the Court explained that the harassing conduct simply needs to be (as provided in the statute) "*discriminat[ion]* . . . because of . . . sex."[64] The critical question is whether an individual is "exposed to disadvantageous terms or conditions of employment" based on sex, rather than whether the words have "sexual content or connotations."[65] Relevant evidence could include "explicit or implicit proposals of sexual activity," use of "sex-specific and derogatory terms" that suggest a hostility to one sex, or "comparative evidence" that shows the harasser treated members of one sex worse than members of the other sex.[66] The Court further explained that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[67] In an earlier case, the Court considered sex-based insults—such as statements that the plaintiff was a "dumb ass woman" and women were not qualified to be managers—together with unwanted sexual propositions and touching when assessing whether the plaintiff had a viable harassment claim.[68]

These tests have been further developed in decades of caselaw from the lower courts—in ways that leave much to be desired. Courts have regularly held that conduct that many "reasonable" people would consider

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61 *Vance*, 570 U.S. at 427.
62 *Id.* at 431.
63 523 U.S. 75 (1998).
64 *Id.* at 80 (emphasis and alteration in original).
65 *Id.* (internal citation omitted).
66 *Id.* at 80-81.
67 *Id.* at 80.
68 *Harris*, 510 U.S. at 19.

to be highly offensive and abusive is insufficient to state an actionable claim.[69] For example, in an (in)famous Ninth Circuit case, the court held that even though a supervisor forced his hand under his co-worker's sweater and bra and fondled her bare breast, the employer was not liable because it was a single incident.[70] More recently, the Seventh Circuit considered a claim brought by a female sales associate based on a business trip with a senior male coworker who proposed they go skinny dipping; followed her into her hotel room before crawling into her bed and saying he wanted a "cuddle buddy"; and then repeatedly knocked on her door and called her after she asked him to leave her room. [71] The Seventh Circuit observed the behavior was "inappropriate[,]" but concluded it did not amount to "severe or pervasive" harassment.[72]

Since *Oncale*, however, lower courts have properly recognized that non-sexualized conduct can state a viable claim. Such conduct can include, for example, harassing conduct based on a failure to conform to sex-based stereotypes; sabotaging of work; or widespread use of offensive epithets.[73] Both before and after *Bostock v. Clayton County*, which confirmed discrimination based on gender identity or sexual orientation is a form of discrimination on the basis of sex under Title VII,[74] many lower courts have held that harassment on the basis of these traits is actionable.[75]

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69 *See, e.g.*, Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 809-19 (2002) (collecting cases which hold that even extremely egregious conduct fails to meet the "severe or pervasive" standard); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 111-23 (2003) (similar); Diane P. Wood, *Sexual Harassment Litigation With a Dose of Reality*, 23 U. CHI. LEGAL F. 395, 401-12 (2019) (an article by Seventh Circuit judge collecting and critiquing harassment cases).

70 *See* Brooks v. City of San Mateo, 229 F.3d 917, 926 (2000). In the wake of #MeToo, California rejected this approach under state law. *See infra* text accompanying note 173.

71 Swyear v. Fare Foods Corp., 911 F.3d 874, 878-81 (7th Cir. 2018).

72 *Id.* at 881-83.

73 *See, e.g.*, Soucek & Schultz, *supra* note 29, at 233-34 (discussing caselaw establishing that "sexual advances or taunts, gender-specific slurs, or acts of hostility and exclusion, the antagonistic actions, assaults, ridicule, ostracism, marginalized, and sabotage" can all constitute sexual harassment).

74 140 S. Ct 1731, 1743 (2020).

75 *See, e.g.*, Copeland v. Georgia Dep't of Corrections, 97 F.4th 766, 775 (11th Cir. 2024) (citing *Bostock*, 140 S. Ct at 1743) (confirming that harassment on the basis of gender identity is harassment on the basis of sex); *see also* Soucek & Schultz, *supra* note 29, at 238 (discussing successful pre-Bostock harassment claims brought by LGBTQ+ employees). That said, recent

Additionally, because Congress has defined "sex" in Title VII to include "pregnancy, childbirth, or related medical conditions," it also includes harassment based on these factors.[76]

It has long been routine for employers to adopt policies prohibiting harassment and to provide training on unacceptable conduct.[77] These may be helpful tools for addressing harassment, but they are not, in themselves, necessarily sufficient to "prevent" or "correct promptly" harassing conduct, the standard ostensibly required by the affirmative defense created by the Supreme Court.[78] Indeed, the stories shared when #MeToo went viral, as well as more systematic research, confirm that harassment remained prevalent notwithstanding policies prohibiting it.[79] Nonetheless, courts routinely defer to such "symbolic structures," assuming that the mere presence of a policy or training is sufficient to establish the affirmative defense, without assessing whether such policies are effective.[80]

In addition to this body of federal law, employees may challenge harassing conduct under state and local statutes. Prior to #MeToo, few states specifically prohibited harassment. Rather, state laws, like federal law, prohibited "discrimination" on the basis of protected traits, and state court judges usually interpreted these standards to be substantively analogous to federal law. (New York City's antidiscrimination law was an important exception, as discussed below.)[81] That said, even before the

developments have re-opened questions regarding how Title VII applies to harassment based on sexual orientation or gender identity. *See infra* text accompanying notes 377-396.

76 *See, e.g.*, Baker v. John Morrell & Co., 382 F.3d 816, 829 (8th Cir. 2004) (discussing menstruation-based harassment as contributing to a claim of sex-based harassment).

77 *See, e.g.*, Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 373 (2020) ("By 1998 . . . 95% of companies had created sexual harassment grievance procedures [and] 80% of organizations offered sexual harassment training for managers.").

78 Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

79 *See* Edelman & Cabrera, supra note 77, at 373 (collecting and discussing studies on workplace polices and incident rates).

80 *Id.* at 376; *see generally* LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016) (providing fuller explication of research showing such symbolic compliance); Tippett, *supra* note 8, at 287-98 (discussing structures that could make policies prohibiting harassment and investigations more effective).

81 *See infra* text accompanying notes 202-208.

reforms discussed in the next Part, some state and local laws were more expansive than federal law in various ways, such as covering smaller employers, including additional protected traits, or providing more comprehensive monetary relief for harms suffered.[82]

Victims of harassing conduct also routinely bring common law claims. Courts have recognized, for example, that harassing conduct can give rise to assault, battery, intentional or negligent infliction of emotional distress, negligent hiring or negligent retention, and failure to maintain a safe workplace.[83] Common law claims can be a vehicle for holding individual perpetrators of harassment responsible, in addition to (or in lieu of) employers. These claims generally allow uncapped compensatory damages.[84] Additionally, independent contractors and other non-employees may use common law claims to secure relief even when they would not be able to pursue relief under Title VII or state analogues.

B. SEXUAL HARASSMENT IN THEORY, RESEARCH, AND AGENCY GUIDANCE

Harassment doctrine, and particularly the law of sexual harassment, has been shaped in important ways by theory, research, and agency guidance. In the 1970s, when lower courts first began to decide cases under the then-new Title VII, they had little difficulty concluding that an employee who was forced to work in an environment that was permeated with epithets or slurs relating to race, religion, or national origin was a victim of unlawful discrimination, even if the employee was not subject to

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82 For a helpful overview of employer size thresholds, and other aspects of state employment discrimination laws generally, see *Employment Discrimination Laws: 50-State Survey*, JUSTIA, *https://www.justia.com/employment/employment-laws-50-state-surveys/employment-discrimination-laws-50-state-survey/* [https://perma.cc/SJS4-GDZJ] (last visited Jan. 2, 2026).

83 *See, e.g.*, MARIA L. ONVTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 517-18 (10th ed., 2020) (collecting and discussing cases articulating various types of harm caused by harassment as the basis for common law claims). In some states, common law claims are preempted by workers' compensation or state antidiscrimination laws. *Id.*

84 *See, e.g.*, Myers v. Cent. Fla. Inv., Inc., 592 F.3d 1201, 1205 (11th Cir. 2010) (upholding jury award for battery claim based on harassment, resulting in $1.5 million in compensatory and punitive damages, even though plaintiff lost statutory claim).

a tangible employment action, such as being fired.[85] However, judges were less sure how to handle claims of sex-based harassment, which often were brought by women who suffered consequences at work after refusing sexual overtures. Many judges reasoned that this was a "personal" issue, rather than more general discrimination on the basis of sex.[86]

Feminist theorists and activists in the late 1970s, including most prominently Catherine MacKinnon, helped articulate why conditioning workplace benefits on submission to sexual advances should be recognized as a form of sex-based discrimination.[87] Lawyers picked up these arguments and courts began to accept them.[88] In 1980, the EEOC issued interpretive guidance[89] that defined "sexual harassment" in sexualized terms. Specifically, it provided that Title VII was violated when "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" were made a term or condition of employment, formed the basis of employment decisions, or when such conduct "unreasonably interfere[ed] with an individual's work performance or create[ed] an intimidating, hostile, or offensive working environment."[90]

Other researchers at the time conceptualized sexual harassment in more general terms, as encompassing not just unwanted sexual propositions, but also non-sexualized harassing conduct, such as teasing, social isolation,

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85 The first case to recognize this was *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (holding a "working environment heavily charged with ethnic or racial discrimination" could state a claim of discrimination under Title VII).

86 *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701-02 (1998) (describing and critiquing this caselaw).

87 *See generally* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); *see also* Schultz, *supra* note 86, at 1696-1705 (discussing MacKinnon and other early feminist theorists).

88 *See id.* at 1696-1705 (explaining this early history of feminist theory regarding harassment, while critiquing the "sexual desire-dominance paradigm" that it engendered).

89 The EEOC does not have authority to issue substantive regulations interpreting Title VII. Thus, even prior to the overruling of *Chevron*, the EEOC's interpretations were assessed under the factors set forth in *Skidmore*. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

90 29 C.F.R. § 1604.11(a); *see also* 45 Fed. Reg. 74677 (Nov. 10, 1980) (publishing the guidance).

and physical abuse.[91] Lawyers brought cases alleging such conduct could also establish a hostile environment based on sex, akin to hostile environments based on race, national origin, or religion. Courts agreed.[92] For example, in 1985, the DC Circuit concluded that "any harassment . . . of an employee . . . that would not occur but for the sex of the employee may, if sufficiently patterned or pervasive, comprise an illegal condition."[93] It recognized that the EEOC's 1980 guidelines focused on sexualized behavior, but indicated that the agency's identification of "certain activities as prohibited by Title VII" should not be "taken to mean that *any other* activities are allowed."[94] Courts also held that sexualized and non-sexualized conduct should be considered together when assessing whether it was sufficiently severe or pervasive to state a claim.[95]

In 1990, the EEOC published new guidance on "current issues of sexual harassment," which summarized the Court's holding in *Meritor Savings Bank* and developments in the lower courts.[96] The 1990 guidance specifies that in addition to the "sexualized" conduct addressed in the 1980 guidelines, "sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex."[97] And it explained that acts of "physical aggression, intimidation, hostility or unequal treatment based on sex" may be combined with "sexual harassment" to establish a hostile environment.[98] However, the agency did not formally repeal or revise the 1980 guidelines,

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91 *See* Schultz, *supra* note 86, at 1699-1701 (discussing work by Carrol M. Brodksky, who conceptualized sexual harassment as including conduct that "'persistently provokes, pressures, frightens, intimidates, or otherwise discomforts a person'").

92 *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

93 *Dole*, 765 F.2d at 1138.

94 *Id.* at 1138 n.20 (emphasis added).

95 *See, e.g.*, *Hicks*, 833 F.2d at 1414-16.

96 EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, at C.4 (citing Hicks, 833 F.2d at 1416; Dole, 765 F.2d at 1138) (Mar. 19, 1990), available at *https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment* [https://perma.cc/KEV6-6G6W].

97 *Id.*

98 *Id.*

which remained accurate, albeit incomplete, in describing *some* forms of sexual harassment.

Social science research confirms that *both* sexualized harassment and other forms of sex-based harassment are prevalent in workplaces. The literature recognizes three distinct types of sexual harassment: (1) conditioning job benefits on acceptance of sexual overtures, (2) unwanted sexual attention, and (3) denigrating or hostile attitudes based on sex, such as insults, sexually-vulgar terms of address or graffiti, and sabotage of work.[99] This last category has been pithily summed up as a "put-down" rather than a "come-on"; it is considered a form of sexual harassment, but in the literature it is often referred to as "gender-based" or "sex-based" harassment.[100] While it is quite difficult to accurately measure the prevalence of sexual (or other) harassment, research suggests that non-sexualized harassing conduct is more common than purely sexual conduct, and that it often leads to more sexually threatening forms of abuse.[101]

In 1998, Professor Vicki Schultz published an influential law review article calling for sexual harassment to be "reconceptualized" as an "expression of workplace sexism, not sexuality or sexual desire."[102] She

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99 *See e.g.*, Lilia M. Cortina & Maira A. Areguin, *Putting People Down and Pushing Them Out: Sexual Harassment in the Workplace*, 2021 ANN. REV. ORGAN. PSYCH. & ORGAN. BEHAV. 285, 287 (describing the tripartite model as a "well-validated and widely accepted classification system" that has "held up across studies that vary by gender, ethnicity, nation, and occupation"); *see also* Louise F. Fitzgerald, Suzanne Swan & Vicky Magley, *But Was It Really Sexual Harassment?: Legal, Behavioral, and Psychological Definitions of the Workplace Victimization of Women*, *in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 10-11 (William O'Donohue, ed., 1997) (describing the same tripartite model).

100 *See* Cortina & Areguin, *supra* note 99, at 288.

101 *Id.* at 288, 291 (collecting studies on prevalence of gender harassment and concluding the studies underestimate true harassment rates); *see also* Paula A. Johnson, Sheila E. Widnall & Frazier F. Benya, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine,* NAT'L ACADS. OF SCI., ENG'G MED. 49 (2018) (reporting that non-sexualized harassment is more prevalent than sexualized harassment).

102 Schultz, *Reconceptualizing Sexual Harassment, supra* note 86; Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 28 (2018) (characterizing her earlier argument). During the 1990s, other theorists advanced similar theories. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 693 (1997) (characterizing sexual harassment as a "technology of sexism"); L. Camille Hébert, *Sexual Harassment Is Gender Harassment*, 43 U. KAN. L. REV. 565, 568 (1995) (arguing both sexual and non-sexual harassing conduct because of sex "inform women of their place and role in the workplace" and "offend, humiliate, and embarrass"). Vicki Schultz subsequently published an

demonstrated that many courts improperly "disaggregated" sexual from non-sexual conduct in harassment cases. They would assess the former under the hostile environment test and deem the latter as only relevant to a standard disparate treatment claim, and then they often found neither sufficient.[103] Referencing the social science research, she argued that both kinds of conduct served to enforce gender norms and sex-based segregation within workplaces. That same year, in *Oncale*, the Supreme Court explicitly rejected the idea that only sexualized conduct was relevant.[104] Lower courts generally followed its lead and held that both sexualized and non-sexualized conduct could be considered in sexual harassment claims.[105]

In 2016, shortly before #MeToo went viral, EEOC Commissioners Chai Feldblum and Victoria Lipnic released a major report, the product of a task force assembled to develop new strategies for preventing harassment.[106] The report provides a very helpful summary of then-existing research on harassment (as well as recommendations on training and accountability, as discussed in Part IV).[107] Specifically with respect to harassment on the basis of sex, the report canvassed the social science literature and emphasized that non-sexualized conduct can be a form of sexual harassment.[108] The report also underlined that harassment on the basis of race and other protected traits is common, as is "intersectional" harassment based on multiple aspects of identity.[109]

The media coverage of #MeToo, however, focused primarily on coerced sexual activity or unwanted sexual attention. In 2019, Brian Soucek and Vicki Schultz published an essay that flagged this tendency

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article arguing that "benign" sexual remarks and actions should *not* be considered harassment. *See generally* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

103 *See* Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 86, at 1706-29 (discussing and critiquing caselaw).

104 *See supra* text accompanying notes 63-67.

105 *See* Soucek & Schultz, *supra* note 29, at 233-34 (discussing caselaw holding non-sexualized conduct to be actionable).

106 *See Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP. COMM'N (2016) [hereinafter *2016 EEOC Report*].

107 *See infra* Section IV.D.

108 *See 2016 EEOC Report*, *supra* note 106, at 8-10.

109 *See id.* at 7-8, 11-14.

and warned of the harms that could result from returning to the idea that sexual harassment only encompassed sexualized conduct.[110] They recognized that the EEOC played a role in fueling the misconception. They noted that some EEOC materials appropriately recognized the broad scope of sex-based harassment, but the 1980 guidelines, and some supporting materials, continued to suggest that sexual harassment *only* encompassed sexualized conduct.[111] As discussed in the next Part, their fears were well-founded; many #MeToo laws codify this narrow conception of harassment.

In April 2024, the EEOC released extensive new enforcement guidance on harassment, formally superseding many of its previous publications, including the section of its compliance manual that explains how investigators should apply the 1980 guidelines.[112] The guidance moved away from the term "sexual harassment" and specified that "sex-based harassment" can include both sexualized conduct *and* non-sexual conduct based on sex.[113] It made clear that harassment on the basis of pregnancy, childbirth, or related medical conditions is a form of sex-based harassment.[114] The guidance also indicated that harassment on the basis of sexual orientation or gender identity is sex-based harassment, following the Court's reasoning in *Bostock v. Clayton County*.[115] As discussed in Part IV, in May 2025, the sections of the guidance addressing sexual orientation and gender identity were vacated by a district court judge, and the EEOC, under the direction of an acting Chair appointed by President Trump, did not appeal the decision. In January 2026, the reconstituted EEOC, with a majority of Republican-appointed commissioners, formerly rescinded the guidance; however, as the chair, Andrea Lucas, emphasized, this does not

110 *See generally* Soucek & Schultz, *supra* note 29. In a "Open Statement on Sexual Harassment," responding to #MeToo, Schultz, Soucek, and eight other leading employment discrimination scholars similarly emphasize the "problem with workplace harassment is sexism, not sexual desire" and that "harassment includes many forms of sexism and abuse, not just sexual misconduct." Schultz, *Open Statement*, *supra* note 38, at 18, 20.

111 *See* Soucek & Schultz, *supra* note 29, at 238-40 (discussing conflicting definitions adopted by the EEOC).

112 *See 2024 EEOC Guidance*, *supra* note 32.

113 *Id.* at II.A.5.a.

114 *Id.* at II.A.5.b.

115 *Id.* at II.A.5.c, n.37 (collecting cases).

mean that employers have a "license to engage in unlawful harassment."[116] The agency's actions do not—and cannot—undermine the validity of the caselaw interpreting Title VII to prohibit a broad range of harassing conduct based on sex.

II. THE SEXUAL HARASSMENT SILO

In response to #MeToo, federal and state lawmakers passed dozens of laws that create special rights for victims of "sexual harassment," as compared to other forms of discrimination or harassment. This legislation collectively makes up the "sexual harassment silo." Some new state laws take a more comprehensive approach, leveraging the #MeToo moment to enact substantive reforms for harassment and discrimination law generally. This Part provides an overview of #MeToo legislation enacted at the federal and state level and the range of approaches the new legislation uses to define "sexual harassment."

A. IDENTIFYING FEDERAL AND STATE #METOO LEGISLATION

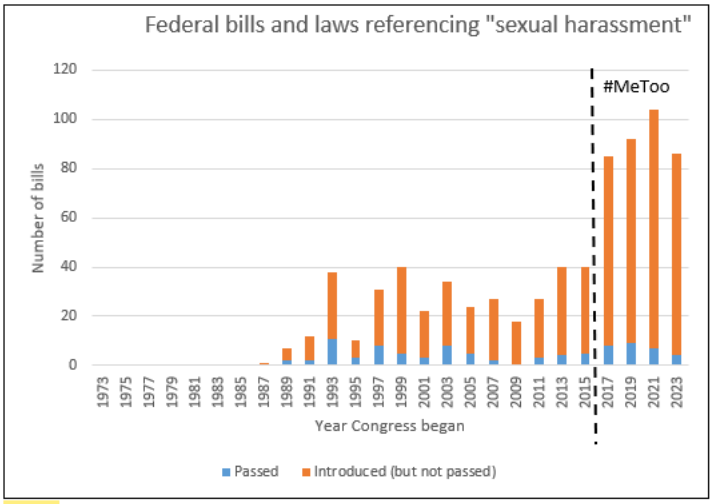
To better understand the scope of new legislation within the sexual harassment silo, I identified and reviewed all post-2017 federal legislation that references "sexual harassment," and I reviewed state laws enacted during the same period that include new protections for sexual harassment, or harassment and discrimination more generally. The precise methods I used to identify relevant bills are described below and in the Appendix. Importantly, I am not suggesting that I have compiled a complete and definitive list of *all* post-2017 legislation that might properly be classified as a response to #MeToo. My goal was more modest: to identify a critical mass of relevant legislation so that I could assess trends in legislative responses. Accordingly, while the lists of federal and state laws that I

116 EEOC Press Release, "EEOC Commission Votes to Rescind 2024 Harassment Guidance," Jan. 23, 2026, available at https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance. When the rescission was proposed, former EEOC leaders criticized the move, in part because it did not afford an opportunity for notice and comment. *See* EEO Leaders, *Response to Proposed Recission of the EEOC's Harassment Guidance* (Jan. 6, 2026), *https://www.eeoleaders.org/eeoleadersstatements* [https://perma.cc/K6MM-NVPY].

compiled and reviewed might be underinclusive or overinclusive in some respects, I believe they are sufficient to achieve that primary objective—and they further suggest that #MeToo had a sizable effect on legislative agenda setting at both the federal and state level.

To identify relevant federal bills, I searched for introduced bills and enacted laws that include the term "sexual harassment," beginning with the 1973-74 Congress and continuing through the 2023-24 Congress. (The Appendix provides greater detail on the database and search parameters, as well as the specific results for each Congress.) This allowed me to assess whether patterns changed after #MeToo went viral in 2017.

GRAPH A



Graph A

As shown in Graph A, in terms of raw numbers, the results were striking.[117] Prior to 2017, no Congress had considered more than forty bills

117 These are descriptive statistics, and I am not making a strong causal claim about to extent to which #MeToo impacted Congressional agenda setting. To truly assess such effects, it would be important to consider how these numbers relate to the total number of bills introduced or enacted in any given Congress, as well as the growing use of omnibus legislation, which may

using the term. The first mention of the term was a bill in 1987, the year after the Supreme Court's decision in *Meritor Savings Bank*. The number of bills spiked in the 1993-94 Congress and then remained relatively steady over two decades, with an average of twenty-nine bills per Congress. (The high number in 1993-94 likewise reflects public events; in fall 1991, Justice Clarence Thomas was confirmed, notwithstanding Anita Hill's graphic descriptions of his alleged harassment of her, which led to widespread protests and a record number of women being elected to Congress in November 1992.[118])

Since #MeToo went viral, each Congress has considered at least eighty-five bills that address "sexual harassment," with an average of ninety-two bills, or more than triple the average before #MeToo. There has likewise been an increase in the number of federal bills *enacted* that include the term.[119] Many of the federal reforms are requirements tied to federal funding, part of a more general trend towards implementing policy through spending power.[120]

Rather than attempt to re-create my search focusing specifically on the words "sexual harassment" in all fifty state legislatures, I identified relevant state laws based on reports published by the National Women's Law Center (NWLC) of post-2017 legislation addressing workplace harassment.[121] I also consulted reports published in 2018 and 2019 by the

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contain distinct components that are functionally separate bills. Additionally, the overall sample size, particular for enacted laws, is relatively small, and I did not attempt to assess whether the rise evident after 2017 reaches statistical significance.

118 *See* U.S. Senate, "Year of the Woman," available at https://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm [perma.cc/HRG2-MXW3] (describing how frustration over the "hotly contested" confirmation hearings spurred women to run for, and ultimately win, Senate seats); Congressional Research Service, *Women in Congress: Statistics and Brief Overview*, at 2 (reporting an increase from 34 women in Congress to 54 women in Congress after the 1992 elections).

119 Since 2017, Congress has passed at least 28 laws using the language, an average of seven per Congress. This is about twice the average number of laws containing the term that were passed in prior Congresses. This finding is higher than reported in Williams et al., *Mind the Gap(s)*, *supra* note 38, at 918 (finding only six #MeToo-related federal bills passed between 2016-22). The *Mind the Gap(s)* study may not have included appropriations bills, even when they include substantive requirements related to accepting federal funding.

120 *See generally* Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. 209 (2024).

121 *See* National Women's Law Center, *State Workplace Anti-Harassment Laws Enacted Since #MeToo Went Viral* (Oct. 19, 2023) [hereinafter NWLC, *Since #MeToo Went Viral*]

National Conference of State Legislatures (NCSL) of proposed and enacted laws addressing sexual harassment.[122] The parameters used to identify bills and laws in these reports are not exactly the same as the search terms I used, but my substantive review of the relevant laws suggests most would have appeared in a search keyed specifically to the term "sexual harassment." More generally, I believe the laws identified in these reports serve as a serviceable proxy for identifying legislative responses to #MeToo.

These resources suggest that #MeToo had a significant effect on state lawmakers' priorities. NWLC concludes that in the six years after #MeToo went viral, twenty-five states and the District of Columbia passed a total of more than eighty workplace anti-harassment bills, some of which are specific to sexual harassment and some of which encompass harassment and discrimination claims more generally.[123] This is approximately triple what was typical in the years prior to #MeToo.[124] NCSL reports that in 2018 alone, thirty-two states introduced more than 125 bills addressing sexual harassment.[125] Laws passed in conservative and liberal states, and both federal and state bills on point often passed with bipartisan support.[126]

B. SCOPE OF #METOO LAWS

(identifying laws passed in the wake of #MeToo to address "workplace harassment"); NWLC, *#MeToo Five Years Later*, *supra* note 19 (similar report issued one year prior); *see also infra* Appendix (describing the NWLC's search parameters in more detail).

122 NATIONAL CONFERENCE OF STATE LEGISLATURES, *Legislation on Sexual Harassment in the Legislature* (Feb. 11, 2019), *https://www.ncsl.org/about-state-legislatures/legislation-on-sexual-harassment-in-the-legislature [perma.cc/4LYP-SH85]*.

123 NWLC, *Since #MeToo Went Viral*, *supra* note 121, at 1-19; *see also* Williams et al., *Mind the Gap(s)*, *supra* note 38, at 929 fig. 10 (showing that from 2016-2022 states passed approximately 80 bills addressing harassment as a primary or secondary topic).

124 *See* NWLC, *MeToo Five Years Later*, *supra* note 19, at 2 (reporting eight to eleven bills enacted each year after #MeToo, as compared to three per year prior to 2017).

125 *See* NCSL, *supra* note 122. The NCSL report includes laws focused internally on state legislatures' *own* proceedings, including expulsions of specific members, that are not included in the NWLC reports. *See id.*; *see also* Williams et al., *Mind the Gap(s)*, *supra* note 38, at 919 (reporting that from 2016-2022, states considered approximately 3000 bills addressing gender equity concerns, including but not limited to harassment, and that 382 passed).

126 *See* NWLC, *MeToo Five Years Later*, *supra* note 19, at 2 (noting "most" state bills passed with bipartisan support); *see also infra* text accompanying notes 239-240 (discussing bipartisan support for EFAA).

After identifying relevant laws, I substantively reviewed all new federal laws referencing sexual harassment and the state laws included in the NWLC reports. I find the #MeToo laws fall into three broad categories, with some blurring at the boundaries. The first expands access to court, enhances remedies, and increases transparency; the second mandates training, policies, and/or data collection on sexual harassment claims; and the third modifies the substantive standards for establishing actionable harassment. This part describes the general contours of each category and provides illustrative examples; table 2 in the appendix provides additional detail for the federal laws identified.

At the outset, however, it is important to recognize that virtually *all* of the concerns that animated these reforms apply equally to harassment on the basis of race, religion, disability or other protected traits; often they would also be relevant to discrimination that does not include "harassing" conduct. In some instances, the new laws address discrimination law more generally, but many operate only within the sexual harassment silo.

1. *Broadening access and remedies*

At the federal level, the most prominent response to #MeToo is EFAA.[127] As discussed in detail in the next Part, EFAA ensures that victims of sexual harassment or sexual assault can pursue litigation in court, rather than being forced into arbitration. Numerous states have passed similar provisions in the past six years.[128] The federal Act, however, is crucially important, not only because it ensures survivors in *all* states have this protection—but also because courts have typically held that state efforts to limit mandatory arbitration are preempted by the Federal Arbitration

127 Pub. L. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. § 401 *et seq.*).

128 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (identifying California, Illinois, Maryland, New Jersey, New York, Vermont, and Washington as states that passed bans on forced arbitration).

Act.[129] This remains a key limitation, to the extent that some of the state laws reach beyond the scope of EFAA.[130]

States have also expanded the scope of workers that are protected against harassment and discrimination. Because federal sexual harassment law is an interpretation of Title VII, it only applies to employees, applicants for employment, or former employees.[131] The same has (historically) been true of most state fair employment laws. In the wake of #MeToo, states have begun to cover domestic workers, interns, and independent contractors.[132] Some of these changes are specific to sexual harassment, and some apply more generally to harassment and discrimination claims.[133] Several states have also lengthened the statute of limitations for bringing claims,[134] with some now extending several years longer than the federal deadline.[135] Again, some of these changes are limited only to sexual harassment and some apply generally to all discrimination claims.[136] Notably, the "marketing" value of #MeToo may have helped broader bills pass; for example, South Dakota passed a bill titled "An Act to revise certain provisions regarding sexual harassment" that substantively expanded coverage more generally.[137]

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129 *See, e.g.*, Chamber of Commerce v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023) (holding California law that prohibited requiring consent to arbitration as a condition of employment to be preempted).

130 *See, e.g.*, New Jersey Civil Justice Ins. v. Grewal, No. 19-17518, 2021 WL 1138144 at *7 (Mar. 25, 2021) (holding law prohibiting wavier of substantive or procedural rights in any employment contract preempted by FAA).

131 *See, e.g.*, Felder v. United States Tennis Assoc., 27 F.4th 834, 844-45 (2d Cir. 2022) (noting Title VII protects employees and job applicants but not independent contractors).

132 *See, e.g.*, NWLC, *Since #MeToo Went Viral*, *supra* note 121 (noting Colorado and Virginia now cover workers in domestic service; Delaware, South Dakota, and Vermont now cover interns; District of Columbia, Illinois, Maryland, New York, and Vermont now cover independent contractors).

133 *Compare* COLO. REV. STAT. 24-34-402 (2025) (including all discrimination claims) *with* VT. STAT. ANN. tit. 21, § 495h(a)(2) (2024) (including only sexual harassment).

134 *See, e.g.*, NWLC, *Since #MeToo Went Viral*, *supra* note 121 (noting that California, Colorado, Connecticut, Maryland, New York, Oregon, Texas, and Vermont have extended their statutes of limitations).

135 *See id.* (noting the statute of limitations is now six years in Vermont and five years in Oregon).

136 *See id.*

137 2020 S.D. Sess. Laws 70, now codified at S.D. CODIFIED LAWS § 20-13-10 (adding "intern[s]" to the general antidiscrimination protections).

States have also expanded the range of employers covered. Title VII only applies to employers with at least 15 employees.[138] Many state employment laws covered somewhat smaller employers, long prior to #MeToo.[139] In response to #MeToo, several states went further, passing laws that apply to *all* employers, no matter how small.[140] In Arizona and Texas, this only applies to sexual harassment claims.[141] In other states, #MeToo has led to more general reform. Illinois and New York originally expanded coverage to employers of all sizes only for sexual harassment claims; they later extended the same protections to victims of any kind of discrimination.[142]

Harassment can cause significant compensatory damages, such as emotional distress or medical expenses, in addition to lost pay. Punitive damages may also be warranted where employers fail egregiously in their duty to respond to harassing conduct. Under federal law, compensatory damages and punitive damages are subject to caps ranging from $50,000 to $300,000 based on the size of the employer.[143] These caps were enacted more than thirty years ago and—despite periodic efforts—they have not been raised since;[144] if the caps were adjusted for inflation, they would be more than twice as high.[145] Functionally, this means victims routinely receive far less than juries believe is warranted for the harm they have suffered.[146]

States have responded to Congress's failure to raise the damage caps under federal law by raising, or eliminating, caps on damages under the state antidiscrimination laws. Some states passed such laws long prior to

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138 42 U.S.C. § 2000e(b).

139 *See, e.g.*, JUSTIA, *supra* note 82.

140 *See* NWLC, *Since #MeToo Went Viral, supra* note 121 (noting Arizona, Connecticut, Illinois, Maryland, New York, and Texas modified laws to cover all employers).

141 *Id.*

142 *Id.*

143 42 U.S.C. § 1981a(b)(3).

144 *See, e.g.*, Anne Cullen, *House Talks Show 'Reinvigorated' Push to Lift Damages Caps*, LAW360 (Feb. 14, 2024).

145 *See, e.g.*, Protect Working People Harmed by Employment Discrimination: *Harms Caused by Caps*, END DAMAGE CAPS FOR WORKERS NOW, *https://www.enddamagecapsforworkers.com/* [https://perma.cc/KB86-VFQK](noting that inflation has risen by 124% since 1991).

146 *Id.* (providing examples of cases with a large reduction in the amount awarded by the jury to comply with the caps).

#MeToo, but several passed such reforms in the past six years. In contrast to many of the other post-#MeToo changes, these new laws apply to the full range of discrimination claims, not just sexual harassment.[147] A few states have also banned settlements that prohibit the victim from being rehired by the employer.[148]

There have also been legal reforms designed to ensure individual perpetrators feel the economic effects of the harms they caused. In 2018, Congress amended the federal tax code to disallow deductions for payments or settlements of "sexual harassment or sexual abuse" cases involving nondisclosure agreements.[149] It also passed a law providing that Congressional staff found to be perpetrators of "harassment" generally (including but not limited to sex) may have to reimburse the government for awards or settlements in connection with the claim.[150] Several states have similarly passed laws limiting the use of public funds to reimburse candidates or elected officials for claims related to sexual harassment.[151] And a few states have also modified their laws so that individual perpetrators of sexual harassment, as well as their employers, can be sued.[152]

Finally, Congress and states have passed laws to protect victims who want to speak publicly about the harassment or discrimination. At the federal level, the Speak Out Act, passed in 2022, prohibits predispute nondisclosure agreements for victims of sexual assault or sexual harassment.[153] There have also been many state laws that enact similar protections.[154] About half of these are specific to sexual harassment cases,

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147 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (noting Connecticut, Delaware, Nevada and Virginia modified laws regarding caps).

148 *See id.* (noting that California, Oregon, and Vermont banned such settlements).

149 26 U.S.C. § 162(q).

150 2 U.S.C. § 1402(b)(2).

151 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (identifying California, Louisiana, and New York as states that passed such limitations).

152 *See e.g.,* TEX. LAB. CODE ANN. §21.141(1) (West 2025) (defining "employer," for purposes of a subchapter on sexual harassment, as including both a person who "employs one or more employees" and a person who "acts directly in the interests of an employer in relation to an employee").

153 Pub. L. 117-224, 136 Stat. 2290 (2022) (codified at 42 U.S.C. § 19401 *et seq.*).

154 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (identifying Arizona [mislabeled in summary]; California, Colorado, Hawai'i, Illinois, Louisiana, Maine, Maryland, Nevada,

while about half apply more generally.[155] That said, the state laws that go beyond the scope of what is protected by the Speak Out Act and purport to apply to arbitration may be held to be preempted by the FAA.[156] Several states have also enacted limitations on defamation lawsuits or other tort-based claims; these laws are sometimes known as anti-SLAPP laws.[157] Collectively, these reforms (together with the ban on forced arbitration) have played an important role in ensuring employers cannot hide misconduct.

2. *Requiring trainings, policies, and data collection*

Another common response to #MeToo at both the federal and the state level has been to require additional training and policies. Congress passed several laws mandating federal agencies, federal contractors, and certain sectors of private industry adopt policies specifically addressing sexual harassment, addressing sexual harassment together with sexual assault, or addressing sexual harassment together with domestic violence, sexual violence, and stalking. For example, passenger air carriers must now post policies addressing "sexual assault and harassment."[158] Any recipients of federal science grants must develop policies to address "sex-based and sexual harassment."[159] The CIA, Merchant Marines, the Peace Corps, and Veterans Affairs must also now take specific steps to develop policies and collect data on sexual harassment.[160]

New Jersey, New Mexico, New York, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Washington as states that passed bans on NDAs).

155 *Id.*

156 *See generally*, E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729 (2023) (discussing mixed caselaw on whether the FAA preempts limitations on nondisclosure agreements).

157 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (identifying Arizona, California, Colorado, Hawai'i, Kentucky, Louisiana, New Jersey, New York, Oregon, Tennessee, Texas, Utah, Virginia, and Washington as states that have passed legislation in this area, although noting it is unclear whether some would apply to speaking publicly about harassment or discrimination).

158 *See* FAA Reauthorization Act of 2024, Pub. L. No. 118-63, § 435(e)(2), 138 Stat. 1175 (2024), codified at 49 U.S.C. § 44903 note.

159 42 U.S.C. § 19191 *et seq.*

160 *See* 22 U.S.C. § 2507a(d), 2507b(a) (Peace Corps); 38 U.S.C. § 533(g), 516 (Veterans Affairs); 46 U.S.C. § 51309, § 51318(a) (Merchant Marines); 50 U.S.C. § 3531 (CIA).

Similar reforms have been enacted at the state level. California, Connecticut, Delaware, D.C., Illinois, Louisiana, Maryland, Nevada, New Jersey, New York, Vermont, Virginia, and Washington passed laws mandating new training specifically on sexual harassment.[161] Many apply to all employers; others only apply to specific classes of employers, such as those with more than fifty employees, tipped employees, or government contractors.[162] Many also required state agencies to develop and promote sexual harassment policies.[163] Some states impose similar requirements on private companies, or at least those seeking government contracts. New York, for example, requires all employers to provide a "sexual harassment prevention policy" at hiring and at annual trainings.[164] And many states now require the collection of data about sexual harassment lawsuits.[165]

Unfortunately, this burgeoning of mandated trainings and policies is unlikely to effectively address sexual harassment. Research suggests that well-designed interactive training, when paired with leadership and accountability measures, is a key component of reducing sexual harassment.[166] Training by itself, however, or training that is simply accompanied by the dissemination of a policy, is unlikely to move the needle. In fact, some studies have suggested that isolated training can be counterproductive.[167] Indeed, at least since the Supreme Court held that employers may use the existence of preventative measures as an affirmative defense in harassment cases, trainings and policies have been standard in most workplaces.[168] And yet, harassment persists.

3. *Modifying substantive harassment law*

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161 NWLC, *Since #MeToo Went Viral*, *supra* note 121.

162 *Id.*

163 *Id.*

164 N.Y. LAB. LAW § 201-g (Consol. 2025).

165 *See* NWLC, *Since #MeToo Went Viral*, *supra* note 121 (identifying D.C., Illinois, Louisiana, and Maryland as states that now require collecting of data on sexual harassment claims).

166 *See infra* Section IV.D.

167 *See id.*

168 *See, e.g.*, Edelman & Cabrera, *Sex-Based Harassment and Symbolic Compliance*, *supra* note 77, at 373 (noting that by 1998, virtually all companies had sexual harassment grievance procedures and most offered training).

A smaller number of states, which reliably lean Democratic, responded to #MeToo by passing legislation substantively addressing perceived shortcomings in federal harassment law. Colorado, Maryland, New York, and Vermont, along with Washington D.C., now specify that the conduct need not be "severe or pervasive" to state a viable harassment claim, even in the absence of a tangible employment action.[169] Instead, they generally indicate that a complainant simply must identify conduct or communication because of a protected trait that creates a work environment that is intimidating, hostile, or offensive;[170] most of these laws also specify that small slights or inconveniences are insufficient to state a claim.[171] California nominally retains the "severe or pervasive" standard, but has specified (counter to a prominent Ninth Circuit decision)[172] that a single incident may be sufficient to meet this standard.[173] It also provides a hostile environment may be shown by establishing conduct that "disrupt[s] the victim's emotional tranquility in the workplace . . . [or] personal sense of well-being."[174]

Some of these new laws provide additional guidance as to what constitutes unlawful harassment. For example, Colorado's law, passed in

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169 *See e.g.*, COLO. REV. STAT. § 24-34-402(1.3)(a) (2025); MD. CODE ANN., STATE GOV'T § 20-601(h)(1),(k) (West 2025); N.Y. EXEC. LAW § 296(1)(h) (Consol. 2025); VT. STAT. ANN. tit. 21, § 495(k)(1) (West 2025); D.C. CODE § 2-1402.11(c-2)(3) (2025). All of these states, as well as California, have been reliably Democratic in recent years. *See* Nathaniel Rakish, *How Red or Blue Is Your State*, FIVETHIRTYEIGHT (May 27, 2021) https://fivethirtyeight.com/features/how-red-or-blue-is-your-state-your-congressional-district/ [https://perma.cc/9R4U-PJQH] (reporting partisan lean of states during the 2020 election); *2024 Presidential Election Results,* 270TOWIN, *https://www.270towin.com/maps/2024-actual-electoral-map* [https://perma.cc/S4R2-V67E].

170 *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-601(h)(1) (West 2025) (stating that harassment includes unwelcome conduct based on protected traits that a reasonable person would view as abusive or hostile); VT. STAT. ANN. tit. 21, § 495d(13)(A)(iii) (West 2025) (stating that sexual harassment includes conduct that creates "an intimidating, hostile, or offensive work environment"). New York specifies it simply must be "inferior terms, conditions, or privileges of employment." N.Y. EXEC. LAW § 296(1)(h) (Consol. 2025).

171 *See, e.g.*, N.Y. EXEC. LAW § 296(1)(h) (Consol. 2025) (providing an affirmative defense if "harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences"); VT. STAT. ANN. tit. 21, § 495(k)(2) (West 2025) (laying out a similar structure).

172 *See* Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000) (finding that a single incident is not enough to satisfy a hostile work environment claim).

173 *See* CAL. GOV'T CODE § 12923(b) (West 2025) (providing that a "single incident of harassing conduct is sufficient to create a triable issue").

174 Id. at 12923(a).

2023, specifies that the conduct must be "subjectively offensive to the individual alleging harassment and . . . objectively offensive to a reasonable individual *who is a member of the same protected class*."[175] Vermont's new law, also passed in 2023, indicates "varying types of conduct and conduct based on multiple characteristics [shall be] viewed in totality rather than in isolation."[176] Vermont also specifies conduct may be harassment regardless of whether it "occurred outside the workplace," "resulted in physical or psychological injury," "the complaining employee was able to continue carrying out [work responsibilities]," or "the conduct was . . . experienced by others outside the protected class" of the individual.[177]

A few states have also modified the standards for vicarious liability for employers. For example, Maryland has expanded the Supreme Court's definition of "supervisor" to include anyone who "directs, supervises, or evaluates" the work activities of the employee, in addition to those with authority to take tangible employment actions.[178] Colorado requires an employer to show that it conducts "prompt, reasonable" investigation of complaints and takes "prompt, reasonable remedial actions" when warranted.[179] New York specifies that a victim's failure to make a complaint "shall not be determinative" in whether the employer is liable.[180]

These substantive changes to the harassment standard collectively create a body of state law that differs in important ways from Title VII doctrine. And the revised standard in all of these states applies to harassment generally, not solely sexual harassment—although several of these states *also* created new standards for "sexual harassment."[181] In other words, even as they took steps to broaden protections under harassment

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175 COLO. REV. STAT. § 24-34-402(1.3)(a) (2025) (emphasis added).
176 VT. STAT. ANN. tit. 21, § 495d(16)(B) (West 2025).
177 *Id.* at § 495d(16)(C)(iii-vi).
178 MD. CODE ANN., STATE GOV'T § 20-611(1) (West 2025).
179 COLO. REV. STAT. § 24-34-402(1.5)(I) (2025).
180 N.Y. EXEC. LAW § 296(1)(h) (Consol. 2025).
181 *See infra* text accompanying notes 194-195.

law, they also substantively reinforced the idea that "sexual harassment" is distinct from "harassment based on sex."[182]

B. DEFINING "SEXUAL HARASSMENT"

The sexual harassment silo, in my terminology, is the body of federal and state law that now provides special procedural protections, coverage rules, training requirements, and data collection mandates for sexual harassment, as distinct from other forms of harassment or discrimination. These new laws require determining what constitutes "sexual harassment." This is a difficult proposition since the genesis of the doctrine was an interpretation of more general antidiscrimination law. Limited procedural protections also raise complicated questions regarding how cases that combine sexual harassment claims with other causes of action will be treated. The next Part delves into these questions in detail, as they are addressed by the federal ban on forced arbitration.

Before turning to EFAA, however, it is important to highlight the variety of ways in which legislators have addressed—or failed to address—these questions. At both the state and federal level, many of the new laws do not define "sexual harassment" at all, meaning courts will ultimately have discretion to determine the meaning of the term.[183] Others, like EFAA, simply identify potentially applicable legal sources and suggest the full scope of harassing conduct is covered.[184] By contrast, some of the new laws adopt statutory definitions for "sexual harassment" that focus narrowly on sexualized conduct, often tracking the EEOC's 1980

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182 *See id.*

183 *See, e.g.*, *infra*, Appendix, Table 2 (identifying federal laws that reference sexual harassment without defining it); *see also, e.g.*, AZ. REV. STAT. § 41-1461(7) (LexisNexis 2025) (specifying "employers" of any size can be liable for "sexual harassment" but not defining sexual harassment). Other states have modified general antidiscrimination provisions to add in an explicit reference to harassment but not further defined the term. *See, e.g.*, UTAH CODE ANN. § 34A-5-106(1)(a)(i) (LexisNexis 2025) (providing an employer may not "harass . . . or discriminate").

184 *See*, *e.g.*, FAA Reauthorization Act of 2024, Pub. L. No. 118-63, § 435(e)(2), 138 Stat. 1025, 1175 (2024), codified at 49 U.S.C. § 44903 note (specifying requirement of new policies for passenger air carriers shall not be "construed to alter existing authorities of the [EEOC], the Department of Labor, or the Department of Justice to enforce applicable employment and sexual assault and sexual harassment laws").

guidance, or define "sexual harassment" in this manner and separately define "harassment based on sex" without the focus on sexualized conduct. And a few states have enacted a general harassment definition that does *not* separate out "sexual harassment" at all. Thus, the theoretical and doctrinal debates of the 1970s-90s regarding whether the concept is limited to "sexualized" conduct have re-emerged in the #MeToo legislation.

At the federal level, one of the most prominent examples of defining "sexual harassment" to be limited to sexualized conduct is a law passed in 2021 that establishes "sexual harassment" in the military as a stand-alone offense that is punishable under the military code.[185] This law specifies that the offense requires showing that the accused "knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature," and "that such conduct was unwelcome."[186] It further requires a showing that submission to "such conduct" was "either explicitly or implicitly" a condition of the job *or* "so severe, repetitive, or pervasive" that it created an "intimidating, hostile, or offensive working environment."[187] New federal provisions applicable to veterans likewise adopt a definition of sexual harassment that focuses exclusively on "verbal or physical contact of a sexual nature which is threatening in character."[188]

Several states have likewise adopted definitions that are specific to such sexualized conduct. For example, as noted above, Texas has extended the statute of limitations[189] and expanded coverage to all employers[190] for sexual harassment claims—but not for other discrimination or harassment claims. Borrowing language almost verbatim from the EEOC's 1980 guidance, the statute limits actionable harassment to "an unwelcome

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185 *See* Pub. L. 117-81, §539D, 135 Stat. 1541, 1700 (2021) (now codified at 10 U.S.C. § 934 note).

186 *Id.*

187 *Id.*

188 38 U.S.C. § 533(g); 38 U.S.C. § 1720D(f).

189 *See* TEX. LAB. CODE § 21.202(a-1) (West 2025) (extending the statute of limitations from 180 to 300 days).

190 *See* TEX. LAB. CODE § 21.141 (West 2025) (defining "employer" for purposes of a subchapter on sexual harassment broadly to encompass "a person who . . . employs one or more employees; or acts directly in the interests of an employer in relation to an employee").

sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature," that functions as a condition of employment or creates an "intimidating, hostile, or offensive working environment."[191] Delaware enacted a very similar definition,[192] and Connecticut had a comparable definition in place prior to #MeToo.[193]

Illinois, Maryland, Vermont, and the District of Columbia take a dual approach. Each enacted a definition of "sexual harassment" that is specific to sexualized conduct, again often borrowing language from the 1980 guidelines, while explicitly rejecting the "severe or pervasive" standard.[194] Each state *also* enacted a general definition of "harassment" on the basis of sex, as well as race, national origin, and other protected traits, that typically just requires a showing of "unwelcome" conduct based on a protected trait (and likewise rejects the severe or pervasive standard).[195] And they amended the prohibition on unlawful conduct to specifically include harassment, either in a list together with actions such as failure to hire,[196] or as a separate provision.[197] As noted above, several also modified aspects of the affirmative defenses that limit vicarious liability by employers.[198]

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191 *Id.* The repeated use of "a" suggests a single incident could be actionable.

192 *See* DEL. CODE ANN. tit. 19, §711A (c) (2025) ("Sexual harassment of an employee is . . . unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that is made a "term or condition" of employment, the basis of an employment decision, or creates an "intimidating, hostile, or offensive working environment").

193 *See* CONN. GEN. STAT. § 46a-60(a)(8) (2025) (defining sexual harassment to mean "unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature" that is made a "term or condition of employment," the basis of an employment decision, or creates "an intimidating, hostile or offensive working environment"). The Connecticut statute specifies it includes "harassment . . . on the basis of sex or gender identity or expression." *See id.*

194 *See* 775 I.L.C.S. 5/2-101(E); MD. CODE ANN., STATE GOV'T § 20-601(K) (West 2025); VT. STAT. ANN. tit. 21, § 495d(13)(A) (West 2025); D.C. CODE § 2-1402.11(c-2)(2)(B) (2025).

195 *See* 775 I.L.C.S. 5/2-101(E-1); MD. CODE ANN., STATE GOV'T § 20-601(H) (West 2025); VT. STAT. ANN. tit. 21, § 495d(16) (West 2025); D.C. CODE § 2-1402.11(c-2)(2)(A) (2025).

196 *See, e.g.*, 775 I.L.C.S. 5/2-102(A) (providing it is unlawful for "any employer to refuse to hire, to segregate, to engage in harassment"); VT. STAT. ANN. tit. 21, § 495 (West 2025) (providing it is unlawful to "harass or discriminate" because of protected traits). Some also separately prohibit sexual harassment as an unlawful practice. *See, e.g.*, 775 I.L.C.S. 5/2-102(D).

197 *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-606(a)(5) (prohibiting employers from "engag[ing] in harassment of an employee"); D.C. CODE § 2-1402.11(c-2)(1) (2025) (providing it is an "unlawful discriminatory practice to engage in harassment based on one or more protected [traits], including sexual harassment").

198 *See supra* text accompanying notes 178-180.

In at least some of these states, the dual definitions reflect that immediately after #MeToo, the state *first* passed special protections for sexual harassment and then successfully expanded their scope to cover other forms of harassment.[199] However, retaining separate definitions for "sexual harassment" and "harassment because of sex" could cause confusion and raises the risk that courts will evaluate the sufficiency of each separately. Colorado, by contrast, enacted a substantive prohibition on "harassment" based on any protected traits addressed in its antidiscrimination law, without separating out "sexual harassment."[200] This alleviates any possibility that a specific sexual harassment definition could be deemed to narrow the ambit of harassment based on sex.

In some sense, it is not surprising that legislatures seeking to define sexual harassment enacted statutory provisions that are narrowly focused on sexualized conduct. A briefing paper published by the National Conference of State Legislatures in spring 2018, presumably to provide support to legislators interested in passing legislation to respond to #MeToo, quotes (and links to) the EEOC's sexual harassment webpage which largely tracks the 1980 guidance.[201] The NCSL briefing sheet also accurately notes that sexual harassment is a "form of sex discrimination" under Title VII, but it does not further address how this case law has broadened the concept beyond specifically sexualized conduct.

Long before #MeToo, New York City took a very different approach to reforming its harassment standard. In 2005, the City Council passed a "Local Civil Rights Restoration Act."[202] Rather than changing the

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199 *See, e.g.*, A8421, § 13, 2019-2020 Reg. Sess. (N.Y. 2019) (amending several provisions that had been initially enacted to be specific to sexual harassment to apply to "unlawful discriminatory practices" generally).

200 COLO. REV. STAT. 24-34-402(1.3) (2025).

201 Suzanne Hultin, *Addressing Sexual Harassment in the Workplace*, NATIONAL CONFERENCE OF STATE LEGISLATURES: LEGISBRIEF: A QUICK LOOK INTO IMPORTANT ISSUES OF THE DAY (May 2018) (available at *https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/hultin_sexua.pdf* [https://perma.cc/GKV7-GDKK]).

202 N.Y.C. Local Law No. 85 of 2005 (Oct. 3, 2005) [hereinafter "NYC Restoration Act"], available at *www.antibiaslaw.com/RestorationAct.pdf* [https://perma.cc/DV2C-C5XH]. *See generally* Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URBAN L.J. 255 (2006) (providing detailed explanation of the NYC Restoration Act).

substantive language of the City's human rights law—which largely mirrored Title VII and New York state's anti-discrimination law—the new law proscribed a different *interpretive* approach. It specified that the provisions "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof," and indicated explicitly that this was regardless of how "comparably-worded" provisions under federal or state law were interpreted.[203] A separate interpretive rule specified that interpretations of federal and state laws were to function "floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[204]

New York City law, like Title VII, makes it unlawful for an employer to "discriminate against" a person in the "terms, conditions or privileges of employment" on the basis of sex, along with numerous other protected traits.[205] Once admonished to focus specifically on this textual language—and to interpret it broadly so as to achieve its remedial purpose—courts rejected the "severe or pervasive" standard applied to federal law and *also* the putative distinction between discrimination and harassment claims. The first New York state appellate decision analyzing the City's law after the Restoration Act explained:

Despite the popular notion that 'sex discrimination' and 'sexual harassment' are two distinct things it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender.[206]

The court went on to specify that the "severity" or "pervasiveness" of harassing conduct is relevant to damages but not to liability; to establish liability a worker simply must demonstrate (as suggested by the plain language of the statute) by a "preponderance of the evidence that she has been treated less well than other employees because of her gender."[207] The

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203 NYC Restoration Act, § 7.

204 *See id.* § 1.

205 N.Y.C. Admin. Code § 8-107 1(a)(3).

206 Williams v. New York City Housing Authority, 872 N.Y.S.2d 27, 37 (N.Y. App. Div. 2009).

207 *Id.* at 76-77.

court then held that to avoid the antidiscrimination statute from operating as a "general civility code," it would recognize an affirmative defense for defendants who could demonstrate that the conduct was "nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"[208] This interpretation has been widely followed by other New York State courts, and also federal courts applying local law.[209]

During the #MeToo moment, the New York state legislature modified state law to adopt the standard that was by then well-developed under New York City law. However, rather than do so solely via interpretative instructions, as the city had done in its Restoration Act, the new state law codified the standard. The state law now has a subsection prohibiting "harassment," which is defined as "subject[ing] an individual to inferior terms, conditions or privileges of employment."[210] (This is in some sense redundant, as the more general discrimination provision has long prohibited discrimination on the basis of protected traits in the "terms, conditions, or privileges of employment."[211]) The harassment provision explicitly rejects the "severe or pervasive" standard, but it creates an affirmative defense for conduct that "does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic . . . would consider petty slights or trivial inconveniences."[212] Thus, in substance, the new codified standard is akin to the caselaw that has developed under New York City's law, but, unlike the City law, the State law reifies, rather than eliminates, the distinction between "discrimination" and "harassment."

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208 *Id.* at 80. This affirmative defense was suggested in a law review article analyzing New York City's restoration act immediately after it passed. *See* Gurion, *supra* note 202, at 145-46.

209 *See, e.g.*, Mihalik v. Credit Agricole Cheuvreux North America, Inc., 715 F.3d 102, 110-11 (2d Cir. 2013) (applying the interpretation set forth in *Williams*).

210 N.Y. EXEC. LAW § 296(1)(h) (Consol. 2025).

211 *Id.* at § 291(1)(a).

212 *Id.* at § 296(1)(h).

III. A CASE STUDY: THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

EFAA, the federal ban on forced arbitration for victims of sexual harassment and assault, is the most prominent federal legislation passed in response to #MeToo. EFAA is also the first major amendment to Federal Arbitration Act passed in decades.[213] This Part uses EFAA as a case study to explore in more depth the potential—and limits—of the sexual harassment silo. After briefly discussing the rise of forced arbitration, it provides a detailed overview of EFAA's substantive requirements and the statutory and legislative history of the key provisions that establish the scope of the new law. It then analyzes early caselaw interpreting the statutory language. This is the most extensive overview, to date, in published literature of the implementation of this new federal law.

A. NEED

EFAA was passed through a convergence of two distinct, albeit overlapping, advocacy movements. The first was #MeToo and the pressure lawmakers faced to take steps to address sexual harassment and assault. The second was a drive to eliminate forced arbitration in the consumer and employment contexts generally.

Arbitration differs significantly from other forms of alternative dispute resolution. In negotiation or mediation, the parties work to resolve disputes, but they retain the power to reject any offer proposed by the other side and ultimately seek relief in court. By contrast, in arbitration, a neutral third party acts as a "judge," with the authority to hear evidence and resolve the matter. The arbitrator's decision is binding and final, and generally there is no right to appeal. Arbitrations take place in a private forum, rather than a public courtroom, and they are often also subject to nondisclosure agreements, meaning victims are barred from talking publicly about the harms they have suffered.

Predispute mandatory arbitration provisions—or "forced arbitration"—are contracts that specify that any disputes that arise in the future between the parties will be resolved through private arbitration. The

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213 *See, e.g.*, Szalai, *supra* note 39, at 2.

Supreme Court permits employers to mandate acceptance of such terms as a condition of employment, even if workers are required to waive the right to pursue statutory or common law claims in court or to act collectively in a class action.[214] Further, mandatory arbitration provisions may be buried in lengthy personnel policies, or distributed through mass emails, such that workers do not even realize they have committed to arbitration until they try to pursue litigation and their employer moves to compel arbitration.[215]

Employment arbitration outside the union context used to be quite rare, but by 2017, a major study found that more than half of all non-unionized employees were covered by mandatory arbitration clauses.[216] Two years later, a report projected that by 2024, at least 80% of private sector non-union workers would be barred from court.[217] Vulnerable workers are particularly likely to be forced into arbitration. The 2017 study found that almost two-thirds of workers making less than $13 per hour were bound by mandatory arbitration clauses, as compared to about half of workers making higher wages.[218] Women and workers of color are disproportionately likely to be subject to arbitration clauses.[219]

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214 *See* Circuit City v. Adams, 532 U.S. 105, 120-23 (2001) (holding mandatory arbitration enforceable as a condition of employment); Epic Systems v. Lewis, 138 S. Ct. 1612, 1632 (2018) (holding class action waivers enforceable). The Supreme Court first allowed use of arbitration to resolve statutory discrimination complaints in *Gilmer v. Interstate / Johnson Lane*, 500 U.S. 20 (1991).

215 *See, e.g.*, Gezu v. Charter Communications, 17 F.4th 547, 554 (5th Cir. 2021) (upholding permissibility of mandatory arbitration provision, including a waiver of any class-based actions, distributed through mass email and where failure to formally opt out was deemed acceptance).

216 *See* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION, 5 (2018) (reporting 56.2% of employees in a national survey of private sector businesses were subject to mandatory arbitration), available at *https://files.epi.org/pdf/144131.pdf* [https://perma.cc/HP2X-WGX4].

217 *See* The Center for Popular Democracy & Economic Policy Institute, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back* 11 (2019). More recent developments, including not only EFAA, but also the strategic use of "mass arbitrations," may have slowed that growth curve. *See generally* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022) (describing how plaintiffs' attorneys responded to mandatory arbitration provisions and bans on class actions by filing thousands of similar arbitrations, imposing significant costs on employers).

218 *See* COLVIN, *supra* note 216, at 9.

219 *See id.* at 8-9 (estimating 57% of women as compared to 53.5% of men are subject to mandatory arbitration and that 59.1% of African American workers as compared to 55.6% of white Non-Hispanic workers are subject to mandatory arbitration).

While proponents of arbitration argue that it helps workers by reducing costs and providing a more efficient resolution of issues than litigation, a growing body of empirical evidence suggests that arbitration substantively advantages employers. Employees are less likely to win in arbitration than in court—and when they do win, the average damage award is hundreds of thousands of dollars lower than in court.[220] Substantial differences persist even when controlling for the kind of claim and plaintiff and attorney characteristics.[221] A significant share of potential workplace claims do not transfer from court to arbitration; they simply disappear.[222] Either the worker, or their lawyer, decide the structural factors favoring employers in arbitration mean it is simply not worth it to pursue claims.[223]

By the time EFAA was being debated in Congress, critiques of mandatory arbitration were prominent in popular discussion.[224] Congress had taken a few steps to address the issue. Most relevant to EFAA, in 2010, Congress passed the "Franken Amendment," a stipulation that companies with large federal defense contracts could not require arbitration of "any claim under title VII . . . or any tort related to or arising out of sexual assault or harassment."[225] More general reform efforts, however, had not succeeded (and still, as of January 2026, have failed to advance). In 2019, the Forced Arbitration Injustice Repeal Act ("FAIR Act"), which would have prohibited forced arbitration generally in workplace, consumer, antitrust, and civil rights cases, passed the Democratic-controlled House

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220 *See generally* Andrew J.S. Colvin & Mark D. Gough, *Mandatory Employment Arbitration*, 19 ANN. REV. OF L. & SOC. SCI. 131, 134-36 (2023) (discussing studies).

221 *See* Mark Gough, *A Tale of Two Forums Employment Discrimination Outcomes in Arbitration and Litigation*, 74 ILR REV. 875, 893-94 (2021).

222 *See generally* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689-700 (2018) (using various methodologies to estimate between tens of thousands and hundreds of thousands of "missing" employment arbitrations).

223 *See id.* at 700-03.

224 *See, e.g.*, Jessica Silver-Greenberg & Robert Geboloff, *Beware the Fine Print: Part 1, Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/XXS4-D5UT] (exposing problems with mandatory arbitration in the first article of a three-part series).

225 Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, div. A, tit. VIII, § 8116, 123 Stat. 3409, 3454-55. *See also* Horton, *EFAA and Textualism*, supra note 29, at *15 n.117 (identifying additional anti-arbitration measures that Congress had enacted by 2025 addressing discrete industries, including car franchising, livestock, loans to military personnel, and residential mortgages).

but did not make it out of committee in the Senate.[226] A bill prohibiting forced arbitration for any kind of employment dispute had been introduced several times but failed to advance,[227] as had a more general bill prohibiting forced arbitration of any statutory or constitutional claim.[228]

The outrage spurred by #MeToo—and particularly prominent stories of egregious harassment where victims were barred from court by mandatory arbitration provisions—offered a strategic opportunity to address one aspect of the problem.[229] Progressive advocacy groups endorsed EFAA, while also emphasizing that they believed more comprehensive protections against forced arbitration were essential.[230] Professor Myriam Gilles, who testified in support of the bill at the House Judiciary Committee hearing, made the same point.[231] However, subsequent efforts to advance the FAIR Act,[232] or specific bans on forced

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226 *See* House Roll Call 540, Bill No. H.R. 1423, 116th Cong. (2019), available at https://clerk.house.gov/Votes/2019540 [perma.cc/44XJ-6GMP] (indicating bill passed 225-186, with 223 Democrats and 2 Republicans supporting it). A similar bill had been introduced in several earlier Congresses as the "Arbitration Fairness Act." *See, e.g.*, S. 987 / H.R. 1873, 112th Cong. (2011-12); S. 878 / H.R. 1844, 113th Cong. (2013-14) (seeking to bar enforcement of predispute arbitration agreements in employment, consumer, and civil rights disputes, later adding antitrust claims).

227 *See* Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021-22); S. 1491 / H.R. 2749, 116th Cong. (2019-20); S. 3615 / H.R. 7109, 115th Cong. (2017-18).

228 *See* Restoring Statutory Rights and Interests of the States Act, S. 635, 116th Cong. (2019-20); S. 550 / H.R. 1396, 115th Cong. (2017-18).

229 Even with the pressure exerted by #MeToo, it took several attempts to pass EFAA. *See* Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203 / H.R. 4734, 115th Cong. (2017-18); H.R. 1443, 116th Cong. (2019-20).

230 *See* Letter to Members of Congress from National Women's Law Center, National Employment Law Project, and National Employment Lawyers Association (Feb. 4, 2022) (urging passage of EFAA but indicating it was only a "partial solution"); Letter to House Leadership from more than 40 organizations (Feb. 7, 2022) (urging passage of EFAA but also noting "many [of the signatories] . . . oppose the use of forced arbitration against all consumers and workers"). Both letters were submitted by Rep. Nadler into the Congressional Record as part of the debate over EFAA. Cong. Rec. H985 (daily ed. Feb. 7, 2022).

231 *See Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows*, Hearing on H.R. 4445, Before the House Comm. on the Judiciary, 117th Cong. at 2 (Nov. 15, 2021) (written testimony of Myriam Gilles) (referencing her prior testimony in support of the FAIR Act and noting that although EFAA "addresses but a subset of claims," it would "provide immediate and meaningful relief for survivors").

232 The FAIR Act passed the House again in 2022, shortly after EFAA was enacted, but failed to advance in the Senate. *See* House Roll Call 81, Bill No. H.R. 963, 117th Cong. (2022), *https://clerk.house.gov/Votes/202281* [perma.cc/28NU-YMCG] (indicating bill passed in the House). *See also* Ariana R. Levinson, *Expanding the Ending Forced Arbitration of Sexual*

arbitration in age discrimination cases[233] or race discrimination cases,[234] have stalled, illustrating how hard it can be to expand beyond the sexual harassment silo.

C. STATUTORY AND LEGISLATIVE HISTORY

EFAA amends the Federal Arbitration Act (FAA) by adding two sections to that Act. One is a substantive prohibition on enforcing certain pre-dispute arbitration agreements or joint action waivers (i.e., bans on class actions). This is a single, somewhat clunky, sentence:

> Notwithstanding any other provision of this title [the FAA], at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be vali or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.[235]

It also specifies that courts, rather than arbitrators, will decide whether a given matter is within the ambit of the Act (even if the agreement itself purports to allow arbitrators to make such assessments).[236] The definition section is also relatively short, defining only four terms: predispute arbitration agreement; predispute joint-action waiver; sexual assault dispute; and sexual harassment dispute.[237] The Act applies "with respect

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Assault & Sexual Harassment Act to Protect Workers' Rights, in THE FEDERAL ARBITRATION ACT: SUCCESS, FAILURES, AND A ROADMAP FOR REFORM 185, 187-89 (Richard A. Bales & Jill I. Gross, eds. 2024) (discussing efforts to expand protections of EFAA to cover a broader range of workplace disputes).

233 *See* Protecting Older Americans Act, S. 1979 / H.R. 4120, 118th Cong. (2023-24) (advanced out of committee in the Senate).

234 *See* Ending Forced Arbitration of Race Discrimination Act, S. 1408 / H.R. 3038, 118th Cong. (2023-24) (failing to advance out of committee in either chamber); *see also* Michael Z. Green, *Expanding the Ban on Forced Arbitration to Race Claims*, 72 U. KAN. L. REV. 455, 491-97, 503 (2024) (discussing arguments for expanding the ban to cover race).

235 9 U.S.C. § 402(a).

236 9 U.S.C. § 402(b).

237 9 U.S.C. § 401.

to any dispute or claim that arises or accrues on or after" its enactment on March 3, 2022.[238]

EFAA passed the House with broad bipartisan support (335-97[239]) and the Senate on a voice vote.[240] When it was considered on the floor of each chamber, members of both parties agreed that egregious harassment occurs, and that victims should not be shut out of court.[241] But this show of unity papers over substantive disagreements as to two key issues—the law's definition of "sexual harassment dispute" and how the new law would be applied to cases that included claims of sexual assault or harassment together with other claims.

1. *"Sexual harassment dispute" and "sexual assault dispute" definitions*

EFAA defines "sexual harassment dispute" as a "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[242] This definition was a focus of considerable debate, and it changed in important ways as the bill made its way through Congress. Even judges who are committed textualists are

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238 Pub. L. 117-90, § 3. Immediately after EFAA passed, there was a flurry of litigation concerning the meaning of this language, with courts reaching somewhat different conclusions. *See, e.g.*, Memmer v. United Wholesale Mortgage, LLC, 135 F.4th 398, 407-09 (6th Cir. 2025) (specifying that a dispute arises when there is "a controversy between [the] parties" and a claim accrues when a "cause of action . . . becomes complete"); Cornelius v. CVS Pharmacy, Inc., 133 F.4th 240, 247 (3d Cir. 2025) (indicating that a dispute arises when "an employee registers disagreement—through either an internal complaint, external complaint, or otherwise—with his or her employer, and the employer expressly or constructively opposes that position"); Famuyide v. Chipotle Mexican Grill, Inc., 111 F.4th 895, 898-99 (8th Cir. 2024) (determining that the dispute arose when the lawsuit was filed in state court); Hodgin v. Intensive Care Consortium, Inc. 666 F. Supp. 3d 1326, 1329-30 (S.D. Fla. 2023) (indicating that the claim accrued when the plaintiff was terminated and that the dispute arose when she filed charge with the EEOC); *see also* Horton, *EFAA and Textualism*, supra note 29, at *26-30 (discussing caselaw on the timing question). Now that the law has been in place several years, this issue is already receding. *See id.* at *25 (providing chart showing claims regarding timeliness tapering off).

239 House Roll Call 33, Bill No. H.R. 4445, available at *https://clerk.house.gov/Votes/202233* [perma.cc/9J3C-A3UX] (indicating bill passed with 113 Republicans and 222 Democrats supporting it, 97 Republicans opposing it, and 2 Republicans not voting).

240 Cong. Rec. S628 (daily ed. Feb. 10, 2022).

241 *See generally* Cong. Rec. S624-28 (daily ed. Feb. 10, 2022); Cong. Rec. H984-93 (daily ed. Feb. 7, 2022) (reflecting bipartisan agreement that victims of severe harassment should have access to court remedies).

242 9 U.S.C. § 401(4).

often willing to consider such "statutory history"—that is, how a bill was modified through amendments during the legislative process—as a guide to interpretation.[243] The changes that were made reflect the contested nature of the term as it has developed since the Supreme Court first recognized sexual harassment as a form of sex-based discrimination in *Meritor Savings Bank*.

As introduced, the bill defined "sexual harassment" as limited to sexualized conduct (largely tracking the EEOC's 1980 guidelines) as "unwelcome sexual advances," "unwanted physical contact that is sexual in nature," "unwanted sexual comments," conditioning professional advancement on "sexual activity," and "retaliation for rejecting unwanted sexual activity."[244] When the House Judiciary committee debated the bill, several Republican members expressed concern that this would be enshrining a "new" definition of sexual harassment into federal law.[245] Democratic Representative Pramila Jayapal, a key sponsor of the bill, assured her colleagues that the bill was not intended "in any way [to] change existing law" regarding what constitutes actionable harassment, and she signaled openness to a clarifying amendment.[246]

Subsequently, when the bill was debated on the House floor, Republican Representative Kenneth Buck, together with the initial Democratic sponsor of the bill Cheri Bustos, offered an amendment changing the definition of "sexual harassment dispute" to the language ultimately enacted: "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[247] Representative Buck characterized it as a clarifying amendment, replacing a "somewhat convoluted definition" with a "[s]imple, straightforward, understandable" standard that would not "supersede

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243 *See generally* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263 (2022).

244 H.R. 4445, as introduced July 16, 2021.

245 *See, e.g.*, HOUSE COMM. OF THE JUDICIARY, Markup of H.R. 4445 the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act at 30:35, 3:00:45 (YouTube, Nov. 17, 2021), *https://www.youtube.com/watch?v=F92CCCc_YTk&t=48s* [perma.cc/6ZWE-JZHQ] (showing Rep. Bishop's statement that the bill has a "definition of sexual harassment . . . that is new to the law," and Rep. Biggs's concern that "some will . . . use the language . . . [to] redefine sexual harassment").

246 *Id.* at 32:53.

247 *See* Amendment 1, Cong. Rec. H992 (daily ed. Feb. 7, 2022).

Federal, State, or Tribal law."[248] Representative Jerrold Nadler similarly explained that it was a "bipartisan" agreement and that "anything related to sexual harassment or assault as currently defined by law," including retaliation for complaining about harassing acts, would be covered by the bill.[249]

This change is important, and not only for the reasons some of the Republican members likely supported it. Indeed, it speaks to one of the longstanding tensions in sexual harassment law. EFAA's original definition did not include the "severe or pervasive" standard. Republican members were thus correct in suggesting that it could have created a standard for "sexual harassment" that differed from how that concept has been developed in federal employment law.[250] But, equally important, the original definition also could have *constricted* the scope of actionable claims by focusing narrowly on *sexualized* conduct.[251] The revised definition, by contrast, clearly encompasses the full scope of harassment based on sex recognized under federal law, state statutes that substantively redefine actionable harassment,[252] and common law claims.[253]

By contrast, there was no debate over (and virtually no discussion of) the definition of "sexual assault dispute," which is a dispute "involving a nonconsensual sexual act or sexual contact" as defined in specific provisions of federal criminal law or "similar applicable Tribal or State law."[254] "Sexual act," in turn, is defined as penetration or certain other

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248 Statement of Rep. Buck, Cong. Rec. H992 (daily ed. Feb. 7, 2022).

249 Statement of Rep. Nadler, Cong. Rec. H992 (daily ed. Feb. 7, 2022).

250 As discussed above, there are definitions elsewhere in the federal code that are similar. *See supra* text accompanying notes 185-188 (discussing definitions of "sexual harassment" under other federal laws).

251 *See, e.g.,* Statement of Rep. Robert C. "Bobby" Scott, Cong. Rec. H991 (daily ed. Feb. 7, 2022) (extended remarks submitted into the Congressional Record expressing concern that the original definition excluded "harassment [that] is not sexual in nature but is motivated by sex-based animus or hostility" and indicating that the amended definition, "[by] embracing sexual harassment jurisprudence . . . encompasses a broader array of harassing conduct").

252 *See supra* subsection II.B.3, C (discussing definitions of "sexual harassment" under various state laws).

253 *Cf.* 48 C.F.R. § 222.7402 (listing common law torts that can arise out of sexual assault or harassment).

254 9 U.S.C. § 401(3).

precisely-specified forms of contact of genitalia or anus.[255] "Sexual contact" is defined more broadly as "the intentional touching, *either directly or through the clothing*," of various sexualized body parts—including buttocks, breast, and inner thigh—with an "intent to abuse, humiliate, [or] harass."[256]

The sexual assault provision could provide an alternate path for some victims of sexually harassing conduct to avoid arbitration. As discussed above, when workers complain that supervisors or coworkers have taken actions such as groping breasts, patting butts, or caressing thighs, federal courts frequently hold such conduct is not sufficient to satisfy the "severe or pervasive" standard as developed under Title VII.[257] Some jurisdictions have responded by amending their employment law to explicitly reject the "severe or pervasive" standard or, in California's case, to specify that a single incident can be sufficient.[258] But even in jurisdictions that have not made such changes, such conduct clearly falls within the ambit of EFAA's definition of "sexual assault." Although EFAA does not create a standalone cause of action for challenging the conduct itself, plaintiffs could pursue tort-based claims. So far, this possibility has yet to be explored in litigation—but it offers potential to further expand EFAA's reach.

2. Scope of the exemption

EFAA specifies that victims of harassment or assault can opt to have an arbitration agreement or class action waiver be deemed unenforceable for "a *case* which is filed under Federal, Tribal, or State law *and relates to* the sexual assault *dispute* or the sexual harassment *dispute*."[259] This language is crucially important. Workers frequently bring claims related to harassment or assault together with other workplace claims, such as other pay discrimination, failure to pay overtime, workplace safety violations, or denial of leave. Under the federal rules of civil procedure, a party may join in a single case "as many claims as it has against an opposing party."[260] Federal courts routinely exercise supplemental

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255 18 U.S.C. § 2246(2).
256 18 U.S.C. § 2246(3) (emphasis added).
257 *See supra* text accompanying notes 69-72.
258 *See supra* text accompanying notes 169-173.
259 9 U.S.C. § 402(a) (emphasis added).
260 FED. R. CIV. P. 18(a).

jurisdiction over state law claims so long as there is a "common nucleus of operative fact."[261] This promotes efficiency, convenience, and fairness by ensuring that all claims are resolved in a single proceeding.[262]

The general preference for addressing all claims between parties in a single forum can be in tension with arbitration agreements that cover some—but not all—claims brought in a case. The Supreme Court has interpreted the FAA to mean that courts cannot deny arbitration simply on the grounds that other claims in a case cannot be arbitrated, even if this would result in "possibly inefficient maintenance of separate proceedings in different forums."[263] By specifying that EFAA applies any "case" that relates to a sexual harassment or sexual assault dispute, Congress ensured that victims of harassment or discrimination would not be forced to arbitrate some claims while pursuing their claims related to harassment or assault in court. This protects victims (and employers) from the cost and emotional toll of having to proceed in both fora and helps promote prompt resolution of all claims.[264]

Despite the clarity of the statutory language, when the bill was debated on the Senate floor, some Senators suggested its reach was narrower than the ordinary meaning of "case" suggests and that plaintiffs seeking to join other claims together with sexual assault or harassment claims would be improperly "gaming the system."[265] Management-side lawyers quickly

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261 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

262 *See, e.g.*, CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3567.1 (5th ed. 2023) (discussing rules and examples of supplemental jurisdiction).

263 Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985).

264 *See, e.g.*, Statement of Sen. Gillibrand, Cong. Rec. S627 (daily ed. Feb. 10, 2022) ("We don't want to have to make a sexual assault or harassment victim relive that experience in multiple jurisdictions.").

265 Senator Joni Ernst (R., Iowa) asserted that she, then-Majority Leader Chuck Schumer (D., New York), and Senator Lindsey Graham (R., South Carolina) had met and agreed the language of the bill should be "narrowly interpreted," that "harassment or assault claims should not be joined to an employment claim without a key nexus," and that if "any subsequent litigation manipulates the text to game the system" they would work to pass a new bill "further codify[ing]" this intent. Statement of Sen. Ernst, Cong. Rec. S625 (daily ed. Feb. 10, 2022). Senator Graham, an original cosponsor of the bill, also indicated that the bill was not intended to take "unrelated claims out of the [arbitration] contract" and that if "lawyers try to game the system, they are acting in bad faith." Statement of Sen. Graham, Cong. Rec. S625 (daily ed. Feb. 10, 2022).

picked up on these cues, sending out client alerts that highlighted this legislative history.[266] But it is essential to recognize that other Senators were equally clear that the bill language should be accorded its plain meaning: that an entire "case" was exempted, and that this remained true even if the harassment or assault claim were subsequently dismissed.[267] Ultimately, the plain language of the statute resolves this question—as has been recognized consistently by courts applying the new statute.[268]

C. *EARLY CASELAW*

1. *Applying the "sexual harassment dispute" and "sexual assault dispute" definitions*

In early litigation under EFAA, several courts have grappled with determining what conduct falls within the scope of "sexual harassment dispute." Most have appropriately recognized that the full spectrum of "harassment" based on "sex"—as that concept has been developed under federal, state, tribal, and local statutes, and also under common law—is within EFAA's ambit. Far fewer have considered the scope of "sexual assault dispute," although, as discussed above, this may be an important alternative path that could be developed in future caselaw.

Courts deciding cases under EFAA in jurisdictions that have substantively revised the meaning of "harassment" are properly holding that conduct that might not be considered "severe or pervasive" under federal law can be sufficient to exempt claims from forced arbitration. Since EFAA's enactment, several courts in New York, where an employee

266 *See, e.g.*, *Signed Into Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, MCGUIREWOODS (Mar. 14, 2022) (asserting "[m]embers of Congress made their intent clear . . . [that] employees should not be able to manipulate the system to keep unrelated claims out of arbitration"); Kenneth Gage, Sara B. Temezko & Ryan Gribbin-Burket, *Congress Seeks to End Forced Arbitration for Sexual Assault, Sexual Harassment, and Related Claims*, PAUL HASTINGS: STAY CURRENT (Feb. 2022) (asserting Senators had pledged to amend the law if litigants improperly "game[d]" the system).

267 Senator Dick Durbin (D., Illinois), an original cosponsor of the bill, responded to Senator Ernst's and Senator Graham's statements by quoting the pertinent language in the bill and indicating that "to clarify, for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with *their full case in court* regardless of which claims are ultimately proven." Statement of Sen. Durbin, Cong. Rec. S626-27 (daily ed. Feb. 10, 2022) (emphasis added).

268 *See infra* subsection III.C.2.

simply must show she was "treated less well than other employees because of her gender," [269] have denied motions to compel arbitration while recognizing the alleged conduct might not violate Title VII.[270] My research did not find comparable reported cases in other jurisdictions that have passed statutes repudiating the "severe or pervasive" standard, but the same analysis should apply.

Likewise, most courts have properly held that stating a claim for harassing or assaulting conduct under common law is sufficient to come within EFAA.[271] An early example of this is *Delirium TV v. Dang*, a case brought by a participant in the reality show *Love Is Blind*. She alleged a fellow contestant incessantly groped her, exposed himself nude, and "forcibly and repeatedly made sexual contact with [her] . . . over her express objections."[272] She brought a tort action alleging "assault (battery)" and incorporating by reference Texas's criminal provisions regarding assault and sexual assault; she also brought claims based on negligent supervision against the production company.[273] The court rejected the employer's claim that EFAA would only apply *if* criminal liability was established, holding instead that so long as the complaint alleged facts that would violate the applicable sexual assault law, the case

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269 Williams v. New York City Housing Authority, 872 N.Y.S.2d 27, 38-39 (N.Y. App. Div. 2009); *see also supra* text accompanying note 207 (discussing New York City law's standards for demonstrating sexual harassment).

270 *See, e.g.*, Mitura v. Finco Services, Inc, 712 F. Supp. 3d 442, 452 (S.D.N.Y. 2024) (observing the "federal 'severe or pervasive standard' of liability does not apply" to the local or state claims); Delo v. Paul Taylor Dance Foundation, 685 F. Supp. 3d 173, 182 (S.D.N.Y. 2023) (focusing on the city standard to assess the viability of the claim because that is the most "lenient applicable liability standard"); Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 552 (S.D.N.Y. 2023) (using the New York City's more lenient standard of liability).

271 EFAA's definitions for sexual harassment dispute and sexual assault dispute incorporate applicable "State law." 9 U.S.C. § 401(3),(4). It is well established that statutory references to "state law" can include state common law. *See, e.g.*, Cipollone v. Ligget Group, Inc., 505 U.S. 504, 522 (1992) ("At least since *Erie R. Co. v. Tompkins*, we have recognized the phrase 'state law' to include common law as well as statutes and regulations.") (plurality); *id.* at 549 (Scalia, J., concurring in part) (agreeing "'State law' as used in [the statutory] provision embraces state common law"); *see also* 48 C.F.R. § 222.7402 (listing common law torts that can arise out of sexual assault or harassment); text accompanying notes 83-84 (discussing tort claims used to challenge harassing behavior).

272 Delirium TV, LLC v. Dang, 714 S.W.3d 640, 646 (Tex. Civ. App. 2024).

273 *See id.* at 644, 647.

could not be forced into arbitration.[274] Courts have reached similar conclusions in recent cases concerning assaults of staff members on cruise ships.[275] However, a few courts have suggested (incorrectly, I believe) that a tort-based claim on its own is insufficient.[276]

Most courts have also properly recognized that under federal law—as well as under New York's more permissive standard—sexual harassment claims can be based on "unwelcome verbal or physical behavior based on a person's gender, regardless of whether that behavior is . . . sexual in nature."[277] In *Owens v. PricewaterhouseCoopers*, the plaintiff claimed she was subjected to negative comments about her sex and age, denied the appropriate share of credit on deals, and yelled at in meetings.[278] The court held that this conduct was sufficient to state a claim.[279] Similarly, in *Puris v. TikTok*, the court held that denigrating a female manager in sex-stereotyped language, criticizing her for "lacking humility" when giving a presentation on her team's accomplishments, and mishandling a complaint related to sexually offensive conduct at a company dinner, collectively were sufficient to state a sexual harassment claim.[280]

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274 *See id.* at 648-49.

275 *See, e.g.*, Doe v. Celebrity Cruises, Inc., 792 F. Supp. 3d 1371, 1374 (S.D. Fla. 2025) (alleging negligence and other tort-based claims against employer based on an alleged sexual assault by a coworker); *id.* at 1380-81 (holding EFAA applies); Bulic v. Celebrity Cruises, Inc., No. 25-21231, 2025 WL 1783865, at *1, *5 (S.D. Fla. June 27, 2025) (similar).

276 *See, e.g.*, Gonzalez v. Carnival Corp., 757 F. Supp. 3d 1317, 1322 (S.D. Fla. 2024) (holding EFAA inapplicable in case alleging intentional infliction of emotional distress based on alleged sexual harassment and assault). Gonzalez alleged her coworkers repeatedly subjected her to improper sexual comments and that one of them rubbed up against her and "touch[ed] her breasts under the guise of closing [her] blouse." *Id.* at 1318. This conduct, if proven, would be nonconsensual "sexual contact," 18 U.S.C. § 2246(3), meaning the plaintiff alleged "conduct constituting . . . a sexual assault dispute" under EFAA. *See* 9 U.S.C. § 401(3); *see also supra* note 256. It is possible that the conduct alleged was not serious enough to "plausibly" state a claim of intentional infliction of emotional distress, but that is a separate legal question. *See infra* subsection III.C.3 (discussing whether the standard should be "facially plausible" or "nonfrivolous").

277 Owens v. PricewaterhouseCoopers LLC, 786 F. Supp. 3d 831, 846 (S.D.N.Y. 2025); *see also id.* at 847 (discussing Second Circuit jurisprudence confirming that under Title VII, "conduct need not be lewd or sexual in nature to constitute sexual harassment"). The *Owens* court did suggest, however, that this is a slightly higher bar than simply alleging the plaintiff was "treated less well" because of sex. *Id.*

278 *Id.* at 837-39.

279 *Id.* at 848.

280 Puris v. TikTok, Inc., No. 24cv944 (DLC), 2025 U.S. Dist. LEXIS 16998 (S.D.N.Y. 2025), at *26 (holding that plaintiff stated a plausible sexual harassment claim under Title VII);

Courts have also properly recognized that retaliation for complaints about sexual harassment or assault are within the ambit of the statute.[281] This is true even if the assault or harassment took place prior to EFAA's effective date. For example, in *Molchanoff v. SOLV Energy*, the plaintiff was sexually assaulted by a supervisor in 2020 and subsequently fired allegedly in retaliation for having complained about the assault.[282] In 2022, after EFAA's effective date, she was refused a new job at a successor company by a person who had participated in the earlier decision to fire her.[283] The court held that the later retaliation was within the ambit of EFAA.[284]

EFAA also applies to retaliation suffered by employees who report or support claims of harassment or assault brought by *other* employees. For example, in *Hicks v. CBC Ent. Holdings*, the plaintiff alleged that she reported that her supervisor harassed other female employees repeatedly, and that her complaints were ignored until he impregnated an underage employee.[285] The company then conducted an investigation and fired the plaintiff, allegedly in retaliation for her earlier reports.[286] The court, noting that the statute does not limit applicability to "victims" of harassment or

id. at *28 (finding that plaintiff stated a plausible sexual harassment claim under state and local law); *see also* Brazzano v. Thompson Hine LLP, No. 24-CV-01420 (ALC)(KHP), 2025 U.S. Dist. LEXIS 59549, at *20-24 (S.D.N.Y. 2025) (holding ten-year pattern of being badmouthed and excluded from meetings because of plaintiff's sex, as well as occasionally being subjected to sexually lewd comments, was sufficient to state a claim of sexual harassment under New York law); Ding v. Structure Therapeutics, Inc., 765 F. Supp. 3d 897, 903-04 (N.D. Cal. 2025) (specifically rejecting argument that New York state law requires "lewd, romantic, or sexual" conduct to state a viable sexual harassment claim).

281 *See, e.g.*, Olivieri v. Stifel, Nicholaus & Co., 112 F.4th 74, 92 (2d Cir. 2024) (holding that "retaliation resulting from a report of sexual harassment is 'relat[ed] to conduct that is alleged to constitute sexual harassment'" and thus within the ambit of EFAA) (quoting 9 U.S.C. § 401(4)); *see also, e.g.*, Holland-Thielen v. Space Expl. Techs. Corp., No. 2:24-cv-06972-JAK (RAOx), 2025 U.S. Dist. LEXIS 149081, at *4, *33-35 (C.D. Cal. 2025) (holding that EFAA applies where SpaceX employees were terminated immediately after writing an "open letter" complaining about the extent to which Musk's sexually offensive social media postings were circulated within the company).

282 Molchanoff v. SOLV Energy, 23-CV-653, 2024 WL 899384, at *1 (S.D. Cal. Mar. 1, 2024).

283 *Id.*

284 *Id.* at *4–5.

285 24-1120-CFC, 2025 U.S. Dist. LEXIS 121448, *3-5 (D. Del., June 26, 2025).

286 *Id.* at *1.

assault, held that her claims were within the ambit of EFAA.[287] Similarly, another court deemed EFAA to apply to an employee who was fired two days after he reported harassment of other employees.[288]

Courts have also held EFAA to be applicable in cases related to harassment based on sexual orientation, gender identity, or male-on-male harassment. In *Mera v. SA Hospitality Group*, for example, the plaintiff was a busser in a café who alleged that he was subject to homophobic slurs in Spanish and inappropriate touching of his legs, wrist, and waist.[289] The court held that these allegations constituted a sexual harassment dispute within the scope of EFAA.[290] Similarly, in *Michael v. Bravo Brio Restaurants, LLC,* the court held that a transgender woman's allegations of harassment based on her gender identity, such as her supervisor's insistence that she "is a boy and . . . should act like a boy" and his statement that she needed "man up and use what God gave you between your legs," were sufficient to constitute sexual harassment under the statute.[291] And in *Cardenas v. F.D. Thomas, Inc.*, the court held that a group of men who had suffered sexually harassing comments and groping from male foremen had viable sexual harassment claims under California law, and thus EFAA applied.[292]

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287 *Id.* at *8.

288 *See* Thomas v. Pooh Bah Enters., No. 25-cv-77, 2025 U.S. Dist. LEXIS 141753, at *2, *14 (N.D. Ill. July 24, 2025); *see also* Silverman v. DiscGenics, Inc., No. 2:22-cv-00354, 2023 WL 2480054, at *1, *3 (D. Utah Mar. 13, 2024) (holding EFAA could apply to human resources officer who alleged was retaliated against for supporting another worker's complaints about harassment)).

289 Mera v. SA Hospitality Group, LLC, 675 F. Supp. 3d 442, 446 (S.D.N.Y. 2023); *see also* Liu v. Minoso, 105 Cal. App. 5th 791, 796-97, 799 (2024) (holding that plaintiff stated a viable harassment claim for discriminatory conduct relating to plaintiff's status as a "lesbian [who] dresses in a unisex non-gender specific style"); Doe v. Saber Healthcare Grp., No. 3:23cv1608, 2024 WL 2749156, at *1-2, *16-17 (M.D. Pa. May 29, 2024) (holding that failure to support employee after learning she was marrying someone of the same sex constituted a viable sexual harassment dispute under EFAA).

290 *See Mera*, 675 F. Supp. 3d at 446-47 (holding that allegations of homophobic slurs and unwanted male-on-male physical contact constituted a viable sexual harassment dispute under EFAA).

291 Michael v. Bravo Brio Restaurants LLC, No. 23-3691, 2024 WL 2923591, *1, *5 (D.N.J. June 10, 2024).

292 Cardenas v. F. D. Thomas, Inc., No. 2:24-cv-10814, 2025 WL 418753, *1-5 (E.D. Ca. Feb. 6, 2025).

Harassment based on pregnancy and related medical conditions is also a form of sexual harassment and thus within the ambit of EFAA. In *Delo v. Paul Taylor Dance Foundation*, the plaintiff alleged harassment based on her pregnancy and status as a new mother, successfully showing that new fathers at her workplace did not face the same range of negative comments.[293] The court held this to be sexual harassment under EFAA, rejecting the employer's argument that such a holding would "re-write EFAA to cover all conduct constituting sexual harassment, gender discrimination and family status discrimination."[294] Likewise, in *Solis v. Prime Comms Retail, LLC*, the court held that repeatedly denying a pregnant employee access to a chair and drinking water, as well as transferring her to a less desirable location, amounted to "nonfrivolous claims" of harassment under California law.[295]

However, a few district courts have—incorrectly, I believe—interpreted EFAA to cover only sexualized harassing conduct. The most prominent is *Cornelius v. CVS Pharmacy, Inc.*, in which the plaintiff, a longtime CVS employee who had started as a cashier and been promoted to manager, complained about a range of discriminatory and harassing treatment from a new supervisor.[296] This included "rude and unnecessary text messages outside of working hours," bragging about not having faced consequences for harassment complaints lodged against him by other employees, "disrespectful responses" to her questions, and allegedly improperly denying her a promotion.[297] The district court held EFAA to be inapplicable, stating that although Cornelius might have a viable claim of sex discrimination, she did not have a claim of "sexual harassment." In the court's view, sexual harassment was limited only to "unwelcome sexual advances or other verbal or physical contact of a sexual nature."[298] A few other judges have made similar distinctions, albeit generally in cases

293 Delo v. Paul Taylor Dance Foundation, 685 F. Supp. 3d 173, 183-86 (S.D.N.Y. 2023).

294 *Id.* at 184-85.

295 Solis v. Prime Comms Retail, LLC, No. 5:24-cv-02389-AH-(SHKx), 2025 U.S. Dist. LEXIS 66307, at *7-8 (C.D. Cal. Apr. 7, 2025).

296 Cornelius v. CVS Pharmacy, Inc., 23-01858, 2023 WL 6876925, at *1 (D.N.J. Oct. 18, 2023), *affirmed in part and judgment vacated*, 133 F.4th 240 (3d Cir. 2025).

297 *See id.* at *1.

298 *Id.* at *3-4 (quoting Friel v. Mnuchin, 474 F. Supp. 3d 673, 692 (E.D. Pa. 2020)).

where the conduct would be more typically understood as "discrimination" rather than "harassment" of *any* kind.[299]

These courts' assertions that only sexualized conduct is actionable as "sexual harassment" is clearly inaccurate as a summary of federal sexual harassment law.[300] Indeed, on appeal in the *Cornelius* case, even the defendant CVS admitted that harassment does not need to be because of "sexual desire;"[301] the company argued instead that the claim should fail because the conduct alleged did not meet the "severe or pervasive" standard,[302] and because it arose prior to EFAA's effective date.[303]

Institutional actors recognized that the district court's approach—focusing exclusively on sexualized conduct—would dramatically narrow the reach of the new law. In the appeal to the Third Circuit, the EEOC

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299 See Smith v. Boehringer Ingelheim Pharms., LLC, No. 3:24-cv-01266 (KAD), 2025 U.S. Dist. LEXIS 160508, at *8, *21, *26-27 (D. Conn. 2025) (asserting that sexual harassment necessarily entails "sexual conduct" and that alleged failure to mentor and provide professional development opportunities were insufficient to state a harassment claim); Singh v. MeetUp LLC, 750 F. Supp. 3d 250, 257-59 (S.D.N.Y. 2024) (concluding plaintiff's allegations of being interrupted at meetings, passed over for male colleagues, and failing to have her contributions recognized as compared to male colleagues constituted gender discrimination, not sexual harassment, and that "[h]olding otherwise would collapse the difference" between the two); *cf.* Johannessen v. JUUL Labs, Inc., No. 3:23-cv-03681, 2024 WL 3173286, at *3-4 (N.D. Cal. June 24, 2024) (concluding plaintiff's allegations of being treated poorly after returning from maternity leave and forced to pump in a room with no lock "plausibly allege discrimination or gender bias . . . but not sexual harassment" but—appropriately—recognizing that harassment can include epithets, physical harassment, and other non-sexualized conduct).

300 *Oncale* and other cases make clear that non-sexualized harassing conduct based on sex can state a viable sexual harassment claim. *See supra* text accompanying notes 66-68, 91-114, 277-280, and 293-295. The decision in *Smith* is particularly disturbing as its use of ellipses functionally misquotes *Oncale* to suggest *Oncale* reached a conclusion squarely at odds with the conclusion *actually* reached in *Oncale.* Specifically, *Smith* characterizes *Oncale* as holding "sexual harassment necessarily includes 'conduct . . . tinged with offensive sexual connotations.'" *Smith* at *21-22 (quoting *Oncale*, 523 U.S. at 80-81). The full quote in *Oncale* makes the *opposite* point. The Court explains the plaintiff must prove "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion*] . . . because of . . . sex'." *Oncale*, 532 U.S. at 80-81. *Oncale* rejects the idea that sexualized conduct is either required or necessarily sufficient to make out a sex-based harassment claim. *See supra* text accompanying notes 66-67.

301 *See* Brief for Appellee CVS, Cornelius v. CVS Pharmacy, Inc., No. 23-2961 (3d Cir., filed Nov. 7, 2023), 2024 WL 1420597, at *29-31 (characterizing the district court's language as a "short-hand summary, based on the EEOC's regulations, rather than an exposition on the contours of sexual harassment law").

302 *Id.* at *36.

303 *See id.* at *10-21. The district court failed to resolve whether the claim was timely. *See Cornelius*, 2023 WL 6876925, at *4 n.3.

submitted an *amicus* brief in support of the plaintiff, citing Supreme Court and lower court caselaw confirming that sexual harassment claims may be based on non-sexualized behavior.[304] It also noted that Congress had considered and *rejected* a definition of sexual harassment for EFAA that focused narrowly on sexualized conduct.[305] The US Chamber of Commerce and the Retail Litigation Center, on the other hand, filed an *amicus* brief in support of CVS arguing that only "sexually charged actions or sexual comments" are actionable harassment.[306]

The Third Circuit did not reach the question of the scope of "sexual harassment"; instead, it vacated the district court's decision and held that EFAA was inapplicable because the dispute arose prior to EFAA's effective date.[307] However, similar arguments continue to be advanced in other EFAA cases. Courts should make clear that EFAA encompasses the full scope of sexual harassment law, which can include both sexualized and non-sexualized harassing conduct.[308]

2. Scope of the exemption

A second question that has been litigated extensively already is the scope of the exemption. As discussed above, EFAA provides that arbitration agreements cannot be enforced for a "case which is filed under Federal, Tribal, or State law" that "relates to the sexual assault dispute or the sexual harassment dispute."[309] Courts have almost uniformly interpreted this language to mean that so long as the plaintiff's case includes at least one claim that is covered by EFAA, the plaintiff can opt[310] to have the entire case adjudicated in court.

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304 Brief for EEOC as Amicus Curiae, Cornelius v. CVS Pharmacy, Inc., No. 23-2961, at 9-14 (3d Cir., filed Nov. 7, 2023).

305 *See id.* at 15.

306 Brief for Retail Litigation Center and the Chamber of Commerce of the United States as Amici Curiae, Cornelius v. CVS Pharmacy, Inc., No. 23-2961, at 4 (3d Cir., filed Nov. 7, 2023); *see also id.* at 13-15 (discussing caselaw).

307 *Cornelius v. CVS Pharmacy, Inc.*, 133 F.4th 240, 247-48 (3d. Cir. 2025).

308 *See supra* text accompanying notes 66-68, 91-114, 277-280, and 293-295.

309 9 U.S.C. § 402(a).

310 The statutory language suggests that the plaintiff must affirmatively raise the argument that EFAA precludes enforcement of an arbitration agreement. *See id.* ("[A]t the election of the person alleging"); *Cf.* Scoggins v. Menard, Inc., 2025 WL 1369010, at *1 (6th Cir. May 12, 2025)

An early decision, *Johnson v. Everyrealm*, has been widely cited for its approach to resolving this question.[311] Johnson was a former NFL player who was pressured by his boss to have sex with colleagues on business trips and subjected to other sex-based harassment.[312] In addition to challenging this conduct as sexual harassment, he also alleged that he was subjected to pay discrimination on the basis of his race and that he had been illegally retaliated against—in violation of a state law protecting whistleblowers—for suggesting a proposed crypto-gambling scheme would violate New York's gaming license rules.[313] The employer argued that even if Johnson could opt to have his sexual harassment claims decided by a court, the other claims should be resolved in arbitration.[314]

The court rejected this argument. Its analysis hinged on the plain meaning of "case" and the distinction in the statutory provision between "case" and "dispute."[315] Citing dictionaries as well as caselaw, the court concluded that "case" should be given its ordinary meaning: a "legal proceeding as an undivided whole," which may include several discrete claims or causes of action.[316] Accordingly, once a court determines that *any* of the claims in a case allege conduct that constitutes a "sexual harassment dispute," the *whole* case is exempted from mandatory arbitration.[317] The same reasoning would of course apply to a claim alleging conduct constituting a "sexual assault dispute."

The *Johnson* court's reasoning has been followed by federal and state courts across the country.[318] Courts have accordingly refused to sever

(reversing district court's application of EFAA to a case in which the plaintiff had "repeatedly and unequivocally told the district court that the arbitration agreement applied").

311 657 F. Supp. 3d 535 (S.D.N.Y. 2023); *see also infra* note 318 (gathering cases citing *Johnson*).

312 *Johnson*, 657 F. Supp. 3d at 543-45.

313 *Id.* at 545-47.

314 *Id.* at 558.

315 *Id.* at 558-59.

316 *Id.*

317 *Id.* at 561.

318 *See* Williams v. Mastronardi Produce, Ltd., No. 23-13302, 2024 WL 3908718, at *1 (E.D. Mich. Aug. 22, 2024) ("This Court shall follow the current majority view, that is based upon the statute's express language, and rules that the EFAA precludes arbitration of this whole case."); *see also, e.g.*, Bruce v. Adams & Reese, LLP, No. 3:24-cv-00875, 2025 WL 611071, at *13-14 (M.D. Tenn. Feb. 25, 2025); Bray v. Rhythm Management Group, LLC, No. TDC-23-3142, 2024 WL 4278989, at *7 (D. Md. Sept. 24, 2024); Molchanoff v. SOLV Energy, LLC, No. 23cv653-

cases in which sexual harassment or sexual assault is challenged along with discrimination or harassment on the basis of other protected traits,[319] and also where it is challenged along with a wide variety of other workplace claims, including wage-and-hour violations,[320] workplace safety issues,[321] and FMLA interference and retaliation.[322] As stated succinctly in a recent decision: "Under the EFAA, when a plaintiff's lawsuit contains at least one claim that fits within the scope of the act, the arbitration agreement is unenforceable as to all claims asserted in the lawsuit."[323]

My research identified very few cases in which a court allowed some claims to go to arbitration when at least one claim was subject to EFAA. Those that did involved relatively unusual circumstances. *Mera v. SA Hospitality Group*,[324] the most frequently cited case in this category, involved a café busser's individual claims of harassment; he also alleged, on behalf of a class of "all non-exempt employees" at the restaurant, that the restaurant had failed to pay wages properly.[325] Noting that the wage claims were "wholly unrelated," the court decided that only the harassment claims would be exempt from arbitration.[326] In a different case involving

LL-DEB, 2024 WL 899384, at *4 (S.D. Cal. Mar. 1, 2024); Watson v. Blaze Media LLC, No. 23-CV-0279-B, 2023 WL 5004144, at *2, *5 n.1 (N.D. Tex. Aug. 3, 2023); Turner v. Tesla, Inc., 686 F. Supp. 3d 917, 925-26 (N.D. Cal. 2023) (all citing *Johnson* and following its reasoning). Many state appellate decisions have likewise followed *Johnson*'s approach. *See, e.g.*, Manwiller v. Advantage Sales & Marketing, 2025 WL 2057232, at *1 (July 23, 2025, Cal. App.4th) ("Like nearly every court to address the issue, we conclude that the EFAA, by its plain terms, protects the entire case from forced arbitration."); *id.* at *2 (gathering cases, including *Johnson*).

319 *See, e.g.*, *Watson*, 2023 WL 5004144, at *1 (explaining that Watson alleged she was subject to sex and religious based discrimination); *Johnson*, 657 F. Supp. 3d at 546-547 (explaining Johnson alleged he was subject to sex-based and race-based discrimination).

320 *See, e.g.*, *Liu*, 105 Cal. App. 5th at 796 (explaining that Liu alleged she was misclassified as exempt from overtime requirements and subject to harassment and discrimination).

321 *See Turner*, 686 F. Supp. 3d at 922 (explaining that Turner alleged she was terminated in retaliation for reporting workplace injuries, as well as subject to harassment).

322 *See* Mitura v. Finco Services, Inc, 712 F. Supp. 3d 442, 449-60 (S.D.N.Y. 2024) (explaining that Mitura alleged she was retaliated against for seeking to use FMLA leave and also subject to harassment and discrimination).

323 *Liu*, 105 Cal. App.5th at 800.

324 Mera v. SA Hospitality Group, 675 F. Supp. 3d 442 (S.D.N.Y. 2023).

325 *Id.* at 447-48.

326 *Id.* (citing *Johnson v. Everyrealm*, 657 F. Supp. 3d 535, 562 n.23) (S.D.N.Y. 2023); *see also* Miles v. Greystar Mgmt. Servs., L.P., No. 2:25-cv-00262-APG-EJY, 2025 U.S. Dist. LEXIS 137283, *9 (D. Nev. July 17, 2025) (holding plaintiff's class-based claims relating to failure to

multiple plaintiffs, some of whom had no claims that related to harassment or assault, the court likewise held EFAA did not apply to those plaintiffs' claims.[327] Another case that was severed focused primarily on conduct that occurred well before EFAA's effective date; the only EFAA-covered claim was an allegation of retaliation long after the plaintiffs had ceased working for the employer.[328] Notwithstanding these very limited exceptions, there is a clear judicial consensus that in virtually all cases, so long as one of the claims is within the ambit of EFAA, the whole case is exempt from forced arbitration.

3. "Alleging conduct" and the plausibility of the pleading

A third issue that has arisen frequently is what standard courts should use when assessing a complaint to determine whether EFAA applies. Courts typically make this determination early in the litigation, when a defendant, after having been served, moves to compel arbitration pursuant to an arbitration agreement and a plaintiff argues EFAA precludes enforcement of the agreement.[329] EFAA specifies that it applies "at the election of a person *alleging* conduct constituting a sexual harassment dispute or sexual assault dispute."[330] Some courts use the Rule 12(b)(6) standard, as interpreted in *Twombly*[331] and *Iqbal*,[332] to assess this: Is the complaint "facially plausible," in the sense that, if true, the facts alleged would allow a court to conclude that the conduct constitutes unlawful

pay overtime may be arbitrated even though her harassment- and retaliation-related claims will proceed in court).

327 Lambert v. New Start Cap. LLC, No. 1:24-cv-8055-GHW, 2025 U.S. Dist. LEXIS 153059, *40-41 (S.D.N.Y. Aug. 7, 2025).

328 *See* Silverman v. DiscGenics, Inc., No. 2:22-cv-00354, 2023 WL 2480054, at *1, *3 (D. Utah Mar. 13, 2024) (compelling arbitration of pre-termination claims but allowing post-termination retaliation claims to proceed in court). The post-termination retaliation claim was added to the complaint only after the employer moved to compel arbitration. *See id.* at *1.

329 *See, e.g., Johnson*, 657 F. Supp. 3d at 546-47 (noting that two weeks after the complaint was filed, the defendants moved to compel arbitration, and that the plaintiff responded by arguing the lawsuit was subject to EFAA and also seeking an emergency motion enjoining an arbitration proceeding that the company had started).

330 9 U.S.C. § 402(a) (emphasis added).

331 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007).

332 Ashcroft v. Iqbal, 566 U.S. 662, 678-79 (2009).

sexual harassment or sexual assault?[333] Other courts apply a more lenient standard, assessing only whether the plaintiff has pled "nonfrivolous claims relating to sexual assault or to conduct alleged to constitute sexual harassment."[334] And some courts deem it unnecessary to resolve which of these standards apply, on the grounds that the allegations in the complaint satisfy both standards.[335]

Importantly, whichever standard is used, courts should recognize that, as discussed in Parts I and II, "sexual harassment" may be litigated under Title VII's prohibition on discrimination based on sex, similar state or local laws, or a variety of common law claims, and that, as discussed earlier in this Part, EFAA's definition of "sexual harassment dispute" encompasses this full range. Likewise, an individual could seek relief for nonconsensual sexual acts or contact, as defined in the law, under a variety of statutory or common law claims. Thus, the assessment of EFAA's applicability should turn on the *facts* asserted in the complaint, not the label affixed to the

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333 The leading case for this approach is Yost v. Everyrealm, Inc., 657 F. Supp. 3d 563, 585 (S.D.N.Y. 2023); *see also* Horton, *EFAA and Textualism*, supra note 29, at *31-32 (discussing how "influential" *Yost* has been). The *Yost* court suggests that EFAA's general operative language—"at the election of a person alleging conduct," 9 U.S.C. § 402(a)—could be read expansively, but that the separate reference to "alleged . . . under applicable . . . law" in the definition of "sexual harassment dispute," *id.* at § 401(4), suggests a 12(b)(6) standard is appropriate, at least for disputes relating to sexual harassment. *See Yost*, 657 F. Supp. 3d at 585. The definition for "sexual assault dispute," 9 U.S.C. § 401(3), does not include the word "alleged." David Horton notes this difference and suggests it means that the plausibility standard should only apply to sexual harassment disputes. *See* Horton, *EFAA and Textualism*, *supra* note 29, at *56. As discussed in the text, even under a 12(b)(6) plausibility standard, the key question should be whether the *conduct* alleged could plausibly be unlawful, rather than the label affixed to the claim.

334 The leading case for this approach is Diaz-Roa v. Hermes Law, 757 F. Supp. 3d 498, 533 (S.D.N.Y. 2024), *appeal docketed*, No. 24-3223 (2d Cir.). Most early cases followed *Yost*, but as of November 2025, the *Diaz-Roa* approach is "gaining traction." Horton, *EFAA and Textualism*, *supra* note 29, at *32-33 (gathering cases). The *Diaz-Roa* court argues that the "non-frivolous standard" is the better interpretation of the statutory language and also that it is preferable because it avoids importing a dispositive assessment on the merits of a claim into the threshold question of whether the case should be resolved in court or in arbitration. *See Diaz-Roa*, 757 F. Supp. 3d at 533. Horton ultimately argues that "courts should split the difference by adopting the plausibility requirement . . . but bending over backwards to allow claimants to amend their complaint." Horton, *EFAA and Textualism*, *supra* note 29, at *54.

335 *See, e.g.*, Lambert v. New Start Cap. LLC, No. 1:24-CV-8055-GHW, 2025 WL 2295254 (S.D.N.Y. Aug. 7, 2025) (indicating it "need not weigh in" on the debate because the plaintiffs met the more stringent standard).

claims.[336] So long as the factual allegations can "be fairly characterized, at least in part, as alleged sexual harassment violations" (or sexual assault violations) a plaintiff may opt to avoid mandatory arbitration.[337]

Additionally, if a defendant moves to compel arbitration, a plaintiff may amend a complaint to make it more clear that EFAA is applicable.[338] For example, in *Johnson v. Everyrealm*—which, as discussed above, is the leading case holding that if any claims are within the ambit of EFAA, the whole "case" is exempt from arbitration—the plaintiff's initial complaint included race discrimination claims but not sex discrimination claims.[339] However, the facts alleged included a litany of sex-based harassment, such as repeated suggestions that to succeed at the company it was necessary to have sex with coworkers. The plaintiff was permitted to file an amended complaint, and ultimately the court, using the 12(b)(6) standard,[340] concluded that EFAA applied because the plaintiff plausibly pled sexual harassment under New York City law.[341]

The relative capaciousness of EFAA's language regarding applicability does not mean *any* allegation related to sexual misconduct is sufficient. In some cases, courts have reasonably held that even if true, the facts alleged

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336 *See, e.g.*, Delo v. Paul Taylor Dance Foundation, 685 F. Supp. 3d 173, 181 (S.D.N.Y. 2023) (clarifying that a plaintiff need not "style[ ]" or "label[ ]" a cause of action as one for sexual harassment to invoke the EFAA); Michael v. Bravo Brio Restaurants, LLC, No. 23-3691, 2024 WL 2923591, *6 (D.N.J. June 10, 2024) (holding a complaint that referenced a hostile work environment based on the plaintiff's identity as a transgender female was within the ambit of EFAA, even though it did not "include the words 'sexual assault' or 'sexual harassment'"); *see also* text accompanying *supra notes* 271-276 (discussing whether common law claims are sufficient to trigger EFAA's ban).

337 *Delo*, 685 F. Supp. 3d at 181-82; *see also* text accompanying notes 272-275 (discussing cases recognizing that EFAA applies to common law claims based on sexual harassment or assault).

338 *See* FED. R. CIV. P. 15(a) (noting that a party "may amend its pleading once as a matter of course" within 21 days of service of a responsive pleading or motion, or subsequently with the court's leave, which should be "freely give[n] when justice so requires").

339 *Johnson v. Everyrealm*, 657 F. Supp. 3d 535, 546-47 (S.D.N.Y. 2023).

340 *See id.* at 551 (finding the claim of sexual harassment had been "plausibly pled"). *Johnson* was decided by Judge Paul Engelmayer; on the same day, he also decided *Yost*, the leading decision calling for application of the 12(b)(6) standard. *See id.* Judge Engelmayer saw an interrelationship between the two decisions. *See Yost,* 657 F. Supp. 3d at 586 (suggesting that since, as interpreted in *Johnson*, EFAA "blocks arbitration of the entire 'case' containing" a sexual harassment claim, applying a lower standard than "plausibility" could "enable a plaintiff to evade a binding arbitration agreement . . . [by] adding facially unsustainable and quickly dismissed claims of sexual harassment").

341 *Johnson*, 657 F. Supp. 3d at 543-48, 553-558.

in the complaint would not state an actionable claim.[342] Some employers have expressed concern that a plaintiff might plead a weak harassment claim, or style a claim as "harassment" when it would more typically be considered "discrimination," simply to avoid being subject to a forced arbitration agreement. In one case where the court held that the plaintiff's allegations of retaliation were insufficient, it also denied the plaintiff's effort to amend the complaint and characterized this as a "bad faith" effort to game the system,[343] (although it later vacated the "bad faith" holding).[344] Similarly, in their *amicus* brief in *Cornelius*—the Third Circuit case concerning the meaning of harassment—the Chamber of Commerce and Retail Litigation Center suggested that plaintiffs would "artfully plead[] sex discrimination claims as 'sexual harassment' to try to bring them into the limited FAA exception."[345]

The difficulty with suggesting that plaintiffs are improperly characterizing discrimination claims as harassment is that there is no clear line between "sex discrimination" and "sexual harassment." Sexual harassment is a form of sex-based discrimination, a judge-made edifice that rests on Title VII's "terms and conditions" language.[346] And, as discussed in the next part, the Supreme Court's recent decision in *Muldrow* threatens to undermine the putative distinction altogether.

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342 *See, e.g.*, Mangum v. Ross Dress for Less, Inc., 777 F. Supp. 3d 519, 524, 531-32 (E.D.N.C. 2025) (holding occasional offensive comments allegedly made by other employees related to plaintiff's genitalia failed to plausibly constitute unlawful sexual harassment); Newton v. LVMH Moet Hennessy Louis Vuitton, Inc., 746 F. Supp. 3d 135, 150, 155 (S.D.N.Y. Aug. 23, 2024) (holding defendant's alleged conduct after the effective date of EFAA did not plausibly state a claim for sexual harassment or retaliation); K.T. v. A Place for Rover, 23-02858, 23-02859, 23-02860, 2023 WL 7167580, *1, *5 (E.D. Pa. Oct. 31, 2023) (holding allegations that a company that provided in-home pet care services negligently allowed a customer to secretly film pet sitters did not plausibly constitute sexual harassment). The district court in *Cornelius* held similarly, but that conclusion was vacated on appeal. Cornelius v. CVS Pharmacy, Inc., 23-01858, 2023 WL 6876925, at *4 (D.N.J. Oct. 18, 2023), *affirmed in part and judgment vacated*, 133 F.4th 240 (3d Cir. 2025).

343 Newton v. LVMH Moet Hennessy Louis Vuitton, Inc., 746 F. Supp. 3d 135, 155, 162-63 (S.D.N.Y. Aug. 23, 2024).

344 Newton v. LVMH Moet Hennessy Louis Vuitton Inc., No. 23-CV-10753, 2025 U.S. Dist. LEXIS 126427, *14-15 (S.D.N.Y. July 2, 2025).

345 Brief for RLC & Chamber as Amici Curiae, *supra* note 306, at 4.

346 *See* Part I.

This review of emerging case law demonstrates that EFAA, while within the sexual harassment silo, has a broader impact than many of the other laws passed in response to #MeToo. This is because of two key features. First, the definition of sexual harassment dispute encompasses both sexualized and non-sexualized harassing conduct, and it incorporates state and local laws that have rejected the "severe or pervasive" standard. Second, if EFAA applies, the entire case can be litigated in court. Although employers have disputed the scope of the statutory language on both points, virtually all courts are properly following the statutory directives.

These provisions extend the reach of the statute. For example, Isabella Mitura, a Korean American with breast cancer, alleged that she was routinely derided by her supervisor and the CEO of her company as an "old Asian woman with no kids," implicating not just sex-based harassment but also harassment based on race, age, and family status; she also alleged she was unlawfully discouraged from taking medical leave and then fired shortly before she was scheduled to return.[347] Teyo Johnson alleged that he was subject to race-based harassment and pay discrimination, as well as sexual harassment, and that he was fired for reporting what he believed would be a violation of New York State's gambling law.[348] Tyonna Turner complained that her coworkers persistently harassed her based on her sex and that the company did not address her complaints, and also that she was retaliated against her for reporting workplace safety violations.[349] Thanks to EFAA, each plaintiff was able to pursue all of these claims in court, rather than being forced into the secrecy of arbitration.

Under many of the other #MeToo laws, these employees might have been able to claim protections for the sexual harassment they suffered, but not for their other claims. And notably, the public has an interest not just in effectively addressing harassment, but also in ensuring compliance with these other laws. These early cases underscore the need for more comprehensive protections addressing forced arbitration, and the other reforms discussed in Part II. In some liberal states, sexual harassment-

347 Mitura v. Finco Services, Inc, 712 F. Supp. 3d 442, 450 (S.D.N.Y. 2024).
348 *Johnson v. Everyrealm*, 657 F. Supp. 3d 535, 542-47 (S.D.N.Y. 2023).
349 Turner v. Tesla, Inc., 686 F. Supp. 3d 917, 921-22 (N.D. Cal. 2023).

specific legislation successfully paved the way for broader reform. However, in most states, and in Congress, efforts to build on the #MeToo laws have stalled. That said, they may operate as a bulwark against backsliding in the current political landscape, a question taken up in the next Part.

IV. DEVELOPMENTS OUTSIDE THE SILO

While the sexual harassment silo was being built, significant changes were occurring outside its walls. Some of these immediately made their way "inside"—most notably, *Bostock*'s confirmation that sexual harassment includes harassment on the basis of sexual orientation or gender identity. (This idea is now under attack, as discussed below.) The effects of other changes have yet to fully manifest. This Part addresses key developments that may have dramatic effects on the scope of protections for victims of sexual harassment and the success, or lack thereof, of the legislation enacted in response to #MeToo.

A. MULDROW *AND THE BLURRING OF HARASSMENT AND DISCRIMINATION*

As discussed in Part I, federal employment law makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of key identity traits.[350] Outside the harassment context, courts have long struggled with how to analyze claims that an employee was subject to discriminatory workplace actions, such as transfers or changes in job responsibilities, that do not affect compensation. Many circuits held that a plaintiff pursuing a standard claim of discrimination (known as a disparate treatment case) needed to establish that the challenged action met a heightened threshold of harm, using language such as "significant," "serious," "materially adverse," or "materially significant disadvantage."[351] If a plaintiff had not suffered an adverse action that met the relevant circuit's heightened standard, her only option was to pursue a hostile environment harassment

350 42 U.S.C. § 2000e-2(a)(1).

351 *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 973 n.1 (2024) (collecting standards imposed by various circuits to establish an actionable adverse employment action).

claim, which would require her to prove that she was subject to "severe or pervasive" conduct creating an abusive workplace environment.

In a 2024 decision, *Muldrow v. City of St. Louis,* the Supreme Court rejected the heightened standards that circuits had imposed.[352] The case concerned an allegedly discriminatory transfer to a position with less prestige and fewer perks but the same pay. The Eighth Circuit, following circuit precedent, had deemed the claim not viable. The Supreme Court reversed.[353] It indicated that the statute simply requires a plaintiff to show "*some* harm respecting an identifiable term or condition of employment," but not that the harm is "'significant,' . . . [o]r serious, or substantial, or any similar adjective suggesting that the disadvantage must exceed a heightened bar."[354]

Muldrow was a "discrimination" case, not a "harassment" case. However, the lynchpin of the Court's holding—"The 'terms [or] condition' phrase, we have made clear, is not used 'in the narrow contractual sense'; it covers more than the 'economic or tangible'"—relied upon its interpretation of the statutory language in two canonical harassment cases: *Oncale* and *Meritor Savings Bank.*[355] This is not surprising. It is in harassment doctrine that the Court has addressed the scope of the "terms or conditions" language.

Litigants and lower courts are just beginning to grapple with the significance of *Muldrow*. It is already becoming clear, however, that it further dissolves the putative distinction between "harassment" and (other forms of) "discrimination" under federal employment discrimination laws. As Sandra Sperino explains in a recent article, pending and recent cases consider whether negative evaluations, criticism, being denied training, being required to work alone, and being assigned different job duties within the same job description satisfy the statutory standard as interpreted

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352 *Id.* at 973-74.

353 *Id.*

354 *Id.* at 974. (emphasis added).

355 *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)); *see also* text accompanying notes 53, 56, 63-67 (discussing significance of *Oncale* and *Meritor Savings Bank* in the development of harassment doctrine).

in *Muldrow*.[356] Courts have reached conflicting results in addressing these questions,[357] and further differences are likely to emerge. Notably, these kinds of actions are *also* often part of hostile environment claims, and, not surprisingly, several of these cases allege *both* hostile environment and "regular" disparate treatment.[358]

This emerging caselaw interacts with a related question: whether a hostile environment claim can include discrete actions that could also be challenged as individual disparate treatment. Often, this arises in challenges to the timeliness of claims. Under the continuing violation doctrine, a hostile environment claim is timely so long as any action that contributes to the abusive environment occurs within the statute of limitations.[359] For example, in one recent case, a manager's supervisor subjected her to frequent insults and demeaning comments related to her sex over several years; she subsequently was fired, allegedly for violating the company's reimbursement policy.[360] Even though only the termination was within the statute of limitations, the Second Circuit held the entire hostile environment claim was timely.[361] Several other circuits have reached the same conclusion.[362] In its 2024 harassment guidance, the

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356 *See* Sandra F. Sperino, *When Is Discrimination Harmful?*, 103 WASH. U. LAW REV. 103, 112-13 (2025) (listing examples of harms that courts have been asked to evaluate under the new standard).

357 *See id.* at 114-22 (collecting and discussing caselaw reaching inconsistent results regarding what counts as "negative" and what constitutes a "term," "condition," or "privilege" of employment).

358 *See, e.g.*, McBride v. C&C Apartment Management LLC, 21 Civ. 02989, 2024 WL 4403701 at *1 (S.D.N.Y. Oct. 1, 2024) (observing "the facts underlying McBride's claims" consist of "two overlapping categories": those constituting "alleged employment discrimination" and those "alleged to have created a hostile work environment").

359 *See* National R.R. Corp. v. Morgan, 536 U.S. 101, 114-15 (2002) (explaining the continuing violation doctrine for harassment claims).

360 King v. Aramark Servs., Inc., 96 F.4th 546, 553-55 (2d Cir. 2024).

361 *See id.* at 561 ("A discrete discriminatory act, such as termination, . . . [may] render a hostile work environment claim timely *if it is shown to be part of the course of discriminatory conduct that underlies the hostile work environment claim*.") (emphasis in original).

362 *See, e.g.*, McNeal v. City of Blue Ash, Ohio, 117 F.4th 887, 902 (6th Cir. 2024) (holding a hostile work environment claim may include discriminatory acts that are independently actionable so long as the act "contributes" to the hostile environment); Baird v. Gotbaum, 662 F.3d 1246, 1251-52 (D.C. Cir. 2011) (holding that discrete acts can "simultaneously support different types of Title VII claims" and thus a court cannot "dismiss a hostile work environment claim merely because it contains discrete acts that the plaintiff claims (correctly or incorrectly) are actionable on their own"); *but see* Porter v. Cal. Dep't of Corr., 419 F.3d 885, 892-93 (9th Cir.

EEOC likewise indicated a "hostile work environment claim" can include conduct that is "independently actionable as unlawful discrimination (disparate treatment), as long as it is part of an overall pattern of harassment conduct."[363]

After *Muldrow*, it is likely that *many* hostile environment claims will include discrete events that could also be challenged as "regular" disparate treatment. It may be advantageous for plaintiffs to frame their claims in that manner. As clarified by *Muldrow*, to state a viable discrimination claim, a worker simply must show "some harm" in a term or condition of employment, whereas to succeed in a hostile environment claim, she must show "severe or pervasive" conduct sufficient to establish an abusive environment.[364] At the same time, for plaintiffs who are subject to forced arbitration clauses or nondisclosure agreements, or seek to take advantage of other procedural benefits enacted in the wake of #MeToo, there will often be benefits to framing claims as "harassment." Depending on the context, defendants may challenge either approach, meaning courts will be asked to parse the indistinct—or maybe entirely illusory—line between the two.

More dramatically, *Muldrow* suggests that the "severe or pervasive" requirement could itself be challenged. Litigants could reasonably claim it is no more justifiable than the "serious," "substantial," or "materially adverse" standards that were rejected in *Muldrow.*[365] There is already a well-developed body of caselaw that provides an alternative model. As discussed above, for more than fifteen years, courts applying New York

2005) (holding that including discrete acts in a hostile environment claim would "blur to the point of oblivion" the distinction).

363 *See 2024 EEOC Guidance*, *supra* note 32, at III.C.1. Although the guidance was subsequently rescinded, it was generally understood that this move was based on opposition to its provisions regarding sexual orientation and gender identity, not other aspects of the guidance. *See, e.g.*, Andrea Hsu, *Trump's EEOC Strikes Harassment Guidance Amid Debate Over Transgender Protections*, NPR (Jan. 23, 2026).

364 *See* Sperino, *supra* note 356 at 138 ("[C]ourts will need to grapple with the tensions between the 'severe or pervasive' materiality requirement in harassment doctrine and the holding in *Muldrow* that Title VII does not require materiality").

365 *See id.* at 135 (discussing the extent to which harassment doctrine may be open to challenge due to ambiguities in the doctrine left after *Muldrow*); *see also* Sandra F. Sperino, *Rethinking Discrimination Law* 110 MICH. L. REV. 69, 87 (2011) (arguing that the "severe or pervasive" requirement is not supported by the statutory text).

City's antidiscrimination law have repudiated the distinction between "harassment" and "discrimination" and also specified that "severity" or "pervasiveness" goes to damages, not liability.[366] Under New York City's law, a worker simply needs to show "she has been treated less well than other employees" because of a protected trait, with an affirmative defense for employers that can show the challenged conduct amounted to no more than "petty slights and trivial inconveniences."[367]

It is too soon to predict how lower courts—and ultimately the Supreme Court—will resolve what kinds of conduct satisfy the "some harm" standard announced in *Muldrow* and how it relates to harassment doctrine. If the Court were to reject the distinction between "discrimination" and "harassment," there would be new questions regarding when and how the protections Congress and state legislators passed for "sexual harassment" or "harassment" would apply. Here, too, New York City case law is helpful: as discussed above, under EFAA, courts have consistently recognized that workers alleging the kind of conduct that is typically understood to constitute harassment can seek recourse from forced arbitration.[368] Additionally, if the Court were to reject a distinction between harassment and other forms of discrimination, it might strengthen the argument that comprehensive reform is necessary.

B. EXECUTIVE ORDERS AND AGENCY ACTIONS REPUDIATING "GENDER IDEOLOGY" AND DEI

Immediately upon taking office in January 2025, President Trump issued executive orders that rejected the prior administration's understanding of sex-based discrimination and sought to dismantle both public and private diversity, equity, and inclusion programs.[369] These

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366 *See supra* text accompanying notes 206-209.

367 *See* Williams v. New York City Housing Authority, 872 N.Y.S.2d 27, 76-890 (N.Y. App. Div. 2009) (discussing the legal standard for summary judgment in a sexual harassment claim under New York City's law).

368 *See e.g. supra* sources cited note 270.

369 *See, e.g.*, *Gender Ideology*, *supra* note 37; *Ending Illegal Discrimination*, *supra* note 37; *Ending Government DEI*, *supra* note 37. For a more comprehensive list of Trump's executive orders relating to DEI, see, e.g., Alston & Bird, *Executive Order Tracker: Diversity, Equity, and Inclusion (DEI) Actions* (last updated April 24, 2025), available at

orders, and actions taken by the federal government to enforce them, raise myriad questions that go far beyond the scope of this Article. As of January 2026, much remains in flux. However, it is already clear these developments could have significant ramifications for sexual harassment law and policy, and thus for the legislation that makes up the sexual harassment silo.

As discussed in Part I, in *Bostock v. Clayton County*, the Supreme Court held that discrimination on the basis of sexual orientation or gender identity necessarily constitutes discrimination on the basis of "sex," and thus violates Title VII.[370] In its 2024 harassment guidance, the EEOC indicated that it would interpret Title VII's prohibition on discrimination on the basis of sex to include harassment on the basis of sexual orientation and gender identity.[371] In addition to indicating that epithets, physical assaults, and other such abusive conduct on the basis of these traits could give rise to actionable claims, the Commission also suggested that denying access to restrooms that match an employee's gender identity or persistent misgendering could constitute a hostile environment based on sex.[372] (*Bostock* had affirmatively declined to address how its reasoning would apply to access to restrooms and other single-sex spaces at work.[373]) The provisions in the guidance about bathroom-access and pronouns were quite controversial, and a large coalition of red-leaning states immediately filed a lawsuit in federal court in Tennessee challenging this interpretation;[374] Texas, together with the Heritage Foundation, filed a

https://www.alston.com/en/resources/executive-order-task-force/executive-order-tracker/diversity-equity-inclusion-dei [https://perma.cc/ND6P-N3W2] (last visited October 23, 2025).

370 140 S.Ct. 1731, 1737 (2020).

371 *2024 EEOC Guidance*, *supra* note 32, at II.A.5.c.

372 *Id.*

373 Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020) ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.").

374 *See, e.g.*, Grace Elletson, *Republican AGs Say EEOC Harassment Guidance Oversteps*, LAW360 (May 14, 2024) (describing the lawsuit brought by 18 Republican state attorneys general).

similar suit in the Northern District of Texas.[375] President Trump made opposition to trans rights a central theme of his campaign.[376]

On January 20, 2025, his first full day in office, President Trump issued an executive order that alleges "ideologues who deny the biological reality of sex" have "improperly transform[ed] laws and policies designed to protect sex-based opportunities into laws and policies that undermine them."[377] The order specifies that all Executive Branch agencies will interpret laws and policies that reference "sex" to mean "immutable biological classification as either male or female" and that it "does not include the concept of 'gender identity.'"[378] It specifically disagrees with regulations issued under Biden that followed *Bostock* to "require[] gender identity-based access to single-sex spaces" and calls for "resci[ssion]" of "such parts" of administrative materials—including the EEOC's 2024 harassment guidance—that are inconsistent with the order.[379]

President Trump does not have the power to supersede judicial interpretations of federal laws. Nor is it clear that President Trump has authority to direct the EEOC to take specific actions. The EEOC was created by Congress; it is an independent agency led by a bipartisan group of five commissioners.[380] Commissioners are appointed to staggered five-year terms, a period that necessarily spans two presidential terms. However, in his second week in office, President Trump fired two of the Democratic Commissioners, several years before their terms were scheduled to end.[381] This action was unprecedented—and possibly

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375 *See* Texas v. EEOC, 2024 WL 3833802, Complaint filed Aug. 15, 2024 (N.D. Tx.).

376 *See, e.g.*, Laura Barrón-López, *Why Anti-Transgender Political Ads Are Dominating the Airwaves this Election*, PBS NEWS WEEKEND (Nov. 2, 2024) *https://www.pbs.org/newshour/show/why-anti-transgender-political-ads-are-dominating-the-airwaves-this-election* [https://perma.cc/BW5Y-XCQU] (reporting that in the closing weeks of the campaign, Trump spent more on anti-trans ads than on ads addressing housing, immigration, and the economy combined).

377 *Gender Ideology*, *supra* note 37, at § 1.

378 *Id.* at § 2(a).

379 *Id.* at § 3(f); § 7(c)(iv).

380 *See* 42 U.S.C. § 2000e-4(a) (specifying the EEOC "shall be composed of five members, not more than three of whom shall be members of the same political party").

381 *See, e.g.*, Andrea Hsu, *Fired by Trump, EEOC Official Fears What the Anti-Discrimination Agency Will Become*, NPR (Feb. 9, 2025) (describing the firing of two Democratic commissioners).

illegal.[382] Because there was already a Republican vacancy when Trump took this action, it also left the agency short of a quorum.[383] In October 2025, the Senate confirmed a new commissioner, restoring a quorum, with the agency being led by two Republican appointees and one Democratic appointee.[384]

By removing the Democratic majority, President Trump effectuated a dramatic shift in the EEOC's focus and priorities. In January 2025, commissioner Andrea Lucas, a Republican whom Trump named acting chair, issued a statement indicating that her priorities would include "defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work" and on taking action against "unlawful DEI-motivated race and sex discrimination."[385]

Commissioner Lucas had previously voted against the harassment guidance, specifically opposing the idea that denying transwomen access to women's restrooms and other single-sex spaces could be unlawful harassment.[386] After taking on leadership of the Commission, she quickly announced that she would direct the removal of nongendered prefixes on EEOC forms and all materials "promoting gender ideology" on the

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382 *See* Alexandra Olson & Claire Savage, *Ex-EEOC Commissioner Fired by Trump Files Lawsuit Demanding Reinstatement*, AP (Apr. 9, 2025) (describing lawsuit filed by former commissioner Jocelyn Samuels). Top Democrats in Congress also characterized the firing as unlawful. *See* Cheyanne M. Daniels, *Top Democrats Call for Immediate Reinstatement of Terminated EEOC Commissioners*, THE HILL (Mar. 25, 2025).

383 *See* Olson & Savage, *supra* note 382.

384 S*ee, e.g.,* Alexandra Olson & Claire Savage, *Senate Confirmation of Trump Nominee Cements His Shake-Up of Top Civil Rights Agency*, AP (Oct. 7, 2025).

385 EEOC Press Release, *President Appoints Andrea R. Lucas EEOC Acting Chair* (Jan. 21, 2025), available at *https://www.eeoc.gov/newsroom/president-appoints-andrea-r-lucas-eeoc-acting-chair* [perma.cc/9C4D-6QF6]. Commissioner Lucas was named as chair in November 2025. *See* Claire Savage, *Trump Taps DEI Critic to Lead Workplace Civil Rights Agency*, AP (Nov. 6, 2025).

386 *See* Commissioner Andrew R. Lucas's Statement on EEOC Enforcement Guidance on Harassment in the Workplace, available at *https://www.eeoc.gov/commissioner-andrea-r-lucass-statement-eeoc-enforcement-guidance-harassment-workplace* [perma.cc/RU36-S6PT] (suggesting the interpretation would increase the risk that (cis)women would be subject to harassment or assaulted in workplace restrooms, locker rooms, or showers); *but see, e.g.*, Amira Hasbenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEX. RESEARCH & SOC. POL'Y 70 (2018) (finding that allowing transwomen access to bathrooms does not increase violence against ciswomen).

agency's internal and external websites.[387] The EEOC also moved to dismiss six cases it had been pursuing on behalf of transgender or gender-nonconforming people who faced discrimination or harassment at work, a move former EEOC General Counsel David Lopez characterized as a "complete abdication of responsibility."[388]

In the meantime, the states' challenges to the harassment guidance continued to progress. The case brought by Texas and the Heritage Foundation was filed in Amarillo, Texas, where the sole federal court judge is a well-known conservative, Matthew Kacsmaryk.[389] In May 2025, Judge Kacsmaryk vacated the provisions in the harassment guidance relating to sexual orientation and gender identity, on the grounds that the EEOC's interpretations exceeded its authority under the Administrative Procedure Act.[390] Unsurprisingly, given the changes in EEOC leadership, the Commission did not appeal the decision. Furthermore, in January 2026, the newly-reconstituted EEOC formally rescinded the guidance.[391] Nonetheless, individuals may continue to claim that harassment based on gender identity or sexual orientation constitutes discrimination on the basis of sex under Title VII. The EEOC's conclusions in the 2024 guidance were based on extensive caselaw finding such harassment to be actionable,[392] and those precedents remain applicable, notwithstanding the EEOC's recent reversal.[393]

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387 *See* EEOC Press Release, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan. 28, 2025), available at *https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace* [perma.cc/U59U-RKKU].

388 *EEOC Seeks to Drop Gender Discrimination Case After Trump's Executive Order*, NPR (Feb. 15, 2025), *https://www.npr.org/2025/02/15/nx-s1-5298679/eeoc-gender-discrimination-case-trump-order* [perma.cc/7SDQ-2MUF].

389 *See, e.g.*, Jacqueline Thomsen, *Shopping for the Judge You Want Honed to Perfection in Texas*, BLOOMBERG LAW (May 9, 2024) (discussing how conservative groups file in Amarillo to "tactically ensure[]" their cases go to Judge Kacsmaryk).

390 Texas v. EEOC, 785 F. Supp. 3d 170 (N.D. Tx. May 15, 2025).

391 *See* EEOC Commission Votes to Rescind Harassment 2024 Harassment Guidance, *supra* note .

392 *See 2024 EEOC Guidance*, *supra* note 32, at notes 36-45 (citing numerous circuit and district court cases supporting its application of *Bostock* to harassment claims generally, as well as the particular conclusions regarding bathroom access and misgendering).

393 If the EEOC were to promulgate *new* guidance indicating that harassment on the basis of gender identity or sexual orientation is not within the ambit of Title VII, courts could

Further complicating matters, however, in June 2025, in *United States v. Skrmetti*, the Supreme Court held that legislation banning certain forms of gender-affirming medical care for children with gender dysphoria does not constitute sex discrimination under the Equal Protection Clause.[394] The majority distinguished its constitutional analysis from its interpretation of Title VII in *Bostock*.[395] Nonetheless, there are already conflicting opinions on the extent to which the Court's discussion of *Bostock* in *Skrmetti* should affect the resolution of claims relating to discrimination on the basis of gender identity under Title VII.[396]

The competing interpretations of how Title VII's prohibition on discrimination on the basis of "sex" applies to harassment based on gender identity or sexual orientation will certainly continue to be litigated. The resulting case law will modify understandings of what constitutes "sexual harassment" and the reach of the laws within—and outside—the sexual harassment silo. Additionally, the extraordinarily negative rhetoric that President Trump and many of his allies have used in their campaign against "gender ideology extremism" could spur harassment and discrimination against trans persons and their allies. And the ramifications could extend far beyond the gender identity context. In his executive order, President Trump asserts that biological sex is "real" and that the sexes are "not changeable."[397] Such language could signal resistance to the longstanding recognition that requiring conformance with traditional sex

reasonably reject claims they should defer to that interpretation based on its inconsistency with the agency's past interpretation, *cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259 (2024) (noting weight accorded an agency interpretation varies in part based on "its consistency with earlier and later pronouncements") (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), as well as the likely tension with the Court's reasoning in *Bostock*.

394 *See* United States v. Skrmetti, 145 S. Ct. 1816 (2025).

395 *See id.* at 1834-35.

396 *Compare, e.g.*, Lange v. Houston County, 152 F.4th 1245, 1251, (11th Cir. 2025, *en banc*) (concluding, in a case challenging an insurance policy that prohibited coverage for sex change operations, that the Court "rejected Lange's interpretation of *Bostock* in [*Skrmetti*])", *with id.* at 1255 (Newsom, J., concurring) (agreeing that Lange's particular claim was foreclosed but emphasizing that Title VII and the Fourteenth Amendment require separate analyses), *and id.* at 1279 (Pryor, J., dissenting) (concluding *Bostock's* "unequivocal statement that for Title VII purposes 'discrimination based on . . . transgender status necessarily entails discrimination based on sex'" should control the case and mean that the policy was facially discriminatory).

397 *Gender Ideology*, *supra* note 37, at § 1.

roles can violate statutory and constitutional protections.[398] This anti-stereotyping principle has been fundamental to modern antidiscrimination law, and its erosion would undermine sex equality principles generally.[399]

The effects of the anti-DEI orders on sexual harassment will likely be less direct than the "gender ideology" debates, but still potentially significant. In his executive order, President Trump asserts that DEI initiatives "use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion'."[400] (DEI professionals disagree with this characterization of their work.)[401] The order directs agencies to identify "the most egregious and discriminatory DEI practitioners" in the industries they regulate and to suggest "up to nine potential civil compliance investigations."[402] It also revokes Executive Order 11246, an order requiring federal contractors to take affirmative steps to comply with antidiscrimination law that had been in place since the 1960s.[403]

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398 See, e.g., United States v. Virginia, 518 U.S. 515, 550 (1996) (providing that under the Constitution, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description") (emphasis original); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality) (interpreting Title VII to mean employers can no longer "evaluate employees by assuming or insisting that they match the stereotype associated with their group"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982) (explaining that gender-based classifications must be "applied free of fixed notions concerning the roles and abilities of males and females").

399 *Cf. generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U.L. REV. 83 (2009).

400 *Ending Illegal Discrimination*, *supra* note 37, at § 1.

401 *See, e.g.*, Kiara Alfonseca, *A Look at What DEI Means Amid Trump Executive Orders*, ABC NEWS (Jan. 24, 2025), *https://abcnews.go.com/US/dei-programs/story?id=97004455* [https://perma.cc/2ZEN-UDF3] (referencing DEI professionals who explained "DEI is not about hitting diversity hiring quotas, . . . since such quotas are illegal").

402 *Ending Illegal Discrimination*, *supra* note 37, § 4(b).

403 *Id.* at § 3(b)(i).

The Trump Administration quickly shut down the government's DEI offices,[404] and many private companies did so as well.[405] In fact, companies had already begun to make this shift; in summer 2024, SHRM, the leading human resources professional organization, made headlines when it removed the reference to "equity" in its model policies.[406] That said, other large companies have reaffirmed their commitment to DEI, even after the Trump executive orders.[407]

DEI offices are typically charged with activities that *encourage* compliance with civil rights laws, including training that can reduce harassment.[408] President Trump's order and the subsequent actions by his administration do not—and cannot—erase the legal mandates passed in the wake of #MeToo that require sexual harassment policies and trainings.[409] Nor do they undo companies' interest, from a liability perspective, in being able to show they've taken preventative measures to

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404 *See*, e.g., Andrea Shu, *Trump calls DEI programs 'illegal.' He plans to end them in the federal government*, NPR, https://www.npr.org/2025/01/23/nx-s1-5271588/trump-dei-diversity-equity-inclusion-federal-workers-government [https://perma.cc/7DGW-2DKC](Jan. 23, 2025) (discussing memo to agency heads requiring them to place all employees of DEIA offices on paid leave and to develop a plan within a week for laying them off).

405 *See, e.g.*, Conor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions,': Here Are All the Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025), *https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/* [https://perma.cc/4WAH-MRXT] (covering companies, including Google, Target, Amazon, and Meta, that had ceased DEI initiatives).

406 *See, e.g.*, Sheila Callahma, *Does SHRM's Removal of 'Equity' from Inclusion, Equity and Diversity Point to a New Strategy or Signal Something Much Bigger?* FORBES (Jul. 28, 2024), *https://www.forbes.com/sites/sheilacallaham/2024/07/28/does-shrms-removal-of-equity-from-inclusion-equity-and-diversity-point-to-a-new-strategy-or-signal-something-much-bigger/* [https://perma.cc/JZV2-7P4U] (describing the change and the controversy it evoked among SHRM's membership).

407 *See, e.g.*, Ryan Adamczeski & Eva Berry, *These 25 Major Companies Still Have DEI Practices*, ADVOCATE (Dec. 23, 2025), https://www.advocate.com/news/companies-keeping-dei#rebelltitem12 [https://perma.cc/U2RM-AT6F] (identifying Costco, Apple, E.l.f. Beauty, and Delta and others).

408 *See, e.g.*, Alex Miller & Natasha Nicholson, *The Surprising Ways that DEI Complements Harassment Prevention Training*, NATIONAL L. REV. (Sept. 10, 2021) (describing how harassment and DEI training can be separate but complementary or combined into a single training). For a helpful overview of DEI and the interactions between #MeToo and Anti-DEI movement, see generally Nicole Buonocore Porter, *#MeToo vs. Anti-DEI*, __ Wayne St. L. Rev. __ (forthcoming 2026) (draft on file with author) (similarly concluding that rolling back of DEI efforts may increase workplace harassment).

409 *See supra* subsection II.B.2.

address harassment.[410] However, the backlash against DEI means that it is likely that sexual harassment trainings and policies will focus narrowly on compliance, rather than addressing larger structural inequities or more subtle forces of discrimination and exclusion, like implicit bias or microaggressions.

More generally, research suggests that harassment flourishes in environments with little diversity and significant power imbalances.[411] It is not clear how effective DEI was in actually achieving diverse and inclusive workplaces, and it is perhaps notable that some leaders on the political left indicated support for President Trump's efforts to dismantle the programs.[412] DEI trainings sometimes felt like simply checking off boxes. But the movement also encompassed more substantial reforms, such as pay equity audits or building pipelines to recruit from underrepresented communities.[413] To the extent President Trump's orders, and agency actions to enforce them, simply preclude "illegal DEI," many policies supporting workplace diversity should be unaffected.[414] However,

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410 *See supra* text accompanying note 60. In recent years, there have been a handful of cases claiming anti-harassment trainings that use offensive language regarding white supremacy or white privilege or mandate acceptance of LGBTQ employees can discriminate constitute race-based or religious-based discrimination. See Porter, *supra* note 408, at *15-18 (collecting and discussing such cases). Most of these cases have failed to survive a motion to dismiss. *See id*. Employers can certainly provide effective anti-harassment trainings that do not invite "reverse" discrimination claims of this type.

411 *See, e.g.*, *2016 EEOC Report*, *supra* note 106, at 25, 28 (gathering studies); *see also*, e.g., Porter, *supra* note 408, at *21-25 (making similar points).

412 *See generally* Noam Scheiber, *As Trump Attacks D.E.I., Some on the Left Approve*, N.Y. TIMES (Feb. 6, 2025), *https://www.nytimes.com/2025/02/06/business/economy/trump-dei-democrats-left-unions.html* [https://perma.cc/TAX6-2V8D] (describing statements from left-leaning activists, authors, and candidates suggesting union organizing and more general workers' advocacy may be more effective at addressing inequality than companies' DEI initiatives).

413 *See, e.g.,* Ginger Christ, *Amid DEI Uncertainty, What Happens to Pay Equity?*, HRDIVE (Apr. 24, 2025), https://www.hrdive.com/news/dei-uncertainty-pay-equity/746281/ [https://perma.cc/GY43-9PBC] (advocating companies continue pay equity audits and strategies to ensure "diverse candidate pool[s]" and quoting an advocate expressing concern that the "elimination of DEI initiatives . . . [will] dismantle[e] the very tools . . . [used] to identify and address the widening pay gap or segregation into lower paid jobs").

414 *See, e.g.,* Rachel Arnow-Richman, Stephanie Bornstein, Tristin Green & Deborah Widiss, *The Legal DEI Project* (June 2025), *https://www.lls.edu/legaldeiproject/* [https://perma.cc/UY6Q-JVKL] (website resource providing legal information about DEI initiatives that remain "lawful and helpful in promoting fair, nondiscriminatory workplaces"); *see also* Alixandra Pollack, David Glasgow, Tara Van Bommel, Christina Joseph & Kenji

given the vagueness of this mandate, employers may abandon all initiatives designed to mitigate barriers to opportunity, even those that would clearly be legal, rather than risk any potential negative consequences from the administration.[415]

C. RED STATE / BLUE STATE DIVERGENCE IN EMPLOYMENT LAW

When #MeToo went viral, lawmakers across the country in both conservative and liberal states passed laws to address sexual harassment and assault. But as explained in Part II, "red" states were more likely to pass protections that were *limited* to sexual harassment; "blue" states, by contrast, were more likely to enact reforms that addressed substantive shortcomings in harassment or discrimination law generally.[416] At the federal level, the reforms that could garner sufficient bipartisan support to be enacted were specific to sexual harassment and sexual assault; more general bills stalled.[417] In this respect, #MeToo legislation is part of a more general divergence of state employment laws. Addressing these reforms in detail is beyond the scope of this Article, but harassment does not exist in a vacuum. Other employment laws make workers more or less vulnerable to harassment—and across a range of policies, workers in generally liberal states have much more robust protections than workers in generally conservative states. These differences may become even more pronounced as states are likely to vary in their response to new policies on the federal level.

Most directly relevant to the contested meaning of sexual harassment, twenty-three states, plus Washington, D.C., explicitly include sexual orientation and gender identity as protected traits in their

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Yoshino, *Risks of Retreat: The Path Forward*, CATALYST & MELTZER CTR. FOR DIVERSITY, INCLUSION, AND BELONGING (June 11, 2025), *https://www.catalyst.org/insights/2025/risks-of-retreat-path-forward* [https://perma.cc/N2SG-MHPQ] (providing advice to companies to help assess legal and other risks associated with both maintaining and rolling back DEI initiatives).

415 *See, e.g.*, Hsu, *supra* note 381 (quoting fired EEOC Commissioner Jocelyn Samuels stating that the vagueness of the order means "employers may be chilled").

416 For an overview of "red" states and "blue" states in recent elections, *see, e.g.*, Rakish, *supra* note 169, *2024 Presidential Election Results*, *supra* note 169.

417 *See supra* text accompanying notes 232-234.

antidiscrimination laws.[418] These states are clustered in the Northeast, West Coast, and upper Midwest. These statutory provisions remain fully enforceable, notwithstanding the federal government's repudiation of so-called "gender ideology."[419] This means that employers in these states need to address harassment or discrimination on these grounds, including potentially ensuring trans employees can access sex-designated spaces at work in accordance with their gender identity. Other employment policies may also be implicated, such as ensuring equal access to health care needs or addressing persistent misgendering, slurs, or insults. As a prominent management-side law firm observed in response to the EEOC's implementation of Trump's executive order on gender ideology, employers may face "potentially conflicting obligations under federal and state law."[420] They advise that employers should consult with counsel to determine how to proceed, but the answers will be murky at best.

There are other notable divergences in employment policies among states that may have indirect effects on harassment. More than half of the states have enacted minimum wages that are higher than the federal standard; several require more than double the federal minimum of $7.25 per hour.[421] Raising the minimum wage can mitigate the economic distress that can make workers particularly powerless to respond to harassment. Eight states now require employers to pay *all* employees at least the full federal minimum wage, regardless of tips.[422] This provides a range of

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418 *See* HUMAN RIGHTS CAMPAIGN, STATE MAPS—EMPLOYMENT, https://www.hrc.org/resources/state-maps [https://perma.cc/GJB9-LPRB] (listing these states).

419 According to Human Rights Campaign, nine additional states' employment agencies accepted complaints based on sexual orientation or gender identity because they adopted *Bostock*'s rationale into state law. *See id.* It's unclear how the federal government's reversal of policy will affect practices in these states.

420 *See* Jim Paretti, *EEOC Acting Chair Issues Statement on Gender Identity, Removes Guidance on Transgender Issues*, LITTLER: ASAP (Jan. 29, 2025), https://www.littler.com/news-analysis/asap/eeoc-acting-chair-issues-statement-gender-identity-removes-guidance-transgender *[perma.cc/6EPL-U6SH]* (summarizing key guidance for employers in light of the executive order).

421 *See* U.S. DEP'T OF LABOR, STATE MINIMUM WAGE LAWS (July 31, 2025), https://www.dol.gov/agencies/whd/minimum-wage/state [https://perma.cc/4P5F-JHZK] (listing state minimum wages).

422 The Rippling Team, *Minimum Wage for Tipped Employees by State: Guide for Employers,* RIPPLING BLOG (Dec. 4, 2024), https://www.rippling.com/blog/minimum-wage-for-

benefits, including potentially making employees less vulnerable to harassment by customers.

Thirteen generally liberal-leaning states, plus the District of Columbia, have passed comprehensive paid family and medical leave laws that allow workers to take time off work to care for their own or a family member's serious health condition.[423] Eighteen states, and the District of Columbia, require employers to provide paid sick leave for short term illnesses.[424] Virtually all of these state laws also provide "safe leave," which is paid time off for victims of domestic violence, sexual assault, and stalking.[425] Collectively, these laws could make it much easier for victims of workplace harassment or assault to take time off work to recover, receive counseling or medical treatment, or otherwise address the injury to themselves.

Legislative action can also make workers *more* vulnerable to harassment. In recent years, several red-leaning states have passed laws that weaken the restrictions on child labor.[426] Research establishes that younger workers are particularly likely to be victims of harassment;[427] this suggests the rollback of child labor laws, which will likely increase youth employment, may increase the prevalence of workplace harassment. New laws that lift restrictions on children working in establishments that serve

tipped-employees [https://perma.cc/Q2E9-SRZV] (advising employers on how to comply with state minimum wage laws, including in states that require the wage to be met without tips).

423 *See* Molly Weston Williamson, *The State of Paid Family and Medical Leave in the U.S. in 2025*, CENTER FOR AMERICAN PROGRESS (Jan. 15, 2025) (identifying states with these policies).

424 *See* Sophia M. Mitchell, *State Paid Sick Leave Laws*, U.S. DEP'T OF LABOR ISSUE BRIEF (Dec. 2024), https://www.dol.gov/sites/dolgov/files/WB/StatePaidSickLeaveLaws.pdf [https://perma.cc/6VXP-LCVG] (listing the states with this requirement).

425 *Id*; *see also* U.S. OFFICE OF PERSONNEL MANAGEMENT, FACT SHEET: TIME OFF FOR SAFE LEAVE PURPOSES, https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/time-off-for-safe-leave-purposes/ [*https://perma.cc/53PQ-4CNE*] (defining "safe leave").

426 *See* Andrew Hammond & Helen Hershkoff, *Retaining and Expanding Child Labor Protections: A State Constitutional Approach*, ___ NW. L. REV. __, at *5-8 (forthcoming 2026) (draft on file with author) (detailing laws passed recently that eliminate permit requirements, restrictions on hours worked, and limitations on the types of work that children may perform). Hammond and Hershkoff also discuss reforms recently passed by blue-leaning states that *enhance* child labor protections. *See id.* at *9-11.

427 *See, e.g.*, *2016 EEOC Report*, *supra* note 106, at 27 (gathering research).

alcohol[428] may be particularly concerning in this respect, as employees in bars, and the restaurant industry more generally, often face significant harassment from both other coworkers and from customers.[429]

Similarly, state and local laws and policies that authorize cooperation with federal immigration enforcement place undocumented workers at heightened risk of harassment. Undocumented workers are officially protected by antidiscrimination law.[430] Nonetheless, sexual harassment and sexual assault, as well as other violations of workplace law, are particularly prevalent among undocumented workers.[431] Undocumented workers reasonably fear that if they complain, employers will retaliate against them by reporting them to federal immigration officials.[432] The Trump administration's aggressive immigration enforcement raises this risk nationwide,[433] but it is particularly pronounced in conservative states that actively work with the federal government to identify and deport undocumented immigrants.[434] More generally, the heated rhetoric around undocumented immigrants—or "illegal aliens"—may spur harassment on the basis of national origin, race, or religion.

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428 *See* Hammond & Hershkoff, supra note 426 (discussing laws passed in North Carolina, Tennessee, and Iowa loosening restrictions on children working in establishments that sell alcohol).

429 *See, e.g.*, Stefanie K. Johnson & Juan M. Madera, *Sexual Harassment Is Pervasive in the Restaurant Industry. Here's What Needs to Change*, HARV. BUS. REV. (January 18, 2018).

430 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION, VI.B (Nov. 18, 2016) ("A worker's immigration status is not relevant to the underlying merits of a discrimination charge.")

431 *See, e.g.*, Tom Spiggle, *Why Workplace Abuse Plagues Undocumented Workers*, FORBES (Dec. 10, 2021), https://www.forbes.com/sites/tomspiggle/2019/08/22/why-workplace-abuse-plagues-undocumented-workers/[https://perma.cc/R3AY-2ZU9] (reporting on the additional power that threats of deportation can give abusive employers).

432 *See id.*

433 *See, e.g.*, Muzaffar Chishti & Valerie Lacarte, *U.S. Immigrant Detention Grows to Record Heights under Trump Administration*, MIGRATION POLICY INSTITUTE (Oct. 29, 2025),), https://www.migrationpolicy.org/article/trump-immigrant-detention [perma.cc/E8CU-VBFE] (reporting number of noncitizens in detention "has grown to the highest level in history").

434 See IMMIGRANT LEGAL RESOURCE CENTER, *State Map on Immigration Enforcement 2024* (Nov. 8, 2024), available at https://www.ilrc.org/state-map-immigration-enforcement-2024 [perma.cc/F3PC-PXBE] (showing numerous red-leaning states in the South, Midwest, and Great Plains mandate locale agencies participate in federal immigration enforcement); *see also* Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE (Nov. 13, 2019)*, *https://www.ilrc.org/resources/national-map-local-entanglement-ice* [perma.cc/5FYJ-4S9G].

D. REBOOTING WORKPLACE HARASSMENT PREVENTION—AGAIN

Almost a decade ago, on June 20, 2016—before President Trump was elected to his first term, before #MeToo went viral, before the murder of George Floyd and the corporate embrace of DEI, President Trump's reelection and the dismantling of DEI—Democratic EEOC Commissioner Chai Feldblum and Republican EEOC Commissioner Victoria Lipnic welcomed their colleagues, members of the EEOC staff, and the public to a meeting entitled "Rebooting Workplace Harassment Prevention."[435] The event marked the public release of a report they had authored on the prevalence of harassment in the workplace and best practices for addressing it.[436]

Feldblum and Lipnic had served as co-chairs of an EEOC task force on harassment.[437] The project had stemmed from their surprise at how many charges alleging harassment were filed with the EEOC, despite "an entire cottage industry of workplace compliance and training adopted and encouraged for thirty years."[438] The task force included management-side and employee-side attorneys, academics, and representatives of advocacy groups.[439] Over a twelve-month period, they reviewed existing research and heard testimony from more than thirty witnesses, and reviewed public comments.[440] The task force then worked collectively, drawing from their own on-the-ground experience as well as the testimony to synthesize recommendations. The report itself was authored only by Feldblum and Lipnic. In the June 2016 meeting, several members of the task force indicated they believed this approach created a space for candid and

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435 *See* EEOC, Meeting of June 20, 2016 – Rebooting Workplace Harassment Prevention (transcript available at *https://www.eeoc.gov/meetings/24095/transcript* [https://perma.cc/7PZ5-DWJK]) [hereinafter June 20, 2016 Meeting].

436 *2016 EEOC Report*, *supra* note 106.

437 EEOC, Meetings of the Select Task Force on the Study of Harassment in the Workplace, *https://www.eeoc.gov/meetings-select-task-force-study-harassment-workplace* [https://perma.cc/E68H-ZDQH].

438 2016 EEOC Report, *supra* note 106, at ii.

439 *See* Press Release, EEOC, EEOC to Study Workplace Harassment (Mar. 30, 2015) (available at *https://www.eeoc.gov/newsroom/eeoc-study-workplace-harassment* [https://perma.cc/7WZ4-U2RG] (listing members).

440 *See* EEOC, Meetings of the Select Task Force on the Study of Harassment in the Workplace, *https://www.eeoc.gov/meetings-select-task-force-study-harassment-workplace* [https://perma.cc/E68H-ZDQH](listing meetings and their panelists and witnesses).

constructive dialogue about the problem, freeing members from feeling obligated to "represent" a particular constituency or perspective.[441]

The report offers an extremely helpful overview of (then-)existing research on the prevalence of harassment. It explains the taxonomy used to describe sexual harassment and that it includes non-sexualized "gender harassment."[442] It also emphasizes that harassment on the basis of protected traits other than sex is common and merits more attention in research, trainings, and policies.[443] It shows how harassment imposes both direct and indirect costs on employers, as well as on victims.[444] And it identifies organizational "risk factors" that can increase the likelihood of harassment, including lack of diversity in the workplace, cultural and language differences, workplaces where some workers do not conform to workplace norms, and workplaces with significant power disparities.[445]

When it comes to prevention, the report is clear. Training, the authors conclude, is "an essential component of an anti-harassment effort," but training is unlikely to be effective on its own—and in some circumstances, isolated training may be counterproductive.[446] Rather, training must be part of a "holistic effort" to address harassment.[447] There needs to be leadership from the top of the organization, and employees at all levels of the organization must be held accountable for ensuring complaints are

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441 *See* June 20, 2016 Meeting, *supra* note 435, testimony of Joseph Sellers ("[T]he views that were expressed often were not associated with the views you would expect of the people when they left the room."); testimony of Rae Vann ("Instead of seeing the respective constituencies or stakeholder representatives retreating to their respective corners, you saw people really engaging in candid and tough discussions and debates," which provided an opportunity to "try to come to solutions.").

442 *See EEOC 2016 Report*, *supra* note 106, at 9 (defining gender harassment and gathering studies that use this terminology).

443 *See id.* at 11-14 (describing research on harassment based on race, ethnicity, disability, age, and religion, as well as "intersectional" harassment based on multiple identities).

444 *See id.* at 17-24 (detailing the financial, personal and managerial costs arising from harassment in the workplace).

445 *See id.* at 25-29.

446 *Id.* at 45; *see also id.* at 49 ("[S]ensitivity training (as currently done) in some instances might be mildly positive, often is neutral, and in some circumstances actually may be counterproductive.").

447 *Id.* at 45.

investigated fairly, complainants do not face retaliation, and perpetrators of harassment receive prompt and proportionate discipline.[448]

The report recommends that in addition to standard anti-harassment "compliance training," employers should consider training bystanders to intervene effectively when they observe harassing conduct and workplace civility training—that is, training that focuses on "what employees and managers *should* do, rather than on what they should not do."[449] Specifically with respect to civility training, Feldblum and Lipnic note that because it "appeal[s] to all individuals in the workplace, regardless of social identity," it "might avoid some of the resistance met by interventions exclusively targeting harassment."[450] This yields general benefits and can reduce harassment. As Lilia Cortina, a leading researcher and a witness for the task force, put it, "incivility acts as a sort of gateway drug" to more overt identity-based harassment.[451]

In the months following the report's release, #MeToo increased its salience—but the legal reforms enacted in response to #MeToo largely failed to incorporate its insights. Most obviously, despite the report's conclusion that training on its own is unlikely to be effective, one of the most common legislative responses to #MeToo was to mandate trainings.[452] Likewise, despite the report's insistence that it was essential to consider and address harassment on the basis of all protected traits, many of the new laws addressed only sexual harassment.[453] And finally, despite the report's recognition that sex-based harassment frequently includes non-sexualized, "gender-based" harassment, many states adopted definitions of harassment that focus narrowly on sexualized conduct.[454]

The developments in intervening years underscore the importance of taking a more comprehensive approach to harassment prevention, and particularly the constructive potential of efforts to promote workplace

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448 *See id.* at 31-37 ("Over and over again . . . we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. . . . [and] this leadership must come from the very top of the organization.")

449 *Id.* at 54–55.

450 *Id.* at 55.

451 June 20, 2016 Meeting, *supra* note 435, testimony of Lilia Cortina.

452 *See supra* subsection II.B.2.

453 *See generally supra* Part II.

454 *See supra* subsection II.B.3.

civility. Despite #MeToo legal reform, harassment remains prevalent.[455] Some research suggests that #MeToo may have *decreased* opportunities for women by making men less likely to include women in work-related social activities or have one-on-one meetings with women.[456] President Trump's executive order dismantling DEI suggests that future harassment trainings will focus even more narrowly solely on compliance. And the backlash to DEI (and arguably to #MeToo as well) underscores the resentment that policies perceived as providing "special" treatment can engender. At the same time, employers in states that explicitly prohibit discrimination based on gender identity or sexual orientation will need to take steps to address harassment on the basis of those traits, while also complying with shifting conceptions of what constitutes sex discrimination under federal law.[457] In short, the tensions of a deeply divided society will manifest in myriad ways.

Notably (and perhaps not coincidentally), in 2024, at around the same time that SHRM, the human resource professionals' organization, was suggesting companies drop the "E" from DEI,[458] it launched a campaign to help promote "civility" in the workplace.[459] The organization announced a "1 Million Civil Conversations"[460] initiative and released a

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455 *See, e.g.*, Sydney Cone, Kate Gold, Atoyia Harris & Sehreen Ladak, *Workplace Conduct Still Needs Improvement After #MeToo*, BLOOMBERG LAW (Oct. 24, 2022) (concluding "notwithstanding significant corporate and legislative efforts, statistics from the [EEOC] suggest that instances and severity of workplace sexual harassment have not dramatically changed in the last five years").

456 *See, e.g.*, *The #MeToo Backlash,* HARV. BUS. REV. (Sept.-Oct. 2019)(reporting that surveys conducted after the #MeToo movement found that 19% of men were reluctant to hire attractive women and 27% avoided one-on-one meetings with women); Anna Brown, *More Than Twice As Many Americans Support Than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sept. 29, 2022) (reporting that a significant percentage of men reported #MeToo made it harder for them to know how to interact with women at work).

457 *See supra* text accompanying notes 418-420.

458 *See supra* text accompanying note 406.

459 *See* SHRM Press Release, *Most American Workers Experience Incivility in the Workplace; Divisive Dialogue Undermines Inclusion and Employee Wellbeing* (2024), *https://www.shrm.org/about/press-room/most-american-workers-experience-incivility-in-the-workplace* [perma.cc/7NHH-VW63] (announcing SHRM's "Civility at Work" campaign and urging employers to promote workplace civility to counter divisive dialogue).

460 *Id.*

toolkit for promoting respect within workplaces.[461] The project was based on research that showed that more than half of U.S. workers reported "experiencing or witnessing incivility at work" *within the previous week*—and that workplaces with high levels of incivility were more likely to have high turnover and decreased collaboration, hurting workplace productivity.[462]

The SHRM toolkit suggests conducting regular surveys to assess incivility within workplaces, welcoming constructive dissent, and establishing clear lines of accountability.[463] It also makes recommendations that can reduce the risk of discrimination or harassment within workplaces—such as fair decision-making processes, a fair grievance policy, and responding to workplace bullies—without linking those concepts to antidiscrimination or antiharassment policies.[464] In this sense, promoting workplace civility might be considered a "universal" approach to minimize harassment and discrimination without engendering backlash, akin to providing universal supports as an alternative to accommodation mandates based on specific identity traits,[465] or framing constitutional guarantees in terms of individual dignity rather than discrimination.[466] That said, civility policies must be structured and implemented without interfering with employees' right to organize, as protected by the National Labor Relations Act.[467]

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461 SHRM Toolkit, *Managing Workplace Conflict*, *https://www.shrm.org/topics-tools/tools/toolkits/managing-conflict-in-the-workplace* [perma.cc/6NTA-FYS9].

462 *See* Jesse Stanchak, *The Impact of Civility on Organizational Success*, SHRM (Mar. 6, 2024) (citing SHRM research with these findings).

463 *See* SRHM Toolkit, *supra* note 461.

464 *See id.*

465 *See generally, e.g.*, NICOLE B. PORTER, THE WORKPLACE REIMAGINED: ACCOMMODATING OUR BODIES AND OUR LIVES (2023) (suggesting universal accommodations for workers).

466 *Cf.* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750 (2011) (arguing liberty-based dignity claim "offers a way for the Court to 'do' equality in an era of increasing pluralism anxiety").

467 In recent years, there have been significant swings in how the NLRB assesses the legality of civility policies. *Compare Stericycle*, 372 NLRB No. 113 at 2 (2023) (providing policies are impermissible if they would have a "reasonable tendency" to chill protected activity); *with The Boeing Co.*, 365 NLRB 154 at 1548 (2017) (providing policies are generally permissible, so long as they were not adopted in response to protected activity or applied to protected activity). Under President Trump, the NLRB likely will return to the *Boeing* approach. That said, shortly after taking office, President Trump removed a member of the Board, and it

I am not suggesting that a policy promoting civility should supplant existing anti-discrimination protections or the legal remedies that back them up. Nor do I think an isolated training on "civility" will meaningfully shift conduct any more than an anti-harassment training, on its own, ends harassment. But if workplace leaders consciously model civility and respect, productively manage conflict, fairly investigate complaints, and respond promptly to offensive or bullying behavior regardless of whether it is based on a protected identity trait, the result could be a decrease in harassment—and a more productive and welcoming workplace for everyone.

CONCLUSION

In response to #MeToo, Congress and state legislatures passed dozens of laws providing special protections to victims of sexual harassment, constructing what I have termed the "sexual harassment silo." These laws create new distinctions between sexual harassment and harassment or discrimination on the basis of race, national origin, and other key identity traits. Advocates understandably seized the opportunity to address the obvious shortcomings of existing sexual harassment law, but they also hoped the new laws would lay the groundwork for more comprehensive reform. That has been true in some liberal leaning states, but in more conservative jurisdictions, and under federal law, efforts to expand protections have stalled.

More subtly—but potentially also more dangerously—many of the new laws define sexual harassment unduly narrowly, focusing only on sexualized conduct. Research has long shown that non-sexualized sex-based harassment, including insults, sexually-vulgar terms of address, isolation, and sabotage of work, is more common than unwanted sexual propositions or touching. Under prior caselaw, it was well established that both sexualized and non-sexualized conduct can constitute unlawful sexual harassment, even though courts often imposed an unreasonably high bar to show that the harassment was "severe or pervasive." The

lacked a quorum until December 2025. *See* Parker Purifoy, *NLRB Regains Quorum as Senate Confirms Trump Labor Slate*, BLOOMBERG LAW (Dec. 18, 2025).

#MeToo legislation thus may have the unintended effect of narrowing the conception of sexual harassment, even as it sought to provide more robust support to victims. That said, immediately upon taking office, President Trump repudiated what he calls "gender ideology extremism" and diversity, equity, and inclusion programs. These executive orders, and the actions federal agencies are taking to implement their directives, may lead to seismic shifts in the understanding of sex discrimination. Unlike prior administrative action, the #MeToo laws cannot be simply swept away by presidential fiat; accordingly, even though they are limited in some respects, the laws passed in response to #MeToo may help safeguard key protections for victims of harassment.