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REEXAMINING REASONABLENESS: Modernizing the *Ellerth/Faragher* Defense

Diane Y. Byun

ABSTRACT

Named after the two 1998 U.S. Supreme Court decisions that established it, the *Ellerth/Faragher* defense is an affirmative defense generally available to employers who would otherwise be held liable for Title VII claims of supervisor harassment. If the supervisor's behavior does not involve an adverse employment action, the employer may avoid liability if it can demonstrate that: (1) the employer exercised reasonable care to prevent and promptly correct unlawful harassment in the workplace, and (2) the aggrieved employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. As employers sought to implement measures that demonstrated reasonable care, sexual harassment training and anonymous phone hotlines emerged as common strategies to assert this affirmative defense. In the contemporary workplace, where digital communication reigns and remote working becomes the new norm, such mechanisms are both archaic and ineffective in the prevention and correction of sexual harassment. This Comment critically analyzes the federal judiciary's low threshold for "reasonableness" under the *Ellerth/Faragher* defense, considering specifically interdisciplinary understandings of the dynamics that motivate sexual harassment and rapid advances in technology. In addressing the law's outdated understanding of reasonableness, the Comment proposes the federal judiciary should (1) reexamine what qualifies as reasonable in the #MeToo era, and (2) strongly consider arguments in favor of "reasonable" including more stringent standards of care for employers reflecting technological advancements. So long as the *Ellerth/Faragher* defense remains the law, it is incumbent upon the federal judiciary to seriously consider evidence demonstrating what is reasonable in the modern workplace. The goal of this Comment is to suggest a comprehensive interdisciplinary approach with real-world impact—to

prevent sexual harassment, rather than to correct—which carries the added benefit of mitigating employer liability.

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits unlawful discrimination in the workplace, including discrimination based on sex.¹ Notably, Title VII contains no explicit reference to sexual harassment.² In 1986, however, the U.S. Supreme Court recognized harassment as a form of discrimination in *Meritor Savings Bank v. Vinson*.³ Although the case suggested risk of employer liability for supervisor harassment, *Meritor* failed to establish a clear standard for determining such liability.⁴ The Supreme Court resolved this issue in 1998 in *Burlington Industries, Inc. v. Ellerth*⁵ and *Faragher v. City of Boca Raton*,⁶ which, together, established the *Ellerth/Faragher* affirmative defense. In those cases, the Court held that employers may be held vicariously liable for a supervisor’s harassing behavior,⁷ subject to their ability to prove an affirmative defense.⁸ If the supervisor’s behavior did not result in a tangible employment

1. 42 U.S.C. § 2000e-2(a)(1) (2006).

2. *Id.*

3. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding sexual harassment to be actionable when it is quid pro quo or creates a hostile work environment and defining harassment as severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff’s employment).

4. See *id.*

5. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

6. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

7. An employee is a “supervisor” for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. See *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

8. While the *Faragher* and *Ellerth* decisions focused on sexual harassment, the Court looked to standards set forth in cases involving harassment based on other protected categories to develop the novel affirmative defense. See, e.g., *McKenzie v. Illinois Dep’t of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (sex discrimination); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1273 (7th Cir. 1991) (race discrimination); *Snell v. Suffolk Cnty.*, 782 F.2d 1094 (2d Cir. 1986) (race discrimination); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988) (race discrimination); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977) (race discrimination); see also 29 C.F.R. § 1604.11(d) (1997) (“knows or should have known” standard of liability for cases of harassment between “fellow employees”).

action, such as dismissal or demotion, the employer may avoid liability using the *Ellerth/Faragher* defense if it can demonstrate: (1) it exercised reasonable care to prevent and promptly correct sexually harassing behaviors, and (2) the aggrieved employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.⁹

As employers sought to implement measures that demonstrated reasonable care, sexual harassment training¹⁰ and anonymous hotlines¹¹ emerged as common strategies for establishing this affirmative defense. Courts have generally accepted the mere existence of such preventative efforts as demonstrating reasonable care, rather than assessing their effectiveness in eradicating sexual harassment.¹² Sexual harassment training seminars and anonymous hotlines therefore act as symbolic evidence of legal

9. The U.S. Equal Employment Opportunity Commission (EEOC) takes the position that the standard of liability set forth in *Faragher* and *Ellerth* applies to all forms of unlawful harassment. See, e.g., 29 C.F.R. § 1604.11 n. 1 (“The principles involved here continue to apply to race, color, religion or national origin”); U.S. Equal Emp. Opportunity Comm’n, EEOC Compliance Manual § 615.11(a) (BNA) 615:0025 (“Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees”).

10. Sexual harassment training rapidly became a central component of reasonable care due to the assumption that such educational efforts prevent sexual harassment. See Susan Bisom-Rapp, *Fixing Watches With Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 *UALR L. Rev.* 147, 162 (2001) (“Courts frequently cite sexual harassment training as evidence that an employer acted reasonably to prevent harassment”); see also Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *Berkeley J. Emp. & Lab. L.* 1, 5 (2001) (noting that “the willingness of some courts to defer to procedures that lack due process protections and the full panoply of remedies existing under Title VII raises grave concerns about the ability of grievance procedures to vindicate employee rights”).

11. See David Sherwyn, Michael Heise, & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your 1–800 Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *Fordham L. Rev.* 1265, 1300 (2001) (“[E]mployers aiming to avoid liability would be best served by not offering a hotline or other similar methods of reporting harassment that are easy and anonymous”).

12. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 *Harv. Women’s L.J.* 1 (2003); Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 *Berkeley J. Emp. & Lab. L.* 481 (2018); Lauren B. Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, *Harv. Bus. Rev.* (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court>.

compliance with the *Ellerth/Faragher* defense.¹³ In the #MeToo era,¹⁴ where digital communication reigns and remote working¹⁵ is the norm, such mechanisms are both archaic and ineffective in the prevention and correction of sexual harassment.¹⁶ Approximately five million people experience sexual harassment at work every year, yet on average, only around 9,200 file a charge with the U.S. Equal Employment Opportunity Commission (EEOC) or state Fair Employment Practices Agencies.¹⁷ In other words, 99.8 percent of people who experience sexual harassment at work never file a sexual harassment charge.¹⁸ This data casts doubt on the effec-

13. See Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (2016).

14. The MeToo movement was founded in 2006 by Tarana Burke to empower survivors of sexual violence—especially young and vulnerable women—by visibly demonstrating how many women have survived sexual assault and harassment, thereby creating solidarity. See MeToo Movement, *History & Inception, Me Too*, <https://metoomvt.org/get-to-know-us/history-inception> [<https://perma.cc/E5TC-BX3J>].

15. See Uri Berliner, *The Office As We Knew It Isn't Coming Back Anytime Soon. Maybe It's Changed Forever*, NPR (April 24, 2020), <https://www.npr.org/2020/04/24/840397136/the-office-as-we-knew-it-isnt-coming-back-anytime-soon-maybe-it-s-changed-forever> [<https://perma.cc/D3BP-NX7K>] (“Offices around the world are shut during the pandemic, making work from home the new normal for millions of white-collar employees. In the United States, remote work is still being encouraged under guidelines outlined by the federal government. But in webinars and conference calls, business leaders and management strategists are discussing what steps must be taken to bring workers back to America’s offices”).

16. See Robert S. Moyer & Anjan Nath, *Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment*, 28 *J. Applied Soc. Psych.* 333, 334 (1998) (“[T]he unpleasant empirical truth is that almost nothing is known about the effects of sexual harassment education and training programs”); see also Noam Scheiber, *Anonymous Harassment Hotlines Are Hard to Find and Harder to Trust*, *N.Y. Times* (April 21, 2017), <https://www.nytimes.com/2017/04/21/business/media/fox-sexual-harassment-hotline-bill-oreilly.html> (“[I]t is very common for companies to bury information about how employees can file confidential complaints and for employees to be completely unaware of the existence of hotlines . . . many employers create hotlines merely to help insulate themselves from legal liability without ever following up on complaints”).

17. Carly McCann et al., *Univ. of Massachusetts-Amherst’s Ctr. for Emp. Equity, Employer’s Responses to Sexual Harassment* (Dec. 2018) <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> [<https://perma.cc/L3Z9-YGC7>]. For EEOC-specific statistics for fiscal years 2010–2019, see U.S. Equal Employment Opportunity Commission, *Charges Alleging Sex-Based Harassment FY 2010–2019*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/QN9M-CW-DA>].

18. *Id.*

tiveness of popular compliance mechanisms, both in their ability to prevent the occurrence of sexual harassment and their facilitation of employee reporting. This Comment takes an interdisciplinary approach to explore and discuss the reasons these inefficacies are still salient in the #MeToo era.¹⁹

Part I of this Comment discusses what qualifies as reasonable and unreasonable under the *Ellerth/Faragher* defense, specifically in the context of Title VII workplace sexual harassment.²⁰ Part II explores why the defense must be modernized, relying on interdisciplinary research to identify deficiencies in employers' execution of antiharassment measures that qualify as "reasonable" under current judicial interpretation. Part III suggests that as technological advancements transform workplace operations, the idea of what constitutes reasonableness is perpetually in flux. It then proposes that the federal judiciary: (1) reexamine what qualifies as reasonable (such as the utilization of artificial intelligence, machine learning, and text analytics); and (2) strongly consider arguments that more stringent standards reflecting technological advancements have become reasonable in the #MeToo era. Pursuant to this proposal, the Comment provides examples of technological tools employers can utilize to meet this more stringent standard, specifically pulse surveys and remote reporting systems. So long as the *Ellerth/Faragher* defense remains the law, it is incumbent upon the federal judiciary to seriously consider evidence demonstrating what is reasonable in the modern workplace.²¹ The Comment concludes

19. Another notable antisexual harassment movement is "Time's Up." The Time's Up movement was founded on January 1, 2018 in response to #MeToo and the Weinstein effect (a global trend of allegations of sexual misconduct against famous or powerful men). While it shares a similar vision of empowerment as #MeToo, Time's Up focuses on systemic gender inequality and patterns of exclusion for women and people of color in the workplace. In January 2018, the Time's Up Foundation also started the Time's Up Legal Defense Fund, a source of legal and financial support for women and men who want to fight sexual misconduct through the justice system—especially those who experienced misconduct in the workplace. See Time's Up Foundation, TIME'S UP was Born When Women Said, "Enough is Enough.," Time's Up, <https://timesupnow.org/about/our-story> [<https://perma.cc/9HZY-JVWR>].

20. While this paper focuses on the relationship between the *Ellerth/Faragher* defense and Title VII claims of sexual harassment, it is worth noting that the affirmative defense is not limited to Title VII harassment claims. See, e.g., *Aguas v. State*, 107 A.3d 1250 (N.J. 2015) (ruling the *Ellerth/Faragher* defense as viable under New Jersey law); but see *State Dep't of Health Servs. v. Superior Court*, 79 P.3d 556 (Cal. 2003) (refusing to adopt the *Ellerth/Faragher* defense to harassment claims under the California Fair Employment and Housing Act (FEHA)).

21. Small employers may be able to effectively prevent and correct

by suggesting a comprehensive, technology-based approach with real-world impact—to *effectively* prevent and correct harassment—which carries the added benefit of mitigating employer liability.

I. “REASONABLE” VS. “UNREASONABLE”

A. *Employer’s Duty to Exercise Reasonable Care*

The first prong of the *Ellerth/Faragher* defense requires a showing by the employer that it demonstrated reasonable care to prevent and promptly correct harassment.²² There is no magic formula for fool-proof antiharassment measures, but guidance from courts and the EEOC provides a model for policies and reporting mechanisms that generally survives judicial scrutiny.²³ Courts have typically held that an employer has exercised reasonable care if it disseminates an antiharassment policy to all employees and provides employees with a channel to report the harassment to someone other than a harassing supervisor.²⁴ Under current judicial interpretation, a policy typically qualifies as “effective” if it, at minimum: (1) requires supervisors to report any instances of sexual harassment to the appropriate authority;²⁵ (2) permits both for-

harassment through less technologically advanced means, such as pulse surveys, while larger employers may have to institute more advanced mechanisms, such as artificial intelligence, given their greater number of resources and employees.

22. See *supra* note 5 and note 6.

23. Small businesses may not be able to implement formal measures (e.g. trainings and comprehensive written policies) but must still commit to demonstrating reasonable care through informal methods (e.g. weekly announcements during company meetings). See Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 *L. & Soc’y Rev.* 83 (2005).

24. See *Ellerth*, 524 U.S. at 764 (“Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms”); *Donohue v. Finkelstein Mem’l Libr.*, 987 F. Supp. 2d 415, 425 (S.D.N.Y. 2013) (quoting *Ferraro v. Kellwood Co.*, 440 F.3d 96, 102 (2d Cir. 2006)) (The first element may be shown by “the existence of an antiharassment policy during the period of the plaintiff’s employment, although that fact alone is not always dispositive”); *Williams v. Silver Spring Volunteer Fire Dep’t*, 86 F. Supp. 3d 398 (Md. 2015) (finding that the adoption and distribution of an antiharassment policy provides compelling proof that an employer has exercised reasonable care in preventing sexual harassment).

25. There is no specific authority designated as the sole recipient of harassment reports. Rather, a supervisor must report the information to those in position to take appropriate action. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (employee made an effort “to avoid harm otherwise” despite filing a complaint with the union instead of her employer; both the employer and union complaint procedures were corrective mechanisms designed to avoid harm).

mal and informal complaints;²⁶ (3) provides a reporting mechanism that bypasses a harassing supervisor; and (4) provides for employee training regarding the policy.²⁷ However, this qualification can be rebutted if the employee can show that the policy was adopted in bad faith or was otherwise defective or dysfunctional.²⁸ The EEOC provides the following guidance regarding the dissemination of antiharassment policies:

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.²⁹

26. See EEOC, EEOC-CVG-1999-2, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors#_ftn60 (hereinafter "EEOC Enforcement Guidance") ("When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing").

27. See *Alatorre v. Mabus*, 106 F. Supp. 3d 1141, 1152 (S.D. Cal. 2015) ("An effective policy should at least: (1) require supervisors to report instances of sexual harassment; (2) permit both formal and informal complaints; (3) provide a mechanism for bypassing a harassing supervisor; and (4) provide for training regarding the policy"); *Shields v. Fed. Exp. Customer Info. Servs. Inc.*, 499 F. App'x 473, 478 (6th Cir. 2012) (citing *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) ("While reasonable sexual harassment policies may take many forms, we have held that an effective policy should at least require supervisors to report incidents of sexual harassment, allow employees to make both formal and informal complaints of harassment, provide a method for employees to bypass a harassing supervisor when making a complaint, and provide for training concerning the policy").

28. See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (citing *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("The only way to rebut this proof is to show that the 'employer adopted or administered an antiharassment policy in bad faith or that the policy was otherwise defective or dysfunctional'"); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 463 (5th Cir. 2013) (finding "generic policies that offer no specific complaint procedure may be insufficient to satisfy the Ellerth/Faragher defense" to vicarious liability for sexual harassment carried out by supervisors).

29. EEOC Enforcement Guidance, *supra* note 26. See, e.g., *Perry v. AutoZoners, LLC*, 954 F. Supp. 2d 599, 120 Fair Empl. Prac. Cas. (BNA) 609 (W.D. Ky. 2013).

Notably, the EEOC's guidance and the federal judiciary's formulations make separate but coexisting recommendations for policy compliance. In addition to ensuring accessibility,³⁰ the EEOC recommends that employers include, at a minimum, the following elements in their antiharassment policy and complaint procedure:³¹ (1) a clear explanation of prohibited conduct;³² (2) assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;³³ (3) a clearly described complaint process that provides accessible avenues of complaint;³⁴ (4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;³⁵ (5) a complaint process that provides a prompt, thorough, and impartial investigation;³⁶ and (6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.³⁷

30. The term "accessibility" refers to both legibility of antiharassment policies and access to organizational reporting mechanisms.

31. See EEOC Enforcement Guidance, *supra* note 26.

32. See, e.g., *Jones v. Allstate Ins. Co.*, 281 F. Supp. 3d 1211 (N.D. Ala. 2016) (finding reasonable care where an employee knew that employer had a policy prohibiting sexual harassment).

33. Employer retaliation against an employee for filing a sexual harassment complaint or otherwise opposing sexual harassment is prohibited under Section 704(a) of the Act. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 257 (codified at 42 U.S.C. § 2000e-3(a) (2018)). Despite this express prohibition, the fear of retaliation is still a major deterrent for victims of sexual harassment to speak up. See, e.g., *Echevarria v. Insight Med., P.C.*, 72 F. Supp. 3d 442 (S.D. N.Y. 2014) (Title VII retaliation claim supported by evidence that employee was terminated one hour after making complaint).

34. See, e.g., *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003) (finding that employer took reasonable precautions where it had a complaint procedure calling for employees to present complaints to their manager or directly to Personnel Department officials).

35. See, e.g., *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002); *IRIS U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001); *Desert Palace, Inc.*, 336 N.L.R.B. 271 (2001).

36. Employers must also ensure that employees feel comfortable enough utilizing the complaint process in the first place. Even with a functional complaint and investigative process in place, an employee who fears retaliation will not engage in reporting. See Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-up Call for Women*, 68 *Brook. L. Rev.* 457, 487-89 (2002) (arguing that the private nature of harassment and fear of adverse consequences discourages women from reporting harassment, thus creating a situation where a claimant will always lose a harassment claim because the claimant will not have made use of an employer's investigation procedures).

37. See, e.g., *Alexander v. Westbury Union Free Sch. Dist.*, 829 F. Supp. 2d 89 (E.D.N.Y. 2011) (employer exercised reasonable care after a teacher voiced complaints to district about a principal's behavior by promptly hiring an independent investigator, bringing disciplinary claims against the principal under a

Accordingly, the mere existence of a well-written antiharassment policy and complaint procedure does not satisfy the burden of proving reasonable care; instead, the employer must implement its policies and practices effectively to achieve the goal of adequate preventative and corrective measures.³⁸ Corrective measures should be designed to stop the harassment, remediate its effects on the employee, and ensure that the harassment does not reoccur.³⁹ As such, adequate corrective measures will include some form of disciplinary action against the harasser.⁴⁰ Examples of corrective disciplinary measures include written warning or reprimand, transfer or reassignment, demotion, wage reduction, suspension, antiharassment training, and probationary monitoring to ensure the harassment does not recur.⁴¹ Employers must implement disciplinary measures that are proportional to the severity of the offense.⁴² In addition to disciplinary actions, corrective measures

state discipline statute for school employees, and firing the principal).

38. See, e.g., *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237 (M.D. Ala. 2001) (employer failed to establish affirmative defense where no effort was made to implement written policy, and employee's attempts to complain about improper conduct were met with indifference and, in some cases, hostility); *Id.* (employer failed to exercise reasonable care where training was inadequate, all managerial employees did not carry out their duties under policy, investigation by district manager was not prompt and ensued only when private investigator started making inquiries, and policy did not provide point person for the airing of complaints).

39. See, e.g., *Jones v. Allstate Ins. Co.*, 281 F. Supp. 3d 1211 (N.D. Ala. 2016) (employer was not liable to female employee under Title VII where, after receiving notice that her male coworker was allegedly sexually harassing her, promptly investigated the allegations and subsequently terminated the male coworker); Cf. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's remedial action for sexual harassment by supervisor was inadequate where plaintiff's shift was changed twice to distance her from harassing supervisor rather than changing the harasser's shift or work area).

40. See, e.g., *Bazemore v. Performance Food Grp., Inc.*, 478 S.W.3d 628 (Tenn. Ct. App. 2015) (finding that employer's corrective measures were effective where employer placed restrictions on harassing manager's ability to interact with employee, and employees were given handbook containing antiharassment policy and were required to take annual courses for sexual harassment training).

41. See Nat'l Acads. of Scis., Eng'g, and Med., *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (2018) (hereinafter "NASEM Study 2018").

42. See *Watt v. UniFirst Corp.*, 969 A.2d 897, 905 (2009) ("The immediate and appropriate corrective action standard does not lend itself to any fixed requirements regarding the quantity or quality of the corrective responses required of an employer in any given case. Accordingly, the rule of reason must prevail and an employer's responses should be evaluated as a whole, from a macro perspective").

should redress the effects of harassment for the aggrieved employee.⁴³ Examples include restoration of leave taken because of harassment, position reinstatement, apology from the harasser, and compensation for losses.⁴⁴ Finally, even if an employer has a sufficient antiharassment policy and complaint process, and properly addresses an employee's grievance, a failure to respond to previous complaints from others about the same alleged harasser can render the employer's preventative and corrective measures inadequate.⁴⁵

B. *Unreasonable Failure by Employee to Report or Avoid Harm*

The second prong of the affirmative defense requires a showing, by the employer, that the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid harm.⁴⁶ This element of the defense is reflective of the general theory that "a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute."⁴⁷ An employer's liability for a supervisor's sexual harassment can be mitigated, if the aggrieved employee unreasonably failed to avoid all harm, by taking advantage of the

43. See *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective per se").

44. See NASEM Study 2018.

45. See *Dees v. Johnson Controls World Serv., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (an employer can be held liable despite its immediate and appropriate corrective action in response to a harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action); see also EEOC Enforcement Guidance, *supra* note 26.

46. See, e.g., *Gerald v. Univ. of P.R.*, 707 F.3d 7 (1st Cir. 2013) (plaintiff admitted attending orientations on company's sexual harassment policies before she initially began working for company and again on her return and conceded she saw posters regarding workplace sexual harassment and knew she could go to personnel if she was sexually harassed; employer had investigated another employee's sexual harassment report against that supervisor and reprimanded him not to make offensive remarks in future; and employer began investigation of supervisor on day subordinate told company officials he had sexually assaulted her, which led swiftly to decision to terminate supervisor); *Taylor v. Solis*, 571 F.3d 1313, 1319 (D.C. Cir. 2009) (employee's failure to report found unreasonable where employee confided harassment shortly after it occurred to friend who was a member of management, but complaint procedure specifically required employee to report harassment to equal employment opportunity (EEO) counselor or EEO manager, and friend was neither).

47. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982).

employer's reporting mechanisms,⁴⁸ or if the employee could have avoided some harm by making an earlier complaint.⁴⁹

To escape liability altogether, the employer must: (1) satisfy the first prong of reasonable care and (2) prove that the employee's failure to complain was unreasonable. Generally, an employer's duty of reasonable care is satisfied under this prong if there is proof that the employee unreasonably failed to use any complaint procedure provided by the employer.⁵⁰

When determining the reasonableness of an aggrieved employee's failure to avail herself of an employer's reporting mechanism, one must consider the difficulty of filing a grievance against her supervisor.⁵¹ It is reasonable for an employee to fail to utilize reporting mechanisms in pursuing procedural justice if the employee had reason to believe that: (1) using the complaint mechanism entailed a risk of retaliation; (2) there were unnecessary obstacles to reporting a complaint;⁵² or (3) the complaint mechanism would not be effective in remedying the actionable harm.⁵³ The question of whether the employee is then required to "otherwise avoid harm" is likely fact dependent, in light of the circumstances and information available to the employee at the time.⁵⁴

An employer who is unaware of alleged sexual harassment cannot be expected to take corrective measures if an aggrieved employee fails to provide notice of her concerns.⁵⁵ Similarly, a

48. See, e.g., *Rucker v. Architect of the Capitol*, 869 F. Supp. 2d 88 (D.D.C. 2012) (no vicarious liability where employer had policy expressly forbidding sexual harassment and an EEO division charged with investigating and correcting allegations of discrimination, yet employee failed to use those resources to prevent and correct her harassment).

49. The burden of proof lies with the employer, not the employee who failed to complain, to provide evidence of the employee's unreasonableness. See EEOC Enforcement Guidance, *supra* note 26.

50. See, e.g., *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 (5th Cir., 1999) (employer established second prong of defense where harassment began during summer, employee misled investigators inquiring into anonymous complaint by denying that harassment occurred, and employee did not complain about alleged harassment until the following March).

51. See, e.g., *supra* note 33; *infra* Part II.B.

52. Examples include undue expenses by the employee, inaccessible points of contact for making complaints, or unnecessarily intimidating or burdensome requirements.

53. See *infra* Part II.

54. An aggrieved employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c.

55. See, e.g., *Green v. Mobis Ala., LLC*, 995 F. Supp. 2d 1285 (M.D. Ala. 2014) (where employer's sexual harassment policy specified individuals to which employees could report harassment and employee reported to individual

delay in reporting hinders an investigator's ability to determine the validity of the allegations due to memory lapses or witness unavailability, inculpatory or exculpatory.⁵⁶ While timely reporting is ideal, employers should not expect employees to complain immediately after the first or second occurrence of relatively minor harassment, such as a few risqué remarks by an individual with no prior history of similar misconduct.⁵⁷ However, if the harassment persists or worsens beyond the small number of instances, and no complaint is made, this delay in complaining might be unreasonable.⁵⁸ If an employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then damages can be mitigated accordingly.⁵⁹

Due to the fact specific nature of Title VII sexual harassment cases, there is no catchall answer as to what circumstances will qualify an employee's delay in reporting as reasonable or unreasonable—that is for the courts or jury to decide.⁶⁰

not listed in policy, then later placed an anonymous complaint in a dropbox three months after the alleged harassment, employer was not on notice and employee failed to report in a reasonably timely manner); *Terry v. Laurel Oaks Behavioral Health Ctr., Inc.*, 1 F. Supp. 3d 1250 (M.D. Ala. 2014) (employee unreasonably failed to take advantage of her employer's antiharassment policy and complaint procedures where she waited more than six months to report supervisor's alleged sexually harassing behavior).

56. One must also consider that whether the employee takes advantage of the employer's reporting mechanism may detract from his or her credibility in the eyes of the jury.

57. See *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp.2d 601, 606 (W.D. Va. 1998) ("Though unwanted sexual remarks have no place in the work environment, it is far from uncommon for those subjected to such remarks to ignore them when they are first made").

58. See, e.g., *Simmons v. Mobile Infirmary Med. Ctr.*, 391 F. Supp. 2d 1124 (S.D. Ala. 2005) (employee unreasonably failed to report supervisor's alleged conduct in touching her breasts on four to five occasions over period of eight months; employee did not complain until almost two months after last alleged incident, and offered no basis for her alleged fear about reporting).

59. See Restatement (Second) of Torts § 918 cmt. c (Am. Law Inst. 1979) (tort victim "is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk").

60. See, e.g., *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 314 (3d. Cir. 2018) ("[T]he passage of time is just one factor. . . . Workplace sexual harassment is highly circumstance-specific. . . . If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second Faragher-Ellert element as a matter of law."). Cf. *Pinkerton v. Colo. Dep't. of Transp.*, 563 F.3d 1052 (10th Cir. 2009) (employee failed to report alleged incidents for over two months even though she had read employer's harassment policy; such lapse of time was not vitiated by her expressed fear of retaliation); *Hockman*

However, even if an employee unreasonably failed to take advantage of the employer's reporting mechanisms, if the employee made other efforts to avoid harm, the second prong of the defense is not satisfied.⁶¹ In fact, there is no requirement that an employee must try to resolve the issue with the employer as an element of exercising due care. As such, a timely complaint by the aggrieved employee to the EEOC or a state fair employment practices agency, while the harassment is ongoing, may qualify as such a mitigating effort.⁶² But it is important to note that a complaint by an employee does not automatically become sufficient effort to avoid harm.⁶³ For example, if an employee failed to cooperate in the investigation process by providing false or inadequate information to corroborate his or her allegation, the act of complaining would not qualify as an effort to mitigate actionable harm.⁶⁴

As is, the *Ellerth/Faragher* defense puts the onus on employees to avoid being "unreasonable" by promptly reporting sexual harassment to either their employer or an applicable agency. This approach allows employers to choose any type of complaint mechanism, such as a sole telephone hotline, to meet the basic requirement of having a functional reporting method to show sufficient "reasonable care." As discussed later in this Comment, oral complaints are ineffective in the prevention and correction of sexual harassment because there is no written record of the complaint, and victims are often hesitant to submit a verbal report. Thus, courts should no longer accept archaic complaint mechanisms like hotlines as a sole reporting mechanism. Instead, courts should require, at a minimum,

v. Westward Commc'ns, LLC, 407 F.3d 317 (5th Cir. 2004) (employee failed to avoid harm where employee failed to report harassment despite the harassment policy's direction that she should report to human resources director if she was uncomfortable with her supervisor; whether employee subjectively felt that she could not "go over the head" of her supervisor was immaterial where the handbook that she acknowledged receiving directed her to do just that).

61. See Faragher, 524 U.S. at 778; Ellerth, 524 U.S. at 745. See, e.g., Thomas v. BET Soundstage Rest., 104 F. Supp. 2d 558 (D. Md. 2000) (finding that plaintiff made an effort to avoid harm where she did not utilize the complaint procedure provided by the employer, but instead wrote an "anonymous" complaint letter detailing her grievances against her supervisor and faxed it to the owners of the defendant restaurant).

62. See, e.g., Watts v. Kroger Co., 170 F.3d 505, at 510 (5th Cir. 1999).

63. While an employee can be expected to cooperate in an employer's investigation by providing relevant information, failure to participate in a mandatory mediation or other alternative dispute resolution process does not constitute unreasonable failure to avoid harm. See Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Compliance Manual (BNA) N:3101 (7/10/97).

64. See *id.*

an accessible e-mail reporting system or a similar technologically advanced system that provides records of the complaint process.

II. THE ILLUSION OF COMPLIANCE AS ADEQUACY

The federal judiciary's current interpretation of what qualifies as reasonable in the first prong of the *Ellerth/Faragher* defense is inadequate. It incentivizes employers to focus on symbolic compliance and avoidance of liability, rather than genuinely provide effective prevention and correction of sexual harassment.⁶⁵ This behavior renders irrelevant the body of interdisciplinary research that probes the dynamics behind harassing behavior. Put simply, there is no assessment as to whether the implementation of the policy itself is practically effective.⁶⁶ To understand why the *Ellerth/Faragher* defense must be modernized, the federal judiciary must first understand the deficiencies of the current interpretation of reasonable care. Employers will also benefit from this interdisciplinary exploration as the inadequacies of the defense manifest particularly in the employer's execution of symbolic compliance.

Common training and reporting mechanisms that often allow employers to clear the bar of reasonable preventative care are ineffective in achieving the main goal of the *Ellerth/Faragher* defense: preventing sexual harassment from happening in the first place.⁶⁷

65. This Comment does not seek to dispute the definition of "effectiveness" (successfully stopping the harassment); instead, it critiques the disconnect between the standing definition of effectiveness and the means that purportedly achieve that end. For the current interpretation of what qualifies as an "effective" policy, see *supra* note 27.

66. *Hairston-Lash v. R.J.E. Telecom, Inc.*, 161 F. Supp. 2d 390 (E.D. Pa. 2001) (finding that promulgating an extensive antiharassment policy is evidence that the employer exercised reasonable care to prevent sexual harassment); *Swingle v. Henderson*, 142 F. Supp. 2d 625 (D.N.J. 2001) (finding the Postal Service exercised reasonable care where the Service provided orientation training regarding sexual harassment, hung up posters regarding what employees should do regarding harassment claims, and sent out a magazine which described policy); See David Sherwyn, et al., Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges, 69 *Fordham L. Rev.* 1265, 1289 (2001) ("the law is relatively clear: a so-called 'good policy' constitutes 'reasonable care'").

67. See Louise F. Fitzgerald, et al., Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model, 82 *J. of Applied Psychol.* 578 (1997) (study finding sexual harassment training had no impact on participants' knowledge about sexual harassment or on the likelihood they would engage in harassing behaviors); Mary Pilgram & Joann Keyton, Evaluation of Sexual Harassment Training Instructional Strategies, 2 *NAS-PA J. About Women in Higher Educ.* 222 (Jan. 2009) (study finding that training participants emerged more confused about what constituted sexual harassment

While the inclusion of legal professionals in creating antiharassment policies is crucial, employers must remember that legally compliant content does not equate to effective content.

A. *The Neglect of the Brain in Reasonableness*

Internal mechanisms that satisfy the bare minimum of reasonable care are ineffective because they fail to consider: (1) the role of neuroscience in employees' decision-making and behavior and (2) the role of psychology in understanding the effects of emotional trauma on employees who have been subjected to sexual harassment.

1. Behavioral Decisions and Unconscious Biases

Many sexual harassment trainings fail to consider the critical role of the science behind employees' decision-making. According to neuroscientist Antonio Damasio, behavioral decisions are motivated by one's mindset, preceding conscious rationality and implying that "reasoning" is no more than an after-the-fact justification.⁶⁸ This means that employees do not rationally select lawful conduct from a PowerPoint presentation they are shown in harassment training as they are rarely wholly conscious of the nature of their motivations and behavior.⁶⁹ For example, employers are guided by legal professionals when creating sexual harassment trainings, as evidenced by the description of employees as either "harasser" or "victim."⁷⁰ The use of legal terminology, especially in the context of sexual harassment, leads to those being trained rejecting the

than before they started); Lisa K. Kearney, et al., *Male Gender Role Conflict, Sexual Harassment Tolerance, and the Efficacy of a Psychoeducative Training Program*, 5 *Psychol. of Men & Masculinity* 72 (2004) (study finding that the training was least effective for those who equated masculinity with power).

68. Antonio Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Penguin Publishing Group, reprint ed. 2005); see also Michael S. Gazzaniga, *Who's in Charge? Free Will and the Science of the Brain* (Harper Collins, reprint ed. 2012).

69. See Bessel Van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* 88 (Gildan Media, LLC 2014) ("Despite the well-documented effects of anger, fear, and anxiety on the ability to reason, many programs continue to ignore the need to engage the safety system of the brain before trying to promote new ways of thinking").

70. See, e.g., Westcliff Univ., *Sexual Harassment in the Workplace Powerpoint* (2017), https://www.westcliff.edu/wp-content/uploads/2017/02/Sexual_Harassment_Tutorial.pdf; Cambria Cmty. Servs. Dist., *Sexual Harassment and Abusive Conduct in the Workplace Powerpoint*, <https://www.cambriacsd.org/files/086300785/Sexual+Harassment+Prevention+EKE.pdf> [perma.cc/X94S-DDGU]; U.S. Marines, *Prevention of Sexual Harassment Training Powerpoint*, <https://www.hqmc.marines.mil/Portals/143/Training/EEO/POSHTrng.pdf> [perma.cc/2VMD-WYY3].

validity of the training because they do not believe the labels of “harasser” and “victim” apply to them.⁷¹ Further, while technically legally compliant, ineffective trainings may actually lead to a future increased risk of liability for employers.⁷² According to sociological research, typical sexual harassment training programs elicit defensive behavior⁷³ and reinforce gender stereotypes.⁷⁴ These trainings tend to portray men as sexually insatiable power figures and women as vulnerable subordinates, polarizing men and women as adversaries; reminding women of the negative stereotypes associated with complainants; and resulting in unconscious gender bias against women as potential legal threats by male employees who subscribe to traditional gender norms. Such a portrayal may also produce a culture that allows “girl watching” as a natural and light-hearted activity which women should not be offended by because “boys will be boys.” In reality, such activities demonstrate the power to sexually evaluate professional colleagues in an organizational climate that inhibits reporting and encourages harassment.⁷⁵

The reinforcement of gender stereotypes is especially harmful to male employees subjected to harassment, as it reinforces the stereotypes that “men always want sex, so they can’t be sexually harassed” or “men must be masculine.”⁷⁶ This stereotype is inaccur-

71. Shannon L. Rawski, *Understanding Employees’ Reactions to Sexual Harassment Training: Interactional Disruptions, Identity Threats, and Negative Training Outcomes* (May 2016) (unpublished Ph.D. dissertation, University of Arkansas) (on file with Scholarworks, University of Arkansas) (“Both the harasser role and the victim role are negative roles. The harasser role is negative because it is a morally deviant role that harms others, while the victim role is negative because it represents a helpless target of harm. Employees will not desire to be caught in an interaction that is framed as sexual harassment in order to avoid these negative roles”).

72. Moreover, the assumption that sexual harassment trainings in general are effective in the prevention of sexual harassment has yet to be demonstrated. See Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 *Berkeley J. Lab & Empl. L.* 481 (2018).

73. See Shannon Rawski, *The Effects of Identity Threat Reactions to Sexual Harassment Training on Training Outcomes*, *Acad. of Mgmt.* (Nov. 30, 2017) <https://doi.org/10.5465/AMBPP.2017.14668abstract> [perma.cc/FDY8-SZQQ].

74. See Justine E. Tinkler, *How Do Sexual Harassment Policies Shape Gender Beliefs? An Exploration of the Moderating Effects of Norm Adherence and Gender*, 42 *Soc. Science Research* (2013).

75. See *id.* (finding gender stereotype reinforcement occurred no matter how minimal the training, making it difficult for women to feel confident and empowered in the workplace); see also Justine E. Tinkler, et al., *Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men’s Gender Beliefs*, 70 *Soc. Psychol. Q.* 480 (2017).

76. Susan Wachob & Rick Nizzardini, *Male Survivors*, Cal. Coal. Against

rate, as evidenced by the 16.8 percent of EEOC charges of sexual harassment filed by men in the fiscal year 2019.⁷⁷ Although there is a dearth of research and literature on male employees and workplace sexual harassment, an article published by the California Coalition Against Sexual Assault articulates the negative effects of this stereotype on male sexual assault victims:

The average man is not prepared for the role of sexual assault victim. Thus, he is taken totally off guard, further adding to the trauma. This lack of anticipating the possibility that he can be a rape victim not only prevents him from having considered options (something as basic as being aware of a rape crisis center as a place to call for help or support), but also minimizes the actual options available to him. The same gender role socialization that has molded his own beliefs has occurred in the very environment that has molded other individuals as well. Thus, while the male survivor struggles to integrate the experience of a sexual assault with his gender stereotyped notions that such things do not happen to men, those who wish to offer him help struggle with the same issues.⁷⁸

Thus, even when male employees understand that they have been subjected to unlawful sexual harassment and seek assistance, they may not be believed, leading to their cases remaining unacknowledged and unexplored. Accordingly, preventative and corrective measures taken by the employer must account for not only the stereotypical victim, female employees, but all potential victims of sexual harassment.

To rectify these issues, this Comment recommends that historically gendered terms such as “harasser” and “victim” be replaced with “instigator” and “target,” or “instigating employee” and “target employee.”⁷⁹ Put simply, trainings’ prescription of appropriate behaviors to employees is insufficient in addressing workplace harassment. Instead of focusing exclusively on behavior, employers should focus on the mindset that is driving the unwanted behavior to make a fundamental change in how employees view themselves and each other. This change can be accomplished by incorporating training that helps employees identify their own negative

Sexual Assault (1999) https://www.sfwar.org/pdf/Men/MS_CALCASA_1999.pdf [perma.cc/F5PC-CSYX].

77. U.S. Equal. Emply. Opportunity Comm’n, Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2020 <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020> [perma.cc/8GWZ-QE3M].

78. See *supra* note 76.

79. Note that I will still be using the terms interchangeably as this is not a writing purposed for workplace sexual harassment training.

unconscious biases and guide them towards mutual respect and accountability.

2. Psychological Impact of Trauma

Common preventative and corrective mechanisms used by employers, such as investigative interviews involving both the victim and harasser, are further ineffective because they neglect a key component of workplace sexual harassment: trauma. Trauma-informed mechanisms are necessary if employers are to move beyond symbolic compliance.

An employer or factfinder should try to understand the neurobiology of trauma and the crucial role that the brain's defense circuitry plays in shaping employee responses to, and coping with, traumatic events—both at the time they occur and in recalling and narrating them later.⁸⁰ Many responses that seem inexplicable to those unfamiliar with normal trauma responses can be better understood by educating oneself about the brain's coping and processing mechanisms.⁸¹ For example, a barrier to an effective, strategic fight or flight response for most victims is the fact that the harasser is usually someone they know, namely their workplace supervisor.⁸² Consequently, the experience is not only alarming and threatening, it is also deeply destabilizing, inflicting harm upon the employee even after the initial event of harassment.⁸³ This destabilization can impede an employee's ability to tell the harasser to stop engaging in harmful conduct, his or her willingness to report the harassment, and even the ability to recall details of the significant events during an investigation. Without an understanding of how trauma affects

80. See Judith L. Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (Basic Books 3rd ed. 2015).

81. Psychiatrist and trauma expert Dr. Bessel Van der Kolk explains the psychological consequences of trauma as follows:

In response to the trauma itself, and in coping with the dread that persisted long afterward, these patients had learned to shut down the brain areas that transmit the visceral feelings and emotions that accompany and define terror. Yet in everyday life, those same brain areas are responsible for registering the entire range of emotions and sensations that form the foundation of our self-awareness, our sense of who we are. What we witnessed here was a tragic adaption: In an effort to shut off terrifying sensations, they also deadened their capacity to feel fully alive.

See Bessel Van der Kolk, *supra* note 69 at 92.

82. Shana Conroy & Adam Cotter, *Self-reported Sexual Assault in Canada*, 2014, Juristat. Statistics Canada Catalogue no. 85-002-X (2017), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>. [perma.cc/7WZD-KGCJ].

83. See Bessel Van der Kolk *infra* note 81; see also Part. II.B.3.

employees, employers cannot create and execute genuinely effective antiharassment measures.

Research shows that participation in formal disciplinary processes play a consistently detrimental role in a victim's psychological state, specifically through revictimization.⁸⁴ Revictimization occurs when employees feel victimized not only from the initial harassment, but also from their experiences in the procedural or criminal justice process.⁸⁵ Dr. Van der Kolk explains the neurological machinery at play when one relives trauma:

The elementary self-system in the brain stem and limbic system is massively activated when people are faced with the threat of annihilation, which results in an overwhelming sense of fear and terror accompanied by intense physiological arousal. To people who are reliving a trauma, nothing makes sense; they are trapped in a life-or-death situation, a state of paralyzing fear or blind rage. Mind and body are constantly aroused, as if they are in imminent danger. They startle in response to the slightest noises and are frustrated by small irritations. Their sleep is chronically disturbed, and food often loses its sensual pleasures. This in turn can trigger desperate attempts to shut those feelings down by freezing and dissociation.⁸⁶

Therefore, in the aftermath of trauma—for example, during the investigation stage—victims may make statements that appear to be incomplete or inconsistent.⁸⁷ They may also attempt to hide or minimize the survival tactics they used, such as appeasement, out of fear they will not be believed or that they will be blamed for their assault.⁸⁸ Such apparent inconsistencies in an employee's testimony

84. See Angela K. Lawson & Louise F. Fitzgerald, *Sexual Harassment Litigation: A Road to Re-victimization or Recovery?*, 9 *Psychol. Inj. & L.* 216 (2016) (finding participation and persistence in litigation played a consistent role in psychological outcomes across time, over and above the impact of harassment itself).

85. See Chantal Poister Tusher, *Revictimization: Advancing Theory and Method*, (May 3, 2007) (Unpublished Ph.D. dissertation, Georgia State University) (on file with Scholarworks, Georgia State University); see also Margaret S. Stockdale, et al., *Interpersonal Violence Victimization and Sexual Harassment: A Prospective Study of Revictimization*, 71 *Sex Roles* 55 (2014).

86. See Bessel Van der Kolk, *supra* note 69 at 97.

87. See Joanne Archambault & Kim Lonsway, *Incomplete, Inconsistent, and Untrue Statements Made by Victims: Understanding the Causes and Overcoming the Challenges*, *End Violence Against Women Int'l* (2008) http://www.calcsa.org/wp-content/uploads/2010/10/VICTIM-STATEMENTS-8_26_08-1.pdf; see also Deryn Strange & Melanie Takarangi, *Memory Distortion for Traumatic Events: The Role of Mental Imagery*, 6 *Frontiers in Psychiatry* 1 (2015).

88. See Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (2019) <https://poseidon01.ssrn.com/delivery.php?ID=891007123000073066096090024023123064123050031074004004>

can potentially undermine his or her credibility in an investigation.⁸⁹ Fortunately, medical experts have conducted comprehensive research to provide the following suggestions for a respectful yet informative investigation:⁹⁰

[1] Create a safe and nonjudgmental environment that encourages honesty, even for unflattering behavior. [2] When an omission, inconsistency, or untrue statement is suspected, the factfinder can respond by pointing out the issues to the employee and asking for clarification. [3] The appropriate time for this type of clarification is after the employee has completed his or her description of what happened, not immediately when the issue arises, as this will disrupt the employee's narrative account. [4] Explain the negative impact of such omissions, inconsistencies, or untrue statements on their credibility during the harassment investigation to emphasize the importance of complete honesty.⁹¹

Whether procedural or judicial, the justice system causes further trauma by not only making the victim relive the events, but also by requiring persistent cognitive appraisals of the traumatic situation, which can convey doubt about the employee's credibility.⁹² Employers must be mindful that what appears to be an inconsistency in the way an employee reacts or tells her story may actually be a typical and normal way of responding to a traumatic experience.⁹³

Due to the contentious nature of litigation, employers may feel reluctant to incorporate a trauma-informed approach as they may feel it will hinder obtaining objective evidence to assess the

104068113077101127022003120070120025020125015023028122123028070031100122005012049020032005000108018067098119090059033031079109090115078024119025124070127118091117027113124019088091080064004119100&EX-T=pdf. [perma.cc/27U6-YTRH].

89. See, e.g., U.S. Equal Employ. Opportunity Comm'n, Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990) <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment#FOOTNOTE%2010> [perma.cc/D3XN-7SL9]. ("When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.")

90. See Archambault & Lonsway, *supra* note 87.

91. *Id.* If the issue remains, the factfinder should explain that there is conflicting information and request for the employee's assistance to make sense of it (i.e., "I need to ask these questions because I want to make sure I get every detail correct").

92. See, Lawson & Fitzgerald, *supra* note 84 (finding the frequency and severity of harassment, as well as plaintiffs' cognitive assessments of their situation, appeared to have the strongest relationship to psychological harm).

93. For more information on how this issue can better addressed through the technology of computer-mediated communications, see Part III.B.

situation. This mindset is inaccurate and counterintuitive to achieving a harassment-free workplace, as evidenced by the prevalence of successfully implemented trauma-informed mechanisms in law enforcement⁹⁴ and Title IX investigations.⁹⁵ Understanding these complex yet common psychological and neurological responses to traumatic experiences will help employers formulate a trauma-informed complaint and investigative process.

Despite widespread implementation of trauma-informed mechanisms for Title IX claims,⁹⁶ the federal judiciary has yet to require the inclusion of trauma-informed mechanisms as part of an employer's duty under Title VII.⁹⁷ This Comment strongly urges the courts to require the incorporation of trauma-informed processes in Title VII cases as a part of an employer's duty of reasonable care.

B. *Insufficient Consideration of Organizational Climate Factors*

Preventative and corrective mechanisms that meet the bare minimum of reasonableness fail to consider and address the role of the organizational climate—the shared perceptions within an organization of the policies, practices, and procedures in place.⁹⁸ In fact, the organizational climate has the most significant impact on sexual harassment, on both encouraging and preventing harassment.⁹⁹

94. See, e.g., Int'l Ass'n of Chiefs of Police, *Successful Trauma Informed Victim Interviewing*, IACP (2020) <https://www.theiacp.org/resources/document/successful-trauma-informed-victim-interviewing>; Int'l Ass'n Campus L. Enf't Adm's, *Trainings on Trauma Informed Response for Sexual Assault Investigations Well Received at Three Initial Venues*, IACLEA, available at <https://www.iaclea.org/trauma-informed-sexual-assault-investigations>.

95. See, e.g., *Trauma-Informed Sexual Assault Investigations and Adjudication Training*, Va. Dep't of Crim. Justice Services, <https://www.dcjs.virginia.gov/training-events/trauma-informed-sexual-assault-investigations-and-adjudication-training>;

96. In response to ineffective sexual assault policies and practices in higher education, the White House Task Force to Protect Students from Sexual Assault charged the National Center for Campus Public Safety (NCCPS) in the Not Alone report to develop a training program on trauma-informed sexual assault investigation and adjudication that includes Title IX training for campus officials. White House Task Force to Protect Students from Sexual Assault, *Not Alone* (2014).

97. See, e.g., *supra* Part I.A.

98. In other words, organization climate includes why shared workplace perceptions are in place; how people experience them; how they are implemented; and what behaviors in the organization are rewarded, supported, and expected. For more information on organizational climate and culture, see Benjamin Schneider, et al., "Organizational Climate and Culture," 64 *Annual Rev. of Psychol.* 361 (2013).

99. See Chai R. Feldblum & Victoria A Lipnic, EEOC, *Select Task Force*

This Part is dedicated solely to providing insight for employers on: (1) why their current execution of ostensibly reasonable mechanisms may be creating a negative organizational climate and (2) how they can work towards an organizational climate that actively deters sexual harassment in order to achieve meaningful compliance with the *Ellerth/Faragher* defense.

Evaluating the organizational climate requires consideration of the collective experience of the entire workforce.¹⁰⁰ Thus, to determine why preventative and corrective measures commonly implemented by employers are ineffective in addressing sexual harassment, employers must identify the aspects of the organizational climate that hinder reporting and fail to deter unlawful harassment.¹⁰¹

1. Stigmatized Identity & Fear of Retaliation

When experiencing sexual harassment, stigma and fear of retaliation often discourage aggrieved employees from speaking out.¹⁰² Hence, it is important for an employer to provide assurance to employees that it will not tolerate adverse treatment of employees who have participated in protected activity. Unfortunately, despite these assurances, employees still fail to report harassment due to fear of retaliation and the stigma that may come from disclosing highly sensitive personal information.¹⁰³ As

on the Study of Harassment in the Workplace (June 2016) (hereinafter EEOC Task Force Report) (“Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment”) available at <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [perma.cc/VHP9-S3JG].

100. See *supra* note 98.

101. See National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 121 (2018) (“Organizational climate is the single most important factor in determining whether sexual harassment is likely to occur in a work setting”)

102. An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. A generalized fear of retaliation does not excuse a failure to complain about sexual harassment. See *Johnson v. North Idaho College*, 278 P.3d 928 (Idaho 2012); see also *Mangrum v. Republic Industries, Inc.*, 260 F. Supp. 2d 1229, 1252 (N.D. Ga. 2003) (employee’s subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee’s duty under Title VII to alert the employer to the allegedly hostile environment).

103. See Louise F. Fitzgerald & Suzanne Swan, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 *J. of Social Issues* 117, 121–22 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id.* at 123–24.

Deborah L. Brake notes, “[d]ecisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so.”¹⁰⁴ Women rarely formally report sexual harassment, partly because when they do report, they experience retaliation in the form of demotion, discipline, firing, salary reduction, or job or shift reassignment.¹⁰⁵ In short, they believe the costs of confrontation outweigh the benefits.¹⁰⁶ In addition to the typical reasons female employees may not report, male employees may have additional reasons to stay silent, such as: (1) reluctance to identify what happened to them as sexual assault because sexual assault is widely viewed as something men do to women, not something that can even happen to a man;¹⁰⁷ (2) fear that they will be perceived as gay if they complain;¹⁰⁸ and (3) fear that because men are not supposed to be sexual assault victims, admitting to such will sully others’ views of their masculinity.¹⁰⁹ These apprehensions are encapsulated by stigma theory,¹¹⁰ which suggests that sexual assault victims who perceive themselves as stigmatized due to their status as a sexual assault victim are less likely to seek support.¹¹¹ Social reactions to the disclosure of a soci-

104. See Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 39–40 (2005).

105. See Kathy Hotelling, *Sexual Harassment: A Problem Shielded by Silence*, 69 J. of Counseling and Dev. 497 (1991); Mollie R. Freedman-Weiss, et al., *Understanding the Barriers to Reporting Sexual Harassment in Surgical Training*, 271 *Annals of Surgery* 608 (April 2020); Marjorie R. Sable, et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students* 55 J. of Am. College Health 157 (Nov. 2006); Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming* (2012).

106. See *supra* note 104 at 36–37.

107. See *supra* note 74; see also Patrizia Riccardi, *Male Rape: The Silent Victim and the Gender of the Listener* (2010).

108. See, e.g., *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998) (male employee called “gay” after being forcibly subjected to humiliating sex-related actions by male coworkers in the presence of rest of the crew; complaints to supervisory personnel produced no remedial action); see also Robert L. Johnson & Diane Shrier, *Past Sexual Victimization by Females of Male Patients in an Adolescent Medicine Clinic Population*, 144 *Am. PsychoL.J.* 650 (1987) (study finding males molested by males were more likely than those molested by females to view themselves as being “gay,” a devalued status in North American society).

109. See *id.* (finding female-victimized males reported the impact of the abuse to be more severe, possibly as a consequence of experiencing a reversal of stereotyped gender roles which placed the female in the more powerful role).

110. See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (2009); Erving Goffman, *The Presentation of Self in Everyday Life* (1959).

111. See Sean C. Rife, *Sexual Assault, Perceived Stigma, and Christian*

etally stigmatized experience, such as sexual harassment, can affect self-esteem. Positive, validating responses are associated with higher self-esteem whereas negative, blaming, and doubting responses are associated with lower self-esteem.¹¹² In other words, an organizational climate that fosters the threat of retaliation can deter reports without anyone ever actually retaliating.¹¹³ Explicit or implicit threats of retaliation, including ostracization by coworkers due to disclosure of one's experience of harassment, are sufficient to deter reports.¹¹⁴ Therefore, to effectively address fears of professional and social retaliation, employers must consider the effects of stigma in the context of sexual harassment and retaliation when creating an antiharassment framework.¹¹⁵

2. The Chilling Effect

Empowered by the cultural shift of the #MeToo movement, women are stepping forward to relay their experiences of workplace harassment in the public sphere.¹¹⁶ While the positive effects of this movement are significant,¹¹⁷ employers and employees alike can-

Fundamentalism: Understanding Support Seeking Among Victimims (May 2009) (unpublished M.A. dissertation, East Tennessee State University).

112. See Henrietta H. Filipas & Sarah E. Ullman, *Social Reactions to Sexual Assault Victims From Various Support Sources*, 16 *Violence and Victims* 673 (Dec. 2001).

113. See Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 *J.C. & U. L.* 1, 39 (2011).

114. See *id.*; see also *Celine D. v. U.S. Postal Service*, No. 0120152203 (EEOC App. February 5, 2016) (During a work meeting, a manager accused a complainant of falsifying information to the EEO Counselor. The EEOC found that this statement creates a chilling effect that may discourage others from participating in the EEO process).

115. See Nicole M. Overstreet & Diane Quinn, *The Intimate Partner Violence Stigmatization Model and Barriers to Help-Seeking*, 35 *Basic Appl. Soc. Psych.* 1 (2013) (identifying three stigma components that hinder help-seeking behaviors: “Cultural stigma highlights societal beliefs that de-legitimize people experiencing abuse. Stigma internalization involves the extent to which people come to believe that the negative stereotypes about those who experience IPV may be true of themselves. Anticipated stigma emphasizes concern about what will happen once others know about the partner abuse (e.g., rejection).

116. Following the #MeToo movement, the EEOC filed 66 harassment lawsuits in 2018, including 41 that included allegations of sexual harassment, reflecting more than a 50 percent increase in suits challenging sexual harassment over fiscal year 2017. In addition, charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017. See Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018).

117. Tim Bower, *The #MeToo Backlash*, *Harvard Bus. Rev.* (Sept.-Oct. 2019), <https://hbr.org/2019/09/the-metoo-backlash> (“74% of women said they

not ignore the unintended consequences on workplace relations. In early 2018, 56 percent of women expected that men would continue to harass but would take more precautions against being caught; while 58 percent of men predicted that men in general would have greater fears of unfair allegations.¹¹⁸ A subsequent survey in 2019 focusing on the backlash toward the #MeToo movement highlighted that 19 percent of men said they were reluctant to hire attractive women, 21 percent said they were reluctant to hire women for jobs involving close interpersonal interactions with men, and 27 percent said they avoided one-on-one meetings with female colleagues.¹¹⁹ As evidenced by these statistics, the road to change is riddled with complexities surrounding attitudes men and women have about the #MeToo movement.¹²⁰

Given the difficult intricacies of pursuing equity in the workplace, employers grapple with how to implement a no-tolerance policy for harassment while maintaining a comfortable and collegial environment. Often, they go to an extreme on one side or another. As indicated by the statistics above, several employers are addressing the issue of harassment by actively excluding women from professional opportunities in the name of liability. Others may choose to fiercely protect female employees by creating a sterile environment in which no potentially off-color comments can ever be made without severe repercussions. Both of these extreme approaches fail to consider that sexual harassment is not a binary matter that can be resolved with a few simple changes within the organization. To give an example, it is unnecessary and unwise for employers to promote an environment in which every minor, unwelcome comment based on a protected category results in a formal complaint and investigation. Such an environment is counterintuitive to promoting healthy workplace relations and creates a culture of silence and exclusion for fear of litigation—a chilling effect.¹²¹ Implementing largely legal-

thought they would be more willing now to speak out against harassment, and 77% of men anticipated being more careful about potentially inappropriate behavior”).

118. Leanne E. Atwater, et al., *Looking Ahead: How What We Know About Sexual Harassment Now Informs Us of the Future*, 48 *Organizational Dynamics* (Oct. 2019).

119. *Id.*

120. See Maja Graso, et al., *Allegations of Mistreatment in an Era of Harm Avoidance: Taboos, Challenges, and Implications for Management*, 34 *Academy of Mgmt Perspectives* 1 (Feb. 2020).

121. “Chilling” is the inhibition of socially beneficial activities due to fear of possible adverse legal consequences. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52

istic solutions, rather than practical ones, creates an invisible yet powerful division as men become hesitant to interact with women in the workplace, inhibiting mentor relationships and paths to advancement.¹²² Put simply, avoiding women in the workplace is not effective harassment prevention.¹²³

In fact, an organizational climate that emphasizes avoidance of liability fails to provide employees with psychological safety to express different or unconventional opinions, exacerbating gender inequity in the workplace. Rather, employers must encourage dialogue to create an open discussion on practical solutions with the goal of fostering joint accountability for preventing, identifying, intervening, and promptly responding and correcting workplace harassment. Employees, in turn, must fight the urge to jump to conclusions and, instead, actively engage in identifying unconscious biases to assess and consider how they affect colleagues in the workplace. Instead of asking “Can I still do that,”

Ohio St. L.J. 481, 510–13, 531–40 (1991); Lydia A. Clougherty, *Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability*, 75 Neb. L. Rev. 1, 11–16 (1996); David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 Berkeley J. Emp. & Lab. L. 321, 321 (1996); Suzanne Sangree, *Title VI Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 Rutgers L. Rev. 461, 532–51 (1995); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding a Collision*, 37 Vill. L. Rev. 757, 777–82 (1992).

122. A 2018 survey conducted by the Society of Resource Managers (SHRM) showed that 11 percent of executives reported “extreme reactions” in workplace behavioral changes to avoid the perception of sexual harassment (e.g., “Don’t talk to women.”; “Scared to say anything.”; “[Avoid] any indirect or direct contact with others, any conversation one-on-one, asking permission to enter into 3 foot personal space and NEVER closer than 3 foot of another”). One executive noted the following policy change to mentoring programs: “Senior – Junior work teams of only two individuals – ended. Working after hours in the office is not allowed for groups of less than 3 employees and must include a manager.” Society for Human Resource Mgmt, *Harassment-Free Workplace Series: The Executive View Topline Report* 4, 5 (2018).

123. Such divisive behavioral choices rely on the false assumptions that (i) sexual harassment takes place because of the proximity between men and women, and (ii) sexual harassment takes place only between men and women. See, e.g., Claire C. Miller, *Unintended Consequences of Sexual Harassment Scandals*, N.Y. Times (Oct. 9, 2017) <https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html> (“In Silicon Valley, some male investors have declined one-on-one meetings with women, or rescheduled them from restaurants to conference rooms. On Wall Street, certain senior men have tried to avoid closed-door meetings with junior women.”).

the focus must shift to “Have I done something that someone didn’t want me to?”¹²⁴

3. Distrust in Procedural Justice & the Bystander Effect

Following sexual assault, employees may turn to the procedural justice system in pursuit of some form of justice by submitting a complaint. This option, however, is often unavailable to employees who work in an organizational climate that is permissive towards sexual harassment. In such a climate, employees choose not to complain due to a perceived risk to victims for reporting harassment, lack of punishment against offenders, and a perception that one’s complaints will not be taken seriously.¹²⁵ Additionally, employees who do report harassment are no better off as they are often subjected to revictimization in the investigative process.¹²⁶ Thus, it is no surprise that employees in a permissive climate have an inherent distrust in the organization’s procedural justice process.

A permissive climate with employees who do not trust the organization will produce unhappy workers and a toxic work environment for sexual harassment victims. As such, it is in the employer’s best interests to work towards cultivating a positive, respectful social climate with an emphasis on equity. A key approach to shifting to a positive climate is the implementation of bystander training in the organization.

As noted above, incidents of workplace harassment are not isolated to the two immediate parties: victim and harasser. Other employees are indirectly involved when they are aware of the unlawful or unwelcome harassment but fail to intervene or report

124. See Bessel Van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, 81 (2014) (“Social support is not the same as merely being in the presence of others. The critical issue is reciprocity: being truly heard and seen by the people around us, feeling that we are held in someone else’s mind and heart. For our physiology to calm down, heal, and grow we need a visceral feeling of safety”).

125. See Chelsea R. Willness, et al. “A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,” *Personnel Psych.*, 60: 127–162 (2007) available at <https://doi.org/10.1111/j.1744-6570.2007.00067.x>; Steven H. Lopez, et al., *Power, Status, and Abuse at Work: General and Sexual Harassment Compared*, 50 *Soc. Quarterly* 3 (Winter 2009) available at <https://www.jstor.org/stable/40220119> [perma.cc/972Y-9RVC].

126. See Laurie A. Rudman, et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization issues in University Sexual Harassment Grievance Procedures* (2010) available at https://doi.org/10.1207/s15324834basp1704_6 [perma.cc/NH4L-Y4UD]; Dianne M. Felblinger, *Incivility and Bullying in the Workplace and Nurses’ Shame Responses*, 37 *JOGNN* 234 (2008) available at <http://www.hadassah-med.com/media/2010208/incivilityandbullyingintheworkplace.pdf> [perma.cc/949B-MF4H].

such behavior.¹²⁷ These indirectly-involved employees are compelled into bystander status by the human tendency to take cues from those around them. In other words, the more people whom one sees failing to intervene in a situation, the more likely others are to conform to their behavior.¹²⁸ In the workplace, the bystander effect creates a culture of silence in which employees stay on the sidelines when it comes to reporting harassment.¹²⁹ This culture of silence ensures that swift procedural justice is hindered and creates further harm to the victim. Bystanders who fail to intervene are, in essence, condoning the hostile behavior and are, informally, seen as supportive of the harasser by co-workers.¹³⁰ Failure to intervene may also normalize harassing behaviors as it shows other employees, such as new hires, that harassment and failure to report are part of the workplace culture.

Thus, despite the existence of detailed policies and training programs, employees still may be subjected to serious harm due to the shield of silence protecting perpetrators. If more bystanders broke their silence, incidents of sexual harassment would decrease.¹³¹ Accordingly, employers must attempt to disrupt the

127. See Paula McDonald, et al., Action or inaction: bystander intervention in workplace sexual harassment, 27 *Int'l J. Human Resource Management* 548 (2016) (“The findings reveal that despite the hidden nature of SH, there is significant involvement of actors who are not direct targets but their actions are frequently delayed, temporary or ineffective”); see also Lynn Bowes-Sperry & Anne M. O’Leary-Kelly, To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers, 30 *Academy of Management Rev.* 288 (2005) available at <http://www.jstor.org/stable/20159120> [perma.cc/K23A-AFG2].

their actions are frequently delayed, temporary or ineffective

128. John Darley and Bibb Latané, the first psychologists to formulate and study the bystander effect, believe that as the number of bystanders increases, the less likely it is that any single individual will help someone in need. See John Darley & Bibb Latané, Bystander intervention in emergencies: Diffusion of responsibility, 8 *Personality & Soc. Psycho L.J.* 377 (1968) available at <https://doi.org/10.1037/h0025589>.

129. See Stefanie K. Johnson, et al., Why We Fail to Report Sexual Harassment, *Harv. Bus. Rev.* (Oct. 4, 2016) (“The bystander effect occurs for two reasons: diffusion of responsibility (if others are present, someone feels that other observers are responsible for intervening) and social influence (bystanders observe others’ behavior to determine the correct behavior; so if no one is intervening then that seems to be the correct behavior, as people abide by the status quo)”) available at https://www.researchgate.net/profile/Ksenia_Keplinger/publication/308875088_Why_We_Fail_to_Report_Sexual_Harassment/links/57f3e22008ae280dd0b7358e.pdf [perma.cc/GA98-JVZL].

130. This Comment does not suggest that being a bystander should have disciplinary ramifications, but rather that bystanders have a moral obligation to intervene, if reasonable to do so, when they witness sexual harassment in the workplace.

131. See Claudia Benavides-Espinoza & George B. Cunningham,

culture of silence and implement bystander intervention training if they are truly to take reasonable care to prevent sexual harassment. Employees can take the following steps to successfully intervene in sexual harassment in the workplace: (1) detect and report sexual harassment as much as possible,¹³² (2) learn how to recognize and report workplace harassment,¹³³ and (3) educate themselves and their coworkers on employee rights.¹³⁴

This dilemma is not employer versus employee; rather, employers and employees are collectively harmed by the presence of sexual harassment in the workplace.

4. Intersectional Disadvantages

The positive effects of #MeToo are not distributed equally, further demonstrating the need for genuinely accessible reporting mechanisms and a positive climate that accounts for all employees.¹³⁵ In a society that marginalizes certain racial and ethnic groups

Bystanders' Reactions to Sexual Harassment, 63 *Sex Roles* 201 (2010) available at <https://doi.org/10.1007/s11199-010-9781-7>; Jena Martin, *Easing 'The Burden of the Brutalized': Applying Bystander Intervention Training to Corporate Conduct*, WVU College of Law Research Paper No. 2018-014 (Mar. 6, 2018) available at <https://ssrn.com/abstract=3135490> [perma.cc/6GZY-A57P]; Sarah L. Swan, *Bystander Interventions*, 2015 *Wis. L. Rev.* 1 (2015) available at <https://ssrn.com/abstract=2643030> [perma.cc/F8L6-U2EL].

132. When creating bystander intervention training materials, employers should take note of the effects of preference falsification (when people conceal or do not reveal what they actually think and prefer creating a world of 'pluralistic ignorance' in which no one is aware of others' preferences) and diverse thresholds (different people require different levels of social support before they will speak up and say what they actually think) on sexual harassment in the workplace. For more on "preference falsification," see Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification*, Harv. Uni. Press (1997). For more on "diverse thresholds," see Mark Granovetter, *Threshold Models of Collective Behavior*, 83 *Am. J. Sociol.* 1420 (1978) available at https://www.uzh.ch/cmsssl/suz/dam/jcr:fffff-f952-f950-ffff-ffff-87498b5e/03.18_granovetter_78.pdf [perma.cc/V5WK-CZKS].

133. For example, unsolicited touching by someone in a supervisory role, unsolicited touching from peers, sending unsolicited pornographic materials electronically, sending sexist jokes electronically, sending sexual advances electronically, or even exhibiting sexualized behavior, such as staring at a woman's breasts, during an interview.

134. Bystander intervention does not always have to include formal reporting. The goal of intervention is to ensure that the individual who was harassed feels safe and protected from recurring harassment or retaliation. Informal methods such as notifying the instigator that their behavior is unwelcome are also helpful in addressing workplace harassment. Those who intervene should follow the lead of the employee who has been harassed and seek their permission before sharing details or reporting an incident.

135. See Dana Kabat-Farr & Lilia Cortina, *Selective incivility: Gender,*

as well as women,¹³⁶ many women face intersectional disadvantages¹³⁷—heightened burdens posed by characteristics beyond gender, such as race or national origin—that may trigger further bias and marginalization.¹³⁸ When an employee is both a woman and a member of a marginalized racial group, the employee is more likely to experience harassment than either white female employees or men who are members of a marginalized racial group.¹³⁹ In other

race, and the discriminatory workplace, *Gender and the Dysfunctional Workplace*, S. Fox & T. R. Lituchy (Eds.), pp. 120–134, Edward Elgar Publishing available at <https://doi.org/10.4337/9780857932600.00014>.

136. See, e.g., Lorraine M. Guttierrez, *Working with Women of Color: An Empowerment Perspective*, 35 *Social Work* 149 (Mar. 1990) (“Research has established that their struggle with the double burden of racism and sexism exacts a toll on their mental health and restricts their opportunities”) available at <https://doi.org/10.1093/sw/35.2.149>; see also Erin Carson, *Tech industry is leaving behind women of color, report shows*, CNET (Aug. 7, 2018) (“Women of color are entrepreneurs. But if you look at the tech scene, you’d hardly know it”) (citing Kapor Center, Pivotal Ventures and Arizona State University’s Center for Gender Equity in Science and Technology, *Women and Girls of Color in Computing* (2018) available at <https://www.wocincomputing.org/wp-content/uploads/2018/08/WOCinComputingDataBrief.pdf> [perma.cc/S97F-ADTA].) available at <https://www.cnet.com/news/tech-leaving-behind-women-of-color> [perma.cc/V7FL-X4Q5].

137. Intersectionality is a theoretical framework rooted in Black feminism and Critical Race Theory that posits multiple social categories, such as race, ethnicity, gender, socioeconomic status, intersect at the micro level of individual experience to reflect the various interwoven systems of privilege and oppression at the macro social-structural level. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *University of Chicago Legal Forum* 8 (1989) available at <https://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8> [perma.cc/P8NM-MNJ5]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 *Stan L. Rev.* 1241 (1991) available at <http://www.jstor.org/stable/1229039>.

138. A 2016 report by the EEOC found “increasing evidence that targets of harassment often experience mistreatment in multiple forms,” referred to as “intersectional harassment,” which can encompass both race and gender. See *supra* note 99 (“As people hold multiple identities, they can also experience harassment on the basis of more than one identity group”); see also Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 *Harv. J.L. & Gender* 185 (2014) (finding interviews with participants solely on gender-based harassment inevitably led to discussions of related race-based harassment, reinforcing the intersectional nature of harassing behavior).

139. Jana L. Raver & Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace Harassment*, 95 *J. of Applied Psychol.* 236 (2010).

words, women of color are more likely to experience harassment than their white or male peers.¹⁴⁰

Employers must assess whether their organizational climate exacerbates intersectional challenges to implement effective anti-harassment procedures and go beyond symbolic compliance. Like white women, women of color must conduct a cost-benefit analysis when deciding whether to report harassment. However, women of color must also account for the reality that they are less likely to be believed and supported, even post-#MeToo.¹⁴¹ According to a 2019 study, there has been a decline in sexual harassment reports among white women, while reports among Black women have remained stable.¹⁴² This finding, according to coauthors Dan Cassino and Yasemin Besen-Cassino, is reflective of the perception that women of color have relatively little power in the workplace and are, therefore, viewed as less likely to file a complaint.¹⁴³ Due to such cultural stereotypes,¹⁴⁴ perpetrators are more strategic in who they choose to harass, consequently targeting women of color.¹⁴⁵ Additional hurdles for women of color may include cultural¹⁴⁶ and language

140. Current research may underestimate the extent and nature of intersectional harassment for two reasons: (1) A significant amount of research on topics such as sexual harassment is based on the experiences of white women, and (2) most research on ethnic harassment is based on the experiences of men who are members of racial minority groups. See Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 *J. Applied Psychol.* 42 (2006).

141. See José M. Abreu, et al., *Ethnic belonging and masculinity ideology among African Americans, European Americans and Latinos*, 1 *Psychology of Men and Masculinity* 75 (2000) (finding that an awareness of racial stereotypes about women [e.g., “Latinas are flirtatious”], even within same-race social circles, lessens an employees’ likelihood of reporting sexual assault due to fear that they will not be believed, both by individuals outside and within their culture) available at <https://doi.org/10.1037/1524-9220.1.2.75>.

142. Dan Cassino & Yasemin Besen-Cassino, *Race, threat and workplace sexual harassment: The dynamics of harassment in the United States, 1997–2016*, 26 *Gender, Work & Organization* (June 7, 2019) available at <https://doi.org/10.1111/gwao.12394>.

143. See id; see also Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *Golden Gate U. L. Rev.* 817, 819 (1993) (“Harassers may also prefer those women of color, such as Latinas and Asian American women, whom they view as more passive and less likely to complain”).

144. For example, African American women as sexually availability and naturally lascivious; Asian American women as exotic, submissive, and naturally erotic; or Latinas as “hot-blooded” and naturally sexual. See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *Golden Gate U. L. Rev.* 819–821 (1993).

145. See *supra* note 146.

146. See Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences*

barriers.¹⁴⁷ The study also found that reports of harassment tend to increase in periods when the unemployment rate is rising.¹⁴⁸ Many low wage jobs, such as live-in caretaker, agricultural worker, or hospitality worker, are disproportionately held by women of color or immigrant women.¹⁴⁹ With unemployment rates at an all-time high,¹⁵⁰ employers must be hypervigilant of intersectional disadvantages as low wage workers are particularly vulnerable to workplace harassment.¹⁵¹

To prevent and effectively address sexual harassment, employers must implement comprehensive measures to develop and maintain a climate that promotes reporting; avoids discouraging or prematurely discounting late complaints; develops supportive

in the Reporting of Employment Discrimination Claims, 20 Wm. & Mary Bill Rts. J. 405, 432–444 (2011) available at <https://scholarship.law.wm.edu/wmboj/vol20/iss2/3> [perma.cc/Q8QT-KZHG].

147. Equal Emp. Opportunity Comm’n. Asian American and Pacific Islander Work Group Report to the Chair of the Equal Employment Opportunity Commission 1, 41 (2008) (“Language is perhaps the most prominent barrier to the EEO complaint process. Therefore, the AAPI community and federal agencies must improve educational opportunities to overcome language barriers by improving bilingual programs and promoting increased cultural diversity”) available at <http://www.eeoc.gov/federal/reports/aapi.html>; see also Laura Mahr, et al., “Interpretation Issues In Sexual Harassment Cases On Behalf Of Female Farmworkers,” Southern Poverty Law Center (2008) (“While obstacles, like language barriers, exist for immigrant women in bringing and proving their cases, individuals who do not speak English deserve and are guaranteed protection under the law”) available at http://www.adph.org/alphnt/assets/042309_05.pdf. [perma.cc/P7KK-VCFU].

148. See *supra* note 146.

149. See U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (2019) available at <https://www.bls.gov/cps/cpsaat18.htm> [perma.cc/FXS7-X9ZW].

150. See Paul Davidson, Unemployment soars to 14.7 percent, job losses reach 20.5 million in April as coronavirus pandemic spreads, USA TODAY (May 8, 2020) (“The U.S. economy lost 20.5 million jobs in April and the unemployment rate soared to 14.7% — both record highs — laying bare the starkest picture yet of the crippling gut-punch delivered by the coronavirus pandemic”) available at <https://www.usatoday.com/story/money/2020/05/08/april-jobs-reports-20-5-m-become-unemployed-covid-19-spreads/3090664001> [perma.cc/85TL-DAGN]; see also U.S. Bureau of Labor Statistics, Effects of COVID-19 Pandemic on Employment and Unemployment Statistics, (2020) available at <https://www.bls.gov/bls/effects-of-covid-19-pandemic-on-employment-and-unemployment-statistics.htm#CES> [perma.cc/XP4X-A4U7].

151. See, e.g., Restaurant Opportunities Center United, The Glass Floor: Sexual Harassment in the Restaurant Industry, (Oct. 7, 2014) (finding 80 percent of female workers in the restaurant industry reported experiencing some form of sexual harassment at work) available at https://chapters.rocnited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf [perma.cc/MFU9-L5MJ].

systems for those who experience sexual harassment; and includes sufficient technological mechanisms to detect, prevent, and address patterns of unwelcome conduct. With these goals in mind, the Comment now turns to discussing the benefits of incorporating technology to prevent harassment.

III. CULTIVATING ACCOUNTABILITY VIA TECHNOLOGY

As technology changes, so does what constitutes reasonableness in an employer's efforts to prevent and correct sexual harassment. With new technological tools, employers will be able to cultivate an organizational climate of respect, empathy, and accountability¹⁵² by identifying and preventing harassing conduct, or risk factors for such conduct, before it reaches the level of actionable harm.¹⁵³ While harassers can misuse technology to harm victims,¹⁵⁴ technology can also help empower victims through

152. While it is important for those in leadership to be committed to a diverse, inclusive, and respectful workplace, an organization must have an accountability system across all positions. According to the EEOC, "accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for doing that job well, or penalized for failing to do so." See *supra* note 99.

153. Incorporating technological tools would help prevent all harassment, not just actionable harassment, since there is a large percentage of sexual harassment that employees experience that does not meet the legal criteria of illegal discrimination under current law.

154. See, e.g., Mary Frost, For domestic violence victims, cyberstalking is a growing issue, *Brooklyn Eagle* (Dec. 2, 2019) available at <https://brooklyneagle.com/articles/2019/12/02/for-domestic-violence-victims-cyberstalking-is-a-growing-issue-this-nyc-clinic-is-helping-them> [perma.cc/QRG6-GM3M].

evidence preservation,¹⁵⁵ digital footprints,¹⁵⁶ data privacy and security measures,¹⁵⁷ and online support spaces.¹⁵⁸

There are two key advantages of using technology for preventative and corrective measures in the workplace: (1) more accessible complaint mechanisms that encourage reporting and reduce the harm of revictimization that often occurs during the retelling of incidents of harassment during investigations and (2) timely notice to employers so they can efficiently identify and address harassment, as well as provide a timestamp on employers' notice of harassment allegations. As such, courts hearing *Ellerth/Faragher* defenses in Title VII sexual harassment cases should allow

155. See Without My Consent, Evidence Preservation, available at <https://withoutmyconsent.org/resources/something-can-be-done-guide/evidence-preservation> [perma.cc/HN4B-H3BY] (“Take the opportunity to turn every harassing email, text, phone call, and website into an exhibit that can be presented as evidence in court, if needed”).

156. See *id.* (“Intermediaries generally maintain logs of everyone who accesses their systems (for example, to post information or send an email). These logs may contain information that can identify a user or provide other important information, including the date and time a user accessed the site, or the user’s IP address”); see also TechTerms, Digital Footprint Definition (“A digital footprint is a trail of data you create while using the Internet. It includes the websites you visit, emails you send, and information you submit to online services. A ‘passive digital footprint’ is a data trail you unintentionally leave online”) available at https://techterms.com/definition/digital_footprint#:~:text=A%20digital%20footprint%20is%20a,trail%20you%20unintentionally%20leave%20online [perma.cc/4XW8-NBGR].

The digital trail left by an offender can be used by survivors and those who work with them to hold offenders accountable; survivors can access technology that help increase privacy and safety (e.g. cybersecurity measures such as malware protection); and online spaces can support survivors healing. (See Hack*Blossom, an unfunded grassroots organization helping domestic violence victims with technological threats <https://hackblossom.org/domestic-violence/#threats> [perma.cc/FCA6-PEFA]).

157. For example, Hack*Blossom is an online grassroots organization dedicated to providing cybersecurity defense strategies for domestic violence victims. See Hack*Blossom, Defense Strategies, (“Our Threat Scenarios explore, in-depth, how to resist a controlling partner. Each guide is accessible and empathetic: you’re not obliged to follow any of our suggestions if you don’t feel they’re right for you. We also have Defense Strategies for proactively securing your digital life”) available at <https://hackblossom.org/domestic-violence/#defense> [perma.cc/4PSJ-7Y2S].

158. See, e.g., LeanIn, Advice, information, and support for harassment survivors and for anyone who wants to help, available at <https://leanin.org/sexual-harassment/individuals> [perma.cc/NTB7-7WX5]; Survivors Chat, Dedicated to survivors of rape and abuse, available at <https://www.survivorschat.com> [perma.cc/HR7B-68KT]; After Silence, We’ve broken the silence on sexual violence. Have you?, available at <http://www.aftersilence.org> [perma.cc/K5A5-U5Y3].

updated evidence to demonstrate what constitutes reasonable care in the modern age of technology.

In fact, as courts attempt to determine which technological tools are appropriate for employers under the new norms of reasonableness, they should consider the following factors:¹⁵⁹ (1) the size, complexity, and resources of the organization; (2) the organization's technical infrastructure, hardware and software capabilities; (3) the costs of the proposed or currently implemented technological measures; (4) whether the employer has conducted adequate research on which technological tool best fits the organization's needs; and (5) whether the employer has considered how the chosen technological tool(s) will identify and address the probability and criticality of potential risks of workplace sexual harassment.

As all employers have different resources and needs, there is no one-size-fits-all approach. Employers should instead conduct an internal assessment to understand where they need to focus their efforts and identify which technological tools are reasonable according to the organization's needs and resources.¹⁶⁰ To ensure that policies and practices keep up with technology, employers should create an organizational task force to: (1) evaluate the effectiveness of current antiharassment policies and procedures, and (2) review developments in technology and make recommendations as to whether new technological tools would be more effective in preventing or addressing harassment. A joint approach that uses both technology and personnel is crucial given the critical role of human judgment and understanding in sexual harassment cases. The following are recommendations of technological tools that employers can utilize based on their respective needs and capabilities.¹⁶¹

A. *Virtual Reality-Based Sexual Harassment Training*

Virtual Reality (VR) can be an effective learning and development (L&D) tool to prevent sexual harassment in the workplace, as immersive VR experiences trigger the same neurological pathways

159. Employers must also keep these factors in mind during the development, implementation, and review of antiharassment measures within the organization.

160. For example, small employers may opt for free tools such as third-party pulse surveys, whereas large employers may choose to incorporate more costly tools such as virtual reality or artificial intelligence.

161. Each recommended tool takes organizational climate into consideration, which is ultimately the largest influence on whether sexual harassment takes place in the work environment. Note that these are only recommendations, and employers can choose other technological tools that best fit their organization.

and connections as real experiences.¹⁶² Current antiharassment VR programs aim to prevent harassment by placing employees in training scenarios that unfold depending on how the employee reacts. These programs address the absence of considerations of neuroscience in basic antiharassment trainings¹⁶³ by incorporating real-time response training, along with identifying and addressing stigma and bias in simulation experiences.¹⁶⁴ By mimicking real-world interactions, VR programs invoke deeper empathy while training employees to become more aware of social cues beyond conversation, such as eye contact, body language, and personal space. Notably, the employee is generally placed in the role of observer or bystander, rather than the typical victim or harasser roles presented in more traditional trainings.¹⁶⁵ This is a vital component of the VR program because it teaches the employee how to identify potentially harmful situations as well as how to assist co-workers in difficult situations. As discussed above, bystander training is an essential aspect of creating a positive climate.

162. See FocusOnVR, Guides: What is Virtual Reality? (Oct. 26, 2018) (“The combination of a stereo-optic video signal (usually side-by-side 3D, where two near-identical images are visible, though slightly offset, one for each eye, like in stereoscopy), head, positional, and room tracking, and 3D positional audio can adequately trick the mind into believing the sensory feedback it is receiving is real”) <https://focusonvr.com/guides-what-is-virtual-reality> [perma.cc/UWJ4-E7Y2]; see also Fatimah Lateef, Simulation-based learning: Just like the real thing, 3(4) J. Eemergencies, Trauma, & Shock 348 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2966567> [perma.cc/DJD9-SA6U]; Yuki Noguchi, Virtual Reality Goes To Work, Helping Train Employees, NPR (Oct. 8, 2019, 7:18 AM) <https://www.npr.org/2019/10/08/767116408/virtual-reality-goes-to-work-helping-train-employees> [perma.cc/G9N2-BL7V]; Jared Lindzon, Is VR the answer to better sexual harassment training? Fast Company (Jan. 31, 2019), <https://www.fastcompany.com/90296445/is-vr-the-answer-to-better-sexual-harassment-training> [perma.cc/X3T9-Q8AC]; Gergana Mileva, Can Virtual Reality Stop Sexual Harassment Before It Starts? AR Post (Oct. 9, 2019, 10:00 AM) <https://arpost.co/2019/10/09/can-virtual-reality-stop-sexual-harassment-before-it-starts> [perma.cc/3ZDZ-P9V8]; Amanda Holpuch & Olivia Solon, Can VR teach us how to deal with sexual harassment?, The Guardian (May 1, 2018), <https://www.theguardian.com/world/2018/may/01/sexual-assault-training-program-vantage-point-virtual-reality-video-games> [perma.cc/GS32-6CWB].

163. See, e.g., *supra* Part II.A.

164. See, e.g., Vantage Point, Vantage Point Training Topics (“Our training material takes into account contextual and hard-to-detect nuances of common sexual harassment situations and teaches proven cutting-edge techniques such as bystander intervention. We focus on bystander intervention, identification of sexual harassment, and on response training”), <https://www.tryvantagepoint.com/workplace-harassment-diversity-inclusion-bias> [perma.cc/8N6Y-PDNZ].

165. *Id.*

VR training is typically conducted on the individual level, eliminating the chances of groupthink-fueled bias that can often occur in traditional, in-person training seminars.¹⁶⁶ Specifically, as an anonymous solo user immersed in the VR training, employees are unconcerned about peer pressure or keeping up appearances, resulting in a more realistic and effective training experience. To evaluate the program's effectiveness, employers who choose to incorporate VR training should follow up with a survey and a virtual meeting to discuss the experience. This follow-up will help employers identify what employees found helpful or unhelpful, and to assess whether employees know how to respond if they see or experience harassment in the workplace.

While VR may sound like a costly option, employers must remember that effective antiharassment measures will not only create a safe environment for employees, but also prevent future costs related to litigation or employee counseling. VR is an effective sexual harassment prevention tool—more so than traditional videos or PowerPoint slides—because it allows employees to learn under the same conditions they would be in if the situation were to actually occur in the workplace. Utilizing this technological tool, employers can help enhance information retention,¹⁶⁷ foster dialogue on how to cultivate an antiharassment organizational climate and encourage empathetic allyship amongst employees. Further, several firms and groups¹⁶⁸ are already researching, developing, or actively offering VR sexual harassment trainings that run on commercial headsets, like the Oculus Go or Oculus Quest, which are fairly inexpensive.¹⁶⁹

166. The typically solitary nature of VR training is especially timely given COVID-19's impact on the traditional workplace. See *supra* note 15.

167. See Kristen Lotze, *Why VR training may be the future of sexual harassment prevention in the workplace*, TechRepublic (April 16, 2019, 1:57 PM) (“VR provides an immersive experience in which the user sees what it’s like to witness and/or be a victim of sexual harassment, which increases user retention”) <https://www.techrepublic.com/article/why-vr-training-may-be-the-future-of-sexual-harassment-prevention-in-the-workplace> [perma.cc/ARG3-3GPR].

168. See, e.g., Press Release, J.J. Keller & Associates, Inc., *HR Pros Can Test J.J. Keller Virtual Reality Sexual Harassment Prevention Training at 2019 SHRM Conference* (June 20, 2019) (offering comprehensive VR sexual harassment training in concert with researchers at University of Wisconsin-Oshkosh), <https://www.jjkeller.com/learn/hr-pros-can-test-jj-keller-virtual-reality-sexual-harassment-prevention-training-at-2019-shrm-conference> [perma.cc/ULT6-25KF].

169. For example, Vantage Point, founded in 2017 by Morgan Mercer, a two-time survivor of sexual violence, uses Oculus Go headsets, and one headset is recommended per one hundred employees, <https://www.tryvantagepoint.com> [perma.cc/44G2-3JQ3]; See Vantage Point (offering immersive and interactive

B. *Computer-Mediated Communications*

Computer-mediated communication (CMC), in its most basic definition, is any human communication that occurs through the use of two or more electronic devices.¹⁷⁰ CMC can help employees overcome initial reporting barriers through three features: (1) accessibility, (2) visual anonymity, and (3) limited channel communication, specifically text only. Employers can combine these features into one effective CMC mechanism for antiharassment: an online remote reporting system (RRS).

1. Remote Reporting System

a. Accessibility

An RRS is available twenty-four hours a day, seven days a week.¹⁷¹ With an RRS, employees would not be limited to the organization's hours of operation, nor by the capacity restrictions of personnel in charge of receiving complaints. This mechanism is especially effective because allowing employees to report a complaint outside of where the harassment took place, and where the harasser might be present, may increase the likelihood that the employee will take advantage of the reporting mechanism. Employers also benefit from having a system that encourages timely reporting, providing them with prompt notice and an opportunity to investigate and/or correct harassment.¹⁷²

decision-making scenario training) <https://www.tryvantagepoint.com>; see also Rae Hodge, Oculus Go price cut permanently to \$149, CNET (Jan. 16, 2020, 11:25 AM) (While there is no public pricing available for Vantage Point's training software, it is priced similarly to existing non-VR sexual harassment trainings; it also requires annual licensing fees), <https://www.cnet.com/news/oculus-go-price-cut-permanently-to-149-report> [perma.cc/BTL4-Y2KK]; See Ave Rio, Virtual Reality Could Be the Answer to Sexual Harassment Training, Chief Learning Officer (April 2, 2018) ("Mercer aims to align with existing pricing of sexual harassment trainings, which cost between \$29 and \$75 per person. There would also be one-time fees for implementation and hardware") <https://www.chieflearningofficer.com/2018/04/02/vr-answer-sexual-harassment-training> [perma.cc/7GS4-F4B8].

170. See Mike Z. Yao & Rich Ling, What is Computer-Mediated Communication?, 25 J. Computer-Mediated Comm'n 4 (Jan. 2020), <https://doi.org/10.1093/jcmc/zmz027>.

171. See Dawn O. Braithwaite, et al., Communication of Social Support in Computer-Mediated Groups for Persons with Disabilities, 11 Health Comm'n 123 (1999).

172. Any RRS used by employers should be available in multiple languages to reflect the linguistic capabilities of the employer's workforce, thereby addressing the issue of language barriers as a reporting deterrent.

b. Visual Anonymity

Given the sensitive nature of sexual harassment, the visual anonymity provided by RRS may encourage employees to report harassment.¹⁷³ Research shows that visually anonymous individuals disclose significantly more information about themselves than nonanonymous participants.¹⁷⁴ CMC produces significantly higher levels of unprompted self-disclosure overall,¹⁷⁵ compared to face-to-face communication, a phenomenon called the online disinhibition effect.¹⁷⁶ The anonymous nature of RRS would also allow a factfinder to be more impartial and understanding of the employee, as there are no non-CMC cues, such as shakiness or lack of eye contact, to influence the factfinder's assessment of the employee's credibility.¹⁷⁷ Factfinders may want to utilize the power of visual anonymity by conducting follow up interviews via webcam and allowing the aggrieved employee or potential witnesses to keep the webcam off while answering questions.

c. Text-Only Communication

Another beneficial feature of the RRS is the medium's advantage of CMC message composition. CMC allows employees to draft their report with greater care and attention than may be possible in a face-to-face or real time phone interaction.¹⁷⁸ Employees "may

173. See Hua Qian & Craig R. Scott, Anonymity and Self-Disclosure on Weblogs, 12 J. Computer-Mediated Comm'n 1428 (2007) ("In CMC, "visual anonymity" typically refers to the lack of any visual representation of a person, such as pictures or video clips."), <https://doi.org/10.1111/j.1083-6101.2007.00380.x>.

174. Adam N. Joinson, Self-Disclosure in Computer-Mediated Communication: The Role of Self-Awareness and Visual Anonymity, 31 Eur. J. Soc. Psych. 177 (2001), http://www.communicationcache.com/uploads/1/0/8/8/10887248/selfdisclosure_in_computermediated_communication_the_role_of_selfawareness_and_visual_anonymity.pdf [perma.cc/4A3U-MNBB].

175. See Richard L. Archer, Self-Disclosure in The Self in Social Psychology 183-205 (Daniel M. Wegner & Robin R. Vallacher eds., 1980) ("Self-disclosure is defined as the act of revealing personal information to others.")

176. See Cathlin V. Clark-Gordon, et. al., Anonymity and Online Self-Disclosure: A Meta-Analysis, 32 Commc'n Rep. 98 (May 7, 2019) <https://doi.org/10.1080/08934215.2019.1607516>.

177. Visual anonymity may also help to address the issue of stigmatized identities, such as male employees subjected to sexual harassment who feel as though they will not be taken seriously. See *supra* Part III.A.

178. See *supra* note 174 ("CMC users need not maintain any other expressive system than writing (i.e. they need not monitor their gestures, facial expressions, voice, or physical appearance). They may in turn re-allocate greater cognitive resources to the articulation of their desired message. These possibilities, along with the relative solitude accompanying CMC use, have been found to heighten users' self-awareness. These advantages allow CMC users to present whatever degree of vulnerability or wisdom that their verbal skills are

stop and think, edit, rewrite, even abort and re-start a message that is not to their liking.”¹⁷⁹ Communication and media theorists Joseph Walther and Saxon Boyd write:

By contrast, it is easy to imagine that [face-to-face] conversants may not have at their disposal relevant references, addresses, or contact information during a specific, impromptu support conversation. On-line, however, since the “conversation” does not continue until each participant is ready, there is no apparent interruption while one searches for external information. . . . Hence, the asynchronous and electronic nature of CMC allows time to craft a good request or a good response. Thus, the actual quality of support may be increased.¹⁸⁰

Moreover, this advantage is particularly significant because of the speech and memory-inhibiting effects of trauma discussed in Part II of this Comment.¹⁸¹

d. Additional Recommendations for an Effective RRS

In addition to reporting capabilities, the RRS portal should have an option for employees to upload documents demonstrating the alleged harassment, such as inappropriate text messages. This provides the employer with concrete documentation of the alleged harassment and the factfinder with the universe of relevant information.¹⁸² The RRS should also include a complaint progress bar so employees can track the status of their complaints.¹⁸³ Finally, the RRS should have a written record of any and all disciplinary measures taken against the alleged harasser.¹⁸⁴ This database serves

able to muster. In this way it is easy to imagine that requests for support, and its provision—especially for emotional support—may be enhanced”) (citations omitted).

179. Joseph B. Walther & Saxon Boyd, *Attraction to Computer-Mediated Social Support in Communication Technology & Society: Audience Adoption and Uses*, 153 (Carolyn A. Lin & David J. Atkin, eds., 2002) (“CMC is a conduit, a channel to people with the beneficial characteristics of the interaction embedded in who the targets are, rather than in the manner of the interaction per se.”).

180. *Id.*

181. This would also benefit employees who struggle with English, as they can take the time to write and review the content of their report to ensure accuracy.

182. Witnesses (bystanders) should also be provided this option as a means of bystander intervention.

183. Even after a complaint is marked as complete, employers should conduct a follow-up with the employee to ensure the matter has actually been resolved and inquire whether the employee is in need of additional protective or corrective measures such as third-party counseling.

184. Records of any disciplinary measures against the aggrieved employee should also be noted, for example, if it is found that the employee was being untruthful in his or her allegations. It is important to emphasize honesty and

two key functions: (1) to create a comprehensive case file that is only accessible to involved or approved parties, such as investigators and the federal judiciary, and (2) to serve as a data resource for employers to anonymize and analyze to identify areas in need of improvement.¹⁸⁵

C. *Data Collection & Analysis*

Employers can use data to understand and evaluate the impact of management's decision making in employee-related matters, improve employee wellbeing and workplace satisfaction, and make antiharassment policies and practices more efficient and effective. With the development of data-driven personnel decisions, assessment of organizational climate is becoming increasingly motivated by concrete employee statistics and data analytics.

1. Pulse Surveys

Employers should conduct anonymous pulse surveys¹⁸⁶ to assess the effectiveness of their sexual harassment prevention mechanisms, and the extent to which harassment is a problem in their organizational climate.¹⁸⁷ Pulse surveys via third-party vendors, like SurveyMonkey, invite employees to notify employers about how they feel about their work relationships and the organization's antiharassment initiatives and training programs.¹⁸⁸ Employers

accountability for those who have been victimized and those who have been falsely accused.

185. It is recommended that employers integrate blockchain solutions in the RRS to ensure confidentiality and data integrity. See Jackie Wiles, *5 Ways Blockchain Will Affect HR*, Gartner (Aug. 27, 2019) ("Employers have access to vast amounts of private information on employees. On a blockchain, records can be encrypted and immutably recorded—especially important for private records related, for example, to medical conditions or performance history. But these records can also be shared when necessary in tokenized form with participants who've been given verified permission."), <https://www.gartner.com/smarterwithgartner/5-ways-blockchain-will-affect-hr> [perma.cc/YFQ9-MZHJ].

186. See HR Dictionary, *Employee Pulse Survey* (Jan. 16, 2013) (A pulse survey "is a tool often used by companies to measure their operating climate and overall performance. A pulse survey is conducted on employees or customers on periodic basis. Such a survey helps to get a sense of the 'health' of the company by evaluating employee satisfaction, productivity, and overall attitude"), <https://hrdictionaryblog.com/2013/01/16/employee-pulse-survey> [perma.cc/DFA5-7JQT].

187. See HSD metrics, *Using Pulse Surveys to Measure Employee Morale* (April 3, 2020), <https://hsdmetrics.com/blog/employee-retention/using-pulse-surveys-to-measure-employee-morale> [perma.cc/A7EQ-AKEH]; WorkplaceRespond, *Workplace Climate Surveys* <https://www.workplacesrespond.org/page/harassment-climatesurveys> [perma.cc/579U-ZBZH].

188. See Heather Bussing, *Using Data To Find Sexual Harassment Issues*

must emphasize the confidentiality and anonymity of pulse surveys. Moreover, anonymized pulse surveys can be conducted both annually and quarterly to elicit not only data about experiences related to harassment, but also attitudinal change in the workforce toward management and its credibility as a fair responder to sexual harassment in the workplace.¹⁸⁹

2. Journey Maps

Using personnel data, employers can create employee journey maps—complete records of the employee experience from recruitment to hiring to separation, including time tracking reports and publicly available social media records.¹⁹⁰ Although typically used for customer tracking,¹⁹¹ these journey maps can also be utilized to record and improve the employee experience, including preventing sexual harassment in the workplace.¹⁹² This compilation of data can succinctly summarize how employees are experiencing the workplace so that employers can identify areas in need of improvement within the organizational climate and create a transparency report on sexual harassment that can be provided to employees on a monthly or annual basis.¹⁹³ Although based on hard numbers and

And How To Take Action, Coernerstone OnDemand: SABA Blog (May 2, 2018), <https://www.saba.com/es/blog/using-data-to-find-sexual-harassment-issues-and-how-to-take-action> [perma.cc/F6XN-M3WQ].

189. The aforementioned CMC-related self-disclosure extends to surveys according to a 1986 report finding that, compared to pencil and paper surveys, answers to electronic surveys are less socially desirable and lead to the disclosure of more information about the self. See Lee Sproull & Sara Kiesler, Reducing Social Context Cues: Electronic Mail in Organizational Communication, 32 *Mgmt. Sci.* 1492 (1986) <http://dx.doi.org/10.1287/mnsc.32.11.1492>.

190. See Amanda Wowk, 6 Steps to Mapping the Employee Journey at Your Organization, QualtrixXM (Dec. 1, 2020), <https://www.qualtrics.com/blog/employee-journey-mapping>.

191. See Kate Kaplan, When and How to Create Customer Journey Maps,” Nielsen Norman Group (July 31, 2016) (“Journey maps combine two powerful instruments—storytelling and visualization—in order to help teams understand and address customer needs. . . . In its most basic form, journey mapping starts by compiling a series of user goals and actions into a timeline skeleton. Next, the skeleton is fleshed out with user thoughts and emotions in order to create a narrative. Finally, that narrative is condensed into a visualization used to communicate”), <https://www.nngroup.com/articles/customer-journey-mapping> [perma.cc/K2E3-385U].

192. See Kristen Ruttgaizer, Employee Journey Maps: Designing the Perfect Employee Experience, IGLOO Software (January 21, 2021) (“An employee journey map is a visualization of the timeline of the entire employee experience, starting when people consider applying for a position until they leave the company.”), <https://www.igloosoftware.com/blog/employee-journey-maps-designing-the-perfect-employee-experience> [perma.cc/H4B7-PBM9].

193. To learn more on how to create an employee journey map, see Erik

data, journey maps present employers with a substantiated portrait of their individual employees and how each engages with the workplace.¹⁹⁴ Using quantitative data, such as data from pulse climate surveys, journey maps can be a valuable tool for employers in harassment prevention and, should it come to litigation, in having a clear timeline of personnel activity to provide to all parties.¹⁹⁵

D. *Artificial Intelligence*

With the rise of technology, expectations of what constitutes as reasonable L&D measures should change. Although virtual reality is a useful L&D mechanism, the most commonly utilized L&D tool is a uniform system of personnel training. Notably, policy education and compliance trainings are no longer conducted solely through mass conference rooms or generic video modules. Therefore, employers should take an instructional approach to personnel training that is optimized for the needs of each employee through artificial intelligence.¹⁹⁶

1. Personalized Learning & Development

As discussed in Part II, the standard approach to employee L&D focuses on legal compliance. This focus creates an environment where employees are not engaged with the organization's L&D initiatives and, more importantly, they are not retaining the vital information covered in the L&D programs. Thus, instead, employers may opt to adapt to the new normal of a technologically

van Vulpen, How Employee Journey Mapping Can Change the Employee Experience, AIHR Digital <https://www.digitalhrtech.com/employee-journey-mapping> [perma.cc/8WYU-R3HH].

194. See Ruttgaizer *supra* note 192. (“Just as the customer journey can vary widely in one company, so can the employee journey. Journey maps should account for this diversity by assessing the needs and goals of all kinds of employees. Consider creating employee personas, just you would for customers. A baby boomer who’s been at the organization for decades and plans to retire soon will have a very different map to a recent graduate starting their first real job. Journey maps should also exist for employees who will resign or be terminated”).

195. For example, recruitment data, training data, attendance data, career progression data, productivity data, position competency data, personal development evaluations, employee satisfaction data, social media data, and internal messaging data between employees. See Bernard Marr, Why Data is HR's Most Important Asset, *Forbes* (Apr. 13, 2018) <https://www.forbes.com/sites/bernard-marr/2018/04/13/why-data-is-hrs-most-important-asset/#219b0b0a6b0f> [perma.cc/XV4W-55FF].

196. See Jay Liebowitz, Knowledge management and its link to artificial intelligence, 20 *Expert Sys. with Applications* 1 (2001) (discussing the emergence and future of knowledge management, and its link to artificial intelligence), [https://doi.org/10.1016/S0957-4174\(00\)00044-0](https://doi.org/10.1016/S0957-4174(00)00044-0).

advanced workplace through one of the following approaches.¹⁹⁷ First, they may adopt adaptive learning in which automation and artificial intelligence are used to assign human or digital resources to employees based on their unique needs using data, analytics, and real-time feedback to continuously adapt the learning path.¹⁹⁸ Second, there is individualized learning where the *pace* of L&D content is adjusted to meet the individual needs of each employee.¹⁹⁹ A third option is differentiated learning in which the *approach* to L&D is adjusted to meet the needs of individual employees; however, it does not necessarily adopt that path as the employee progresses.²⁰⁰ Lastly, there is competence-based learning where employees advance through an L&D program based on their personal ability to demonstrate competency, including the application and utilization of relevant knowledge, skills, and social dispositions.²⁰¹

197. To learn more about the different types of personalized learning employers can implement in virtual organizations, see Daniel E. O’Leary, et al., *Artificial Intelligence and Virtual Organizations*, 40 *Comm’n ACM* 52 (1997); see also Sukant Khurana, et al., *Personalized Learning Through Artificial Intelligence*, *Medium: The Startup* (Jan. 28, 2018), <https://medium.com/swlh/personalized-learning-through-artificial-intelligence-b01051d07494.le> [perma.cc/H2KJ-NJ4F].

198. Employers can also utilize data from employee journey maps to implement adaptive learning in online training programs that will change in real time to reflect the employee’s abilities and adapt to them accordingly. See Chiradeep BasuMallick, *Is Adaptive Learning the Answer to Workplace Learning Challenges?*, *HR Technologist* (Mar. 17, 2020), <https://www.hrtechnologist.com/articles/learning-development/adaptive-learning-workplace-learning-challenges> (“Adaptive learning is defined as a digitally-led learning track that identifies an employee’s skill gaps, disseminates learning material, solicits feedback at regular intervals, and tweaks the path as per the learner’s pace, existing skillset, preference, and cognitive capabilities. It uses a combination of automation and artificial intelligence to achieve this.”); see also Hongchao Peng, et al., *Personalized Adaptive Learning: An Emerging Pedagogical Approach Enabled by a Smart Learning Environment*, 6 *Smart Learning Env’t* 9 (2019).

199. See, e.g., Agoritsa Gogoulou, et al., *A Web-based Educational Setting Supporting Individualized Learning*, *Collaborative Learning and Assessment*, 10 *Educ. Tech. & Soc’y* 242 (2007).

200. See, e.g., Max Bennett, *Using AI for Differentiated Learning*, *Medium* (Apr. 4, 2019), <https://medium.com/qmind-ai/using-ai-for-differentiated-learning-69395c1861ac> [perma.cc/MNX5-VDUJ] (“With artificial intelligence, technology may be used to understand the learning strategies, educational background and academic interests of students. This information is then used to provide personalized learning, testing and feedback to students from preschool to college level that gives students the challenges they are ready for, identifies gaps in knowledge and redirects to new topics when appropriate.”)

201. See Miguel Badaracco & Luis Martinez, *An Intelligent Tutoring System Architecture for Competency-Based Learning*, in *KES 2011: Knowledge-Based and Intelligent Information and Engineering Systems* 124–133 (König A., Dengel A., Hinkelmann K., Kise K., Howlett R.J., Jain L.C. eds.,

Overall, employers who adopt personalized L&D programs will save time, money, and effort. Personalized L&D, no matter the form, will show the courts that employers are committed not only to symbolic compliance, but also to genuine harassment prevention and effective training policies and practices. Further, personalization will create a more efficient educational process.²⁰² This is because personalization L&D identifies distinct behavioral patterns and correlations in an employee's behavior and segments employees accordingly so employers can effectively deliver relevant L&D content that meets each employee's needs and goals.²⁰³

2. Emotion Recognition Software

Given the crucial role of cognitive processes in employee training, specifically the mindset and emotional state of employees, emotion recognition systems can be another vital tool for employers.²⁰⁴ In a special issue on the concept of presence in the *International Journal of Cognition, Technology, & Work*, scholars proposed:

With the affective intelligent user interfaces we are creating, we aim to enhance *presence* and *co-presence* in learning environments by teaching the system to recognize the user's state and adapt its processes in order to aid their learning. For example, once the system learns a user's preferences and emotional states, when the user is in a learning environment and becomes anxious, in response, the system can provide the users' preferred style of encouragement, thus potentially reducing anxiety and allowing the learner to focus more

Springer, Berlin, Heidelberg, 2011); see generally Mrigank Kumar, Using Artificial Intelligence to Augment Competency Based Interviews, LinkedIn (Sept. 11, 2018), <https://www.linkedin.com/pulse/using-artificial-intelligence-augment-competency-based-mrigank-kumar> [perma.cc/48T7-PRCK].

202. See, e.g., Norsham Idris, et al., Adaptive Course Sequencing for Personalization of Learning Path Using Neural Network, 1 *Int. J. Advances Soft Comput. Application* 49 (2009).

203. See, e.g., Barsha Chetia, 5 Ways Adaptive Learning Leads to Better and Faster Employee Performance, CommLab India (Jan. 22, 2020), <https://blog.commlabindia.com/elearning-design/adaptive-learning-faster-employee-performance> [perma.cc/DG6Y-FQMM]. ("In adaptive learning, learners spend time only on areas which require development and skip what they have mastered already. . . . [T]here is no need to re-teach what your learners already know, instead focusing on where they need to become competent.")

204. See Subhashini Radhakrishnan & P.R. Niveditha, Analyzing and Detecting Employee's Emotion for Amelioration of Organizations, 48 *Procedia Comput. Sci.* 530, 531 (2015) ("By becoming more knowledgeable about how emotions affect the primary sources of competitive advantage, organizations can help their management team recognize the critical connection of employee's emotions and then try to make it right before it affects the productivity.")

attention on the task. Similarly, when the system recognizes that the learner is becoming frustrated or bored, the system could adjust the pace of the training accordingly so that the optimal level of arousal for that user's learning is achieved.²⁰⁵

Specifically, emotion recognition software (ERS) can analyze the emotional output of an employee sitting in front of a computer through real-time behavioral facial emotion recognition and intensity of emotion recognition.²⁰⁶ However, employers must consult a privacy professional to assess whether the collection and processing of employee biometric data for antiharassment measures is compliant with the applicable data privacy laws.²⁰⁷ For employers who are concerned about employee privacy rights, it is suggested that: (1) employers request expanded consent on data collection and processing, and (2) provide clear, specific, and unambiguous information to employees on how the data will be collected, what it will be collected for, whom it will be disseminated to, and how employees can withdraw consent with consideration of existing and overlapping data privacy laws and regulations.

The nuances of individual facial expressions rely upon an adequate amount of data for real-world application in the workplace. While employers debate whether facial expression data collection is even a possibility, there are other benefits to using ERS. First, employers can use ERS to analyze auditory and visual modalities to capture emotional content from various styles of speaking.²⁰⁸ Second, ERS can detect when an employee loses focus, assisting employers to identify areas in need of improvement within their L&D content.²⁰⁹ ERS uses employees' webcams to analyze eye

205. Fatma Nasoz, et al., *Emotion Recognition from Physiological Signals Using Wireless Sensors for Presence Technologies*, 6 *Int'l J. Cognition, Tech. & Work* (2003).

206. See Dhvani Mehta, et al., *Recognition of Emotion Intensities Using Machine Learning Algorithms: A Comparative Study*, 19 *Sensors (Basel)* 1897 (2019).

207. See, e.g., Sushman Biswas, *Everything You Need to Know About Processing HR Data Under GDPR*, *HR Technologist* (Apr. 12, 2018), <https://www.hrtechnologist.com/articles/hr-compliance/everything-you-need-to-know-about-processing-hr-data-under-gdpr>; Ashley M. Farrell-Pickett & Alexa Hankard, *Employers: Stop, Drop, and Ensure CCPA Compliance as to Employees Residing in California*, *Nat'l L. Rev.: Greenberg Traurig, LLP L&E Blog* (Mar. 11, 2020), <https://www.natlawreview.com/article/employers-stop-drop-and-ensure-ccpa-compliance-to-employees-residing-california> [perma.cc/SZ7H-A72K].

208. See Panagiotis Tzirakis, et al., *End-to-End Multimodal Emotion Recognition Using Deep Neural Networks*, 14 *J. Latex Class Files 1* (2015).

209. See, e.g., *Nestor Artificial Intelligence*, <https://nestor-ai.com/> (last visited Mar. 21, 2021); Amar Toor, *This French School is Using Facial Recognition*

movements and facial expressions to determine whether employees are paying attention to the webinar or video training. If the ERS sees the employee drift off, the software will ask questions about the subject and formulate quizzes based on the content covered during moments of inattentiveness, forcing employees to pay attention to the key information.²¹⁰

Employers can utilize ERS for asynchronous or synchronous online trainings, although an interactive synchronous webinar is preferable for employers who wish to establish a better working relationship with employees. Nevertheless, by using ERS, employers will be able to show that both supervisors and lower-level employees completed the training, and that they paid attention and understood the training.²¹¹

3. Digital Communication Analytics

Employers are able to assess their workplaces for risk factors associated with sexual harassment through artificial intelligence analysis of messages exchanged by employees, such as email or instant messaging.²¹² Using advanced analytics and predictive analytics,²¹³ employers can project future trends, events, and

to Find Out When Students Aren't Paying Attention, *The Verge* (May 26, 2017), <https://www.theverge.com/2017/5/26/15679806/ai-education-facial-recognition-nestor-france> [perma.cc/PHN2-9G6R] (“The software [Nestor] uses students’ webcams to analyze eye movements and facial expressions and determine whether students are paying attention to a video lecture. It then formulates quizzes based on the content covered during moments of inattentiveness. Professors would also be able to identify moments when students’ attention waned, which could help to improve their teaching.”); Lulu Chang, *Artificial Intelligence Will Track Whether You’re Paying Attention in Class*, *Digital Trends* (May 30, 2017), <https://www.digitaltrends.com/cool-tech/nestor-ai-paying-attention> [perma.cc/6APW-FR4D] (“Nestor could improve student performance, especially as the popularity of massive open online courses (MOOCs) rises.”)

210. The federal judiciary must not allow employers to use ERS programs that perpetuate inequity for marginalized citizens. To learn more about why and how equitable and accountable artificial intelligence can be used in the employment context, see *Equitable AI*, Algorithmic Justice League, <https://www.ajl.org/learn-more> [perma.cc/W2DW-Z9VT].

211. This training should cover not only prohibited conduct, but also (i) how to report unwelcome conduct and (ii) what will happen to employees who subject others to workplace harassment or make false reports of such harassment.

212. Suraj Tripathi, et al., *Deep Learning based Emotion Recognition System Using Speech Features and Transcriptions*, Samsung R&D Institute India-Bangalore 1 (2019).

213. *Advanced and Predictive Analytics: An Introduction*, Bi-Survey, <https://bi-survey.com/predictive-analytics> [perma.cc/ZL5L-HZ4A] (“Advanced analytics describes data analysis that goes beyond simple mathematical calculations such as sums and averages, or filtering and sorting. Advanced analyses use

behaviors within the organizational climate. In fact, in response to the #MeToo movement, Chicago-based NexLP has already designed an algorithm to identify potential liabilities, such as sexual harassment, within company documents, including emails and chat conversations.²¹⁴ Specifically, the data is analyzed for various triggers to determine the probability of a genuine issue arising within the workplace. Any data identified by the algorithm as potentially problematic is then sent to an attorney or HR manager to investigate. However, it is important to note, that these algorithms are far from perfect due to the complex nature of how harassment presents itself.²¹⁵ Nevertheless, this software allows the factfinder within the organization to be on notice of potential harassment.²¹⁶

4. Chatbots: Creating a New Support Resource for Employees

Robotic autonomous agents, otherwise known as chatbots, are an emerging presence within the realm of artificial intelligence and human resources.²¹⁷ As self-service platforms, chatbots can provide immediate and consistent support for employees seeking support regarding workplace harassment. Unlike traditional

mathematical and statistical formulas and algorithms to generate new information, to recognize patterns, and also to predict outcomes and their respective probabilities. Predictive analytics is a sub-division of advanced analytics and focuses on the identification of future events and values with their respective probabilities.”)

214. See NexLP, <https://www.nexlp.com> [perma.cc/6K7E-4HPD] (NexLP is a VC-backed startup focused on machine learning and artificial intelligence “to derive actionable insights from structured and unstructured data to deliver operational efficiencies & proactive risk mitigation for legal, corporate and compliance teams.”)

215. Further, artificial intelligence does not account for broader cultural or unique interpersonal dynamics.

216. See, e.g., Daniel Gutierrez, *Recommind Launches Advanced Analytics for Instant Messaging Data*, *Inside Big Data* (Aug. 28, 2015), <https://insidebigdata.com/2015/08/28/recommind-launches-advanced-analytics-for-instant-messaging-data> [perma.cc/5QKE-ARN4] (“Recommind, a leader in advanced analytics, announced Axcelerate 5.5, the latest version of its pioneering cloud-based eDiscovery platform. Axcelerate now enables sophisticated analysis of instant messaging (IM) data with smart processing technology that can be applied to a wide range of platforms. . . . With Axcelerate, they can quickly spot the conversations that matter for investigations, compliance and litigation. While their opponents are still sifting through email, Axcelerate customers are planning a winning strategy.”)

217. *Gartner Predicts 25 Percent of Digital Workers Will Use Virtual Employee Assistants Daily by 2021*, Gartner (Jan. 9, 2019), <https://www.gartner.com/en/newsroom/press-releases/2019-01-09-gartner-predicts-25-percent-of-digital-workers-will-u> [perma.cc/3NZZ-BKRD].

reporting mechanisms, chatbots provide a simple and intuitive conversational user experience.²¹⁸ Chatbots serve four key purposes in the context of the *Ellerth/Faragher* defense: (1) to be an unbiased resource for employees who fear retaliation or judgment;²¹⁹ (2) to assist the employee in identifying whether actionable harassment²²⁰ has occurred;²²¹ (3) to provide information to employees who have been sexually harassed and are unsure of their legal rights, or those who simply want to learn more about workplace sexual harassment;²²² and (4) to help the employee navigate and document the

218. Employers should integrate the employee intranet search mechanism into the chatbot, including the aforementioned RRS database. For example, if an employee would like to find certain documents or specific information, he or she can simply request that information on the chat app and receive a link that leads them to the relevant page on the intranet or RRS. This streamlines the process by eliminating the need to open another browser or app.

219. See Katyanna Quach, #MeToo Chatbot, Built by AI Academics, Could Lend a Non-Judgmental Ear to Sex Harassment and Assault Victims, *The Register* (Sep. 11, 2019), https://www.theregister.co.uk/2019/09/11/ai_harassment_help_chatbot [perma.cc/6RND-2B7E] (“The bot, arising as a result of the Me Too movement, is trained to analyse messages to classify the type of harassment described by a victim, and determine, for instance, whether an attack was verbal or physical. It can also ask for basic information, such as the time and date of an assault, before recommending victims receive medical or psychological treatment, depending on the severity, and help them report their abuser to police with contact details.”)

220. Oftentimes workplace harassment is minor during the first occurrence and employees are not sure what to do to prevent future behavior. If harassment has taken place but is not actionable, the chatbot should then provide social mitigation tactics such as “Have you tried telling your co-worker that this makes you uncomfortable?” or “You should try telling your co-worker ‘Hey, just letting you know that I would watch out because not everyone has the same sense of humor and that could be taken the wrong way.’” The chatbot should also ask, “Do you want me to notify HR anonymously that there’s been an issue?” If the employee chooses an anonymous reporting method, the chatbot should clarify that any anonymous reports will make it difficult for the employer to make any direct actions on the matter and that the employer is not officially on notice due to the anonymous nature of the complaint.

221. See *infra* note 223; see also Tobias Bauer, et al., #MeTooMaastricht: Building a Chatbot to Assist Survivors of Sexual Harassment, in *ECML PKDD 2019: Machine Learning and Knowledge Discovery in Databases* 503–521 (Peggy Cellier & Kur Driessens eds., Spring, 2019).

222. Erin Winick, Victims of Sexual Harassment Have a New Resource: AI, *MIT Tech. Rev.* (Dec. 6, 2017), <https://www.technologyreview.com/2017/12/06/241607/victims-of-sexual-harassment-have-a-new-resource-ai> [perma.cc/4HJ5-BP5V] (“Using deep learning, the AI system [Botler AI] was trained on more than 300,000 U.S. and Canadian criminal court documents, including over 57,000 documents and complaints related to sexual harassment. Using this information, the software predicts whether the situation explained by the user qualifies as sexual harassment, and notes which laws may have been violated under the criminal code. It then generates an incident report that the

complaint process by asking objective questions about the incident and compiling the answers into a time-stamped form that the employee can download and submit to the employer and, potentially, lawyers or government agencies.²²³

If possible, employers should create their own chatbot app. Though, alternatively, employers may utilize a third-party app as long as it has robust privacy mechanisms and the ability to personalize the data, such as incorporating employer-specific reporting procedures.²²⁴

At present, legally “reasonable” structures and systems of organizations hinder anti-harassment efforts due to inefficient policies and practices created to match the requirements of legal compliance. The inclusion of digital tools in training and reporting mechanisms will help transition the outdated “reasonableness” of the Ellerth/Faragher defense into the 21st century.

CONCLUSION

A preoccupation with legal liability often prevents employers from evaluating preventative and corrective mechanisms for their effectiveness in reducing and addressing sexual harassment. Without legal incentives compelling employers to demonstrate that their prevention efforts are effective, antiharassment measures will likely go unevaluated—especially because a mechanism found to be ineffective could expose the employer to legal liability. To ensure that antiharassment mechanisms are adequate, judicial interpretation of what is sufficient to meet the reasonable care requirement of the *Ellerth/Faragher* defense will have to change.

Courts evaluating employers’ *Ellerth/Faragher* defenses in Title VII harassment cases should heighten the reasonableness standard to include active preventative measures and accessible reporting mechanisms through technology. This heightened standard will

user can hand over to relevant authorities.”)

223. See, e.g., Mong Palatino, ‘Gabbie’ Chatbot Helps Victims of Sexual Harassment in the Philippines, *Global Voices* (Oct. 11, 2018), <https://globalvoices.org/2018/10/11/gabbie-chatbot-helps-victims-of-sexual-harassment-in-the-philippines> [perma.cc/AC4Y-3DP7]. (“Meet Gabbie, a Facebook messenger chatbot that helps Filipinos report incidents of sexual assault and harassment. . . . Here’s how Gabbie works: when a person sends a message to Gabbie, he or she will be asked if he or she was a victim of assault or harassment or simply wants to know more about sexual violence. Gabbie is coded with information about Philippines’ laws about violence against women.”)

224. It is unlikely that all employers will be able to implement such a technologically advanced mechanism without the aid of a third-party app. However, employers are advised against using third-party chatbot apps if there is doubt about the strength of the application’s privacy measures.

ensure that employees are not limited to archaic reactive complaint mechanisms. In determining the reasonableness of an employer's reporting mechanism, the court or finder of fact should consider the prevalence in the industry of technological tools like artificial intelligence, machine learning, and text analytics. So long as the *Ellerth/Faragher* defense remains the law, it is incumbent upon the federal judiciary to seriously consider evidence demonstrating what is reasonable in the age of technology. This shift will create pressure, driving corporate change, and ultimately, true equity within the workplace.