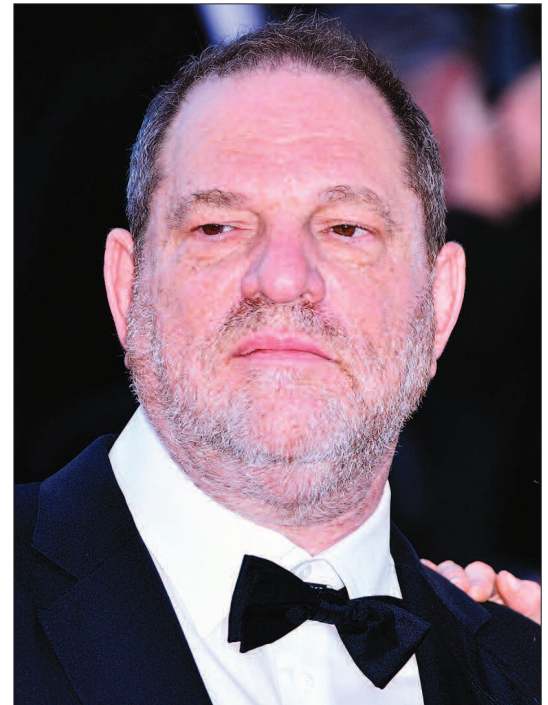


Workplace Sexual Harassment

Will the latest charges lead to a shift in corporate culture?

Charges of workplace sexual harassment have exploded into the news in recent months as allegations by dozens of women have forced the resignations of such high-profile figures as Uber co-founder Travis Kalanick, Fox TV host Bill O'Reilly and — in perhaps the most spectacular fall from grace — iconic Hollywood producer Harvey Weinstein. Many observers believe the scandals, which involve accusations of harassment, sexual coercion and in some cases rape, mark a turning point in the decades-long battle to change corporate culture so that sexual harassment is no longer tolerated. Human resource managers are beginning to evaluate whether anti-sexual harassment programs might be more effective if they focused on teaching employees to avoid and respond to all types of inappropriate and uncivil behavior rather than simply on teaching them the technicalities of anti-harassment law. At the same time, however, businesses increasingly are requiring employees to sign arbitration agreements that forbid them from taking sexual harassment claims to court, a practice some women's rights advocates say helps perpetuate the behavior.



Movie producer Harvey Weinstein, recently accused of sexual harassment or assault by more than 60 women, joins a long list of media, high tech and other executives who have lost their jobs in the wake of similar allegations. The rash of charges prompted hundreds of thousands of women around the world to report — using the hashtag #MeToo — their own experiences of sexual harassment.

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Workplace Sexual Harassment

BY SHARON O'MALLEY

THE ISSUES

On her first day as a site reliability engineer at Uber in 2015, Susan J. Fowler got a string of text messages from her new manager saying he was “looking for women to have sex with.”¹ She considered the messages “so clearly out of line” that she immediately reported them to the human resources (HR) department at the on-demand car service.

In a detailed blog post about the experience published last February, Fowler said HR acknowledged the manager’s behavior was sexual harassment but told her that because the manager was “a high performer,” it was “probably just an innocent mistake on his part.” An HR representative, she wrote, advised her to change to another team so she would not have to interact with the harasser. The rep also said the manager would probably give her poor marks on her evaluation if she did not switch teams — and HR couldn’t stop him, Fowler recalled.

So Fowler joined another team and quit Uber a year later. Her blog post details a year’s worth of sexual harassment and retaliation against her and some of her female colleagues. A law firm hired by Uber investigated her allegations and recommended a variety of actions the company should take, including firing 20 employees.² In June, CEO Travis Kalanick, who helped found Uber in 2009, stepped down under pressure from investors over the allegations.³

Fowler’s experience is common in Silicon Valley, where 53 percent of female tech employees said they had experienced sexual harassment and 37 percent said they had witnessed it,



Getty Images/VCG/Wang Kaichun

Travis Kalanick stepped down in June as CEO of Uber following reports of widespread sexual harassment and retaliation against women at the car-hailing company. The growing furor over workplace sexual harassment is prompting human-resource managers to evaluate whether companies should focus on teaching employees how to avoid — or respond to — inappropriate and uncivil behavior rather than simply teaching them about anti-harassment law.

according to an August survey by the Washington, D.C., research firm Lincoln Park Strategies.⁴ But Kalanick’s departure is — or was — unusual in the male-dominated tech culture, where, according to Fowler and others, superstars are shielded from repercussions because they earn so much money for their employers.

Kalanick’s departure was followed by a rash of sexual-harassment-related resignations and firings of tech executives, including the founder of 500 Startups, a venture capital company, who called himself “a creep” in a Twitter apology; the co-founder of Binary Capital; and the CEO of Social Finance, or SoFi, which one female former employee described as “a frat house.”⁵

Outside of the high-tech world, high-profile resignations over sexual harass-

ment had started earlier: Fox News personality Bill O’Reilly, after costing the network \$45 million in settlements with six accusers, lost his job in April, just 10 months after his longtime boss, Roger Ailes, resigned as the media empire’s CEO for the same reason.⁶ Michael Barnes, the CEO of Signet Jewelers, which owns Kay Jewelers and Jared the Galleria of Jewelry, and world-famous astronomer Geoff Marcy, who taught at the University of California, Berkeley, left their jobs amid multiple allegations of sexual harassment.⁷

Most recently, more than 60 women have accused film producer Harvey Weinstein of sexual harassment or assault. Weinstein has denied the assault charges.⁸ On Oct. 14, the board of the Academy of Motion Pictures Arts and Sciences expelled Weinstein, saying it wanted “to send a message that the era of willful ignorance and shameful complicity in sexually predatory behavior and workplace harassment in our industry is over.”⁹

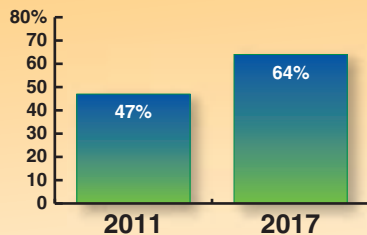
Such well-publicized reckonings, some after decades of unpunished misconduct, could signal the start of a culture change in the American workplace, says Melissa Silverstein, founder of Women and Hollywood, which advocates for greater gender diversity in Hollywood. The Weinstein scandal has touched off “a global conversation about sexual harassment” among people who “want to see change,” she said.¹⁰

Since the Weinstein scandal exploded, more than half a million women worldwide — including four U.S. senators — have taken to social media using the hashtag #MeToo to share their own harassment and assault experiences and discuss what needs to change.¹¹

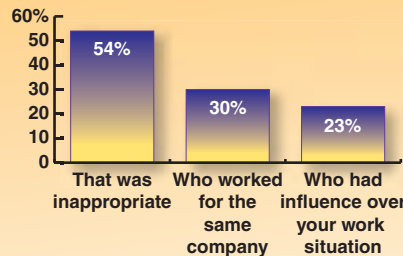
Most Say Sexual Harassment a ‘Serious Problem’

Nearly two-thirds of American adults polled this month say workplace sexual harassment is a “serious problem,” up from 47 percent in 2011. This month’s poll also found that more than half of the women surveyed had received unwanted sexual advances they considered inappropriate.

Percentage of Americans Who Say Sexual Harassment Is a “Serious Problem”



Percentage of Women Who Received Unwanted Sexual Advances from a Man



Source: Caitlin Gibson and Emily Guskin, “A majority of Americans now say that sexual harassment is a ‘serious problem,’” *The Washington Post*, Oct. 17, 2017, <https://tinyurl.com/ydbmm6u7>

“The floodgates have opened,” said former Fox News host Gretchen Carlson, who received a \$20 million confidential settlement to resolve her sexual harassment suit against Ailes. “Everyone is talking about this now.”¹² Media mogul Oprah Winfrey called it a “watershed moment” for women who felt that in order to keep their jobs, “I’ve got to smile [and] pretend he didn’t say that; I’ve got to pretend he didn’t touch me. I think those days are about to be over.”¹³

Indeed, a *Washington Post*-ABC News poll after the Weinstein scandal broke found that 64 percent of Americans see workplace sexual harassment as a “serious problem,” up from 47 percent in 2011.¹⁴ (See graph, above.)

However, skeptics doubt such a cultural shift is occurring or will last. Typically, companies backslide once the corporate mea culpas fade, embarrassed executives settle the lawsuits and the media spotlight focuses elsewhere, says Susan Antilla, a financial writer who authored a book about sexual harassment on Wall Street 15 years ago.¹⁵ “As soon as the spotlight

gets off the case, they go back to where they were,” she says.

Still others say public attitudes will be tough to change, given that U.S. voters elected Donald Trump president last year even though 15 women had accused him of sexually harassing or assaulting them and despite revelations that he had settled multiple sexual harassment lawsuits during his business career. He also was caught on tape bragging about sexually assaulting women in 2005. Trump denied the allegations and dismissed the taped conversation as “locker room talk.”¹⁶

“Unfortunately, the lesson that we learned after the election is that sometimes harassers are rewarded,” said Fatima Goss Graves, president of the National Women’s Law Center, a Washington advocacy group that promotes equality and opportunity for women and families.¹⁷ Author Antilla says, “In this administration, we’re not going to see any progress. It’s going to go backward.”

Workplace sexual harassment is a form of gender discrimination prohibited

under Title VII of the 1964 Civil Rights Act. It can involve unwelcome sexual advances, requests for sexual favors or verbal or physical harassment of a sexual nature toward an employee or job applicant.¹⁸ It also includes offensive comments — even nonsexual ones — about a person’s gender. Harassment can occur between men and women or between people of the same gender, and it applies to gay and transgender employees as well. On college campuses, Title IX of the Education Amendments of 1972 protects students who might be harassed by teachers, administrators or other students.¹⁹ Besides the two federal anti-discrimination laws, a variety of state laws prohibit verbal harassment or other sexually threatening behavior such as indecent exposure, groping or stalking someone.²⁰

No one really knows how prevalent workplace harassment is because three-quarters of victims never report their experiences or file claims or lawsuits, according to a task force at the Equal Employment Opportunity Commission (EEOC), the federal agency that investigates Title VII violations.²¹ About 17 percent of the nearly 7,000 sexual harassment complaints examined by the EEOC in 2016 were filed by males, and 26 percent by LGBT individuals.²² The *Post*-ABC poll found that 54 percent of female survey respondents said they had received unwanted and inappropriate sexual advances either at work or outside of the workplace.²³

Others say the proliferation of mandatory confidential arbitration clauses — which require sexual harassment victims to seek redress through an arbitrator and then not discuss the case publicly — hides the true scope of the problem. (See “At Issue,” p. 909.) “This veil of secrecy protects serial harassers by keeping other potential victims in the dark, and minimizing pressure on companies to fire predators,” Carlson wrote in a *New York Times* op-ed in October.²⁴ Her book, *Be Fierce: Stop Harassment and Take Your Power Back*, was published that month.

EEOC commissioners Chai R. Feldblum and Victoria A. Lipnic, co-authors of the task force report, wrote that the country has come a long way in the 30 years since the U.S. Supreme Court labeled workplace harassment a form of gender discrimination. But “sadly, [we] still have far to go,” they said.²⁵

“I’m not quite sure why leaders have not gotten the wake-up call that what they’re doing is not working well enough,” Feldblum says. “Businesses have not taken the steps they can to change their culture. Leaders will advise them to have an anti-harassment policy and have training, [but] those two elements . . . are not sufficient to change a culture.”

However, Cornell University law professor David Sherwyn says most companies have beefed up their anti-harassment policies.²⁶ “For normal people in normal business, the companies . . . say, ‘Get out,’ ” he says. He acknowledges, however, that when the allegations are against people like Bill O’Reilly, who bring in a lot of money, some “companies will look the other way because it’s a bottom-line thing.”

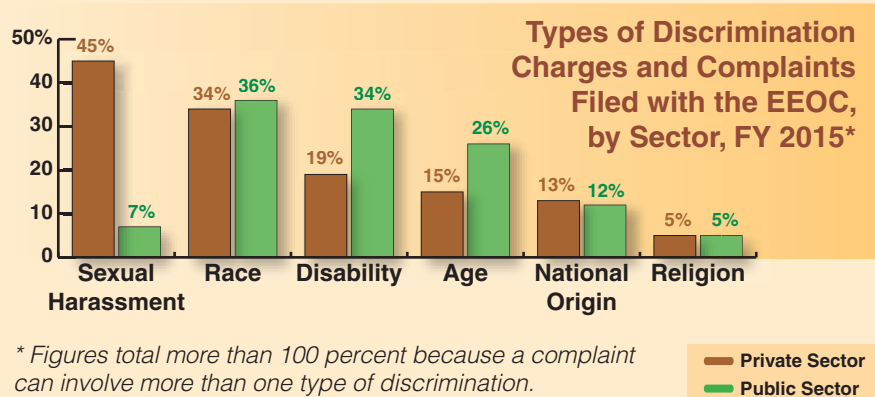
Harassment “happens less now in corporate America,” says San Francisco lawyer Harmeet Dhillon, because most companies provide mandatory sensitivity training in order to protect themselves from liability. “To the extent that they think they will have to pay for bad behavior, they will stop the bad behavior,” she says.

Companies that offer sensitivity training and create zero-tolerance policies for harassment “are fixing what they can,” says Phyllis Hartman, owner of PGHR Consulting, a human resources consulting firm in Pittsburgh, “but the reality is . . . it’s more of a company cultural issue.” Hartman, a member of a Society for Human Resource Management committee on ethics and corporate social responsibility, adds: “We need to focus on helping people get along.”

Male-dominated industries, such as construction, “still have a good-old-boys mentality,” says Karla Y. Epperson, senior HR business partner for the California

EEOC Complaints Highest in Private Sector

Forty-five percent of charges and complaints filed with the U.S. Equal Employment Opportunity Commission (EEOC) in 2015 against private-sector firms involved sexual harassment; in the federal sector, the figure was 7 percent.



Source: Chai R. Feldblum and Victoria A. Lipnic, “Select Task Force on the Study of Harassment in the Workplace,” U.S. Equal Employment Opportunity Commission, June 2016, <https://tinyurl.com/y8xux2gn>

construction company NPL. “And that means, unfortunately, that they cover up certain incidents that should not be covered up.”

Feldblum says harassment is often worse in traditionally male fields such as technology, where “women are walking into cultures that often see sexual harassment as a normal way of doing business.” Science, engineering and math fields also have high rates of harassment, she says. (See sidebar, p. 904.)

Harassment is prevalent in Silicon Valley, says Dhillon, because many of those firms are small startups that are exempt from California’s requirement that companies hold biannual sexual harassment training. “There are no checks and balances . . . on their obligations to their workers,” she says, “until someone gets sued.” But she continues to see evidence of sexual harassment, she says, in fields where “a powerful man or woman uses a position of power to pressure or demand sexual favors from a subordinate.”

Corporate leaders must “do a significant reset of their culture, and that

starts with an awareness that culture change doesn’t happen on its own,” says Feldblum. “They need to . . . make it very clear through words and actions that they expect to have no harassment in the workplace.”

As sexual harassment and assault cases continue to make headlines, businesses, employees and regulators are asking these questions:

Are workplace training programs on sexual harassment effective?

On an NPL building site in California, a vendor unloading his usual weekly delivery turned casual small talk with a male construction worker toward sex, a conversation the worker later said was unwelcome. But he did not report it to NPL’s human resources department until weeks later, after he had attended a mandatory training session on sexual harassment.

NPL’s Epperson recounts that the employee had not realized the builder was accountable for the behavior of its vendors. “He thought it was up to the vendor to take action,” she says.

WORKPLACE SEXUAL HARASSMENT

But during the training he learned that “if an individual felt harassed by whatever comment or gesture was made by [a vendor’s employee], it’s still our responsibility to take action.”

California, like Connecticut and Maine, requires most businesses to hold regular sexual harassment training for employees. “I think that’s a great idea,” says Epperson, who has worked at NPL for two years and is the 50-year-old company’s first human resources pro-

One, from 2001, concluded that the training leaves some men feeling threatened and at risk of false accusations. In a stunning finding, that study’s co-author, Shereen Bingham, a professor of communication at the University of Nebraska, Omaha, said last year that men who completed a 30-minute training were actually less able to identify coercive behavior toward a subordinate as sexual harassment than men who did not take the training.²⁸

school dean, the renowned astronomer Marcy and an assistant basketball coach left the school amid sexual harassment scandals.³⁰ She criticized the university’s training for its lack of discussion about power dynamics and inequality and for focusing on how to supervise harassers, which implies that supervisors would never be the culprits.³¹

The commissioners have advocated a change in the kind of training companies offer, from the typical definitions-based video session to broader, in-person “respectful workplace training,” whose premise is that incivility is a gateway to harassment. “It doesn’t focus as much on legal definitions as on common sense,” says Feldblum, a member of the EEOC since 2010. “It’s more about what you should do as opposed to directions on what you shouldn’t do.”

Fran Sepler, president of the Minneapolis-based human resources consulting firm Sepler & Associates, is working with the EEOC to create respectful workplace training modules. Rather than teaching people what they shouldn’t do, the new training is “positive and skill-building.” It focuses “on what people should do, and not just with protected classes — but with everybody in the workplace,” she says. It discourages “behaviors that are rude and not civil, but which don’t rise to the level of unlawful harassment. If you stop those behaviors, you won’t get to the level of harassment.”

Sepler says sexual harassment training is “too nuanced” for online delivery. She advocates classroom sessions with a live trainer. Epperson, who requires NPL’s employees to watch online videos, agrees that face-to-face follow-up with employees is critical to reinforcing their understanding of what the online course teaches.

Still, Epperson says that any sexual harassment training — even a canned version — is better than none. “We can equip people all day long, and if they’re going to bury themselves, they’re going to bury themselves,” she says. “But it cannot be said that the employer



Getty Images/WireImage/Steve Zak Photography

Former Fox News host Gretchen Carlson received a \$20 million settlement to resolve her sexual harassment suit against then-Fox News CEO Roger Ailes, who resigned in June 2016 following numerous reports of sexual harassment. Carlson, who has received hundreds of letters from women saying they, too, had suffered from workplace harassment, said recently: “The floodgates have opened. Everyone is talking about this now.”

fessional for the region, which covers California, Texas, Oregon, Washington and Nevada. Members of construction crews often are unaware that they could offend co-workers with graphic stories about sexual exploits, she says. “The training programs that are out there are really beneficial,” Epperson says.

It is unclear, however, whether such programs are universally effective. The EEOC task force’s review last year of research on sensitivity training unearthed just two studies — both more than 15 years old — addressing whether sexual harassment training prevents the behavior.²⁷

The task force complained that most training focuses more on legal definitions and avoiding lawsuits than on stopping bad behavior. “Much of the training done over the past 30 years has not worked as a prevention tool,” the EEOC’s Feldblum and Lipnic wrote in the report. And “ineffective training can be unhelpful or even counterproductive.”²⁹

“The training we actually have to do is laughable. It’s just terrible,” said Leslie Salzinger, a professor of gender and women’s studies at the University of California, Berkeley, where a law

didn't do what was in their power to equip that employee with tools and with training."

Cornell law professor Sherwyn says training has become more important as celebrity offenders such as O'Reilly, Kalanick and Weinstein make headlines. "If I were in charge of [human resources] at a large company," Sherwyn says, "I would have stepped up my training, and I would have been prepared for large claims. . . . I would be more serious, because I'd be afraid that more people would say, 'Wow, this stuff that someone accused O'Reilly of, somebody has said that to me.' "

Do business policies perpetuate sexual harassment?

After Uber's Fowler left the team whose manager she said had propositioned her, several of her female colleagues told her the same man had approached them about having sex. HR had told Fowler her report was the first about this manager, she said. But her colleagues said HR told them the same thing when they reported their experiences.³²

After Fowler's blog went viral, Uber hired former U.S. Attorney General Eric Holder to investigate her claims. One of his recommendations: HR should track complaints and let senior management know if multiple employees have reported the same manager. Then, Holder said, management should intervene. Fowler's abusive supervisor was fired.

Now in private practice in Washington, Holder also recommended that Uber make it clearer to employees how to lodge complaints and give them options for talking to HR, their supervisors, other managers or a helpline. "This encourages employees who may otherwise fear retaliation to come forward," Holder wrote in his report.³³

It is common for Silicon Valley firms such as Uber not to have such policies in place, says San Francisco lawyer Dhillon, because most started small and without much workplace experience:

"A couple of tech bros get together with one another to start a company; some other bro has money, so they get him in on it. They hire some women. They call them girls."

But even companies with formal procedures and regulations in place are not immune to sexual harassment claims.

Too often, says Washington lawyer Joseph Sellers, business leaders misplace their faith in an announced policy — often a zero-tolerance policy — forbidding sexual harassment. "They believe: 'Resting on the confidence of that policy, we'll have no sexual harassment, and . . . if there is, we won't be held legally responsible,' " says Sellers. "They rely so much on the presence of the policy, so they don't devote resources and attention to protecting against [sexual harassment] in everyday decisions."

Harassment, as a result, is left unchecked, Sellers says.

Management's behavior is more important than policies, Sellers says. "The leadership of the company tends to be viewed as having the most significant influence on whether harassment occurs in the workplace," he says. "It could be that the senior people are engaged in harassment, or they tolerate it, see it, know about it but don't do much about it."

Employees take their cues from "what kind of behavior is permitted, regardless of what the policy says," Sellers adds. "Policies are important, but they are by no means sufficient as a way to protect against workplace harassment."

Dorothy Edwards, president of Alteristic, a Springfield, Va., nonprofit organization that has created programs to prevent sexual violence, says zero-tolerance policies put would-be harassers on notice that they will suffer penalties for misconduct. "That's a good message," she says, "but it doesn't stand alone." Edwards advocates policies that encourage or even require employees to treat each other with respect and to make it safe for victims to report harassment without the fear of retaliation.

Sellers says one policy in particular — the mandatory arbitration contract — can perpetuate sexual harassment.³⁴

Some companies require employees to sign a contract upon employment that binds them to work out any grievances with a company-appointed arbitrator. That prevents a woman who claims sexual harassment from suing the company over it; instead, she is required to take her complaint to the arbitrator and abide by that decision.

Those contracts often include confidentiality clauses forbidding an employee who enters into arbitration to talk about the case or any settlement that results from it.

Forcing employees into secret hearings conducted by company-picked decision-makers "silences survivors of sexual harassment," television journalist Carlson said in a Capitol Hill press conference last spring. Lawmakers introduced a bill that would make it easier for sexual harassment victims to avoid forced arbitration.³⁵

The EEOC's Feldblum calls confidentiality clauses "problematic in terms of shining sunlight onto problems, especially when you have situations with the superstar harasser — someone who is high value to the company. Things don't get fixed because the incident is swept under the rug." The result, says Sellers, is an experience like Fowler's at Uber: When multiple women complain about the same individual, they don't know about each other. And employees who later encounter the harasser have no warning of that history of misconduct.

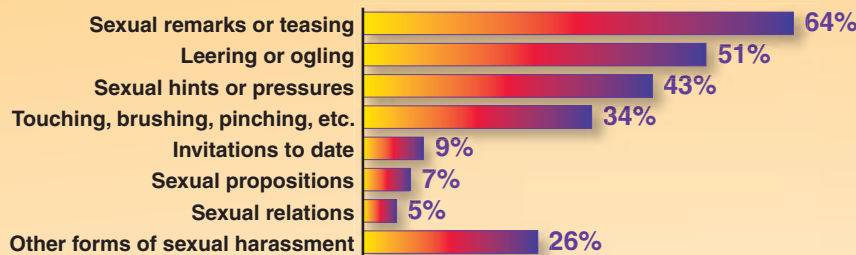
Still, says Patricia Wise, a labor and employment lawyer in Toledo, Ohio, who calls herself "no fan of arbitration," the practice gives her management clients an advantage. "If my clients are sued, I would much prefer that they not resolve it through the courts, which is a public forum. Arbitration can be quiet, faster and less expensive [than a lawsuit]. Employees should consider it."

She adds, however: "If I put on my

Most Workplace Sexual Harassment Is Verbal

Most of the sexual harassment women experience at work involves nonphysical behavior such as sexual remarks, teasing or ogling, according to a 2016 online survey of 500 Redbook readers. Overall, 80 percent of respondents experienced sexual harassment at work, compared with 90 percent in 1976. Some 9,000 women responded to the earlier survey.

Percentage Who Experienced Various Types of Workplace Sexual Harassment, 2016



Total Who Experienced Sexual Harassment: 80%

Source: Ashley Mateo and Kaitlin Menza, "The Results of a 1976 Survey of Women About Sexual Harassment At Work Remain Virtually Unchanged In 2017," Redbook, March 27, 2017, <https://tinyurl.com/yaczn69y>

other hat, which is that I care about the issue of harassment, I don't think arbitration is the way to go. The arbitrator is going to require an employer . . . to train its managers. It's not the best place for an employee to be. But employees don't have a choice if they sign an arbitration form."

Cornell's Sherwyn disagrees that arbitration harms an employee who has filed a sexual harassment complaint. Going to court, he says, does not guarantee that the case will get publicity. "People get that wrong," he says. "Roger Ailes didn't go to court; Bill O'Reilly didn't go to court. The only reason we know about this is because they're celebrities." He says sexual harassment lawsuits filed by noncelebrities rarely get publicity.

Sherwyn says lawsuits stretch a complaint out over years, while arbitration settles the matter quickly. Anti-arbitration attorneys, he says, "are worried about the 2 percent of cases or fewer that are egregious and deserve to see the light

of day. I'm worried about the 98 percent that are just dealing with people."

Do policies designed to prevent sexual harassment go too far?

Some say sexual harassment training, along with some other workplace practices, is making things worse for women at work.

Psychologist Kim Elsesser, author of the book *Sex and the Office: Women, Men and the Sex Partition That's Dividing the Workplace*, offered this scenario: "Imagine a male executive asks a male employee to join him on a Starbucks run or for a beer after work. No one blinks an eye, a friendship develops, and perhaps a mentor relationship as well. However, if the same male executive invites a woman to join him for coffee or a beer, it's a different story." ³⁶

Elsesser, a lecturer in women's studies at UCLA, wrote in an op-ed piece for the *Los Angeles Times*: "I'm not suggesting we set the clock back on the progress we've made in trying to de-

crease sexual harassment at work. But I've found that heightened awareness of harassment is also inadvertently leaving many employees overly cautious in interactions with the opposite sex. It's creating a barrier." ³⁷

Vice President Mike Pence drew barbs in March when a 2002 comment he made to a Capitol Hill newspaper about refusing to dine alone with any woman other than his wife resurfaced in *The Washington Post*. ³⁸ Critics questioned whether his policy meant he would not hire women in leadership positions that might require them to meet with him privately. ³⁹

Sepler, the Minneapolis HR executive, says policies that are too restrictive can create fear and apprehension among employees, and that can rob women of opportunities. She advocates policies that focus on how to "do things positive" rather than separate men and women. "If I'm a male manager and I'm afraid to be with a female employee," she says, "who's missing the mentoring opportunities?"

In her 2003 book, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy*, New York University law professor Cynthia Estlund argued that zero-tolerance policies banning any sexual references in jokes or conversation among colleagues "threaten both workplace sociability and equality." Even 14 years ago, she said, "the ban on sexual harassment [had] become unmoored from the anti-discrimination norm from which it arose." ⁴⁰

But Sepler says policies do not "go too far. I have yet to see a policy that says, don't have a sense of humor; don't enjoy your co-workers; don't go to lunch together. People who think policies have gone too far will look at a perfectly reasonable policy and say it's unfair."

Toledo attorney Wise distinguishes between policies that overcorrect a problem and those that go too far. "We have not overcorrected," she says, "but there is some legitimacy to saying

we've gone too far. . . . If I were a man, I probably would stop [complimenting] women; that doesn't rise to the level of sexual harassment." On the other hand, she says, a manager who constantly comments on the appearance of the women who work for him might be guilty of harassment.

Human resources consultant Hartman, however, says compliments about a woman's physical appearance should be verboten in the workplace. "That's not what they're there for," she says. "You can compliment somebody, but why compliment them on their hair or clothes? That's saying that matters more than the work they're doing. What matters is how well the person is doing the job."

Still, she agrees that women lose out when men refuse to travel with them or have private business conversations with them behind a closed office door. "A lot of that kind of travel is what moves a woman's career forward," she says.

A growing cohort of men's activists in Silicon Valley, however, has said tensions over what constitutes sexual harassment have created a "witch hunt" atmosphere in the high-tech world.⁴¹

The New York Times reported in September that a group of about 200 men in Silicon Valley meets regularly to discuss men's rights and object to what they refer to as "diversity dogma."⁴²

But San Francisco attorney Dhillon — who is representing 28-year-old Google engineer James Damore, who lost his job for writing a memo questioning whether women "were biologically less capable of engineering" — says Damore's lawsuit is about discrimination, not sexual harassment.⁴³

She claims that some Silicon Valley companies have set high quotas for hiring women. "That's a zero-sum game," she says. "If you're going to have 70 percent [of new positions] set aside for women, and 30 percent set aside for men, that's illegal. I believe what people are entitled to in the workplace is a gender-neutral workplace." ■



Getty Images/Bloomberg/Andrew Harrer

In a video shown on NBC's "Meet the Press" on Oct. 22, Massachusetts Sen. Elizabeth Warren and three other Democratic senators recalled their own experiences with workplace sexual harassment. Warren said when she was a young law professor, a senior faculty member asked her to stop by his office. When she got there, "he slammed the door and lunged for me," she said. "It was like a bad cartoon. He's chasing me around the desk trying to get his hands on me. And I kept saying, 'You don't want to do this. You don't want to do this. . . . Please don't do this.' " The other senators who told their stories were Heidi Heitkamp of North Dakota, Claire McCaskill of Missouri and Mazie Hirono of Hawaii.

BACKGROUND

Early Problems

Sexual harassment has been part of American culture since the early 1600s, when African slaves were brought to Jamestown, Va.⁴⁴

Female slaves were forced into "productive, reproductive and sexual labor crucial to the political economy" at that time, wrote attorney and historian Adrienne D. Davis, the vice provost of Washington University in St. Louis. "Conceiving slavery as sexual harassment sheds light on how slave law was labor law, plantations were workplaces and enslaved women's resistance constituted gender activism."⁴⁵

After the Civil War, women's rights advocates demanded that Philadelphia housekeeper Hester Vaughn, who had come to the United States from England,

be pardoned. Vaughn, who was fired when her employer learned she was pregnant, had been convicted of infanticide and sentenced to death after authorities found her with her dead baby. A backlash from protesters, who argued that Vaughn had been sexually coerced, convinced the governor of Pennsylvania to pardon her.⁴⁶

In the late 19th and early 20th centuries, labor activists and the Woman's Christian Temperance Union attempted to protect women from sexual harassment. Yet through much of the early 20th century, women in clerical and factory jobs silently endured physical and verbal assaults from male colleagues and supervisors. Even labor unions, which negotiated protections for women from work that was too physically demanding, could not shield them from being propositioned by their bosses. Largely left on their own to ward off the advances of lecherous co-workers, women were told by advice handbooks to quit their jobs if they were unable to stop the abuse.⁴⁷

The problem became worse as vast numbers of women began to enter the workforce during World War II. Later, in 1964, Congress passed the Civil Rights Act, including Title VII, which prohibited sex discrimination in the workplace. The next year, the new U.S. Equal Employment Opportunity Commission began to investigate claims of discrimination in employment. Later, Title IX of the Education Amendments of 1972 prohibited sexual harassment at public schools and colleges.

Still, the predatory sexual behavior that women experienced at work continued, even as the feminist movement took hold in cities. In 1975, a group of women's rights activists at Cornell University in Ithaca, N.Y., gave a name to something "they had all experienced but rarely discussed — unwanted sexual demands, comments, looks or sexual touching in the workplace." They called it sexual harassment.⁴⁸

The women organized around a former Cornell colleague, Carmita Wood, who filed a claim for unemployment benefits after she quit her job because of unwelcome touching from her supervisor. She had requested a transfer instead, but Cornell refused and said she did not qualify for benefits because she quit for personal reasons.

Wood and activists at the university's Human Affairs Office formed Working Women United and hosted events at which secretaries, factory workers, mail-room clerks, waitresses and other female wage earners spoke about their experiences. Some reported having to watch their male colleagues masturbate in the workplace. Others said they had been threatened. And nearly all said they had been pressured to have sex or be denied promotions.⁴⁹

The movement gained national attention when in 1975 *The New York Times* reported on the testimony of Lin Farley, director of the Women's Section in Cornell's Human Affairs Office, to the Commission on Human

Rights in New York. It was the first time a newspaper used the phrase "sexual harassment," which appeared in the article's headline.⁵⁰

Farley had outlined six behaviors that she considered to be sexual harassment:

- "Constant leering and ogling of a woman's body;
- Continually brushing against a woman's body;
- Forcing a woman to submit to squeezing or pinching;
- Catching a woman alone for forced sexual intimacies;
- Outright sexual propositions, backed by threat of losing a job; and
- Forced sexual relations."⁵¹

The Times quoted Farley calling the frequency of sexual harassment in the workplace "literally epidemic."⁵²

Redbook magazine went further in 1976, calling sexual harassment a "pandemic — an everyday, everywhere occurrence."⁵³ The magazine conducted a survey of 9,000 female readers; nearly 90 percent of respondents reported they had experienced sexual harassment on the job. In addition, nearly half said they had quit a job because of sexual harassment or knew a woman who had.⁵⁴ (See graphic, p. 900.)

The new movement sparked a backlash, starting with CNN commentator Rhonda Koenig, who wrote in the February 1976 issue of *Harper's* that "a lot of women would feel deprived without a reasonable quota of sexual harassment per week" and accused feminists of perpetuating the "myth of women as oppressed."⁵⁵

In the same vein, self-described "anti-feminist crusader" Phyllis Schlafly said in 1981 that women who complained had been harassed because they were "asking for it."⁵⁶ She told a Senate committee reviewing federal guidelines on harassment that "virtuous women are seldom accosted by unwelcome sexual propositions or familiarities, obscene talk or profane language."⁵⁷

Early Lawsuits

Still, by the early 1970s, the first six sexual harassment lawsuits were filed in federal court under Title VII of the Civil Rights Act, which prohibits employers from discriminating on the basis of race, color, religion, national origin or sex. But defense attorneys successfully argued that the courts "should not be concerned with the social life of company employees" and that because both men and women could suffer from sexual harassment, it did not qualify as discrimination. Plaintiffs lost all but one of those early lawsuits.⁵⁸

The lone breakthrough lawsuit, though, led other courts to recognize harassment based on sex to be within the purview of Title VII. The suit was brought by U.S. Department of Justice employee Diane Williams. Williams, who started working in the agency's Community Relations Service in January 1972, said her boss fired her that September after she rejected his repeated sexual advances. Defense attorneys argued that she was fired not because of her gender — since both men and women are subject to sexual harassment — but because she had snubbed her boss.⁵⁹

The judge disagreed, saying enforcement of Title VII does not depend on "a characteristic peculiar to one of the genders." The victory established *quid pro quo* sexual harassment — when employment or a promotion, for example, depend on providing sexual favors — as a form of sex discrimination in 1976.⁶⁰

Some media organizations mocked the win, calling it an "effort to regulate hanky-panky," Julie Berebitsky wrote in her book *Sex and the Office: A History of Gender, Power, and Desire*.⁶¹

In 1981, the EEOC added a section on sexual harassment to its guidelines on gender discrimination. The agency acknowledged two kinds of sexual harassment: "*quid pro quo*, as in the

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Chronology

1960s-1970s

Sexual harassment becomes illegal.

1964

Title VII of the Civil Rights Act bans employment discrimination based on race, religion, sex or national origin.

1964

New U.S. Equal Employment Opportunity Commission (EEOC) begins investigating discrimination claims.

1976

Sexual harassment plaintiff wins a court case for the first time.

1980s-1990s

EEOC and courts define sexual harassment.

1981

EEOC acknowledges two kinds of sexual harassment: *quid pro quo* and creating a hostile work environment.

1984

U.S. Circuit Court of Appeals says a single, severe workplace incident can constitute sexual harassment.

1986

U.S. Supreme Court rules for victim in its first sexual harassment case.

1991

Law professor Anita Hill accuses Supreme Court nominee Clarence Thomas of persistent sexual harassment when the two worked together years earlier. . . . Former Arkansas state employee Paula Jones drops sexual harassment lawsuit against Gov. Bill Clinton in exchange for \$850,000. . . . Federal District Court judge finds that posting pornographic photographs in the workplace constitutes sexual harassment.

1993

Supreme Court rules that a victim does not have to suffer psychological damage for a workplace to be considered hostile.

1995

Sen. Bob Packwood, R-Ore., resigns after dozens of campaign workers accuse him of sexual harassment.

1997

Sexual harassment complaints to EEOC peak at 15,889.

1998

Female employees of Eveleth Taconite Co. iron mine settle the first sexual harassment class-action lawsuit for \$3.5 million. . . . Supreme Court rules same-sex sexual harassment is actionable under Title VII. . . . Female employees at a Mitsubishi Motors manufacturing plant win \$34 million in sexual harassment suit. . . . Supreme Court says businesses are not liable for a sexual harassment claim if they established procedures for employee redress but the accuser did not follow those procedures.

2000s-Present

Monetary awards in sexual harassment cases skyrocket.

2004

Former Fox News producer Andrea Mackris sues TV personality Bill O'Reilly for \$60 million, claiming sexual harassment. She settles for an undisclosed amount of money.

2011

Jury awards Aaron's rental store employee Ashley Alford \$95 million — later reduced to \$40 million — in a claim against a manager she said sexually harassed her for a year. She eventually settled for \$6 million.

2012

A physician's assistant at Sacramento's Mercy Hospital wins largest sexual harassment award ever: \$168 million.

2016

Fox News agrees to pay former "Fox & Friends" co-host Gretchen Carlson \$20 million to settle sexual harassment lawsuit against Chairman Roger Ailes, who is forced to resign. . . . EEOC task force on harassment says three-quarters of sexual harassment victims never report abuse and calls for overhaul of prevention programs for employees. . . . Fifteen women accuse then-presidential candidate Donald Trump of sexual harassment or assault after the leak of a 2005 "Access Hollywood" video on which he bragged about grabbing women's private parts. . . . Jury awards Houston teenager \$8 million in sexual harassment suit against Chipotle, where she worked in 2013.

2017

Fox News fires Bill O'Reilly amid multiple claims of sexual harassment. . . . Uber engineer Susan J. Fowler publishes blog alleging rampant sexual harassment at the on-demand car service, leading to CEO Travis Kalanick's resignation. . . . Fidelity Investments fires well-known stock picker Gavin Baker for allegedly sexually harassing a junior female employee. . . . More than 60 actresses, employees and other women accuse film producer Harvey Weinstein of sexual harassment; some say he raped them; the board fires him. . . . Amazon Studios head Roy Price resigns after a Hollywood producer accuses him of making unwanted sexual advances. . . . Four Democratic senators — Elizabeth Warren, Heidi Heitkamp, Claire McCaskill and Mazie Hirono — make video statements, aired on "Meet the Press" on Oct. 22, about their own experiences with sexual harassment.

Women Leaving the Sciences Because of Sexual Harassment

"This reduces our scientific integrity."

Rebecca Barnes recalls that the first time she presented her doctoral research at a scientific meeting, a male scientist listened politely to her two-minute presentation and then told the blonde Yale University forestry and environmental studies student: "You're so much smarter than you look. You should consider dyeing your hair."

Not long after, as she prepared for a meeting with a renowned scientist, whom she would accompany to collect water samples from a stream, her professor pulled her into his office to prep her, she says. "You might consider wearing something different," he advised the shorts-clad scientist.

"It's August, and I'm going to be sampling," she says she replied. "What do you expect me to be wearing?"

Barnes is now an assistant professor of environmental science at Colorado College and an investigator on a National Science Foundation-funded team that aims to increase the participation and advancement of women in science and engineering. But many women leave scientific fields before they make it that far, she says, often because they tire of harassment.

Barnes calls the two incidents examples of "a thousand paper cuts" she has endured as a female scientist in a male-dominated field in which young female scientists depend on their male superiors for academic and professional recommendations. And while some people might deem the comments as falling short of harassment, they made her feel "unwelcome" among male scientists, she insists. And she has been sexually harassed "more times than I can count" — in ways she declined to describe for this article — by male scientists, professors and classmates, she says.

Barnes is not alone. In a study of 474 male and female astronomers and planetary scientists published in the *Journal of Geophysical Research* in July, 79 percent of women reported sexist remarks from peers and 44 percent said they heard them from supervisors. Nearly two-thirds of the women said men

had questioned their mental abilities, compared with 48 percent of men who reported the same.¹

Women make up about one-quarter of those in STEM (science, technology, engineering and math) occupations: 24.7 percent of those in computer and math occupations and 15.1 percent of those in architecture and engineering, according to the nonprofit Catalyst, which advocates for diversity in the workplace.²

In the astronomy study, women of color reported experiencing the most hostility, including verbal and physical harassment, according to the study by four female scientists. An equal number of white women and women of color said they had been verbally harassed about their gender.

Kathryn Clancy, an associate professor of anthropology at the University of Illinois and lead author of the study, said 28 percent of female scientists of color reported feeling unsafe because of their race or gender. In addition, 18 percent of women of color and 12 percent of white women said they skip professional events because they do not feel safe attending them.³

Clancy said the survey covered 2010 through 2015. "This isn't something anyone can point to and say, 'These results are padded by something that happened in 1967,'" she said. "They're feeling unsafe [and] skipping professional events today."⁴

Barnes says the study results ring true. She is a member of the Earth Science Women's Network and says the peer networking group conducted its own study a few years ago and found that 51 percent of its 3,000 members said they had experienced harassment. "These comments that make you feel like you're unwelcome are something that are now far more acknowledged as a problem," she says "We drive [women scientists] away because of the tiny things that happen every day. It's insidious."

In September, the American Geophysical Union (AGU), a professional organization of earth and space scientists, voted to broaden its definition of "scientific misconduct" to include

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Williams case, and unwelcome advances and sexual requests that could create a hostile work environment."⁶²

Feminist author and attorney Catharine MacKinnon, in her 1979 book *Sexual Harassment of Working Women*, was the first to propose the controversial, two-pronged definition. Ten years after Williams' victory, MacKinnon was co-counsel for the plaintiff in the first sexual harassment case heard by the U.S. Supreme Court.

The high court ruled in 1986 that the sexual harassment of an employee by a supervisor violates the federal

law against sex discrimination in the workplace. The case involved a lawsuit filed by Mechelle Vinson, a former teller at a Meritor Savings Bank branch in Washington, D.C., who said her manager pressured her into having sex more than 50 times in the bank. Vinson said she initially rejected the manager's advances but reconsidered because she feared she would lose her job. The court ruled that sexual harassment violates the law if it is "sufficiently severe or pervasive" to create "a hostile or abusive work environment."⁶³

It wasn't until 1991, however, that

sexual harassment became a national issue when University of Oklahoma law professor Anita Hill accused Supreme Court nominee Clarence Thomas of sexual harassment when she had worked with him years earlier at the EEOC and the U.S. Department of Education. During televised Senate confirmation hearings that gripped the country, Hill said Thomas had invited her on dates and made comments about sex and pornography. Hill never filed charges against Thomas, who denied her claims. The Senate confirmed his appointment to the high court, 52-48, where he remains a justice.⁶⁴

sexual harassment, discrimination and bullying.⁵ The organization received four complaints about improper conduct toward women during its own annual meeting in December.⁶

Scientific misconduct — traditionally defined as fabrication, falsification or plagiarism in research — can result in dismissal, the loss of a federal grant, a reprimand or a damaged reputation.

Not every scientist agrees that sexual harassment belongs in the same category as fabricating lab results, however. Mark Frankel, who formerly directed the scientific responsibility program at the American Association for the Advancement of Science in Washington, which calls itself “the world’s largest general scientific society,” says misconduct applies specifically to scientific research, while harassment is inappropriate in any field. “There is a line between them,” Frankel told *Science* magazine. “I would prefer seeing each of them on one side of the line or the other rather than seeing them incorporated.”⁷

Alan Price, a former federal scientific misconduct investigator, said investigating research wrongdoing requires different skills from those needed to investigate sexual harassment. Now that the American Geophysical Union has combined them, he said he worries that such investigations “wouldn’t be done well.”⁸

Barnes says more actions like the AGU’s and grants such as the one her team received from the National Science Foundation could help attract more women to scientific fields, and retain them. Women earn about 37 percent of U.S. undergraduate degrees in STEM disciplines and are underrepresented in other scientific fields. For example, women receive just 18 percent of computer science degrees.⁹

Writing in *The Atlantic*, Joan C. Williams and Kate Massinger of the Center for WorkLife Law at the University of California Hastings College of the Law, said within a decade the United States will have a shortage of 1 million college-educated STEM workers, largely because many women drop out of STEM fields

once they become doctoral students.¹⁰

In a 2014 survey on gender bias against women of color in science, Williams found that one in three female science professors reported sexual harassment.¹¹ “There’s been a lot of talk about how to keep women in the STEM pipeline,” Williams and Massinger wrote, “but it fails to make a crucial connection: One reason the pipeline leaks is that women are harassed out of science.”¹²

A more diverse scientific community “comes up with better solutions,” Barnes says. “[W]e need all hands on deck to figure out climate change and national disasters and energy supply. If we are driving people out of these fields because of bad behavior, that is reducing our scientific integrity.”

— Sharon O'Malley

¹ Kathryn B. H. Clancy *et al.*, “Double jeopardy in astronomy and planetary science: Women of color face greater risks of gendered and racial harassment,” *Journal of Geophysical Research*, July 10, 2017, <https://tinyurl.com/y98d96r7>.

² “Women in Science, Technology, Engineering and Mathematics (STEM),” Catalyst, Dec. 9, 2016, <https://tinyurl.com/zberj4q>.

³ Clancy, *op. cit.*

⁴ Azeen Ghorayshi, “Many Women of Color Feel Unsafe Working in Science, New Study Finds,” *BuzzFeed*, July 10, 2017, <https://tinyurl.com/y73zg3t3>.

⁵ “AGU Scientific Integrity and Professional Ethics,” American Geophysical Union, March 2017, <https://tinyurl.com/y7zbzffr>.

⁶ Maggie Kuo, “Geophysics society hopes to define sexual harassment as scientific misconduct,” *Science*, April 7, 2017, <https://tinyurl.com/ybjoujhn>.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Deborah Bach, “Study examines why some STEM fields have fewer women than others,” *Science X*, Oct. 13, 2016, <https://tinyurl.com/yb8dyhys>.

¹⁰ Joan C. Williams and Kate Massinger, “How Women Are Harassed Out of Science” *The Atlantic*, July 25, 2016, <https://tinyurl.com/luvyuth>.

¹¹ Joan C. Williams, Katherine W. Phillips and Erika V. Hall, “Double Jeopardy? Gender Bias Against Women of Color in Science,” WorkLife Law, University of California Hastings College of the Law, 2014, <https://tinyurl.com/kkbvkv>.

¹² Williams and Massinger, *op. cit.*

That same year, President George H.W. Bush signed the Civil Rights Act of 1991, which gave plaintiffs in employment discrimination suits the right to seek compensatory and punitive damages and to request a jury trial. Previously, plaintiffs could sue only for injunctive relief, including reinstatement to a job they had lost because of the discrimination, or lost pay and benefits.⁶⁵

The publicity surrounding the Senate confirmation hearings, combined with the expanded provisions for victims of workplace discrimination, including sexual harassment, led to a record number

of sexual harassment claims filed with the EEOC that year. One accuser was Arkansas state employee Paula Jones, who filed a sexual harassment lawsuit against President Bill Clinton, claiming he exposed himself to her and requested oral sex when they met in a hotel room in 1991. Clinton denied the allegations. Jones dropped her lawsuit in exchange for \$850,000.⁶⁶

By 1997, EEOC had recorded 15,889 charges of sexual harassment, filed both with the agency and its state affiliates, the highest in its history and more than double the 6,127 it logged in 1990.⁶⁷

Landmark Rulings

During the 1990s and early 2000s, federal courts and the Supreme Court ruled on a number of landmark sexual harassment cases, including:

- *Robinson v. Jacksonville Shipyards, 1991* — A federal District Court judge in Jacksonville, Fla., ruled that posting photographs of nude women in the workplace constitutes sexual harassment. Previously, courts had ruled that sexually explicit pictures could “contribute” to an atmosphere of sexual

Workers Urged to Report Harassment When They See It

"We want them to intervene early."

For a variety of reasons, three-quarters of people who experience sexual harassment at work never report it to their supervisors, the company's human resources department, the U.S. Equal Employment Opportunity Commission (EEOC) or a court, according to the EEOC, the federal agency that investigates such allegations.¹

An EEOC task force on harassment last fall proposed a solution: Companies can teach employees who witness or learn about the harassment to report it on the victim's behalf, says EEOC Commissioner Chai R. Feldblum. Such bystander intervention, she says, is similar to the Department of Homeland Security's anti-terrorism motto: "If you see something, say something."

Bystander intervention is widely taught on college campuses, where students are trained to step in if they suspect sexual violence is about to occur. The theory behind such training is that sexual assaults could be reduced if witnesses other than the victim confronted the offender directly; distracted him before an assault occurred; or reported the incident as the victim's delegate.

Dorothy Edwards, president of Alteristic, a Springfield, Va., firm that creates sexual harassment and assault prevention strategies, says bystander training for sexual harassment covers four areas:

- *Recognizing the warning signs.* "What does harassment look like?" Edwards says. "It's very behavioral. As early as possible, even when it's subtle, we want [every employee] to recognize it. We don't want them to only see it when it's really explicit. We want them to intervene early."

- *Understanding the barriers to getting involved.* Not everyone who witnesses harassment is willing to intervene, Edwards says. Workplaces that train employees to intervene should make it optional. Shy employees, she says, as well as those who do not want to get their peers in trouble or fear retaliation themselves if they report a peer, might never participate in an intervention. She advises managers to make clear that it is OK not to intervene and to offer a confidential way to report misconduct.

- *Implementing the "direct, delegate, distract" strategy.* Direct involves telling the harasser to stop. "Some people can do this, and some people can't," Edwards says. Delegate means reporting the incident to someone else — a human resources manager, a supervisor or even a friend who is willing to tell someone in authority about the incident. Distract involves interrupting

the harassment as it is happening. "Create a distraction to defuse what's going on," Edwards advises. "Say, 'Hey, what's going on?' or 'I need you in my office; can you come here?' or 'Do you have lunch plans? Come with us.'"

- *Focusing on positive behaviors.* If employees intervene only when they catch a harasser in the act, then workplaces will always be reacting rather than preventing, Edwards says. "We need to be shifting norms in a way that makes those behaviors less palatable." The new norm in the workplace, she says, should be that harassment is not OK and that "we look out for each other."

Such training, Edwards says, gives employees tools that they weren't equipped with before to counter the obstacles bystanders often face when deciding whether to intervene: a fear of retaliation; confusion about what constitutes sexual harassment and whether they should report it; and the tendency of bystanders to do nothing if other witnesses are not acting.

At several Oregon construction companies, Edwards' organization is trying out the sexual harassment version of bystander training. She says of the multiyear pilot, which began more than a year ago, employers are starting to embrace the program. "We don't know if it works."

So far, however, Edwards says, employees have called the four-tier approach "more realistic" than a single policy that makes the victim alone responsible for reporting harassment. Real success, she adds, will come when employees, rather than HR, set the tone that sexual harassment in their workplace will not be tolerated.

Companies that conduct bystander training, she says, should start with employees who are the most influential among their peers. "Who are the people who everyone takes their cues from?" Edwards says. "Who is the one in the center of the social life, organizing cocktails after work?"

"If you get these socially influential folks to buy in . . . by having them model and endorse these norms, that is more effective than training," Edwards says, and they reinforce the training once the rest of the team has had it.

— Sharon O'Malley

¹ Chai R. Feldblum and Victoria A. Lipnic, "Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace," U.S. Equal Employment Opportunity Commission, June 2016, <http://tinyurl.com/gnrncpn>.

harassment, but the *Robinson* ruling established the pictures themselves amounted to harassment.⁶⁸

- *Harris v. Forklift Systems, 1993* — When a female employee claimed the company's president created a

hostile work environment by making her the target of sexual innuendos and insults, Forklift Systems attorneys argued that no psychological harm occurred. The high court ruled that psychological damage is not

necessary for a workplace to be considered hostile. Justice Sandra Day O'Connor wrote for the court: "Title VII comes into play before the harassing conduct leads to a nervous breakdown."⁶⁹

• *Faragher v. City of Boca Raton and Burlington Industries v. Ellerth*, 1998 — These landmark cases led the Supreme Court to clarify that an employer is liable when any of its supervisors sexually harasses a subordinate in a *quid pro quo* situation. However, the high court also said employers are not responsible for sexual harassment by their supervisors if the employer has an established procedure for employees to “seek redress” from sexual harassment; and if the employee took advantage of that procedure. This is why so many companies require employees to take sexual harassment training.⁷⁰

• *Oncale v. Sundowner Offshore Services*, 1998 — The Supreme Court unanimously ruled that same-sex sexual harassment is actionable under Title VII.⁷¹

• *Pennsylvania State Police v. Suders*, 2004 — The high court ruled that the employer is automatically liable and may offer no affirmative defense if an employee is forced to quit his or her job because of sexual harassment.⁷²



Getty Images/Bettmann

During televised Senate confirmation hearings that gripped the country in 1991, University of Oklahoma law professor Anita Hill accused Supreme Court nominee Clarence Thomas of sexual harassment when she had worked with him years earlier. Hill said Thomas had invited her on dates and made comments about sex and pornography. Hill never filed charges against Thomas, who denied her claims. The Senate narrowly confirmed his appointment to the high court, where he remains a justice.

Rising Monetary Awards

In the years after passage of the Civil Rights Act of 1991, monetary awards in sexual harassment cases pushed well into the millions. Among the highest jury awards and settlements were:

- Female workers at the Mitsubishi Motors plant in Normal, Ill., were awarded \$34 million in 1998 after complaining they were subjected to fondling, verbal abuse and obscene jokes and behavior. Some women quit because of it, while others claimed they were denied promotions because they refused managers' sexual advances.⁷³

- A jury in 1999 awarded \$21 million to the first female millwright at a Chrysler plant in Detroit, who said co-workers showed her sexually explicit photos and called her inappropriate names. However, the Michigan Supreme Court threw out the award in 2004, calling the amount excessive

and “clearly the product of passion and prejudice.”⁷⁴

- Six workers won a \$30 million award from Ralphs grocery company in Escondido, Calif., in 2002 after complaining that a store manager touched them and threw a 12-pack of soda at them. In 2006, a state appeals court ruled that the award was excessive and reduced it.⁷⁵

- The New York Knicks paid \$11.6 million in punitive damages in 2007 to a former team executive who said she was fired after complaining that coach and basketball operations president Isiah Thomas harassed her over a two-year period.⁷⁶ The woman eventually settled for an undisclosed additional amount, including back pay, future lost wages and legal fees.⁷⁷

- A jury awarded \$10.6 million to an employee of the financial services firm UBS in 2011 after the company fired her for complaining a supervisor

repeatedly commented on the size of her breasts and his penis.⁷⁸

- An employee of an Aaron's rent-to-own franchise won \$40 million in 2011 after claiming the store's general manager sexually harassed her for a year.⁷⁹ However, the plaintiff eventually settled for a \$6 million payout.⁸⁰

- The largest jury award to an individual to date is \$168 million in 2012 to Ani Chopourian, a physician's assistant at Mercy General Hospital in Sacramento. She said she asked for help from her supervisor, who laughed when doctors made sexual comments to her, propositioned her, called her “stupid” and stuck her with a needle.⁸¹

- Fox News agreed to pay former “Fox & Friends” co-host Gretchen Carlson \$20 million in 2016 to settle her lawsuit against former Chairman Roger Ailes, whom she accused of sexually harassing her in public, ogling her body and asking her for sex.⁸² ■

CURRENT SITUATION

Social Media Harassment

The EEOC is recommending that businesses include a section on social media use in their sexual harassment policies after the report co-authored by Feldblum and Lipnic, the two co-chairs of the EEOC task force on workplace harassment, called social media “a possible means of workplace harassment.”⁸³

“Harassment should be in employers’ minds as they draft social media policies and, conversely, social media issues should be in employers’ minds as they draft anti-harassment policies,” wrote Feldblum and Lipnic.⁸⁴

Feldblum says businesses should assign the same penalties for online harassment as for a face-to-face offense. In the report, the authors wrote: “Social media platforms are potential vehicles for workplace-related interactions. And wherever that exists, employers must be aware that harassment may occur.”⁸⁵

A 2014 poll by the Pew Research Center, a nonpartisan think tank in Washington, said 6 percent of internet users have been sexually harassed, and 19 percent had witnessed someone else being sexually harassed online. Women ages 18 to 24 are particularly vulnerable, with 25 percent reporting they have been the target of online sexual harassment. Women are more likely than men to be harassed via social media, the poll of 2,849 Web users revealed.⁸⁶

The same state and federal laws that ban sexual harassment in the workplace apply whether the offense occurs in the office, on a business trip, in the field or online. Likewise, anti-harassment laws for students and educators apply outside of the classroom.⁸⁷

However, women have begun using social media to publicize their sexual harassment claims. Uber’s Fowler, for example, posted her “strange, fascinating and slightly horrifying story” about systematic sexual harassment on a blog, as did astronomer Joan Schmelz, who wrote that, years ago, a supervisor belittled her, gossiped about her, withheld opportunities and even bad-mouthed her to a prospective employer.⁸⁸

Supporters of the women who accused Fox’s O’Reilly of sexual harassment prompted tens of thousands of followers to tweet their objections to O’Reilly’s advertisers.

“The scandals around Bill O’Reilly and Uber have shown people there’s an easier, quicker way [than going to court] to bring about cultural change,” Janine Yancey, founder and CEO of Emtrain, an educational technology company, wrote in her blog. “They can mobilize online to bring a public conscience to the problem and lobby consumers to exert economic pressure on the employer.”⁸⁹

And a social media rant can damage a business’s reputation. “More and more, stories depicting aggressive corporate cultures are both the source of fascination in a social media-driven world and a potential reputation risk that goes well beyond what a company’s current employees and future recruits think of it,” *Washington Post* columnist Jena McGregor agreed.⁹⁰

California’s Problems

The Golden State has been particularly beset by sexual harassment problems — in Hollywood, in Silicon Valley and beyond.

After *The New York Times* and *The New Yorker* in early October published accusations of sexual misconduct against Oscar-winning film producer Harvey Weinstein, the 65-year-old Hollywood icon flew to Europe for sex-addiction treatment and said, in a statement, “I’m trying to do better.”⁹¹

The Times also reported that Weinstein, who has won six best-picture Oscars, had paid settlements to at least eight actresses and female employees of his companies Miramax and Weinstein Co. — some of them for more than \$100,000 — over three decades in connection with the allegations. In his statement, Weinstein admitted: “I appreciate the way I’ve behaved with colleagues in the past has caused a lot of pain, and I sincerely apologize for it.” But he denied several of the allegations “as patently false,” his then-lawyer, Lisa Bloom, told *The Times*.⁹² Bloom, a prominent women’s rights attorney, dropped Weinstein as a client days after the allegations became public.⁹³

Weinstein’s accusers include actors Ashley Judd, Gwyneth Paltrow and others who reported unwelcome sexual advances. Some have claimed he forced them to have sex, which Weinstein has denied.⁹⁴ After a sixth woman came forward accusing Weinstein of sexual assault, the Los Angeles Police Department opened an investigation into the case. Unlike earlier cases, the latest allegation, by an unnamed Italian actress, occurred in 2013, within the 10-year statute of limitations window. It is the first rape allegation against Weinstein reported in Southern California. New York City police already are looking into two assault allegations, and London’s Metropolitan Police are investigating allegations made by three women.⁹⁵

News of the allegations shook the East Coast as well as Hollywood. Weinstein has donated more than \$1 million over the years to the campaigns of a number of high-ranking Democrats, including Hillary Clinton and Barack Obama. Plus, he used his influence to persuade others in Hollywood to make sizable donations.⁹⁶

Some politicians — including Sens. Patrick Leahy of Vermont, Richard Blumenthal of Connecticut and Elizabeth Warren of Massachusetts — have vowed to donate the amount of those contributions to charity.⁹⁷

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At Issue:

Is mandatory arbitration harmful to harassment victims?



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for a number of years, the U.S. Supreme Court has grown increasingly supportive of arbitration agreements entered into by employer and employee. Both sides agree to submit to confidential binding arbitration on any employment-related dispute, including sexual harassment complaints. So you forgo your right to go to court and have a trial by jury. That means you also have given up the opportunity to have a public proceeding.

One of the consequences is that somebody could have just gone through arbitration against Supervisor A, and you could be working under the same supervisor and being harassed, but you would not know that others have made the same claim. You are stuck having to prove your claim from scratch, when having knowledge of a similar claim by a co-worker could help you build your case.

When arbitration is used to resolve a private dispute, nobody knows about it except the employer. You lose the benefit of having rulings that are public and could guide people's conduct in the future.

The more we have decisions entered by arbitrators, the more we are having adjudication that may not reflect the modern workplace. For example, if sexual harassment claims involve gender fluidity, we may never know about them. Arbitrators may be making thoughtful rulings on law in those cases — but they are doing it in private. So we are losing the ability to be guided by the courts in these cases because increasingly, employers are using arbitration as a way to settle workplace disputes.

Another set of issues arises when the arbitration agreements have provisions that prohibit class-action lawsuits. If I and a co-worker both feel we have been harassed and want to adjudicate our claims together, the arbitration agreement says we cannot do that. We have to use separate arbitrators, even though our claims are about the same thing.

Finally, arbitration companies typically are hired by the employers against whom the claims are being made. Judges tend to be a lot more independent. Arbitrators don't have that same liberty. They have less independence than judges, in part, because they might not be selected again if they rule against the employer. This creates at least the perception that some arbitrators have an economic incentive to be beholden to employers.

along with the spate of sexual harassment cases that have made headlines recently — from Uber, Fox News, the University of California, Berkeley, and others — has come a round of criticism against organizations that require their employees to take their complaints to an arbitrator rather than to a judge.

Personally, I would rather work for a company that has an arbitration policy. Here is why:

- Companies that have pre-dispute mandatory arbitration policies are well versed in the law. They settle cases they cannot win. They cannot use the delays inherent in litigation to draw the process out.
- Arbitration is much quicker than a court case. A victim who can prove sexual harassment to an arbitrator will walk away with an award within the year. That same victim, if she takes her case to court, will wait two or more years for a trial and then has to fear numerous motions, appeals and other delays.
- The privacy of the process is a positive for employees who are harassment victims. Employers, when they become defendants in a lawsuit, tend to tear at an accuser's character and integrity. Unlike private arbitration, litigation leaves a public record that contains those personal details, which colleagues may read if they choose.
- Lawsuits are costly, and pursuing a court case is a huge investment. In fact, the cost of hiring counsel stops many sexual harassment victims from going to court. While most lawyers will take harassment cases on a contingency basis — that is, they will take a part of the settlement rather than charge an hourly fee — they still want substantial “upfront” money. Arbitration is an easier system to be pro se (on one's own behalf) and is less of an investment for lawyers.

• The facts do not support the argument that litigation is superior because the public “needs to know” about the employer's conduct. In fact, more than 85 percent of all harassment claims are dismissed or settled without a judge or jury even being exposed to it. Moreover, fewer than 1 percent of all discrimination charges are resolved at trial, and even fewer court cases involving harassment claims find their way into the headlines. Thus, the contention that litigation brings these cases to the public is simply not true.

The cases of high-profile harassers like Fox News' Bill O'Reilly and Uber's Travis Kalanick became notorious only because the players were already famous.

Arbitration is not perfect, but don't reject it until you compare it to the alternatives.

WORKPLACE SEXUAL HARASSMENT

Continued from p. 908

Some Weinstein accusers, including Lauren Sivan, a reporter for KTTV in Los Angeles, called the revelations a “tipping point” for an industry infamous, in part, for its ubiquitous “casting couch” and discrimination against women directors.⁹⁸ “This is the moment we look back on and say, ‘That’s when it all started to change,’” Jenni Konner the co-showrunner for HBO’s “Girls,” told *The New York Times*.⁹⁹

But *Times* movie critic Manohla Dargis said she isn’t convinced. “I hope she’s right,” she wrote. “The entertainment in-

in sexual harassment and corporate law.¹⁰¹

The same week the Weinstein story broke, Amazon Studios announced that it had suspended president Roy Price after a Hollywood producer accused him of making unwanted sexual advances toward her.¹⁰² He later resigned.

The Weinstein case also reverberated in Northern California, where a bipartisan group of more than 140 state lawmakers, lobbyists and consultants wrote a public letter complaining of pervasive sexual harassment in politics and across all industries.



Getty Images/WireImage/Paul Zimmerman

Roy Price, head of Amazon Studios, resigned on Oct. 17 after a Hollywood producer accused him of making unwanted sexual advances toward her. Some observers say the flood of complaints of sexual harassment in the movie industry means such behavior will never again be tolerated. But others, such as New York Times movie critic Manohla Dargis, are not so sure. “The entertainment industry is extraordinarily forgiving of those who have made it a lot of money,” she said.

dustry is extraordinarily forgiving of those who have made it a lot of money.”¹⁰⁰

In fact, according to TMZ, Weinstein’s 2015 employment contract said if the Weinstein Co. had to pay any new settlements for his sexual or other misconduct, he was required to reimburse the company, plus pay escalating fines, starting at \$1 million for the fourth such instance. “That’s shocking. It demonstrates the company knew and was willing to sacrifice these targets for the profitability of the company,” said Jennifer Drobac, an Indiana University law professor who specializes

“It’s a pretty regular thing in Sacramento,” said lobbyist Samantha Corbin, who helped coordinate the letter. “A lot of us are fed up with power dynamics that are not on our side.” The Weinstein scandal “elevated conversations that already happened under the radar between women colleagues and friends for years.”¹⁰³

Elsewhere in California, after the rash of sexual harassment complaints against venture capitalists in Silicon Valley, a state senator has introduced legislation to try to stop financial professionals from making sexual favors a requirement for

startup funding for tech companies.

Sen. Hannah-Beth Jackson, a Democrat from Santa Barbara, introduced legislation in August to amend the state’s civil rights law to add legal penalties for investors who sexually harass the founders of new tech companies who are seeking financial backing.¹⁰⁴

“There are too many of these men abusing their power against women who are looking for funding for their ideas, as these women try to break into an industry that is overwhelmingly dominated by men,” Jackson told *The Mercury News*.

Jackson introduced the bill after two prominent Silicon Valley venture capitalists — David McClure, founder of the startup accelerator 500 Startups, and Frank Artale, a Seattle-based managing director at Ignition Partners, resigned in response to accusations of sexual harassment.¹⁰⁵

More recently, Mike Cagney, CEO of online lender Social Finance, announced he would step down after a male employee filed a lawsuit saying he had witnessed the executive harassing female employees and then firing them for reporting it.¹⁰⁶

Jackson’s bill would amend the state’s 1959 Unruh Civil Rights Act, which forbids sexual harassment by attorneys, landlords, teachers, physicians and other professionals who do not work at the same company as their victims. Her proposal would add venture capitalists, which means victims could sue them for misconduct with an entrepreneur.¹⁰⁷ ■

OUTLOOK

Changing Mindsets

The problem of sexual harassment, says Ariane Hegewisch, an economist and program director for employment and earnings at the Institute

for Women's Policy Research, a think tank in Washington, "will never go away as an issue."

"Good companies," she says, will "deal with it properly" as the number of male and female employees evens out. But a new crop of vulnerable employees has already begun to emerge as more low-skill workers enter the workforce.

A 2016 study from Harvard University predicts that the United States is producing too few college-educated employees to fill all of the jobs that will become available over the next decade. So a growing number of workers without degrees will fill the gaps — if the economy is to continue to grow.¹⁰⁸

"With lower-skill jobs come a lot of power differences," says Hegewisch. "Unions are having less oversight. Job security is uncertain. It creates a feeling that [the employees] can't change somebody's actions. . . . I don't think that will necessarily get better."

EEOC Commissioner Feldblum is more optimistic, however. She says she believes harassment will be stopped, but adds, "It's not going to happen on its own." The commissioner, whose term at the EEOC expires in 2018, foresees a nationwide campaign that will channel the outrage against the high-profile harassers "into encouraging employers to make systemic culture change."

She says the EEOC will have a role to play, and she plans to be a part of it. The scope of the campaign against sexual harassment, Feldblum says, will have to match that of Mothers Against Drunk Driving and the effort to legalize same-sex marriage. "We should have a concerted public campaign to make harassment not cool in the workplace," she says.

Feldblum notes that changing a national mindset requires the effort of both men and women. "This is not solely a women's issue," she says. "This is a social, cultural issue. I hope that women and men in partnership will lead it."

Toledo attorney Wise ascribes much power to corporate leaders in the shaping

of a future without sexual harassment. "They have to decide it is a problem," she says. "It's not something that women can solve on their own. It's got to come from the top of the organization." But, she adds, "I don't see that coming."

Edwards, of Alteristic, however, expects to see "a measurable reduction" in harassment cases within five years. The key, she says, is for companies, one by one, to change their cultures, making sexual harassment so out of norm that nobody would think of engaging in it.

"With any issue like harassment, it is going to be determined by a critical mass setting the norms, by lots of people making small choices," she says. "Very often, when we talk about issues like this, we talk about, 'Hey, it's going to take a long, long time to change the attitudes and make it pervasive."

"But if starting tomorrow, every workplace said, 'We're going to do our own small thing,' if starting tomorrow, every workplace said, 'We're going to create a safe space,' these small choices can have a big impact," she says. ■

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FOR MORE INFORMATION

Alteristic, 7955 Cameron Brown Court, Springfield, VA 22153; 571-319-0354; alteristic.org. Develops training programs and strategies for sexual assault and harassment prevention, community mobilization and bystander intervention.

California Department of Fair Employment and Housing, 2218 Kausen Drive, Suite 100, Elk Grove, CA 95758; 800-884-1684 in California; 916-227-0551 outside the state; www.dfeh.ca.gov. State agency that enforces California workplace anti-discrimination laws.

Equal Employment Advisory Council, 1501 M St., N.W., Suite 400, Washington, DC 20005; 202-629-5650; www.eeac.org. Advises member companies on compliance with equal employment opportunity and affirmative action regulations.

Equal Employment Opportunity Commission, 131 M St., N.E., Washington, DC 20002; 800-669-4000; www.eeoc.gov. Federal agency that enforces workplace anti-discrimination laws.

Equal Rights Advocates, 1170 Market St., Suite 700, San Francisco, CA 94102; 415-621-0672; www.equalrights.org. Legal organization that works to protect and expand economic and educational access and opportunities for women and girls.

Institute for Women's Policy Research, 200 18th St., N.W., Suite 301, Washington, DC 20036; 202-785-5100; www.iwpr.org. Promotes women's issues and policies to strengthen families and communities.

Office for Civil Rights, U.S. Department of Education, 400 Maryland Ave., S.W., Washington, DC 20202; 800-421-3481; ocras.ed.gov. Federal agency that enforces Title IX, which bars gender discrimination in education programs that receive federal funding.

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