

Federal #MeToo

EXAMINING SEXUAL HARASSMENT IN GOVERNMENT WORKPLACES



U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
REPORT



APRIL 2020

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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Federal #MeToo: Examining Sexual Harassment in Government Workplaces

Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC

Briefing Report

April 2020

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

April 1, 2020

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Federal #MeToo: Examining Sexual Harassment in Government Workplaces*. The report is also available in full on the Commission’s website at www.usccr.gov.

In this report, the Commission examined the Equal Employment Opportunity Commission’s (EEOC) enforcement efforts to combat workplace sexual harassment across the nation’s largest employer, the federal government. The Commission’s review included the frequency of such claims and findings of harassment, the resources dedicated to preventing and redressing harassment, and the impact and efficacy of these enforcement efforts. The Commission also evaluated agency-level sexual harassment practices at the State Department and at the National Aeronautics and Space Administration (NASA).

The Commission majority approved key findings including the following: Despite the passage of over thirty years since the landmark ruling establishing that sexual harassment claims may be pursued under Title VII of the Civil Rights Act, sexual harassment continues to be a significant problem, including in federal workplaces. According to a 2018 Merit Systems Protection Board (MSPB) survey, an estimated 1 in 7 federal employees experienced sexually harassing behaviors at work between 2016 and 2018. Women face the highest risk of sexual harassment in federal workforces. The EEOC does not report intersectional data on sexual harassment; however, studies have shown that black women are at the highest risk of being victims of sexual harassment across all sectors. Within the federal workforce, black workers are substantially more likely to be the victims of sexual harassment than members of any other race.

Between 2014 and 2016, EEOC reviewed anti-harassment programs at each federal agency under its jurisdiction, finding that a vast majority of federal agencies had ineffective anti-harassment programs.

The Commission majority voted for key recommendations, including the following: The federal government, as the largest employer in the nation, must be a model employer and it, through its Office of Personnel Management and following guidance from EEOC, should continually disseminate sexual harassment policies and practices consistent with the conduct of a model

employer and a leader of protecting the rights of all workers. Federal agencies need to implement mandatory anti-harassment training programs that are specific, clear, and accessible and target every level of employee. Federal agencies should take steps to prevent the incidence of workplace sexual harassment, including:

- Implementing department-wide, uniform penalties to be used in disciplinary actions
- Banning serious perpetrators from receiving promotions and performance awards
- Ending the practice of reassigning perpetrators to other divisions
- Embracing and training employees regarding bystander intervention

Congress should establish a federal ombudsperson, empowered to investigate alleged sexual harassment claims of complainants who may not have adequate recourse through available channels where existing agency structures may be compromised by conflicts. Congress should allocate additional funds to enable EEOC to help agencies proactively identify and prevent sexual harassment.

Specifically, with respect to the two federal agencies that the Commission investigated, the Commission recommended that NASA engage in stricter enforcement of the anti-discrimination and anti-harassment laws that protect individuals in federally funded institutions under Title IX to address the culture of sexual harassment and misogyny in grant-receiving research institutions. The Commission also determined that in light of testimony we received, and the often isolated geographic conditions in which diplomatic functions must be discharged, it is important that State Department leadership, including the Secretary, direct and ensure that the culture of State workplaces globally is to have zero tolerance for sexual harassment, meaningful access to fair processes where claims are asserted, and no tolerance for retaliation.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon
Chair

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Commissioner Special Assistants Alec Deull, Carissa Mulder, Amy Royce, Rukku Singla, Alison Somin, and Irena Vidulovic, assisted their Commissioners in reviewing the report. Commissioner Legal Interns Kori Pruett (J.D. Candidate 2021, Georgetown University Law Center) and Ryan Kelley (J.D. Candidate 2021, George Washington University Law School) also offered valuable research assistance.

With the assistance of Attorney-Advisor Pilar Velasquez McLaughlin, the Commission’s General Counsel Maureen E. Rudolph reviewed and approved the report for legal sufficiency.

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EXECUTIVE SUMMARY

Federal employees, like all workers, are entitled to work environments that are free from sexual harassment.¹ Sexual harassment under Title VII and federal regulations includes unwelcome sexual advances, requests for sexual favors, and other verbal and/or physical harassment that is of a sexual nature. Harassment, however, need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. Studies show that harassing behaviors can be either “direct,” which is targeted at a specific individual or “ambient” meaning that there is “a general level of sexual harassment in an environment.”² Sexual harassment directly harms the person who is subject to the inappropriate conduct, and it also can negatively impact the employment conditions of others in the workplace by creating a hostile work environment. This legally prohibited conduct can impose painful and sometimes lifelong harms that are disproportionately borne by women.

The federal government is the largest employer in the United States, and it employs an estimated two million workers domestically and internationally.³ Between fiscal years 2015 and 2018 federal employees filed 2,257 sexual harassment claims,⁴ and women filed the great majority—over 80 percent—of these complaints.⁵ This figure represented a 36 percent increase from fiscal year 2015 to fiscal year 2018.⁶ Further, the number of claims are likely to reflect substantial underreporting of actual occurrences of sexual harassment because many studies suggest that sexual harassment is substantially underreported even if the estimates of the extent of underreporting vary. In 2016, the Equal Employment Opportunity Commission (the EEOC) estimated that up to 85 percent of women will experience sexual harassment at work at least one or more times during their careers.⁷ The EEOC also estimated that three out of four individuals who experience sexual harassment in

¹ See *infra* notes 64-86 (discussing applicable civil rights law and standards).

² National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, 2018, at 2, <https://www.linguisticsociety.org/sites/default/files/24994.pdf>.

³ See Office of Personnel Management, “FedScope: Federal Workforce Data,” (Sept. 2018), <https://www.fedscope.opm.gov>.

⁴ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See Equal Employment Opportunity Commission, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai Feldblum and Victoria Lipnic, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

the workplace never tell a supervisor, manager, or union representative about the incident.⁸ Similarly, according to a study by the University of Massachusetts' Center for Employment Equity, about five million employees are sexually harassed at work every year, but 99.8 percent of them never file a formal charge.⁹ Moreover, in a 2017 survey of U.S. workers, approximately one in three (31 percent) reported that they had been sexually harassed at work.¹⁰ Overall, the poll found that 45 percent of women, and 15 percent of men reported being sexually harassed in the workplace. Of those who responded to the poll, 73 percent of women and 81 percent of men indicated that they never reported it to their employers.¹¹

Workplace sexual harassment is not new, but it has gained widespread attention in recent years that has served to give greater visibility to the extent of the problem. Tarana Burke began the Me Too movement in 2006, when she created the organization Just Be Inc. to help victims of sexual harassment and sexual abuse.¹² Ten years later, following heightened attention on college campuses regarding sexual assault, a wave of sexual harassment allegations in the media industry drove several prominent public figures to resign from their positions. This national spotlight on the prevalence of sexual harassment in workplaces intensified what became known as the Me Too or the #MeToo movement. The movement has also caused many industries and companies to assess the adequacy of their efforts to curb misconduct and protect workers.¹³ Responding to #MeToo, some companies and organizations have changed their sexual harassment policies, required more training, altered their claim resolution approaches, and taken incremental steps

⁸ Ibid; *see also infra* notes 213-22 (discussing low reporting in the federal system for various reasons, including fear of retaliation).

⁹ Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, "Employer's Responses to Sexual Harassment," Center for Employment Equity at the University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>.

¹⁰ Rachel Gillett, "Sexual harassment isn't a Hollywood, tech, or media issue – it affects everyone," *Business Insider*, Nov. 30, 2017, <https://www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11>.

¹¹ Ibid.

¹² Sandra Garcia, "The Woman Who Created #MeToo Long Before Hashtags," *New York Times*, Oct. 20, 2017, <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>. Sexual harassment is generally understood as an unwanted sexual advance, request for sexual favors, and/or other verbal or physical harassment that is sexual in nature. But sexual harassment does not have to be sexual in nature and can include offensive remarks about a person's gender or sex. *See* EEOC, "Sexual Harassment," https://www.eeoc.gov/laws/types/sexual_harassment.cfm. Sexual abuse or sexual assault—while harassment can be a part of the abuse—is differentiated because it is unwanted sexual activity, often with perpetrators using force, making threats, or taking advantage of a victim that is unable to consent. *See* American Psychological Association, "Sexual abuse," <https://www.apa.org/topics/sexual-abuse/>.

¹³ Sandra Garcia, "The Woman Who Created #MeToo Long Before Hashtags," *New York Times*, Oct. 20, 2017, <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

towards fostering better workplace cultures.¹⁴ Congress has also had its share of scrutiny regarding allegations of sexual harassment and misconduct against Members of Congress.

The federal government is not immune from workplace sexual harassment. In the face of this increased awareness and activity, there is a lack of research specifically focusing on how sexual harassment affects federal workers, and what agencies are doing to protect people on the job. A full assessment of every facet of the problem in the federal government is beyond the reach of this report. Here the U.S. Commission on Civil Rights investigates whether the federal government is successfully combating sexual harassment in federal workplaces generally and examines those efforts in two agencies. While the size of the federal government's workforce makes a comprehensive review difficult, it also makes attention to sexual harassment in federal workplaces imperative.

Sexual harassment reportedly exists at varying levels throughout every federal agency,¹⁵ and this report examines the Equal Employment Opportunity Commission's (EEOC's) relevant oversight, guidance, and adjudication processes, and how internal sexual harassment policies and practices unfold at two agencies: the U.S. Department of State (State) and the National Aeronautics and Space Administration (NASA). The Commission identified these two agencies for review by examining federal data regarding the processing of sexual harassment complaints, as well as independent research indicating that both agencies have characteristics that are correlated with higher risks of sexual harassment.¹⁶ For instance, both are large federal agencies with workforces

¹⁴ See e.g., Stefanie Johnson, Ksenia Keplinger, Jessica Kirk, and Liza Barnes, "Has Sexual Harassment at Work Decreased Since #MeToo," *Harvard Business Review*, July 18, 2019, <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo>; Jodi Kantor, "#MeToo Called for an Overhaul. Are Workplaces Really Changing?" *New York Times*, March 23, 2018, <https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html>.

¹⁵ Under Executive Order 12067 all federal agencies are required to submit annual workplace statistics to the EEOC reflecting their efforts to prevent workplace discrimination and ensure equal opportunities. See Equal Employment Opportunity Commission, <https://www.eeoc.gov/federal/eo-12067.cfm>.

¹⁶ See e.g., Louise Fitzgerald, Michele Gelfand, and Fritz Drasgow, "Measuring Sexual Harassment: Theoretical and Psychometric Advances," *Basic and Applied Social Psychology*, vol. 17, no. 4, (1995)(discussion of gender disparities being correlated to higher risks of sexual harassment); Chelsea Willness, Piers Steel, and Kibeom Lee, "A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment," *Personnel Psychology*, vol. 60, (2007), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1744-6570.2007.00067.x> (discussion of gender disparities being correlated to higher risks of sexual harassment); Elyse Shaw, Ariane Hegewisch, Cynthia Hess, "Sexual Harassment and Assault at Work: Understanding the Costs," Oct. 15, 2018, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf; EEOC, Select Task Force on the Study of Harassment in the Workplace, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm (for research breaking down these criteria and finding correlation with increased sexual harassment); Marina Koren, "When Scientists Are Sexually Harassed in the Field," *The Atlantic*, Oct. 11, 2017, <https://www.theatlantic.com/science/archive/2017/10/sexual-harassment-fieldwork-science/542559/> (for research showing isolated or decentralized environments may be correlated to increased risks).

that fit the definition of being male-dominated,¹⁷ and both have workplaces that are either isolated or decentralized.¹⁸ According to research, both factors are correlated to higher incidence of sexual harassment.¹⁹ The Commission also selected these agencies because they are representative of large federal agencies (those with 10,000 to 74,999 employees). One has a high number of formal sexual harassment complaints (State) in contrast to the other which has few formal complaints (NASA). Lastly, the Commission selected these agencies in order to facilitate an analysis of how different workplace cultures (e.g., hierarchal and bureaucratic versus scientific and collegial) may play a role in either preventing or encouraging sexual harassment.

The Commission held a briefing titled Federal #MeToo: Examining Sexual Harassment in Government Workplaces on May 9, 2019, convening current and former government officials, academic and legal experts, advocates, and impacted persons. The briefing included a public comment session and was supplemented by written materials submitted by the general public. This report is also informed by responses to Commission's interrogatories and documents provided by the EEOC, NASA and Department of State.

Together the research, testimony, and personal accounts informed the Commission's investigation and underscored a common misconception about the nature of the workplace sexual harassment problem. That is, sexual harassment is not about sex or sexual attraction; instead, sexual harassment is ultimately about power.²⁰ And under civil rights law, as the Supreme Court has recognized, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."²¹

A group of employment law professors recently reviewed patterns of sexual harassment, and found that "the bottom line is that harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality. Harassment provides a way for some men to

¹⁷ See Chapter 4, Table 10 (breakdown of NASA's workforce); Chapter 4, Table 20 (breakdown of State's workforce).

¹⁸ Department of State, HR Fact Sheet, June 30, 2019, (last accessed, Aug. 21, 2019), <https://www.state.gov/wp-content/uploads/2019/07/Human-Resources-Fact-Sheet-as-of-032019.pdf>; NASA Center Assignments by State, https://www.nasa.gov/pdf/313552main_NASA_Center_Assignments_by_State.pdf.

¹⁹ See *supra* note 16.

²⁰ Heather McLaughlin, Christopher Uggen, and Amy Blackstone, "Sexual Harassment, Workplace Authority, and the Paradox of Power," *American Sociological Review*, 2012, vol. 77, no. 4; Christopher Uggen and Amy Blackstone, "Sexual Harassment as a Gendered Expression of Power," *American Sociological Review*, (Feb. 2004), vol. 69, no. 1; Afroditi Pina and Theresa Gannon, "An overview of the literature on antecedents, perceptions, and behavioral consequences of sexual harassment," *Journal of Sexual Aggression*, (2012), vol. 18, no. 2; see also Katz Testimony, *Washington Briefing*, p. 125.

²¹ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

monopolize prized work roles and to maintain a superior masculine position and sense of self.”²² Moreover “[w]omen, too, sometimes act to uphold their relative positions. ... [W]here unwanted sexual misconduct occurs, it is typically a telltale sign of broader patterns of discrimination and inequality at work such as sex segregation and gender stereotyping.”²³

Effectively combatting sexual harassment requires an understanding of what contributes to it. Studies show that sexual harassment occurs in all workplaces and across all job sectors. Research suggests that there are characteristics in some workplaces that may make them more susceptible to harassment. Some data suggest that workplaces that differentiate roles and duties based on gender stereotypes and are more permissive of sexism often have more incidents of sexual harassment.²⁴ Further, jobs with gender imbalances in leadership and managerial positions also tend to have more incidents of harassment compared to workplaces with more gender parity.²⁵ Research indicates that “[s]ex segregation and inequality in employment, where men hold most of the top positions or prized jobs in an organization, field, or industry, and women are relegated to lower-status jobs, are a major cause of sex harassment.”²⁶ In addition, research shows that isolated or remote or decentralized workplaces may also correlate with increased sexual harassment.²⁷

²² Vicki Schultz, “Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,” 71 *Stan. L. Rev.*, June 2018, https://digitalcommons.law.yale.edu/fss_papers/5301, at p. 19, (citing research). *See also* Title VII; EEOC, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; *Complaint v. U.S. Postal Service*, EEOC Appeal No. 0120133382 2015 WL 755097 (Feb. 11, 2015) (held that hateful nature of the alleged comments calling Complainant “homo” and telling him he was “living in sin” and would be “going to hell” coupled with the alleged lack of adequate response on the part of management, sufficiently severe to state a viable claim of harassment due to gender-based stereotyping that required further investigation and processing), <https://www.eeoc.gov/decisions/0120133382.r.2.txt>.

²³ Schultz, 71 *Stan. L. Rev.* at 19.

²⁴ Julia Becker, Matthew Zawadzki, and Stephanie Shields, “Confronting and Reducing Sexism: A Call for Research on Intervention,” *Journal of Social Issues*, (Dec. 2014), vol. 70, no. 4; Cailin Starnski and Leanne Son Hing, “Gender inequalities in the workplace: the effects of organizational structures, processes, practices, and decision makers’ sexism,” *Frontiers in Psychology*, (Sept. 16, 2015); Emily Leskinen and Lilia Cortina, “Dimensions of Disrespect: Mapping and Measuring Gender Harassment in Organizations,” *Psychology of Women Quarterly*, 2014, vol. 38, no. 1.

²⁵ *See e.g.*, Myrtle Bell, Mary McLaughlin, Jennifer Sequeria, “Discrimination, Harassment, and the Glass Ceiling: Women Executives as Change Agents,” *Journal of Business Ethics*, vol. 37, (2002); Louise Fitzgerald, Professor Emerita of Psychology, Women’s Studies and Management, University of Illinois at Urbana Champaign, Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019 at 2-3 (hereinafter Fitzgerald Statement).

²⁶ Vicki Schultz, “Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,” 71 *Stan. L. Rev.*, June 2018, https://digitalcommons.law.yale.edu/fss_papers/5301, at pp. 22-23, *citing* various social science studies.

²⁷ *See e.g.*, New America, “Sexual Harassment: A Severe and Pervasive Problem,” Sept. 2018, https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-

Within the federal government, and its nearly 2,000 individual agencies, an administrative process exists for handling claims of sexual harassment that is specific to employees and applicants of the federal government and, as explained below, is separate and different from the process for employees of private companies and state and local government employees.²⁸ In order to bring a claim of sexual harassment, employees and applicants for employment must first file a complaint with their employing agency. The EEOC, through its regulations, requires that all federal agencies have an internal process for reviewing, accepting, mediating, investigating, and deciding the merits of such claims. This “Equal Employment Opportunity” complaint process or, “EEO” process, takes place within the complainant’s agency and begins by the employee or applicant for employment filing an informal sexual harassment complaint with an EEO counselor within 45 days of the alleged incident. If the matter is not resolved at the informal stage, the Complainant may file a formal complaint after which the agency will either dismiss the complaint or accept it and conduct a formal investigation. Once the investigation is complete, the Complainant can elect either a decision from the agency, or request an in-person hearing before the EEOC. The Complainant does not have the opportunity to appeal (either to the EEOC or federal district court) until all agency administrative rights have been exhausted.

In the federal government, the EEOC’s role is largely oversight over agency EEO programs as well as adjudicative. One of EEOC’s core roles is to oversee the administrative EEO hearings process; as explained above, a complainant can either elect a decision on their case from their employing agency, or a hearing before an EEOC administrative judge. To accommodate those hearings, EEOC employs hundreds of administrative judges (who are also federal employees) throughout nearly 40 field offices and 15 district offices spread out across the country, and a headquarters located in Washington D.C.²⁹ When a complainant requests a hearing, they may have the opportunity to present their case to an EEOC administrative judge who will decide whether discrimination occurred. The EEOC also has appellate functions; when a complainant receives an unfavorable decision from their employing agency, the complainant may pursue an appeal through

[10_190248.pdf](#), at 55; Irma Morales Waugh, “Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women,” *Violence Against Women*, vol. 16, no. 3, (2010); Alexia Fernández Campbell, “Housekeepers and Nannies Have No Protection from Sexual Harassment under Federal Law,” *Vox*, (2018), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws>; Chai Feldblum and Victoria Lipnic. *EEOC Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, (June 2016); Bernice Yeung, “Rape on the Night Shift: Under the Cover of Darkness, Female Janitors Face Rape and Assault.” *Frontline*, (June 23, 2015), <https://www.pbs.org/wgbh/frontline/article/rape-on-the-night-shift/>.

²⁸ This is the same process for other theories of discrimination including disparate treatment or disparate impact claims based on other protected bases. See e.g., U.S. Commission on Civil Rights, *Are Rights A Reality?*, November 2019, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf>.

²⁹ U.S. Equal Employment Opportunity Commission, EEOC Office List and Jurisdictional Map, <https://www.eeoc.gov/field/>

EEOC's Office of Federal Operations who will review their case and may issue a different decision. This process is discussed more thoroughly in chapter 3 of this report.

The procedure described above is the EEO claims process for federal government employees and applicants and the role EEOC plays in federal sector employment. EEOC however, plays a different role in the enforcement of Title VII and in private sector and state and local government employees' claims alleging sexual harassment. In the private sector, EEOC is directly responsible for enforcing individual Title VII claims against private employers by pursuing an individual's claim on their behalf.³⁰ With respect to state and local government employees' claims, EEOC has less involvement; here, Department of Justice enforces Title VII, and ensuing sexual harassment claims, and may bring a lawsuit against a state or local government, but typically only after EEOC conducts an initial investigation and attempts to conciliate the matter.³¹ Thus, the path a sexual harassment complaint will follow is entirely dependent on where the employee works.

Sexual harassment imposes substantial burdens on individual victims, workplaces, and society at large.³² Sexual harassment has both physical and psychological consequences, which can include survivors suffering from depression, stress, anxiety, and high blood pressure, among other harmful consequences.³³ These conditions not only negatively affect an individual's health, but they can also lead to missed workdays, reduced productivity, and increased turnover.³⁴ Sexual harassment

³⁰ U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964," <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

³¹ U.S. Equal Employment Opportunity Commission and U.S. Dep't of Justice, *Title VII Employment Discrimination Charges Against State and Local Governments*, Dec. 21, 2018, <https://www.justice.gov/opa/press-release/file/1122816/download>

³² See e.g., Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009); *Zar and Castillo v. Brennan*, Case No. 19-cv-250, U.S. District Court for Northern District of California, (Jan. 2019), at 7, <https://legalaidatwork.org/wp-content/uploads/2019/01/USPS-Sex-Harrasment-Complaint.pdf>; Jason Houle, Jeremy Staff, Jeylan Mortimer, Christopher Uggan, and Amy Blackstone, "The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career," *Society and Mental Health*, vol. 1, no. 2 (July 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf>.

³³ See e.g., Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009); Jason Houle, Jeremy Staff, Jeylan Mortimer, Christopher Uggan, and Amy Blackstone, "The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career," *Society and Mental Health*, vol. 1, no. 2 (July 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf>.

³⁴ See e.g., Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009); *Zar and Castillo v. Brennan*, Case No. 19-cv-250, U.S. District Court for Northern District of California, (Jan. 2019), at 7, <https://legalaidatwork.org/wp-content/uploads/2019/01/USPS-Sex-Harrasment-Complaint.pdf>; Jason Houle, Jeremy Staff, Jeylan Mortimer, Christopher Uggan, and Amy Blackstone,

can also result in an employee questioning his or her skills and abilities as a worker. Taken together, these results can push valuable workers out of their jobs or limit promotion opportunities which can hurt an individual's career trajectory and be costly to employers.³⁵ Many workers, however, are forced to endure harassment because they cannot financially afford to leave a hostile and damaging work environment.³⁶ Accordingly, the Commission's research shows that sexual harassment in the federal workplace is a civil rights issue of national and federal importance.

The federal government has a special role in enforcing civil rights nationally and should strive to set the standard in harassment free workplaces.³⁷ Like all employers, for federal agencies to effectively attract and retain qualified and dedicated workers, they must promote practices that are free from harassment and discrimination. All workers should face a level employment playing field and have an opportunity to contribute to their fullest potential. The EEOC notes that "while the promise of workplace equality is a legal right afforded to all of our nation's workers, equal opportunity is more than a matter of social justice. It is a national economic imperative."³⁸

The Commission's investigation also revealed a discrepancy between federal and private sector requirements for sexual harassment claims. Before bringing a claim to EEOC or commencing a civil action, employees alleging sexual harassment in the federal workplace must first work

"The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career," *Society and Mental Health*, vol. 1, no. 2 (July 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/pdf/nihms318538.pdf>; Heather Metcalf, Chief Research Officer at Association for Women in Science, Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019, at 4 (hereinafter Metcalf Statement).

³⁵ See e.g., Elyse Shaw, Ariane Hegewisch, Cynthia Hess, "Sexual Harassment and Assault at Work: Understanding the Costs," Oct. 15, 2018; Amanda Rossie, Jasmine Tucker, and Kayla Patrick, "Out of the Shadows," National Women's Law Center, 2018, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; Heather Boushey and Sarah Jane Glynn, "There are Significant Business Costs to Replacing Employees," Center for American Progress, Nov. 16, 2012, <https://cdn.americanprogress.org/wp-content/uploads/2012/11/16084443/CostofTurnover0815.pdf>.

³⁶ See e.g., Rebecca Thurston, Yuefang Chang, Karen Matthews, Roland von Kanel, and Karestan Koenen, "Association of Sexual Harassment and Sexual Assault with Midlife Women's Mental and Physical Health," *Journal of the American Medical Association (JAMA) Internal Medicine*, vol 179, no. 1, (2019), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2705688>; Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009); Shannon Barth, Rachel Kimmerling, Joanne Pavao, Susan McCutcheon, Sonja Batten, Erin Dursa, Michael Peterson, and Aaron Schneiderman, "Military Sexual Trauma Among Recent Veterans: Correlates of Sexual Assault and Sexual Harassment," *American Journal of Preventive Medicine*, vol. 50, no. 1, (Jan. 2016), <https://www.sciencedirect.com/science/article/abs/pii/S0749379715003189>.

³⁷ See *infra* notes 41-43 (discussing that the federal government should be a model workplace).

³⁸ See U.S. Equal Employment Opportunity Commission, "Equal Employment Opportunity: Management Directive 715," (effective date: Oct. 1, 2003), <https://www.eeoc.gov/federal/directives/md715.cfm>.

through and navigate the Equal Employment Opportunity (EEO) process within their own agencies.³⁹ The EEO process raises questions of conflicts of interest because the agency is tasked with investigating the allegations and also with defending itself. Federal employees are also subject to confusing time restrictions, and in many cases unwittingly forfeit their right to bring formal claims at all.⁴⁰ These policies, which also raise questions of conflict of interest, may leave victims of sexual harassment in the federal workforce at a distinct disadvantage compared to their non-federal employee counterparts.

The following report examines data trends, as well as the adequacy of prevention, redress, and reporting efforts to address sexual harassment in the federal workplace. After discussing the relevant civil rights law and procedures, background literature, and an overview of federal sexual harassment data in Chapter 1, Chapter 2 examines the role of federal equal employment opportunity protections through the EEOC as an oversight and regulatory agency, and Chapter 3 provides more specific information on the EEOC policies and procedures regarding sexual harassment. Chapter 4 then analyzes and compares the policies and procedures of the State Department and NASA. The report concludes with the Commission's findings and recommendations, which are highlighted below, and discussed in full in Chapter 5.

Federal #MeToo: Highlighted Findings and Recommendations

Findings

1. Despite the passage of over thirty years since the landmark ruling establishing that sexual harassment claims may be pursued under Title VII of the Civil Rights Act, sexual harassment continues to be a significant problem, including in federal workplaces.
2. There is a dearth of publicly available data regarding sexual harassment among federal employees. The challenge of fully understanding the scope of the issue in federal workplaces is compounded by the fact that sexual harassment often goes unreported.
3. While harassment may sometimes be part of inappropriate workplace manifestations of sexual attraction, it is ultimately a demonstration of power, control, and dominance. Any person can be a victim of sexual harassment, regardless of the victim's or the harasser's sex or sexual orientation.
4. According to a 2018 Merit Systems Protection Board (MSPB) survey, an estimated 1 in 7 federal employees experienced sexually harassing behaviors at work between 2016-2018.

³⁹ See *infra* notes 461-62.

⁴⁰ See *infra* notes 463-72; 479-82.

5. Structural risk factors for sexual harassment often intersect and are exacerbated by other discriminatory biases based on race, ethnicity, national origin, religion, age, gender identity, sexual orientation, and disability.
6. Interns and contractors are especially vulnerable to sexual harassment in federal workplaces because many established protections are unavailable to them.
7. The federal EEO complaint process is unduly complex for victims.
8. Organizational factors have strong correlations in predicting harassment.
9. Overall, the total number of sexual harassment claims – and the number of claims per employee – has been steadily increasing in recent years.
10. Foreign nationals, or locally employed staff, are especially vulnerable to sexual harassment in State Department workplaces abroad, because incidents that occur in overseas posts are handled locally and are often not addressed adequately.
11. Women face the highest risk of sexual harassment in federal workforces.
12. The EEOC estimates that three out of four individuals who experience sexual harassment in the workplace never tell a supervisor, manager, or union representative about the incident.
13. Sexual harassment contributes substantially to the enduring gender pay gap by causing reductions in productivity, increased use of sick and annual leave, and attrition of women.
14. Studies have found that sexual harassment decreases linearly as structural gender imbalances approach parity.
15. Between 2014 and 2016, EEOC reviewed anti-harassment programs at each federal agency under its jurisdiction, finding that a vast majority of federal agencies had ineffective anti-harassment programs.
16. Effectively combatting sexual harassment often requires changing workplace culture, and bystander training can achieve cultural change from within by demonstrating that complaints are welcomed and everyone is working collectively towards a safe and effective workplace.

Recommendations

1. The federal government, as the largest employer in the nation, must be a model employer and it, through its Office of Personnel Management and following guidance from EEOC, should continually disseminate sexual harassment policies and practices consistent with the conduct of a model employer and a leader of protecting the rights of all workers.

2. Federal agencies should take steps to prevent the incidence of workplace sexual harassment, including:
 - Implementing department-wide, uniform penalties to be used in disciplinary actions,
 - Banning serious perpetrators from receiving promotions and performance awards,
 - Ending the practice of reassigning perpetrators to other divisions,
 - Embracing and training employees regarding bystander intervention.
3. Federal agencies need to implement mandatory anti-harassment training programs that are specific, clear, and accessible and target every level of employee.
4. Federal agencies should scrutinize policies that permit the use of nondisclosure clauses in settlements of harassment and other discrimination claims.
5. Congress should enact explicit statutory protections from sexual harassment for federal government contractors and interns, whether paid or unpaid.
6. Congress should establish a federal ombudsperson, empowered to investigate alleged sexual harassment claims of complainants who may not have adequate recourse through available channels where existing agency structures may be compromised by conflicts.
7. Congress should allocate additional funds to enable EEOC to help agencies proactively identify and prevent sexual harassment.
8. The EEOC should begin collecting and reporting intersectional data on sexual harassment in federal workplaces, so that more effective and targeted measures can be taken to combat harassment against the people most affected by it.
9. Stricter enforcement of the anti-discrimination and anti-harassment laws that protect individuals in federally funded institutions under Title IX is needed to address the culture of sexual harassment and misogyny in grant-receiving research institutions.
10. In light of testimony that the USCCR received, and the often isolated geographic conditions in which diplomatic functions must be discharged, it is important that State Department leadership, including the Secretary, direct and ensure that the culture of State workplaces globally is to have zero tolerance for sexual harassment, meaningful access to fair processes where claims are asserted, and no tolerance for retaliation.

Below is the agenda from the briefing the Commission held in May 2019 to inform this report:



U.S. Commission on Civil Rights Public Briefing:

Federal Me Too: Examining Sexual Harassment in Government Workplaces

Thursday, May 9, 2019

National Place Building, 1331 Pennsylvania Ave. NW, Suite 1150,
Washington, DC 20425 (also [live-streaming](#))

Introductory Remarks: Chair Catherine E. Lhamon: 9:00 am - 9:10 am

Panel One: EEOC & Outside Experts: 9:10 am - 10:40 am

- **Congresswoman Jackie Speier**
- **Dexter Brooks**, Associate Director, Federal Sector Programs, Equal Employment Opportunity Commission (EEOC)
- **Sunu Chandy**, Legal Director, National Women's Law Center
- **George Chuzi**, Attorney, Kalijarvi, Chuzi, Newman, & Fitch

Panel Two: State Dept, NASA, & STEM organizations: 10:50 am - 12:10 pm

- **Gregory Smith**, Director, Office of Civil Rights and Chief Diversity Officer, U.S. Department of State
- **Jenna Ben-Yehuda**, President & CEO, Truman National Security Project
- **Stephen Shih**, Associate Administrator, Diversity & Equal Opportunity, NASA
- **Heather Metcalf**, Chief Research Officer, Association for Women in Science

Panel Three: Academics and Community Stakeholders: 1:10 pm - 2:30 pm

- **Christine Back**, Legislative Attorney, Congressional Research Service
- **Tamara Chrisler**, Managing Policy Director, Leadership Conference on Civil and Human Rights
- **Donald Tomaskovic-Devey**, Professor of Sociology & Executive Director, Center for Employment Equity, University of Massachusetts-Amherst
- **Rhonda Davis**, Head of Office of Diversity and Inclusion, National Science Foundation
- **Louise Fitzgerald**, Professor Emerita, Psychology, Women Studies, & Management, University of Illinois at Urbana-Champaign

Panel Four: Legal and Community Experts: 2:40 pm - 4:00 pm

- **Dariely Rodriguez**, Director of Economic Justice Project, Lawyers' Committee for Civil Rights Under Law
- **Mona Charen**, Senior Fellow, Ethics & Public Policy Center
- **Jane Liu**, Legal Director, National Asian Pacific American Women's Forum
- **Debra Katz**, Attorney, Katz, Marshall & Banks

Open Public Comment Session: 5:00 pm - 6:30 pm

CHAPTER 1: INTRODUCTION AND BACKGROUND

The federal government is the largest employer in the nation and employs an estimated two million workers both domestically and internationally.⁴¹ The federal government also is a principal enforcer of the nation's antidiscrimination laws. Accordingly, the federal government must position itself as a model employer and a leader of protecting the rights of all workers.⁴² Debra Katz testified that:

When sexual harassment is permitted and enabled in the federal sector, taxpayers are funding it. Taxpayers are paying the salaries of people who are harassing in the workplace. ...And taxpayers should not be funding these kinds of violations of discrimination law. They undermine our nation's commitment to equality.⁴³

This chapter begins with a discussion of the current historical timeframe and increased awareness of sexual harassment across all workplaces. Next, the chapter provides an introduction to the applicable civil rights law legal definition of sexual harassment. The chapter also includes a discussion of the extent of sexual harassment in the federal workplace, the role of workplace culture and environment, and strategies to prevent and address sexual harassment.

Increased Awareness of Sexual Harassment

The issue of sexual harassment most recently intensified in the national spotlight after October 15, 2017, when actor Alyssa Milano famously tweeted to her Twitter followers to use the hashtag #MeToo if they had experienced harassment or assault. Her tweet instantly went viral, and according to the Pew Research Center, a year later the hashtag had been used more than 19 million times.⁴⁴

⁴¹ See Office of Personnel Management, "FedScope: Federal Workforce Data," (Sept. 2018), <https://www.fedscope.opm.gov/>.

⁴² Brooks Testimony, *Washington Briefing*, p. 76. See also U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress*, Sept. 2008, http://test-public.mspb.gov/studies/studies/The_Federal_Government_A_Model_Employer_or_a_Work_in_Progress_384592.pdf (noting that the federal government "has long aimed to be a 'model employer'").

⁴³ Katz Testimony, *Washington Briefing*, p. 143.

⁴⁴ Monica Anderson and Skye Toor, "How social media users have discussed sexual harassment since #MeToo went viral," *Pew Research Center*, Oct. 11, 2018, https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/?utm_source=Pew+Research+Center&utm_campaign=bc6a468ed2-EMAIL_CAMPAIGN_2018_10_11_05_08&utm_medium=email&utm_term=0_3e953b9b70-bc6a468ed2-400487317.

Although Alyssa Milano’s tweet brought a renewed focus to the expression,⁴⁵ the phrase “me too” was originally used by social activist Tarana Burke in 2006.⁴⁶ Burke began the movement and coined the phrase “me too” to express solidarity with women and girls who had experienced sexual assault.⁴⁷ The more recent #MeToo movement initially focused on sexual harassment in Hollywood, but advocates have now expanded its scope to demonstrate that harassment is prevalent across industries of all types, including those largely dominated by low-paid, low-wage women of color.⁴⁸ For instance, research has shown that in the fast-food industry, black and Latina women experience sexual harassment at higher rates than white female employees.⁴⁹ Other industries that are heavily dominated by women of color workers, such as domestic work, health-care, and agricultural labor, also have rampant rates of sexual harassment and assault, yet due to the inherent power dynamics, women in these industries are often more fearful of reporting their alleged attackers.⁵⁰ Jane Liu, Legal Director at the National Asian Pacific American Women’s Forum, testified at the Commission’s briefing that Asian and Pacific Islander immigrant workers are also less likely to report harassment because they may face many barriers in reporting, such as language barriers, cultural stigma, fear, or lack of knowledge on what behaviors constitute sexual harassment.⁵¹

⁴⁵ Monica Anderson and Skye Toor, “How social media users have discussed sexual harassment since #MeToo went viral,” *Pew Research Center*, Oct. 11, 2018.

⁴⁶ Emma Brockes, “#MeToo founder Tarana Burke: ‘You have to use your privilege to serve other people,’” *Guardian*, Jan. 15, 2018, <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

⁴⁷ *Ibid.*

⁴⁸ *See e.g.*, National Organization of Women, “Black Women & Sexual Violence,” Feb. 2018, at 4, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf>; Doreen St. Felix, “One Year of #MeToo: We Need a More Inclusive Language of Abuse and Victimhood,” *New Yorker*, Oct. 10, 2018, <https://www.newyorker.com/culture/culture-desk/one-year-of-metoo-we-need-a-more-flexible-language-of-abuse-and-victimhood>.

⁴⁹ Hart Research Associates, “Key Findings from a Survey of Women Fast Food Workers,” Oct. 5, 2016, <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf>.

⁵⁰ Interview with Tarana Burke, Alicia Garza, and Mily Trevino-Sauceda, “Farmworkers, Domestic Workers & Women in Low-Wage Jobs Face Challenges Reporting Sexual Assault,” *Democracy Now*, Dec. 8, 2017, https://www.democracynow.org/2017/12/8/farmworkers_domestic_workers_in_women_in; National Organization of Women, “Black Women & Sexual Violence,” Feb. 2018, at 4, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf>; Robin Runge, “Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women,” *Journal of Gender, Social Policy & the Law*, vol. 20, no. 4, 2012, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1566&context=jgspl>.

⁵¹ Jane Liu, testimony, Briefing Before the U.S. Commission on Civil Rights, Washington, D.C., May 9, 2019, transcript, p. 123 (hereinafter cited at Washington Briefing).

Following the investigative reporting of the Harvey Weinstein scandal,⁵² claims of harassment and/or assault against many prominent men across different sectors of the workforce came to light, and often raised by multiple women.⁵³ Notably, several federal and state politicians resigned in the wake of allegations of sexual harassment.⁵⁴ These accusations not only revealed how widespread sexual harassment is, but also exposed limitations of the processes designed to handle sexual harassment complaints. In Congress, for example, a complainant was forced to work with an alleged harasser for a thirty-day “cooling off period.”⁵⁵ At the Commission’s briefing, Representative Jackie Speier testified that “Congress has been a breeding ground for a hostile work environment for far too long. It’s time to throw back the curtain on the repulsive behavior that has thrived in the dark without consequences.”⁵⁶ Representative Speier emphasized that while it was difficult to talk about her own experience of sexual assault when she was a congressional staffer, she did so because she was concerned about the prevalence of mistreatment of women staff and Members of Congress.⁵⁷

Since the rise of the #MeToo movement, women serving in Congress have played a central role in acknowledging and condemning their colleagues’ inappropriate conduct. When allegations that Senator Al Franken had forcibly kissed and groped two of his female coworkers became public in late 2017, Senator Kirsten Gillibrand publicly called for his resignation. The same day, dozens of other Democratic senators joined in urging Senator Franken to step down. Under increasing pressure from colleagues in his own party, Senator Franken announced his resignation in December 2017.⁵⁸ That sexual harassment allegations and admissions would have such immediate

⁵² High profile actors accused Weinstein of sexually propositioning them, creating hostile work environments, and assaulting them. As more and more women actors spoke out about the abuses they had suffered by him, Weinstein was fired by his company on October 8, 2017. He has since been arrested on rape charges and awaits trial. *See e.g.*, Daniel Victor, “How the Harvey Weinstein Story Has Unfolded,” *New York Times*, Oct. 18, 2017, <https://www.nytimes.com/2017/10/18/business/harvey-weinstein.html>; Al Baker and James McKinley, Jr. “The Case Against Harvey Weinstein, Explained,” *New York Times*, May 25, 2018, <https://www.nytimes.com/2018/05/25/nyregion/weinstein-case-legal-explainer.html>.

⁵³ *See e.g.*, Editors, “After Weinstein: More than 100 high-powered men accused of sexual misconduct,” *USA Today*, Nov. 22, 2017, <https://www.usatoday.com/story/news/2017/11/22/weinstein-aftermath-all-men-accused-sexual-misconduct/884778001/>.

⁵⁴ Leila Ettachfani, “These 9 Politicians Have Resigned for Sexual Misconduct in the Wake of #MeToo,” *Vice*, May 9, 2018, https://www.vice.com/en_us/article/kzkeyv/these-9-politicians-have-resigned-for-sexual-misconduct-in-the-wake-of-metoo.

⁵⁵ Rachael Bade and Elana Schor, “Capitol Hill’s Sexual Harassment Policy ‘Toothless,’ ‘A Joke,’” *Politico*, Oct. 27, 2017, <https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224>.

⁵⁶ *Ibid.*

⁵⁷ Speier Testimony, *Washington Briefing*, p. 9.

⁵⁸ Clare Foran, “Senate Democrats Call for Al Franken to Resign,” *The Atlantic*, Dec. 6, 2017, <https://www.theatlantic.com/politics/archive/2017/12/al-franken-women-senators-resign/547658/>.

and dramatic consequences for those implicated in wrongdoing is a relatively new phenomenon of the attention that #MeToo brings to these issues. However, the problem runs deep: in March 2019, based on a Congressional inquiry, the Inspector General of the Architect of the Capitol published a report detailing 57 incidents of sexual harassment over the past ten years, including allegations that Members of Congress had harassed custodial staff, who did not report these incidents due to fear of losing their jobs.⁵⁹

In order to bring greater accountability for sexual harassment in Congress, in December 2018, Senator Amy Klobuchar, along with 43 bipartisan co-sponsors, introduced the Congressional Accountability Act of 1995 (CAA) Reform Act that would amend the 1995 bill of the same shorter name.⁶⁰ The bill was signed into law in December 2018.⁶¹ It revised the CAA as follows:

- eliminated CAA counseling requirements and made mediation an employee's option (rather than a requirement) before filing a claim with the Office of Compliance (OOC) alleging the violation;
- required current and former Members of Congress to reimburse the federal Department of Treasury for compensatory damages included in an award or settlement resulting from the Member's alleged act of discrimination or retaliation;
- required referral to congressional ethics committees of final disposition of claims alleging CAA violations by Members of Congress and senior staff of employing offices;
- required all legislative offices (including non-congressional offices) that violate CAA to reimburse the Treasury for resulting award or settlement payments;
- extended CAA anti-discrimination requirements and remedies to uncompensated legislative branch interns, detailees, and fellows; and
- provided OOC and CAA resources and services to employees outside of the Washington, D.C. area.⁶²

⁵⁹ U.S. Architect of the Capitol, Congressional Request: Office of Inspector General Sexual Harassment Inquiry, Mar. 15, 2019, <https://www.oversight.gov/sites/default/files/oig-reports/archive/18579//Combined%20AOC%20OIG%20Sexual%20Harassment%20Inquiry%20with%20AOC%20response.pdf>, at 12.

⁶⁰ Congressional Accountability Act of 1995 Reform Act, S. 2952, 115th Congress, 2017-2019.

⁶¹ *Id.*; see also Pub. L. 115-397.

⁶² S.3749, Congressional Accountability Act of 1995 Reform Act, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3749>.

Just as it appears that essentially every industry is touched by allegations of sexual harassment, so too is every branch of the federal government.⁶³

Sexual Harassment Under Title VII and Major Federal Court Decisions

Title VII of the Civil Rights Act of 1964 (“Title VII”) applies to employers, including federal, state and local governments (with 15 or more employees), and to the federal government.⁶⁴ Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations.⁶⁵ Title VII states that:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

⁶³ See e.g., Dahlia Lithwick, “He Made Us All Victims and Accomplices,” *Slate*, Dec. 13, 2017, <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html>; Stacy Cammarano, “#MeToo in the federal court system is doomed to fail,” *Washington Post*, May 8, 2018, https://www.washingtonpost.com/opinions/metoo-in-the-federal-court-system-is-doomed-to-fail/2018/05/08/3d299380-52da-11e8-abd8-265bd07a9859_story.html (citing Matt Zapotowski, “Judiciary closes investigation of sexual misconduct allegations against retired Judge Alex Kozinski,” *Washington Post*, Feb. 5, 2018, https://www.washingtonpost.com/world/national-security/judiciary-closes-investigation-of-sexual-misconduct-allegations-against-retired-judge-alex-kozinski/2018/02/05/e3a94bb8-0ac0-11e8-95a5-c396801049ef_story.html?utm_term=.237b0d6329ed); Office of the Inspector General, *Office of the Inspector General Sexual Harassment Inquiry*, Mar. 15, 2019, <https://www.oversight.gov/sites/default/files/oig-reports/archive/18579/Combined%20AOC%20OIG%20Sexual%20Harassment%20Inquiry%20with%20AOC%20response.pdf>; Andrew Restuccia, Emily Goldberg, and Rebecca Morin, “How the federal government hides sexual harassment payouts,” *Politico*, Jan. 3, 2018, <https://www.politico.com/story/2018/01/03/sexual-harassment-executive-branch-payments-319151>.

⁶⁴ Title VII of the Civil Rights Act of 1964, Pub. L. 88-352; 42 U.S.C. § 2000e(a) and (b); 42 U.S.C. § 2000e-16(a) (application to federal government).

⁶⁵ 42 U.S.C. § 2000e(b) (employment agency), (d) (labor organization), (e) (schools, colleges, and universities); Equal Employment Opportunity Act of 1972, 42 USC § 2000e-1 note, Pub. L. 92-261, 86 Stat. 103 (1988) (the Equal Employment Opportunity Act was amended in 1988 to remove the previous exemption for educational institutions); see also Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. Chicago L. Rev. 1317, 1317-18 (1991).

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁶⁶

The following legal standards for when sexual harassment creates liability under Title VII for an employer have been established by federal court decisions. EEOC has also issued decisions interpreting the terms used to establish liability. These legal liability standards under Title VII apply to all employers, including the federal government. Chapters 2 and 3 discuss the federal government's anti-harassment procedures, the processing of sexual harassment complaints, and disciplinary actions based on sexual harassment.

The Supreme Court first held that Title VII prohibits sexual harassment in the workplace in 1986, in the case of *Meritor Savings Bank v. Vinson*.⁶⁷ As set forth in paragraph (1) above, Title VII makes it unlawful for employers to discriminate with respect to terms and conditions of employment because of sex.⁶⁸ In *Meritor*, the Court unanimously held that Title VII prohibits sexual harassment as a form of sex-based discrimination because it requires victims to work in an "abusive" or "hostile" environment.⁶⁹ The Court also held that to be prohibited, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" ⁷⁰ This ruling established what is now known as the "severe or pervasive" standard that is used to assess the frequency or gravity of sexual harassment, to determine whether it is a violation of Title VII.⁷¹

In 1993, in *Harris v. Forklift Systems, Inc.* the Supreme Court considered whether a plaintiff must prove psychological injury in order to prevail on a sexual harassment hostile work environment claim.⁷² The Court held that if a workplace is permeated with behavior that is so severe or pervasive as to create a hostile or abusive working environment, a Title VII violation exists regardless of whether the plaintiff suffered a psychological harm.⁷³ In emphasizing that Title VII does not require proof of an injury, the *Harris* court stated that:

⁶⁶ 42 U.S.C. § 2000e-2(a).

⁶⁷ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

⁶⁸ 42 U.S.C. § 2000e-2(a)(1).

⁶⁹ *Meritor*, 477 U.S. at 64.

⁷⁰ *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, concurred in this aspect of the judgment. *Meritor*, 477 U.S. at 74 (Marshall, J. concurring) ("I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII.").

⁷¹ *Id.*

⁷² *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

⁷³ *Id.* at 21-22.

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.⁷⁴

The *Harris* Court also introduced a reasonable person standard to evaluate whether the harassment violated federal law, clarifying that conduct must be sufficiently severe or pervasive to create both an objectively and subjectively hostile or abusive work environment.⁷⁵ The Court held that in determining whether an environment is hostile or abusive, "all the circumstances" should be taken into account, and that:

These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.⁷⁶

In a concurring opinion, Justice Scalia stated that he did not believe the standards for indicating that harassment must rise to the level of being "abusive" or "hostile" were made clear, or ameliorated by adding the term "objectively," or "by appealing to a 'reasonable person[']s' notion of what the vague word means."⁷⁷ He opined that the majority's decision "add[ed] little certitude," "opening more expansive vistas of litigation."⁷⁸

The ambiguity of the "severe and pervasive" legal standard regarding what constitutes sexual harassment and which behaviors violate Title VII has resulted in split decisions among circuit courts. For instance, two appellate court cases—one from the Seventh Circuit and one from the Eighth Circuit—show how the standards established in *Meritor* and *Harris* can be interpreted differently. The Seventh Circuit case, *Turner v. The Saloon*, involved a male waiter who alleged that his female supervisor grabbed his genitals and buttocks, and asked him to kiss her, among

⁷⁴ *Harris*, 510 U.S. at 22.

⁷⁵ *Id.* at 21-22.

⁷⁶ *Id.* at 23.

⁷⁷ *Id.* at 24 (Scalia, J. concurring).

⁷⁸ *Id.* at 24 (Scalia, J. concurring).

other unwelcome behaviors.⁷⁹ The Seventh Circuit reasoned that in the cases it had decided, unwelcome touching “increases the severity of the situation,” “especially when the touching is ‘of an intimate body part.’”⁸⁰ Therefore, the Court ruled that the actions against Turner were sufficiently severe to prove a violation of Title VII and affirmed the lower court’s ruling against the restaurant’s motion to dismiss the case.⁸¹

The Eighth Circuit case, *LeGrand v. Area Resources for Community and Human Resources*, involved a male employee of a nonprofit group who was allegedly subjected to similar conduct by a board member. The named harasser engaged in inappropriate behavior, such as grabbing the plaintiff’s buttocks, reaching for his genitals, gripping his thigh, forcibly kissing him on the mouth, and asking him to participate in watching pornographic movies, among other things.⁸² The court of appeals stated that in light of the “demanding standards set by the Supreme Court...” the harassment was not deemed to be sufficiently severe or pervasive to violate Title VII.⁸³ Following other cases in the Eighth Circuit that involved demeaning remarks or even touching of intimate body parts, the court ruled that the behavior did not meet the severe or pervasive standard.⁸⁴ The court also considered that the harasser’s behavior occurred in three “isolated incidents” that were “not physically threatening or violent,” and held that the behavior was “not so severe or pervasive as to poison [the victim’s] work environment.”⁸⁵ At the Commission’s briefing, Christine Back, Legislative Attorney for the Congressional Research Service, testified that the Seventh and Eighth Circuits’ seemingly inconsistent rulings about highly similar fact patterns show that “in addition to the evidence in a case, how courts characterize the evidence ... shape [their] ultimate conclusion.”⁸⁶

In her statement submitted to the Commission, Dariely Rodriguez, Director of the Economic Justice Project at the Lawyers’ Committee for Civil Rights Under Law, argued that the ambiguity around the Supreme Court’s “severe or pervasive” standard has made it difficult for complainants

⁷⁹ *Turner v. The Saloon*, 595 F.3d 679 (7th Cir. 2010).

⁸⁰ *Turner*, 595 F.3d at 685-86 (citing and quoting 7th Circuit cases).

⁸¹ Minute Entry, *Turner v. The Saloon*, 1:05-cv-04595 (N.D. Ill. 2010) (notice that parties have reached a settlement agreement and declaring court’s intent to dismiss case with prejudice, and vacating previously scheduled trial).

⁸² *LeGrand v. Area Resources for Community and Human Services*, No. 04-1284, 348 F.3d 1098, 1100 (8th Cir. 2005).

⁸³ *LeGrand*, 348 F.3d at 1102.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Back Testimony, *Washington Briefing*, p. 87.

to bring cases of harassment, and even harder to win them.⁸⁷ Rodriguez also notes, however, that some courts have accurately recognized that harassment may encompass a variety of behaviors that can “alter the terms, conditions, or privileges of employment, with no single type, frequency, or duration of conduct required to make a showing of severe or pervasive harassment.”⁸⁸

At the Commission’s briefing, Debra Katz, who has specialized in litigation of sexual harassment cases including having participated in bringing the *Meritor* case in which the Supreme Court first recognized Title VII coverage of sexual harassment, also testified that while the severe or pervasive standard is longstanding, it is not applied consistently. She explained that judges have broad discretion in how to rule in sexual harassment cases. Regarding the severe or pervasive standard, Katz testified that:

I know it’s a longstanding standard, but the problem is it’s like [a] Rorschach test... There’s going to be discretion in how courts look at these kinds of issues. [] [T]he severe and pervasive standard just lends itself to a much more subjective look at some really terrible things that happen in workplaces. In one workplace it’s actionable, in the other it’s not.⁸⁹

In light of criticisms of the severe or pervasive standard, in April 2019, Senator Patty Murray and Representative Katherine Clark introduced the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act.⁹⁰ As part of the proposed legislative changes, the Act seeks to replace the severe or pervasive standard with a definition of sexual harassment as conduct “regardless of whether it is direct or indirect, or verbal or nonverbal, that unreasonably alters an individual’s terms, conditions, or privileges of employment, including by creating an intimidating, hostile, or offensive work environment.”⁹¹ The legislation would also clarify that harassment evaluations should be determined by the “totality of the circumstances,” but violations may also arise from a single incident.⁹²

In their statement to the Commission, Debra Katz and Hannah Alejandro, Senior Counsel at Katz, Marshall & Banks, stated that this bill would also direct judges to “consider whether humiliating or degrading language or conduct occurred, whether the conduct reflects stereotypes about the

⁸⁷ Dariely Rodriguez, Director of the Economic Justice Project at the Lawyers’ Committee for Civil Rights Under Law, Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019, at 2 (hereinafter Rodriguez Statement).

⁸⁸ *Ibid.*

⁸⁹ Katz Testimony, *Washington Briefing*, p. 135.

⁹⁰ Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act, H.R. 2148, 116th Congress (2019-2020).

⁹¹ *Id.* at Tit. II, § 204(c)(1).

⁹² *Id.* at § 204(c)(3) vii.

target, and whether there is a ‘power differential’ between the alleged harasser and target.”⁹³ Lastly, the Act would also broaden the scope of conduct in harassment investigations by explicitly stating that the following acts do not preclude a finding of unlawful behavior:

- (A) The complaining party is not the individual being harassed;
- (B) The complaining party acquiesced or otherwise submitted to, or participated in, the conduct;
- (C) The conduct is also experienced by others outside the protected class involved;
- (D) The complaining party was able to continue carrying out duties and responsibilities of the party’s job despite the conduct;
- (E) The conduct did not cause a tangible injury or psychological injury; or
- (F) The conduct occurred outside of the workplace.⁹⁴

Katz and Alejandro assert that the provisions of the BE HEARD Act, if enacted, would establish a standard for unlawful sexual harassment that is significantly more objective, more robust, and more reflective of real-world workplaces than the current severe or pervasive standard.⁹⁵

The parameters of the legislation could also be impacted by other cases. For example, the Supreme Court also took up the issue of when harassing behavior violated Title VII in the 1998 *Oncale v. Sundowner Offshore Services* decision, in which it held that the statute is not meant to be a “general civility code.”⁹⁶ The Court held that the behavior must be “so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”⁹⁷ Moreover, the *Oncale* opinion stated that “[t]itle VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at “discriminat[ion] ... because of ... sex.”⁹⁸

The *Oncale* decision also addressed how Title VII should be applied when a claim involves persons of the same sex. Before the case went up to the Supreme Court, the federal District Court for the

⁹³ *Id.* at § 204(c)(4); *see also* Debra Katz, Partner and Hannah Alejandro, Senior Counsel, at Katz, Marshall & Banks, Written Statement for the Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019 at 2 (hereinafter Katz Statement).

⁹⁴ *Id.* § 204 (c)(4); *see also*, Katz Statement, at 2.

⁹⁵ Katz Statement at 2.

⁹⁶ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998).

⁹⁷ *Id.*

⁹⁸ *Oncale*, 523 U.S. at 80 (emphasis in original).

Eastern District of Louisiana ruled that “Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.”⁹⁹ Oncale lost on appeal in the 5th Circuit,¹⁰⁰ but in the opinion written by the late Justice Scalia, the Supreme Court unanimously reversed that decision, holding that Title VII’s prohibition of discrimination “because of sex” applied to members of the same sex.¹⁰¹ As discussed above, the Supreme Court’s opinion also clarified that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”¹⁰² The above line of reasoning could possibly be impacted by two Title VII cases currently before the Supreme Court, which were combined and heard in oral arguments on October 8, 2019.¹⁰³ These cases do not involve sexual harassment, but they do question the breadth of application of Title VII and *Price Waterhouse*. The first disputes whether Title VII’s prohibition of discrimination applies to claims based on discrimination because of sexual orientation,¹⁰⁴ and the second questions whether Title VII prohibits discrimination against transgender people.¹⁰⁵

The Supreme Court has also set legal precedents about sexual harassment in hostile work environment cases. In these cases, an employer can be found liable for failing to prevent or address sexual harassment, unless the employer can prove that it made sufficient attempts to prevent the harassment, and that the employee failed to utilize the anti-harassment measures provided by the employer or otherwise avoid harm. In 1998, in *Burlington Industries, Inc. v. Ellerth*¹⁰⁶ and *Faragher v. City of Boca Raton*,¹⁰⁷ the Supreme Court clarified under what circumstances an employer is vicariously liable in Title VII sexual harassment cases. In *Ellerth*, the Court held that

⁹⁹ *Oncale v. Sundowner Offshore Services*, Civ. A. No. 94–1483, 1995 WL 133349, at *2 (E.D. La. 1995).

¹⁰⁰ *Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996).

¹⁰¹ *Oncale*, 523 U.S. at 79-80.

¹⁰² *Id.* at 80.

¹⁰³ See U.S. Supreme Court, Oral Arguments, Argument Transcripts, Term Year: 2019, Argument Session: October 7, 2019 – October 16, 2019, No. 17-1618, *Bostock v. Clayton County* and No. 18-107, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, https://www.supremecourt.gov/oral_arguments/argument_transcript/2019.

¹⁰⁴ See *Bostock v. Clayton Cty. Bd. Commissioners*, 894 F. 3d 1335, 1337-38 (Mem) (11th Cir. 2018) (denying rehearing based on analysis that Title VII protects against discrimination because of sexual orientation, and that *Price Waterhouse* “requires the conclusion that Title VII prohibits discrimination against gay and lesbian individuals because their sexual preferences do not conform to their employers’ views of whom individuals of their respective genders should love”) (internal citations omitted).

¹⁰⁵ See *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 884 F.3d 560, 572 (6th Cir. 2018) (“Based on *Price Waterhouse*, we determined that “discrimination based on a failure to conform to stereotypical gender norms” was no less prohibited under Title VII than discrimination based on “the biological differences between men and women.” *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004). And we found no “reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.” *Id.* at 575.”).

¹⁰⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

¹⁰⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

an employer is always vicariously liable if a supervisor harasses an employee and the employee suffers a tangible employment harm (e.g., demotion, firing, failure to promote) and in these situations, no affirmative defense is available to the employer.¹⁰⁸ The Court reasoned that this outcome is always applicable because the employer acts through its supervisors:

Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.¹⁰⁹

In *Faragher*, the Court held that where a supervisor creates an unlawful hostile work environment, but there is no resulting tangible employment action, employers are only liable if they were negligent (i.e., knew or should have known the harassment was occurring and failed to stop it).¹¹⁰ In these instances, the employer may raise an affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹¹¹

Federal employees may elect to have the EEOC decide if sexual harassment occurred (and whether an agency is liable) by electing a hearing before the EEOC in the first instance, or they may instead first seek agency determination and then, as they deem necessary, file an appeal with the EEOC following an agency’s determination as to whether harassment has occurred. Consistent with the case law discussed above, EEOC’s decisions have also found federal agencies automatically liable when a manager or supervisor engages in a tangible employment action harassment for accepting or denying a sexual advance, e.g., hiring or firing, promotion or failing to promote, demoting, reassigning, or changing benefits or the terms and conditions of employment.

EEOC also finds agencies liable for a supervisor or co-worker who engages in hostile environment harassment unless the agency took steps to promptly correct the harassment, make a complainant whole, and prevent additional harassment from occurring. In making this determination, EEOC

¹⁰⁸ *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807-808.

¹⁰⁹ *Ellerth*, 524 U.S. at 762.

¹¹⁰ *Faragher*, 524 U.S. at 807 (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.”).

¹¹¹ *Faragher*, 524 U.S. at 778.

considers such factors as interim relief, appropriate disciplinary action against the harasser, and other corrective action. An example of corrective action found to be proportionate and effective by EEOC is where upon learning of sexually harassing behavior (sexual comments and showing complainant pornographic pictures), the complainant's supervisor immediately counseled the harasser, and the harassing behavior stopped.¹¹² EEOC has also found immediate removal and permanently transferring a supervisor to be prompt and effective action.¹¹³ Conversely, EEOC has considered the following examples to be ineffective remedial action: not taking any actions to redress the behavior, intentionally preventing an EEO investigation, or requiring a complainant to use personal leave to avoid harassment.¹¹⁴ EEOC does not view reassignment of a complainant as appropriate corrective action.¹¹⁵

An agency may also avoid liability under Title VII for the actions of a manager if the employee did not take advantage of any preventative or corrective opportunities offered by the agency. With regard to anti-harassment policies (discussed in this report below) and the obligation of employees to utilize them, the EEOC has held that if an agency has an anti-harassment policy that conforms to the EEOC's guidance the agency is not liable if the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."¹¹⁶ If on the other hand, the agency does not have a conforming anti-harassment policy in place, the agency will be liable under Title VII.¹¹⁷

¹¹² See *Alycia R. v. Dep't of Hous. & Urban Dev.*, EEOC Appeal No. 0120172284 (Mar. 8, 2019).

¹¹³ See *Theresia B. v. U.S. Postal Service*, EEOC Doc. No. 0120140780, 2016 WL 7666515.

¹¹⁴ See *Taryn S. v. Dep't of Veteran Affairs*, EEOC Appeal No. 0120162172 (Sept. 14, 2018) (no corrective action taken based on report of sexual harassment including inappropriate touching, kissing, and asserting the desire to have sexual relations, and supervisor affirmatively instructed the EEO manager not to investigate one of the complaints); *Erlene S. v. Dep't of Justice*, EEOC Appeal No. 0120160618 (Feb. 22, 2018) (same – no action taken to prevent further harassment); *Maxine C. v. U.S. Postal Service*, EEOC Appeal No. 0120162531 (Sept. 12, 2018) (agency must restore any leave used as a result of harassment); *Danita S. v. Dep't of Transp.*, EEOC Appeal No. 0120161096 (May 17, 2018) (same – did not restore complainant leave used to avoid harassment).

¹¹⁵ See *Margaret M. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120151790 (Jan. 11, 2018) (finding agency liability where 1) the agency acknowledged that complainant has proved she was subjected to sexual harassment by a co-worker, 2) the agency was aware of the conduct, and 3) the only corrective action taken was to remove complainant from the workplace and place her on administrative leave instead of disciplining the harasser).

¹¹⁶ See *Rhodes-Coleman v. U.S. Postal Service*, EEOC Doc. No. 01A42059, 2004 WL 1646771, *4 (2004) (Case dismissed despite evidence of a hostile work environment where agency had anti-harassment policy that followed EEOC guidance and employee had not used it).

¹¹⁷ *Briggs v. U.S. Postal Serv.*, EEOC Doc. NO. 01A32026, WL 1494489 (2004) (reversing a final agency decision that found no agency liability because the agency's anti-harassment policy did not contain: 1) a clear explanation of prohibited conduct, 2) assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation, 3) a clear description of the anti-harassment complaint process, 4) assurance to protect confidentiality to the extent possible, 5) an anti-harassment complaint process that

Defining Sexual Harassment

According to the EEOC:

it is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include 'sexual harassment' or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.¹¹⁸

Sexual harassment is often defined in part by reference to the above-described case law, and by subsequent federal regulations. Under Title VII of the Civil Rights Act of 1964, EEOC is charged with handling sexual harassment complaints brought by workers against their employers.¹¹⁹ Updated in 1999 after the 1998 Supreme Court cases on vicarious employer liability described above,¹²⁰ EEOC's federal regulations provide that:

provides a prompt, thorough, and impartial investigation, and 6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred).

¹¹⁸ U.S. Equal Employment Opportunity Commission, "Sexual Harassment," (accessed Nov. 12, 2019), https://www.eeoc.gov/laws/types/sexual_harassment.cfm.

¹¹⁹ 42 U.S.C. § 2000e-4; 42 U.S.C § 2000e-16.

¹²⁰ 45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999 ("Appendix A to § 1604.11—Background Information: The [EEO] Commission has rescinded § 1604.11(c) of the Guidelines on Sexual Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the *Faragher* and *Ellerth* decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors.")

Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or;
- (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹²¹

Sexual harassment can include anything from unwelcome sexual advances, requests for sexual favors, and other verbal and/or physical harassment that is of a sexual nature.¹²² EEOC states that Title VII does not prohibit behaviors such as “simple teasing, offhand comments, or isolated incidents that are not ‘extremely serious.’”¹²³ However, the law does prohibit harassment when it is frequent or severe and creates a hostile or offensive work environment or when the harassment results in a tangible employment action.¹²⁴

Sexual harassment is the lived experience of millions of workers. Studies have shown that harassing behaviors can be “direct” that target a specific individual or “ambient,” which means that there is “a general level of sexual harassment in an environment.”¹²⁵ These behaviors do not have to be overtly sexual in nature, and instead may reflect disparaging attitudes based on gender.¹²⁶ Some evidence suggests this form of harassment—often known as gender harassment—

¹²¹ 29 C.F.R. § 1604.11(a).

¹²² “Sexual Harassment,” Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (accessed Aug. 21, 2019).

¹²³ *Faragher*, 118 S.Ct. at 2283.

¹²⁴ “Sexual Harassment,” Equal Employment Opportunity Commission; *see e.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Katz v. Dole*, 709 F. 2d 251 (4th Cir. 1983); *see also* Equal Employment Opportunity Commission, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, <https://www.eeoc.gov/policy/docs/harassment.html>. For a full discussion of the role of EEOC in federal sector cases, *see* discussion in Chapter 2.

¹²⁵ National Academies of Sciences, Engineering, and Medicine, *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*, 2018, at 2, <https://www.linguisticsociety.org/sites/default/files/24994.pdf>.

¹²⁶ Note: while sex and gender are often used interchangeably, these concepts are separate. An individual’s gender expression or identity may or may not be connected to a person’s sex. *See generally*, Candace West and Don Zimmerman, “Doing Gender,” *Gender & Society*, Vol. 1, No. 2, June 1987, pp. 125-151,

is the most common form of sexual harassment.¹²⁷ In fact, the Commission received testimony from Louise Fitzgerald, Professor Emerita Department of Psychology at University of Illinois that the scenario of sexual coercion, or “sleep with me or you’re fired” form of sexual harassment is the least common scenario that occurs in the workplace.¹²⁸

At the Commission’s briefing, Heather Metcalf, Chief Research Officer for the Association for Women in Science, testified that:

Gender harassment is the most common form of sexual harassment and consists of verbal and non-verbal behaviors that convey hostility, objectification, exclusion or second-class status based on a person’s gender. This is so widespread that it goes unnoticed, and often isn’t recognized as a form of discrimination or harassment when people experience it. Harassment also is not just based on gender or sex, and for workers who are part of more than one marginalized social group, it often has a multiplicative effect.¹²⁹

Fitzgerald argues that gender harassment can also be understood as “gender hostility,” where, for example, men denigrate women and convey contempt often in the attempt to push them out of the workplace or dissuade them from continuing to pursue a particular career.¹³⁰ Fitzgerald explains that gender hostility is not about sexual desire or conquest.¹³¹ Her research shows that instead,

<http://www.csun.edu/~snk1966/West%20and%20Zimmerman%20Doing%20Gender.pdf>; Kristen Schilt and Laural Westbrook, “Doing Gender, Doing Heteronormativity: ‘Gender Normals,’ Transgender People, and the Social Maintenance of Heterosexuality,” *Gender & Society*, Vol 23, No. 4, Aug. 2009, https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1002&context=soc_articles; Equal Employment Opportunity Commission, “Sexual Harassment,” https://www.eeoc.gov/laws/types/sexual_harassment.cfm; U.S. Merit Systems Protection Board, “Update on Sexual Harassment in the Federal Workplace,” March 2018, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

¹²⁷ See e.g., Emily Leskinen, Lilia Cortina, & Dana Kabat, “Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work,” *Law and Human Behavior*, vol. 35, no. 1, (2011), at 32. (In a study of 9,725 women in the military, of the respondents who reported harassment, 89.4 percent reported gender-based harassment). Ibid; Paula Johnson, Shelia Widnall, and Frazier Benya, eds., *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*, National Academies of Sciences, Engineering, and Medicine, 2018, at 25; Louise Fitzgerald, Michele Gelfand, and Fritz Drasgow, “Measuring Sexual Harassment: Theoretical and Psychometric Advances,” *Basic and Applied Social Psychology*, vol. 17, no. 4, (1995), 430.

¹²⁸ Fitzgerald Written Statement at 1-2.

¹²⁹ Metcalf Testimony, *Washington Briefing*, p. 57.

¹³⁰ Louise Fitzgerald, Professor Emerita of Psychology, Women’s Studies and Management, University of Illinois at Urbana Champaign, Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019 at 2 (hereinafter Fitzgerald Statement).

¹³¹ Ibid; see also *supra* note 102 (quoting Justice Scalia’s opinion in the *Oncale* case).

these behaviors, while not always illegal, can be psychologically and emotionally damaging because they are often degrading and offensive.¹³² Studies have shown that three types of sexual harassment (i.e., gender harassment/hostility, unwanted sexual attention, and sexual coercion) may “frequently co-occur, not only in the experiences of any woman over time, but also in her interactions with a single offender.”¹³³ Fitzgerald asserts that these patterns exist because harassment is “only incidentally about sexual attraction,” and is actually a manifestation of power, control, and dominance.¹³⁴

According to the EEOC, harassment can occur regardless of the victim’s or the harasser’s sex, or the victim’s or the harasser’s sexual orientation. EEOC clarifies that a harasser may be the victim’s direct supervisor, a supervisor in another department of an agency, a co-worker or colleague, or someone not affiliated with the employer, such as a client or customer.¹³⁵ Debra Katz testified to the Commission succinctly that: “[s]exual harassment is about abuse of power, plain and simple.”¹³⁶

Quid Pro Quo

In a final set of delineating terms, sexual harassment claims are generally broken into two types: “quid pro quo” harassment or hostile work environment.¹³⁷ In incidents of quid pro quo harassment, a supervisor demands sexual favors, sexual contact, or sexual intercourse from an employee or potential employee as a condition of employment. Researchers assert that “while sexual coercion is by definition quid pro quo sexual harassment, sometimes unwanted sexual attention can be considered quid pro quo sexual harassment if tolerating such behaviors becomes a term or condition of employment.”¹³⁸ Under quid pro quo claims, defining who is a supervisor and what authority the supervisor has over the victim have become threshold issues.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ “Sexual Harassment” Equal Employment Opportunity Commission.

¹³⁶ Katz Testimony, *Washington Briefing*, p. 125.

¹³⁷ Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, March 19, 1990, (accessed Aug. 26, 2019), <https://www.eeoc.gov/policy/docs/currentissues.html>.

¹³⁸ See Paula Johnson, Shelia Widnall, and Frazier Benya, eds. *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, National Academies of Sciences, Engineering, and Medicine, (2018) (citing Louise Fitzgerald, Michele Gelfand, and Fritz Dragow, “Measuring Sexual Harassment: Theoretical and Psychometric Advances,” *Basic and Applied Social Psychology*, vol. 17, no. 4, (1995), at 27, <https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic>).

The Supreme Court has stated that the ability of a supervisor to use his/her authority either explicitly or implicitly over an employee defines quid pro quo sexual harassment.¹³⁹ According to federal regulations implementing Title VII, to establish quid pro quo, a plaintiff must prove that the plaintiff was subjected to unwelcome sexual conduct, and the demand to perform such act was explicitly or implicitly a determining factor in securing a job, maintaining their job, or being promoted within the agency.¹⁴⁰ In the 1998 *Faragher* case, in addition to the holdings discussed above, the Supreme Court held that colleagues and co-workers cannot engage in quid pro quo harassment,¹⁴¹ therefore, for an employer to be vicariously liable, the action must have been committed by a supervisor “with immediate (or successively higher) authority over the employee.”¹⁴²

Defining who is a supervisor is the threshold issue to determining strict liability where a tangible employment action has taken place. In the 2013 case of *Vance v. Ball State University*, which involved allegations of harassment based on race, the Supreme Court held that only immediate or successively higher supervisors or others who have the authority to carry out a tangible employment action that constitutes a significant change in one’s employment status, like firing, failing to promote, or even a position reassignment, can be liable for quid pro quo harassment.¹⁴³ The *Vance* Court considered that some federal courts of appeals “have substantially followed the more open-ended approach advocated by the EEOC’s Enforcement Guidance, which ties supervisor status to the ability to exercise significant direction over another’s daily work.”¹⁴⁴ However, the Supreme Court decided that, “[w]e reject the nebulous definition of a ‘supervisor’ advocated in the EEOC Guidance and substantially adopted by several courts of appeals.”¹⁴⁵ Therefore, after the 2013 *Vance* decision, “an employer is a ‘supervisor’ for purposes of vicarious liability under Title VII [only] if he or she is empowered by the employer to take tangible employment actions against the victim.”¹⁴⁶ A supervisor may also include someone who has the

¹³⁹ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 750-51 (1998).

¹⁴⁰ 29 C.F.R. §1604.11(a)(1) and (2).

¹⁴¹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”).

¹⁴² *Id.*

¹⁴³ *Vance v. Ball State University*, 570 U.S. 421 (2013) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

¹⁴⁴ *Vance*, 570 U.S. at 431.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 424.

power to recommend such decisions subject to tacit approval by others.¹⁴⁷ In this regard, the Supreme Court has clarified that:

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.¹⁴⁸

Still, the definition is narrower than what EEOC set forth in their prior guidance. In her written testimony to the Commission, Christine Back, Legislative Attorney for the Congressional Research Service pointed out that “by defining a supervisor solely in those terms, the Court expressly rejected a definition based on whether the alleged harasser had authority to direct the victim’s daily work, thereby narrowing the definition of supervisor that some lower courts had previously applied.”¹⁴⁹ Civil rights advocates argue that this narrow definition essentially created a standard that absolves employers of responsibility even when their employees effectively act as supervisors of employees.¹⁵⁰

Hostile Work Environment

The other form of sexual harassment is known as hostile work environment, which can be the result of forms of gender harassment discussed above. This is where an employee or group of employees create a workplace that is intimidating, hostile, or offensive to work in due to behaviors, comments, or actions.¹⁵¹ According to the 2016 U.S. Merit Systems Protection Board survey of

¹⁴⁷ *Id.* at note 8 (“The dissent suggests that it is unclear whether Terry would qualify as a supervisor under the test we adopt because his hiring decisions were subject to approval by higher management. *Post*, at 2458, n. 1 (opinion of GINSBURG, J.). See also *Faragher*, 524 U.S., at 781, 118 S.Ct. 2275. But we have assumed that tangible employment actions can be subject to such approval. See *Ellerth*, 524 U.S., at 762, 118 S.Ct. 2257. In any event, the record indicates that Terry possessed the power to make employment decisions having direct economic consequences for his victims. See Brief for Petitioner in *Faragher v. Boca Raton*, O.T. 1997, No. 97–282, p. 9 (“No one, during the twenty years that Terry was Marine Safety Chief, was hired without his recommendation. [He] initiated firing and suspending personnel. [His] evaluations of the lifeguards translated into salary increases. [He] made recommendations regarding promotions ...” (citing record)).”)

¹⁴⁸ *Ellerth*, 524 U.S. at 762 (citing “*E.g., Shager v. Upjohn Co.*, 913 F.2d 398, 405 (C.A.7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the committee functioned as the supervisor’s “cat’s-paw”). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes. See *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (C.A.2 1992) (“From the perspective of the employee, the supervisor and the employer merge into a single entity”).

¹⁴⁹ See Back Statement, at 4.

¹⁵⁰ Katz Testimony, *Washington Briefing*, p. 134.

¹⁵¹ 29 C.F.R. §1604.11(a)(3); see also “Sexual Harassment,” Equal Employment Opportunity Commission.

federal employees regarding sexual harassment,¹⁵² in the previous two years, federal employees reported multiple occurrences of unwelcome sexual teasing, jokes, comments, or questions; exposure to sexually oriented materials (e.g., photos, videos, written materials); unwelcome communications (e.g., emails, phone calls, notes, text messages, social media contacts) of a sexual nature; derogatory or unprofessional terms related to sex or gender to name just a few.¹⁵³ Their March 2018 survey results found that “[a]pproximately 1 in 7 Federal employees experienced one or more of the sexual harassment behaviors during the preceding 2 years.”¹⁵⁴

As stated above, isolated incidents or off-color jokes may or may not violate the law, as the Supreme Court has established standards to “make clear that conduct must be extreme to amount to a change in the terms and conditions of employment. . . [and] to ensure that Title VII does not become a ‘general civility code.’”¹⁵⁵ Rather, the behaviors must be “severe or pervasive”¹⁵⁶ and reach a point where they create a workplace that would be intimidating, hostile, or offensive to a “reasonable” person.¹⁵⁷

According to the Congressional Research Service, generally, courts have ruled that for a plaintiff to bring a successful hostile work environment claim the plaintiff must meet the following criteria:

- He or she [was subject to conduct based on] a protected category under Title VII;¹⁵⁸

¹⁵² Merit Systems Protection Board, *Update on Sexual Harassment in the Federal Workplace*, March 2018, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACR OBAT>, at 1 (Regarding methodology: “When MSPB conducted its first study of sexual harassment in 1981, there was little published research or data available. Accordingly, MSPB staff conducted independent research and consulted with experts to craft a detailed survey to measure Federal employees’ views of and experiences with sexual harassment. That survey has provided baseline data and served as a model for subsequent research into sexual harassment. To permit comparison over time, the MPS 2016 repeated numerous items from the preceding surveys (with revision to reflect new possibilities such as harassment through text messaging or social media). The survey also included new items to reflect a contemporary understanding of sexual harassment.”).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, 3.

¹⁵⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) at 788; *see also, Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

¹⁵⁶ *Meritor Savings Bank v. Vinson* 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim]’s employment and create an abusive working environment.”). *Id.*

¹⁵⁷ *Harris v. Forklift Systems, Inc.* (1993).

¹⁵⁸ *See* Congressional Research Service, *Sexual Harassment and Title VII: Selected Legal Issues*, by Christine Back and Wilson Freeman, April 9, 2018, p. 2-3, <https://fas.org/sgp/crs/misc/R45155.pdf> (noting that: “Title VII prohibits discrimination ‘because of such individual’s race, color, religion, sex, or national origin.’ 42 U.S.C. §§ 2000e-2(a)(1) and (a)(2).” *Ibid.*, note 8).

- The conduct was unwelcome;
- The conduct was based on the plaintiff's protected category;¹⁵⁹
- The plaintiff *subjectively* viewed the harassment as creating an abusive work environment; and
- A "reasonable" person would also *objectively* view the work environment as abusive.¹⁶⁰

Sexual Harassment Data and Trends

Despite the passage of over thirty years since the landmark *Meritor* ruling establishing that sexual harassment may violate Title VII,¹⁶¹ sexual harassment continues to be a significant problem in private, public, and federal workplaces. Since the *Meritor* ruling, many empirical studies have come to suggest that one in every two women encounter some form of harassing behavior during their working lives. Moreover, research studies suggest that this statistic may underestimate the prevalence of the issue.¹⁶² For instance, a 2009 study conducted by Associate Professor of Psychology at the University of Illinois, Kathleen Rospenda and colleagues found that in a nationally representative sample of over 2,000 respondents, one of every two women had been harassed in the previous year alone.¹⁶³ The researchers also note that reports of sexual harassment

¹⁵⁹ *Ibid.*, 3 (noting that: "With respect to showing that the alleged harassment or hostile treatment was based on sex, some courts have held that the harassment did not have to be sexual in nature. *See, e.g., Boumehdi v. Plastag Holdings, LLC.*, 489 F.3d 781, 788 (7th Cir. 2007) (stating that though "most of [harasser]'s alleged comments were sexist rather than sexual, our precedent does not limit hostile environment claims to situations in which the harassment was based on sexual desire." *Ibid.*, note 9)).

¹⁶⁰ *Ibid.*, 4 (noting: "*See e.g., LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098, 1102 (8th Cir. 2005)(prima facie elements require the plaintiff to show: membership in a protected group, subjection to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment was "sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc) (setting forth similar elements to establish a "hostile-environment sexual-harassment claim"). *Ibid.*, note 10.

¹⁶¹ *See supra* note 50.

¹⁶² Fitzgerald Statement, at 2; *see also*, Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009).

¹⁶³ Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009), at 837.

were more prevalent among women than men, and people of color experienced the highest levels of harassment and discrimination in the workplace overall.¹⁶⁴

The researchers also found that the type of occupation and workplace results in gender differences regarding the experience and reporting of sexual harassment.¹⁶⁵ They studied male-dominated, same-sex, and women-dominated jobs, and they also studied whether race was a factor. They found that women in the sample who worked in occupations dominated by men were more likely to experience sexual harassment. However, the researchers found that occupation was unrelated to the rates of harassment of women, since women were more likely to experience harassment compared to men, even in same-sex or women-dominated occupations. Yet occupation did have an effect on men in the sample. For instance, the researchers found that men had a higher prevalence of experiencing sexual or gender harassment in women-dominated jobs.¹⁶⁶ Regarding race, the researchers found that black respondents and individuals who identified as other or mixed race/ethnicity experienced the highest levels of harassment in the workplace.¹⁶⁷ Therefore, the researchers assert that:

same-sex dominant occupations were protective for men, but not women, making occupation a more salient correlate of gender-based harassment and discrimination among men. Similarly, race was a significant correlate of gender-based and generalized HDW [harassment and discrimination in the workplace] for men. This suggests that visible social status characteristics (e.g., gender, race/ethnicity) are more likely to provoke harassment or discrimination from prejudiced individuals.¹⁶⁸

Extent of Sexual Harassment in the Federal Workplace

Despite the fact that researchers have been studying the issue of sexual harassment for at least the past thirty years, there continues to be a lack of publicly available data regarding sexual harassment against federal employees.¹⁶⁹ One impediment is that the majority of federal agencies only release

¹⁶⁴ Ibid., 826.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., 828.

¹⁶⁸ Ibid., 837 (emphasis in original).

¹⁶⁹ See e.g., Fitzgerald Statement, at 2; Legal Aid at Work Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019; (hereinafter Legal Aid Statement); Diana Boesch, Jocelyn Frye, and Kaitlin Holmes, “Driving Change in States to Combat Sexual Harassment,” Center for American Progress, Jan. 15, 2019, <https://www.americanprogress.org/issues/women/reports/2019/01/15/465100/driving-change-states-combat-sexual-harassment/>.

their raw statistical data, which make it difficult to understand both the full extent of sexual harassment, as it may be under-reported, as well as why sexual harassment is occurring in the first place. At the Commission's briefing, Associate Director of EEOC's Office of Federal Operations Dexter Brooks explained that this data release is a choice that federal agencies make and some agencies chose to publish more details than just statistical information regarding sexual harassment. For example, the Central Intelligence Agency (CIA) released an annual report announcing, without names, sexual harassment cases it had that year and how they were resolved. He told the Commission that "if CIA can do that, why can't other agencies."¹⁷⁰ As a result of these varied federal agency choices, the information on sexual harassment in the workplace that is most readily available tends to come from academic sources or the private sector.

In 2017 one poll found that about one in three people, and 45 percent (or approximately 33.6 million) of women and 15 percent of men reported experiencing sexual harassment at work.¹⁷¹ Of women who reported, those between the ages of 30 and 44 experienced the most harassment (49 percent), followed by women between the ages of 45 to 64 (47 percent), 18 to 20 (41 percent), and 65 or older (40 percent). The survey also found that of those who had been sexually harassed on the job, 73 percent of women and 81 percent of men did not report the harassment.¹⁷² Researchers at the Center for Employment Equity found that women were least likely to file sexual harassment charges in industries such as the government, health care, social assistance, and finance, but were most likely to file in mining, warehousing, and transportation industries.¹⁷³ Overall, the study found that sexual harassment charges filed by women were higher in male-dominated work places.¹⁷⁴ The study concluded that:

Sexual harassment remains a persistent and serious threat to women and men in American workplaces. While the vast majority of those who experience sexual harassment in the workplace never report this harassment internally nor file a formal discrimination charge, those who do are typically confronted by harsh outcomes.¹⁷⁵

¹⁷⁰ Brooks Testimony, *Washington Briefing*, p. 33.

¹⁷¹ Rachel Gillett, "Sexual harassment isn't a Hollywood, tech, or media issue – it affects everyone," *Business Insider*, Nov. 30, 2017, <https://www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11>. Note: in terms of methodology: MSN polls its readers and then uses machine learning to model how a representative sample of the U.S. would have responded, using big data, such as the Census." Ibid.

¹⁷² Ibid.

¹⁷³ Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, "Employer's Responses to Sexual Harassment," Center for Employment Equity at University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

In one 2014 study on sexual harassment and assault in the military (part of the federal sector), researchers found that an estimated 26 percent of active-duty women had experienced sexual harassment or gender discrimination in the previous year, which included almost 5 percent who had experienced one or multiple sexual assaults (compared to seven percent and one percent of active-duty men, respectively).¹⁷⁶

Other empirical research has also found that reports of sexual harassment are higher in:

1. Occupations in which job duties and tasks are defined as “traditionally masculine” or being performed by men (e.g., military service, law enforcement, construction)¹⁷⁷
2. Occupations with gender imbalance in supervisory and managerial roles, where these positions are more likely to be filled by men (e.g., technology and STEM professions)¹⁷⁸
3. Occupations that station employees in remote and/or isolated work environments (e.g., military bases, construction or agricultural sites, field and research sites).¹⁷⁹

¹⁷⁶ National Defense Research Institute, “Sexual Assault and Sexual Harassment in the U.S. Military: Top-Line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study,” RAND Military Workplace Study, 2014, https://www.rand.org/pubs/research_reports/RR870.html; see also, U.S. Commission on Civil Rights, *Sexual Assault in the Military*, (Sept. 2013), https://www.usccr.gov/pubs/docs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

¹⁷⁷ Lauren P. Daley, Dnika J. Travis, and Emily S. Shaffer, “Sexual Harassment in the Workplace: How Companies Can Prepare, Prevent, Respond, and Transform Their Culture,” Catalyst, March 15, 2018, at 6, https://www.catalyst.org/wp-content/uploads/2019/01/sexual_harassment_in_the_workplace_report.pdf; Anika Warren, “Cascading Gender Biases, Compounding Effects: An Assessment of Talent Management Systems,” Catalyst, Feb. 9, 2009, at 6 (discussing gender composition and male-dominated industries), https://www.catalyst.org/wp-content/uploads/2019/01/Cascading_Gender_Biases_Compounding_Effects_An_Assessment_of_Talent_Management_Systems.pdf; Murali Shanker, Marina N. Astakhova, and Cathy L.Z. DuBois, “Sexual Harassment: A Complex Adaptive System Viewpoint,” *Gender, Technology, and Development*, (2015), vol. 19, no. 3, at 6-7.

¹⁷⁸ Kevin Stainback and Donald Tomaskovic-Devey, “Intersections of Power and Privilege: Long-Term Trends in Managerial Representation,” *American Sociological Review*, 2009, vol. 74, no. 5; Heather McLaughlin, Christopher Uggen, Amy Blackstone, “The Economic and Career Effects of Sexual Harassment on Working Women,” *Gender & Society*, 2017, vol. 31, no. 3; Catalyst, “Women in Male-Dominated Industries and Occupations: Quick Take,” Aug. 23, 2018, <https://www.catalyst.org/research/women-in-male-dominated-industries-and-occupations/>; Dana Kabat-Farr and Lilia M. Cortina, “Sex-Based Harassment in Employment: New Insights into Gender and Context,” *Law and Human Behavior*, 2014, vol. 38, no. 1, [https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20\(2014\).pdf](https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20(2014).pdf); New America, “Sexual Harassment: A Severe and Pervasive Problem,” Sept. 2018, https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-10_190248.pdf.

¹⁷⁹ New America, “Sexual Harassment: A Severe and Pervasive Problem,” Sept. 2018, https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-10_190248.pdf, at 55; Irma Morales Waugh, “Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women,” *Violence Against Women*, 2010, vol. 16, no. 3; Alexia Fernández Campbell,

While sexual harassment is a significant issue across all job sectors and all industries, longstanding research shows that organizational factors (rather than individual factors) have strong correlations in predicting harassment.¹⁸⁰ “Harassment flourishes because of a climate of tolerance and a culture of silence in the face of it.”¹⁸¹ For instance, in a study comparing workers across three different job sectors: academia (studying “virtually all employees of a small public university”), the court system (studying “one of the larger federal circuit courts”), and the military (sample of employees in all branches of the U.S. military), researchers found that the underrepresentation of women in workgroups was correlated to an increased likelihood in women experiencing gender harassment.¹⁸² When the researchers compared the odds of workers experiencing harassment in “gender-balanced workgroups” (i.e., equal numbers of women and men) with those who work with almost all men, researchers found that women who work mainly with men were 1.68 times more likely to encounter gender harassing behaviors.¹⁸³ Interestingly, however, the women did not report experiencing an increase in harassment that was directly sexual; instead, they reported an increase in gender harassment.¹⁸⁴ For the men across all three samples (academia, federal courts and military), an opposite pattern emerged, where underrepresentation of men did not increase men’s risk for either sexual or gender harassment and in some cases led to a decreased likelihood of experiencing harassment overall.¹⁸⁵ These findings show a high correlation of nonsexual discriminatory experiences of women increasing in male-dominated work environments, and

“Housekeepers and Nannies Have No Protection from Sexual Harassment under Federal Law,” *Vox*, 2018, <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws>; Chai Feldblum and Victoria Lipnic. *EEOC Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, June 2016; Bernice Yeung, “Rape on the Night Shift: Under the Cover of Darkness, Female Janitors Face Rape and Assault.” *Frontline*, June 23, 2015, <https://www.pbs.org/wgbh/frontline/article/rape-on-the-night-shift/>.

¹⁸⁰ See e.g., Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “Sexual Harassment, Workplace Authority, and the Paradox of Power,” *American Sociological Review*, Aug. 2012, vol. 77, no. 4, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3544188/pdf/nihms376621.pdf>; Lilia Cortina, Written Testimony for Select Task Force Meeting- Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, U. S. Equal Employment Opportunity Commission, June 15, 2015, https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm.

¹⁸¹ New America, “Sexual Harassment: A Severe and Pervasive Problem,” Sept. 2018, https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-10_190248.pdf, at 26.

¹⁸² Dana Kabat-Farr and Lilia M. Cortina, “Sex-Based Harassment in Employment: New Insights into Gender and Context,” *Law and Human Behavior*, 2014, vol. 38, no. 1, [https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20\(2014\).pdf](https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20(2014).pdf), at 61 (regarding academia), 63 (regarding the court system) and 65 (regarding the U.S. military).

¹⁸³ *Ibid.*, 68.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

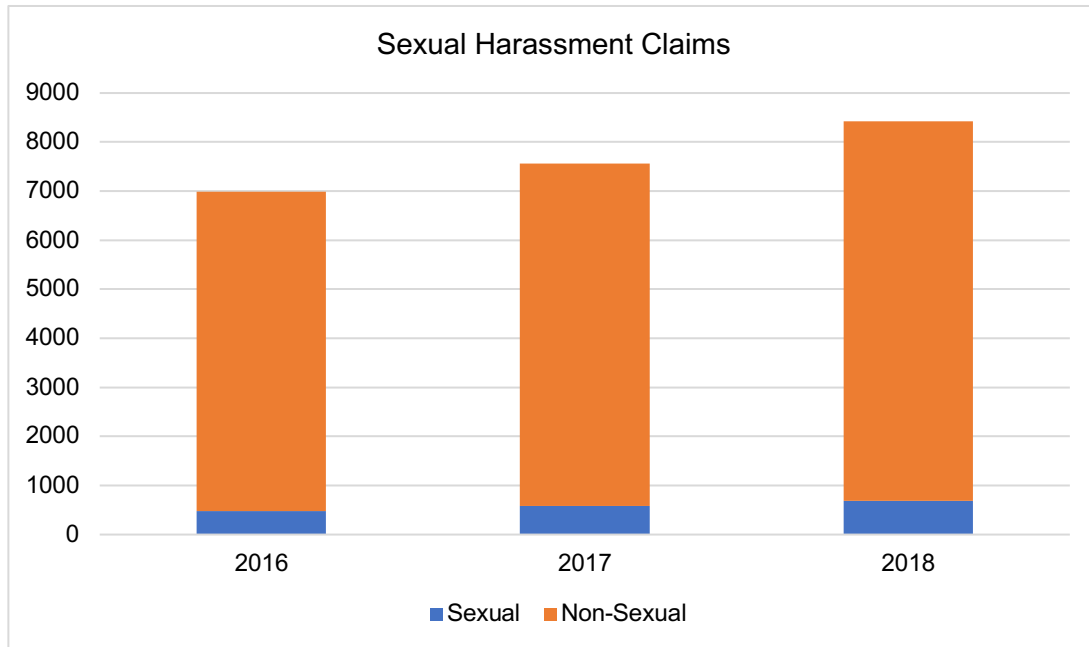
underscore that in many cases harassment of women is not about sexual attraction or gratification, but rather an exercise of power and an expression of prevailing sexist notions about gender.¹⁸⁶

Every year, federal employees file thousands of sexual harassment claims against their agency employers which are processed through the federal EEO administrative process. In fiscal year 2016, federal employees filed a total of 6,990 sexual and non-sexual harassment claims. As discussed previously, non-sexual forms of sexual harassment (i.e., gender harassment, hostile work environment) represent the majority of sexual harassment claims compared to harassment that was sexual in nature (6,505 and 485, respectively). Claims increased in FY 2017 to 7,560 (6,975 and 585, respectively); and in FY 2018 claims further increased to 8,418 (7,733 and 685, respectively) (see chart 1).¹⁸⁷ Comparatively, private sector employees filed a total of 12,860 sex-based harassment charges in FY 2016, which decreased to 12,428 in FY 2017, but increased to 13,055 in FY 2018.¹⁸⁸

¹⁸⁶ See e.g., Ibid., 68; Katz Testimony, *Washington Briefing*, p. 125; Christopher Uggen and Amy Blackstone, “Sexual Harassment as a Gendered Expression of Power,” *American Sociological Review*, (Feb. 2004), vol. 69, no. 1.

¹⁸⁷ See EEOC, Form 462 Complaints Tables, Federal Sector Reports, <https://www.eeoc.gov/federal/reports/tables.cfm>.

¹⁸⁸ See EEOC, *Charges Alleging Sex-Based Harassment (Charges filed with EEOC)*, FY 2010- FY 2018, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

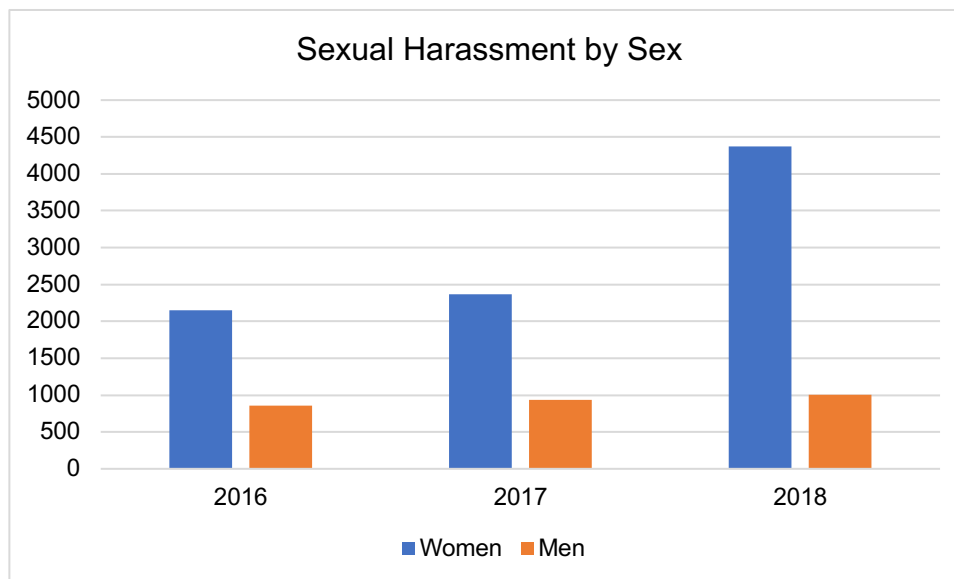
Chart 1: EEOC Federal Sexual Harassment Claims (2016-2018)

Source: EEOC Data, <https://www.eeoc.gov/federal/reports/index.cfm>

Further, these data show that not only have the number of federal sexual harassment complaints increased, but the rate (i.e., the number of complaints per employee) has also increased.¹⁸⁹ For instance, in 2017, the change in complaint rate was 21.2 percent from the previous year; and while the change in percentage was less in 2018 compared to 2017 rates (with an 8.8 percent increase), the complaint rate overall still increased.

As discussed above, decades of data show that women are more likely to be sexually harassed than men in the workplace. The past several years reflect similar recent data in the federal sector.

¹⁸⁹ Equal Employment Opportunity Commission, EEOC responses to U.S. Commission on Civil Rights Interrogatory Responses, Sept. 6, 2019, at 14.

Chart 2: EEOC Federal Sexual Harassment Claims by Sex (2016-2018)

Source: EEOC Data, <https://www.eeoc.gov/federal/reports/index.cfm>

In addition, breaking these data out by race/ethnicity reveal that among all racial groups, black employees consistently report more harassment based on race (see Chart 3).¹⁹⁰ While EEOC does not report intersectional data on sexual harassment (e.g., race and gender), studies have shown that black women are at the highest risk of being victims of sexual harassment in the federal, public, and private sector workforces.¹⁹¹ Sunu Chandy, Legal Director at the National Women’s Law Center, testified that laws regarding sexual harassment claims need to take complainants’ multiple identities into account.

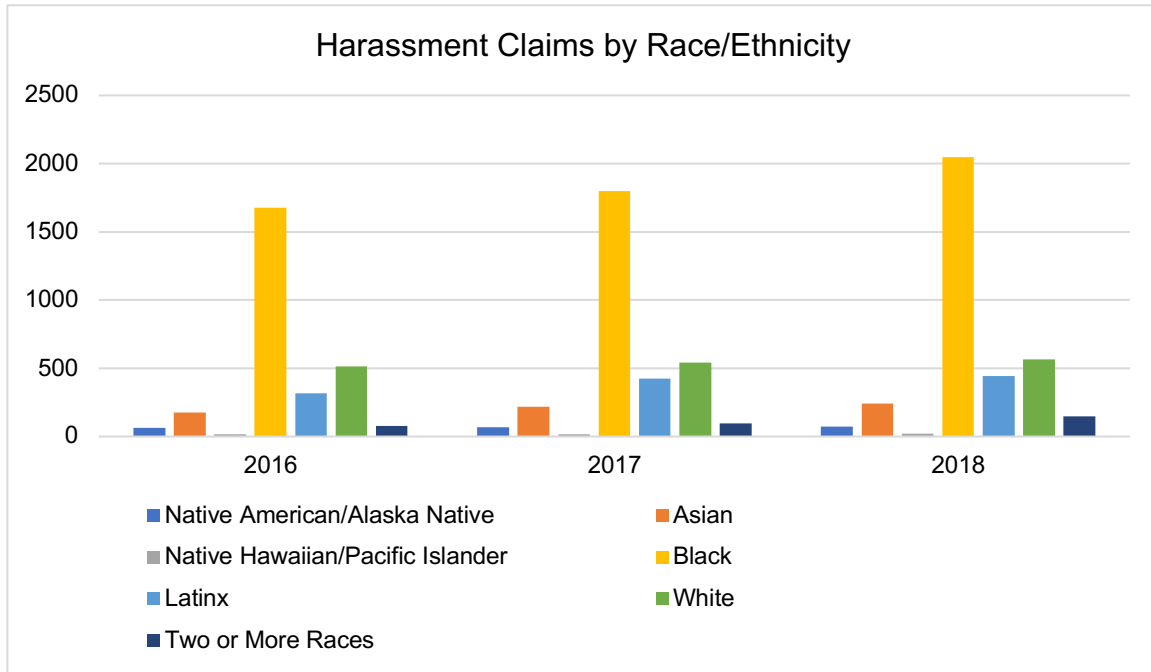
I [] think because courts have not grappled with intersectional discrimination so often, I think plaintiffs and employees have not brought those claims in ways that have allowed that body of law to develop much. But I think there’s a lot of interest in doing that because that is how we experience discrimination in our lives, and it’s not simply saying I have a

¹⁹⁰ See EEOC, Annual Report on Federal Workforce Fiscal Year 2016, Complaint Tables; EEOC, Annual Report on Federal Workforce Fiscal Year 2017, Complaint Tables; EEOC, Annual Report on Federal Workforce Fiscal Year 2018, Complaint Tables, <https://www.eeoc.gov/federal/reports/index.cfm>.

¹⁹¹ Hart Research Associates, “Key Findings from a Survey of Women Fast Food Workers,” Oct. 5, 2016, <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf>; Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Institute for Women’s Policy Research, Oct. 15, 2018; Amanda Rossie, Jasmine Tucker, and Kayla Patrick, “Out of the Shadows,” National Women’s Law Center, 2018, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; Equal Employment Opportunity Commission, Federal Sector Data, <https://www.eeoc.gov/federal/reports/index.cfm>.

race claim. I have a sex claim. But rather, as a woman of color, I have a particular kind of claim and that should be put forward together – more and more before the courts.¹⁹²

Chart 3: EEOC Federal Harassment Claims by Race/Ethnicity (2016-2018)



Source: EEOC Data, <https://www.eeoc.gov/federal/reports/index.cfm>

At the Commission’s briefing, EEOC’s Dexter Brooks testified that annually about 15,000 to 16,000 formal complaints of discrimination are filed by the roughly three million federal employees. Brooks explained that “[w]hen we look at those complaints of discrimination, the growing trend is now that over 50 percent of our complaints of discrimination contain an allegation of harassment.”¹⁹³ In 2016, testimony provided to the EEOC’s Select Task Force on the Study of Harassment in the Workplace and research reviewed by Task Force staffers revealed a wide range in the percentages of women who reported experiencing sexual harassment at work, from 25 percent to 85 percent.¹⁹⁴ Further, academic studies suggest that approximately 70 percent of

¹⁹² Chandy Testimony, *Washington Briefing*, p. 44.

¹⁹³ Brooks Testimony, *Washington Briefing*, p. 12.

¹⁹⁴ Equal Employment Opportunity Commission, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai Feldblum and Victoria Lipnic, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

workers who experience sexual harassment in the workplace never tell a supervisor, manager, or union representative about the incident.¹⁹⁵

Similar results were found in the Merit Systems Protection Board 2016 survey, which found that government-wide, approximately 1 in 7 (14.3 percent) federal employees experienced one or more sexual harassment behaviors during the preceding two years. Breaking these down by gender, women were more than twice as likely as men to report experiencing sexual harassment in the survey (20.9 percent, 8.7 percent, respectively).¹⁹⁶ The Merit Systems Protection Board survey breaks sexual harassment into three categories: gender harassment (i.e., unwelcome behaviors that disparage or objectify others based on their sex or gender); unwanted sexual attention (i.e., unwelcome behaviors of a sexual nature that are directed towards a person); and sexual coercion (i.e., pressure or force to engage in sexual behavior).¹⁹⁷ Among these categories, a vast majority of both women and men stated that these behaviors were inappropriate in the workplace. Yet, the researchers note that this does not necessarily mean that workers are not engaging in inappropriate behaviors.¹⁹⁸

In terms of specific behaviors, when comparing the 1994 Merit Systems Protection Board (MSPB) survey to the 2016 survey (most recent), the researchers found that overall, the numbers of employees who had experienced sexual harassment (measured by eight harassing behaviors) had decreased (see table 1).

¹⁹⁵ Ibid. (citing Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 *The Sage Handbook of Organizational Behavior* (J. Barling & C. L. Cooper eds., 2008), at 485,

https://pdfs.semanticscholar.org/a41c/9c91cc084fede9faca785bf099ec7adb8264.pdf?_ga=2.1264113.1304292683.1574102662-413231289.1574102662.

¹⁹⁶ U.S. Merit Systems Protection Board, "Update on Sexual Harassment in the Federal Workplaces," March 2018, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACR OBAT>.

¹⁹⁷ Ibid., 2.

¹⁹⁸ Ibid., 3.

Table 1: MSPB Survey Comparison (1994 and 2016)

Percent of Employees Indicating Types of Sexual Harassing Behaviors				
	Men		Women	
	1994	2016	1994	2016
Unwelcome invasion of personal space	8%	3%	24%	12%
Unwelcome sexual teasing, jokes, comments, or questions	14%	3%	37%	9%
Unwelcome sexually suggestive looks or gestures	9%	1%	29%	9%
Unwelcome communications of a sexual nature	4%	1%	10%	6%
Pressure for dates	4%	1%	13%	3%
Stalking	2%	1%	7%	2%
Pressure for sexual favors	2%	1%	7%	1%
Actual or attempted rape or sexual assault	2%	1%	4%	1%

Source: Merit Systems Protection Board,

<https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1442317&version=1447804&application=ACROBAT>

According to a 2016 EEOC Select Task Force on the Study of Harassment in the Workplace report, researchers found that anywhere from 25 percent to 85 percent of women reported experiencing sexual harassment in the workplace.¹⁹⁹ This broad range reflects some of the inconsistencies about what constitutes sexual harassment and how this information is gathered methodologically.²⁰⁰ For instance, some people may think that sexual harassment consists only of behaviors that are sexual in nature.

Academic research indicates that when the term is undefined in surveys and respondents are asked if they had experienced “sexual harassment,” approximately a quarter of women reported experiencing “sexual harassment” in the workplace.²⁰¹ When researchers utilized probability sampling²⁰² and asked employees whether they had experienced one or more specific sexually

¹⁹⁹ Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, June 2016, at 8.

²⁰⁰ Remus Ilies, Nancy Hauserman, Susan Schwochau, and John Stibal, “Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities,” *Personnel Psychology*, vol. 56, no.3, (Dec. 2006), at 609-12.

²⁰¹ *Ibid.*

²⁰² A probability sample is a methodological research design that allows each respondent from the sampling frame or population being studied equal chances of being selected for the study (i.e., being randomly selected). This type of

based behaviors (e.g., unwanted sexual attention or sexual coercion), the rate of reported harassment rose to approximately 60 percent of women.²⁰³ When researchers used convenience sample surveys²⁰⁴ (non-probability sampling) to inquire about the same behaviors, the incident rate rose to about 75 percent; and in one case the rate rose to 90 percent.²⁰⁵ These differences could be the result of an availability bias or “sample-selection bias,” meaning that researchers are simply going to have more access to individuals who are more likely to report. It is important to note, however, that surveys or interviews utilizing convenience samples can also downwardly report the rates of sexual harassment.²⁰⁶ For instance, if an organization had an increased awareness regarding sexual harassment and positive mechanisms to address and report incidents, employees would presumably be more likely to engage in research studies.²⁰⁷ However, the prevalence of sexual harassment occurring at that particular organization would potentially be lower, thus it may not offer an accurate gauge to the severity of the issue.²⁰⁸

Researchers have thus concluded that individuals often do not label certain sexually based behaviors—despite being unwelcome, problematic, or offensive—as “sexual harassment.”²⁰⁹ The issue of defining sexual harassment becomes even clearer when studies utilize the Sexual Experiences Questionnaire, which is the most widely used survey of harassment of women at work, and does not limit questions to only those that are sexual in nature, but also asks questions

sampling allows researchers to generalize their results to population being studied. *See e.g.*, Norman Denzin, *Sociological Methods*, (New York, NY: Routledge), 2017.

²⁰³ Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, June 2016, at 8.

²⁰⁴ A convenience sample is a methodological research design that constructs the sample from a population or group of individuals that are “convenient” or close-by to the researcher to make the sampling frame. Results from these samples cannot be generalized to the broader population. *See e.g.*, Norman Denzin, *Sociological Methods*, (New York, NY: Routledge), 2017.

²⁰⁵ Remus Ilies, Nancy Hauserman, Susan Schwochau, and John Stibal, “Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities,” *Personnel Psychology*, vol. 56, no.3, (Dec. 2006), 612.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, 612-13.

²⁰⁸ *Ibid.*

²⁰⁹ Vicki Magley, Charles Hulin, Louise Fitzgerald, and Mary DeNardo, “Outcomes of Self-Labeling Sexual Harassment,” *Journal of Applied Psychology*, vol. 84, no.3, 1999.

about gender harassment.²¹⁰ When this definition is added into surveys, researchers find that almost 60 percent of women report experiencing harassment in probability samples.²¹¹

Retaliation and Backlash

Federal law prohibits retaliation against employees who make EEO complaints, in both the federal and the private sector.²¹² Fear of retaliation was a consistent theme that emerged at the Commission's briefing. Several panelists explained that victims of sexual harassment and/or other colleagues who witness the behavior often will not report incidents because they do not want to face negative repercussions.²¹³ Attorney George Chuzi flatly stated that "federal employees are terrified to serve as witnesses. It's hard to prove these cases without contemporaneous witness testimony. They are paralyzed with fear about being retaliated against."²¹⁴

In a January 2018 U.S. Department of Agriculture Office of Inspector General survey of almost 2,000 U.S. Forest Service employees in California, the majority of the respondents stated that they were aware of the agency's "zero tolerance" harassment policy.²¹⁵ The survey also indicated, however, that most of the employees who alleged experiencing harassment did not report the incident(s) because they did not trust the reporting process, did not believe that the process would be confidential, or feared that reporting would negatively affect their job.²¹⁶

²¹⁰ Emily Leskinen, Lilia Cortina, and Dana Kabat, "Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work," *Law and Human Behavior*, vol. 35, no. 1, (2011), at 27, <https://lsa.umich.edu/psych/lilia-cortina-lab/Leskinen%20et%20al.%202010%20LHB.pdf>. (Authors argue that the Sexual Experiences Questionnaire (SEQ), developed by Dr. Fitzgerald and her colleagues is the most validated and widely used measure of sexual harassment experiences). *See also*, Louise F. Fitzgerald, Vicki Magley, Fritz Drasgow, & Craig Waldo, "Measuring Sexual Harassment in the Military: The Sexual Experiences Questionnaire (SEQ-DoD)," *Military Psychology*, vol. 11, no. 3, (1998).

²¹¹ Remus Ilies, Nancy Hauserman, Susan Schwochau, and John Stibal, "Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities," *Personnel Psychology*, vol. 56, no.3, (Dec. 2006) (This is based on 86,578 respondents from 55 independent probability samples, utilizing the SEQ. The researchers found that 58 percent of women report having experienced sex-based harassment across a variety of work environments.) *Ibid*.

²¹² *See* No FEAR Act, Pub. L. 107-174, 116 Stat. 566 (codified as amended in scattered sections of 5 U.S.C.).

²¹³ *See e.g.*, Speier Testimony, *Washington Briefing*, p. 9 and 29; Ben-Yehuda Testimony, *Washington Briefing*, p. 52; Rodriguez Testimony, *Washington Briefing*, p. 117.

²¹⁴ Chuzi Testimony, *Washington Briefing*, p. 46.

²¹⁵ Virginia E. B. Rone, *Survey of the Forest Service Region 5 Regarding Sexual Harassment*, United States Department of Agriculture Office of Inspector General, Jan. 23, 2018, <https://www.usda.gov/oig/webdocs/17-028.pdf>. The Forest Service is part of the USDA. The Commission chose not to investigate the Forest Service or USDA since other investigations of this agency were already underway.

²¹⁶ *Ibid*.

A March 2018 *PBS NewsHour* investigation of the U.S. Forest Service found a series of allegations by women who faced discrimination and harassment at work, but many of the women who were interviewed stated they were too afraid of retaliation to report the incidents and that that fear was a common theme among the interviews.²¹⁷ In interviews with 34 current and former Forest Service women, across 13 states, they all described workplaces that were hostile to women that were expressed through patterns of bullying, gender discrimination, sexual harassment and assault by fellow crew members and supervisors.²¹⁸ Many of these women alleged that when they chose to report these incidents they were met with retaliatory actions, such as verbal threats, bullying letters, being stripped of duties, negative performance reviews, and demotions.²¹⁹ In 7 of the 34 interviews, these federal workers asked to remain anonymous because they feared further retaliation.²²⁰ For instance, one woman asked for the interview transcript to be destroyed after her interview because she was too afraid of the consequences.²²¹ Another woman summed up the experiences like this: “We all live in this fear ... So, if I have to speak up I will. But it’s frustrating because there’s so many more out there who are not talking.”²²²

In interviews with employees, union representatives, lawyers, and congressional investigators, *PBS NewsHour* also found that all discussed that the agency struggles with long-standing issues related to the Forest Service’s “boys’ club” culture across the country.²²³ Further, women are often assigned to duties in remote forest locations, which may place them in higher risk scenarios for sexual harassment and assault.²²⁴ Many of the women who were interviewed stated that the worst offenses often occur in the agency’s wildland firefighting division, where gender disparities are prominent.²²⁵ For instance, in 2018 during the off-season, the Forest Service had 6,633 male fire employees compared with only 890 female fire employees.²²⁶ That is, only 11.8 percent of the workforce was female.²²⁷

²¹⁷ *PBS NewsHour*, Mar. 1, 2018, <https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began>.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ $6,633 + 890 = 7,523$. $890/7,523 = 11.8\%$.

Testifying to the House Oversight and Government Reform Committee, Shannon Reed, an air quality scientific specialist who formerly worked at the National Park Service and Forest Service, described a “dark history” of “gender discrimination, sexual harassment, assault and rape” over the past eight years.²²⁸ While Reed was training to be a fire-fighter, she testified to being called a “slut, whore, and c*nt,” and was told that she would have to “suck c*ck” to keep her job.²²⁹ Reed further recalled male supervisors threatening to “bend me over and spank me” and other men told her that she was “unwelcome as a female,” “seen as a sex object,” and was also tripped, pushed, and kicked.²³⁰

Available data show that sexual harassment is a prevalent issue for federal employees in many agencies. Federal employees filed a total of 29,657 harassment claims between fiscal year 2015 and 2018; of these, sexual harassment accounted for 2,257 complaints and non-sexual harassment 27,400 complaints.²³¹ These numbers do not necessarily reflect the total number of sexual harassment claims for those years, however, since this figure only reflects those employees who filed a claim with EEOC.²³² In fiscal year 2015 alone, the EEOC reported that federal sector employees “filed 6,741 complaints alleging harassment as all of, or part of, alleged discrimination.”²³³ These complaints made up 43 percent of all federal sector complaints filed by employees that year.²³⁴

EEOC reports that these statistics offer a snapshot into the prevalence of federal workplace harassment, but are both under- and over-inclusive. These data are over-inclusive because not all complaints about harassment are based on behaviors that are protected under employment discrimination laws and/or the complaint may not have met the legal standard of severe or

²²⁸ Charles Clark, “Sexual Harassment Continues to Infect Forest Service, Park Service,” *Government Executive*, Nov. 15, 2018, <https://www.govexec.com/oversight/2018/11/sexual-harassment-continues-infect-forest-service-park-service/152873/>.

²²⁹ Committee on Oversight and Reform, “Examining Misconduct and Retaliation at the U.S. Forest Service,” Nov. 15, 2018, <https://oversight.house.gov/legislation/hearings/examining-misconduct-and-retaliation-at-the-us-forest-service>.

²³⁰ Shannon Reed, Testimony, Committee on Oversight and Reform, “Examining Misconduct and Retaliation at the U.S. Forest Service,” Nov. 15, 2018, at 2, <https://docs.house.gov/meetings/GO/GO00/20181115/108759/HHRG-115-GO00-Wstate-ReedS-20181115.pdf>.

²³¹ EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019.

²³² *Ibid.*

²³³ Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, June 2016, at 6, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

²³⁴ *Ibid.*

pervasive to constitute actionable, unlawful harassment.²³⁵ On the other hand, these data may be under-inclusive because approximately 90 percent of individuals who claim to have experienced harassment do not take formal action against the harasser (e.g., filing a charge or a complaint).²³⁶

In the latest Merit Systems Protection Board study on sexual harassment released in March 2018, researchers found that only 11 percent of the complainants formally filed a complaint, whereas the majority (61 percent) of those surveyed stated that they avoided the harasser(s).²³⁷ Only 8 percent of federal employees believed that their agency took corrective action against the harasser(s); leading the researchers to conclude that “the risks of reporting harassment outweigh any potential personal or organizational benefits, and [employees] decide not to use agency procedures for addressing sexual harassment and holding the harasser(s) accountable for their misconduct.”²³⁸ Private sector research has also suggested that employees choose not to file sexual harassment claims because they “do not trust the process, do not expect it to be confidential, and/or expect retaliation.”²³⁹ At the Commission’s briefing, Donald Tomaskovic-Devey, Professor of Sociology and Executive Director of the Center for Employment Equity at University of Massachusetts, Amherst, testified that a large proportion of employees who do report sexual harassment experience retaliation. He stated:

and it’s pretty much across the board that discrimination complaints are associated with job loss. If you file a discrimination charge you have or will lose your job, at least more than 60 percent of the time. [And] sexual harassment actually stands out as having a much higher level of retaliation behavior after the charge is filed. So, job loss is common for sexual harassment, retaliation and job loss are the common responses to filing a charge. So far, if you get my drift, filing a charge is dangerous.²⁴⁰

²³⁵ Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, June 2016, at 8.

²³⁶ *Ibid.*, at 8.

²³⁷ *Ibid.*, 8. U.S. Merit Systems Protection Board, “Update on Sexual Harassment in the Federal Workplace,” Research Brief, March 2018, at 8, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACR OBAT>.

²³⁸ *Ibid.*, 8.

²³⁹ Donald Tomaskovic-Devey, Professor of Sociology and Executive Director at Center for Employment Equity at University of Massachusetts, Amherst Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019, at 3 (hereinafter Tomaskovic-Devey Statement).

²⁴⁰ Tomaskovic-Devey, Testimony, *Washington Briefing*, p. 92.

While these data refer to the private sector, at the briefing, Tomaskovic-Devey reported that due to the lack of transparency, there are not comparable federal data available.²⁴¹

Similarly, Heather Metcalf of the Association of Women in Science testified before the Commission that victims of sexual harassment may not report because the stakes are too high. Metcalf stated that in her research she encountered a woman who was in a three-year battle with her employer due to a serial harasser in a technology department.²⁴² But instead of punishing the harasser, her employer moved her to a different department despite the fact that other women also came forward.²⁴³ Metcalf continued on to testify that this was:

Similar to my own situation in graduate school. They moved her, and offered her a settlement and she decided that the settlement wasn't worth it, that she wanted to fight it and she actually went public with this. But it ended up creating some backlash, where she was getting hate mail at her home. She has two young children. People were coming by her home and she felt like her children were unsafe. She incurred tens of thousands of dollars in legal debt to pursue this case, and these are the kinds of things that people have to think about, as well as the emotional labor concern about potentially losing her job and whether she should walk away from her employer, whether she should pursue with the EEOC[.]²⁴⁴

As discussed above, Jane Liu, Legal Director at the National Asian Pacific American Women's Forum testified that Asian and Pacific Islander women often are fearful to report harassment because of fear of retaliation as well as concerns about how it would affect their own and their family's reputation.²⁴⁵ Individuals who experience harassment in a variety of professions can also find themselves in situations where they have to work closely with their harassers in isolated environments and are faced with few options on how to resolve the harassing behavior.²⁴⁶ Reported sexual harassment allegations from a remote research expedition illustrate this phenomenon. Several women made allegations against David Marchant, a Boston University geologist,

²⁴¹ Ibid., at 101, 106.

²⁴² Metcalf Testimony, *Washington Briefing*, p. 82.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Liu Testimony, *Washington Briefing*, pp. 122-23; *See also* Retaliation and Backlash, at *infra* notes 213-256.

²⁴⁶ *See e.g.*, National Academies of Sciences, Engineering, and Medicine, *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*, 2018, at 55; Marina Koren, "When Scientists Are Sexually Harassed in the Field," *The Atlantic*, Oct. 11, 2017, <https://www.theatlantic.com/science/archive/2017/10/sexual-harassment-fieldwork-science/542559/>.

regarding interactions while they were on research expeditions in Antarctica.²⁴⁷ The allegations against Marchant included him calling one woman a “sl*t” and a “wh*re.”²⁴⁸ A former graduate student of Marchant, Jane Willenbring alleged that:

Merchant shoved her, threw rocks at her when she urinated in the field and [i]n another instance... Marchant declared it was “training time.” Excited that he might be about to teach her something, Willenbring allowed him to pour volcanic ash, which includes tiny shards of glass, into her hand. She had been troubled by ice blindness, caused by excessive ultraviolet light exposure, which sensitizes the eyes. She says she leaned in to observe, and Marchant blew the ash into her eyes. “He knew that glass shards hitting my already sensitive eyes would be really painful—and it was.”²⁴⁹

Willenbring also said that she waited to file her complaint until after she received a tenure position because she feared retribution, and other women stated that Marchant threatened to impede them from getting research funding if they went public.²⁵⁰ An investigation by Boston University’s Equal Opportunity Office found “by a preponderance of the evidence [] Dr. [David] Marchant engaged in sexual harassment in violation of Boston University’s Sexual Harassment Policy ... by directing derogatory and sex-based slurs and sexual comments at you [Willenbring] during the 1999-2000 field expedition to Antarctica.”²⁵¹ Provost Jean Morrison elected to terminate Marchant, a decision he appealed.²⁵² After a faculty hearing committee recommended a lesser remedy, the President of Boston University chose to enforce his termination in April 2019.²⁵³

Allegations like these are far from isolated. According to a 2014 survey of field scientists, 64 percent reported they had experienced sexual harassment while on the job, and 20 percent reported having been sexually assaulted.²⁵⁴ Further, the remote nature of some occupations may actually amplify the possibility of harassment due to the very nature of the job site. For instance, in remote

²⁴⁷ Marina Koren, “When Scientists Are Sexually Harassed in the Field,” *The Atlantic*, Oct. 11, 2017, <https://www.theatlantic.com/science/archive/2017/10/sexual-harassment-fieldwork-science/542559/>.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Meredith Wadman, “Boston University concludes geologist sexually harassed student,” *Science Magazine*, Nov. 17, 2017, <https://www.sciencemag.org/news/2017/11/boston-university-concludes-geologist-sexually-harassed-student>.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Kathryn Clancy, Robin Nelson, Julianne Rutherford, and Katie Hinde, “Survey of Academic Field Experiences (SAFE): Trainees Report Harassment and Assault,” *PLOS ONE*, (2014), vol. 9, no. 7, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0102172>.

locations there is often little to no communication with the outside world.²⁵⁵ This isolation can magnify the feeling of helplessness that often comes with abuse, and victims in these situations may find themselves without anywhere to go.²⁵⁶

Costs of Sexual Harassment

Studies have shown that sexual harassment in the workplace can affect victims' daily functioning and may cause victims to seek extensive mental health support.²⁵⁷ When examining the effects of sexual harassment in the workplace, Rospenda and colleagues found that experiences with harassment had a significant correlation with mental health issues "beyond life and job stressors, particularly in women."²⁵⁸ At the Commission's briefing, Foreign Service Officer Alissa Redmond shared her experience and testified that subsequent to being assaulted and date raped after attending a Marine Ball, she experienced consistent panic attacks and nightmares. She shared that:

I know my rank as a junior officer meant I had to keep my head down, handle all tasks thrown my way, and never, ever complain, especially to HR yet after a year of panic attacks and nightmares, I knew I couldn't function as a professional without additional support that wasn't available to me overseas. I ultimately felt somewhat comfortable admitting to a med in HR at post that I had been assaulted when I read Secretary Clinton's directive to State employees which explicitly stated that those who sought mental health treatment would not automatically face loss of or a downgrade in their security or medical clearances to continue to serve.

I remain profoundly grateful to those at post who did grant me the leave I requested to treat subsequently diagnosed anxiety, depression, and PTSD [Post-Traumatic Stress Disorder]. To [receive] leave, I did have to sit through the male psychiatrist at our med office, employed by our med office telling me, you don't need to dramatize things to leave this post if that's what you want to do. I tallied up [fees] for my female psychiatrist, private psychologist, psychiatrist in the U.S., whose exorbitant, but worthwhile fees I paid for out of pocket, recouping in part through medical insurance reimbursements after the fact, that I had to tell over half a dozen men that I was raped by our colleague before I could complete all of the paperwork I needed to leave post for counseling... I had to advance sick leave

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Elyse Shaw, Ariane Hegewisch, Cynthia Hess, "Sexual Harassment and Assault at Work: Understanding the Costs," Oct. 15, 2018, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf.

²⁵⁸ Kathleen Rospenda, Judith Richman, and Candice Shannon, "Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study," *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009), 819.

over three months with a reduction in pay, loss of differential, while purchasing my own plane ticket and accommodations in the U.S. to remain away from my work overseas to treat my PTSD domestically. I'm extremely proud of myself for returning to complete that assignment.²⁵⁹

Other studies have shown that regardless of whether women label unwanted behaviors as sexual harassment or not, the negative consequences of enduring such behavior remains the same.²⁶⁰ Professor of Psychological Sciences at the University of Connecticut Vicki Magley and colleagues found that in a sample of almost 1,200 female employees from three separate workplaces “whether or not a woman considers her experience to constitute sexual harassment, she experiences similar negative psychological, work, and health consequences.”²⁶¹ This means that “reported experiences with unwanted sex-related behavior on the job consistently led to negative outcomes; labeling these experiences as sexual harassment had no effect on the degree of the negative outcomes.”²⁶² Further, these long term physical and mental negative health effects can lead to long-term costs for federal employees. For instance, in *Zar and Castillo v. Brennan*, the victims in a sexual harassment lawsuit against the United States Postal Service sought medical care due to “severe distress” along with “pain, stress, and anxiety” allegedly caused by “unwelcome sexual comments and sexual attacks and acts that were terrifying, humiliating, harmful, and degrading. . . [and] [t]hese unwelcomed acts were severe or pervasive and created a hostile work environment for the Plaintiffs.”²⁶³

Yet, if agencies work to prevent harassment and discrimination in their workplaces, that work has the possibility of reducing rates of mental health issues and decreasing life stressors for all employees;²⁶⁴ and since data show that harassment plays a stronger role in predicting problem

²⁵⁹ Alissa Redmond Testimony, *Washington Briefing*, pp. 156-7.

²⁶⁰ See Vicki Magley, Charles Hulin, Louise Fitzgerald, and Mary DeNardo, “Outcomes of Self-Labeling Sexual Harassment,” *Journal of Applied Psychology*, vol. 84, no.3, 1999; Liberty Munson, Andrew Miner, & Charles Hulin, “Labeling sexual harassment in the military: An extension and replication,” *Journal of Applied Psychology*, vol. 86, no. 2, (May 2001).

²⁶¹ Vicki Magley, Charles Hulin, Louise Fitzgerald, and Mary DeNardo, “Outcomes of Self-Labeling Sexual Harassment,” *Journal of Applied Psychology*, vol. 84, no.3, 1999, at 399.

²⁶² *Ibid.*

²⁶³ See Complaint, *Zar and Castillo v. Brennan* Jan. 2019, at 7, <https://legalaidatwork.org/wp-content/uploads/2019/01/USPS-Sex-Harrassment-Complaint.pdf>; Order Denying Defendant’s Motion for Judgment on the Pleadings, *Zar and Castillo v. Brennan*, No. 19-cv-00250, 2019 Westlaw 2503650 (N.D. Cal. June 17, 2019); Stipulation of Agreement of Compromise and Settlement Order, *Zar and Castillo v. Brennan*, No. 19-cv-00250 (N.D. Cal. Nov. 8, 2019)

²⁶⁴ Kathleen Rospenda, Judith Richman, and Candice Shannon, “Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study,” *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009), at 838.

drinking and mental health in women compared to men this means that these benefits could extend to as many as approximately 860,000 employees or 43 percent of the federal workforce nationwide.²⁶⁵

In their submission to the Commission, Legal Aid at Work asserted that in addition to the physical and emotional effects, sexual harassment may also “discourage women from seeking learning opportunities, asking for promotions, or otherwise advancing to higher paid and more powerful positions, which contributes to the enduring pay gap between men and women.”²⁶⁶ And these negative career effects are further heightened when harassment occurs at the intersection of gender, race, immigration status, and other social and demographic characteristics.²⁶⁷

The long-term organizational costs may also be high.²⁶⁸ In a study examining the effects of sexual harassment on early career attainment, researchers found that women who were targets of harassment were 6.5 times as likely to leave their jobs compared to non-targeted women.²⁶⁹ Heather Metcalf told the Commission that harassment has been shown to have an array of costs to employees and organizations, ranging from “reduced productivity, increased use of sick and annual leave, and workplace attrition in response to harassment.”²⁷⁰

²⁶⁵ Partnership for Public Service, “Federal Workforce,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf; Kathleen Rospenda, Judith Richman, and Candice Shannon, “Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study,” *Journal of Interpersonal Violence*, vol. 24, no. 5, (May 2009).

²⁶⁶ Legal Aid at Work, submission to U.S. Commission on Civil Rights, June 10, 2019, at 4 (citing Elyse Shaw, Ariane Hegewisch, Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018).

²⁶⁷ Legal Aid at Work, submission to U.S. Commission on Civil Rights, June 10, 2019, at 4; Amanda Rossie, Jasmine Tucker, and Kayla Patrick, “Out of the Shadows,” National Women’s Law Center, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

²⁶⁸ Elyse Shaw, Ariane Hegewisch, Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018; Senators’ Letter to R. Alexander Acosta, Secretary of Labor and William Wiatrowski, Acting Commissioner, Bureau of Labor Statistics, Jan. 29, 2018, <https://www.gillibrand.senate.gov/imo/media/doc/1.29.18%20DoL%20BLS%20on%20Sexual%20Harassment.pdf>; Robert Faley, Deborah Erdos Knapp, Gary Kustis, and Cathy Dubois, “Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army,” *Journal of Business and Psychology*, vol. 13, No. 4, 1999.

²⁶⁹ Heather McLaughlin, Christopher Uggen, and Amy Blackstone. 2017. “The Economic and Career Effects of Sexual Harassment on Working Women.” *Gender & Society* 31(3): 333– 58. <https://doi.org/10.1177/0891243217704631>.

²⁷⁰ Metcalf Statement, at 4 (citing U.S. Merit Systems Protection Board, “Update on Sexual Harassment in the Federal Workplace,” March 2018, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>).

One significant challenge to fully understanding the cost of sexual harassment in federal workplaces is that the Labor Department does not collect these data. In a joint letter in January 2018, U.S. Senator Kirsten Gillibrand along with 22 senators, called for the Labor Department and Bureau of Labor Statistics (BLS) to start collecting data on the prevalence and cost of sexual harassment in the workforce.²⁷¹ In the letter the senators stated that:

in some instances when workplace sexual harassment occurs, employees choose to leave their job, or even their career, rather than continue to experience harassment. In fact, women who have been harassed are 6.5 times more likely to change jobs than those who have not. These consequences are particularly concerning in science, technology, engineering, and math fields, where approximately one in five women report experiencing sexual harassment at work.

When a worker changes jobs or industries, there are costs for the employer as well as the worker. Employees lose out on the ability to be promoted or receive raises or bonuses, and employers have to cover replacement costs to find a new worker. This drives down the labor force participation rate and increases the wage gap. Moreover, it is a loss to society. Right now, we do not know how many gifted workers and innovators were unable to contribute to our country because they were forced to choose between working in a harassment-free workplace and their career.²⁷²

In response to the senators, the Bureau of Labor Statistics Acting Commissioner William J. Wiatrowski stated that while the Labor Department “takes sexual harassment very seriously . . . collecting this information would be complex and costly.”²⁷³ In response, Senator Gillibrand and her 22 colleagues sent a follow-up letter stating that:

While your letter indicated the Department takes workplace sexual harassment ‘very seriously,’ your lack of commitment to collect this data undermines your assurances. . . . The notion that this work is complex by nature does not seem to be a sufficient justification to decline this request.²⁷⁴

²⁷¹ Senators’ Letter to R. Alexander Acosta, Secretary of Labor and William Wiatrowski, Acting Commissioner, Bureau of Labor Statistics, Jan. 29, 2018, <https://www.gillibrand.senate.gov/imo/media/doc/1.29.18%20DoL%20BLS%20on%20Sexual%20Harassment.pdf>.

²⁷² Ibid.

²⁷³ William Wiatrowski, Acting Commissioner, Bureau of Labor Statistics, Letter to Senator Gillibrand, April 11, 2018, <https://www.documentcloud.org/documents/4498008-Sexhar041118-DOL-Response.html>.

²⁷⁴ Senators’ Letter to R. Alexander Acosta, Secretary of Labor and William Wiatrowski, Acting Commissioner, Bureau of Labor Statistics, Jan. 29, 2018, <https://www.help.senate.gov/ranking/newsroom/press/gillibrand-murray->

Starting in the 1980s, Merit Systems Protection Board has collected data on the federal workforce that was similar to those that the senators were requesting, but focusing on the federal workforce. In the MSPB 1994 study, the agency found that a “conservative estimate” of the cost of sexual harassment in the federal workplace over the course of two years “cost the government a total of \$327.1 million as a result of job turnover, sick leave, and decreased productivity.”²⁷⁵ At the writing of this report, this \$327 million in 1994 dollars would be the equivalent of approximately \$574 million in 2019.²⁷⁶

Many argue that these figures underestimate the true financial cost of sexual harassment in federal workplaces.²⁷⁷ Further, these figures are likely to have increased in the subsequent decades as the number of sexual harassment claims have also increased.²⁷⁸ And due to the confidential nature of federal agency settlements, getting a full understanding of the cost of sexual harassment to federal agencies continues to be difficult.²⁷⁹

Following the Labor Department’s rejection of the request to collect these data, in March 2018, Senator Gillibrand, along with Senators Patty Murray, Dianne Feinstein, and Elizabeth Warren, called on the Government Accountability Office (GAO) to open an investigation to determine the economic effects of workplace sexual harassment on the nation’s workforce. The joint letter stated that:

As recent media reports have made abundantly clear, far too many U.S. workers continue to suffer from sexual harassment in their workplaces, resulting in substantial costs to our nation’s economy and workforce. While employers tend to focus on direct costs to a business, such as legal fees or settlement amounts, the true cost of sexual harassment

[urge-department-of-labor-to-start-taking-workplace-harassment-seriously-reconsider-decision-not-to-collect-economic-data.](#)

²⁷⁵ Merit Systems Protection Board, “Sexual Harassment in the Federal Workplace,” (1994), at 24-26, <https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>.

²⁷⁶ Calculation by Commission staff utilizing the Bureau of Labor Statistics (BLS) inflation calculator. Note, the updated 2018 Merit Systems Protection Board research brief did not include the economic costs in its report.

²⁷⁷ Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018; Legal Aid at Work, submission to U.S. Commission on Civil Rights, June 10, 2019; Joe Davidson, “#MeToo, #NoMore, now #HowMuch? What is the cost of sexual harassment?” *Washington Post*, June 8, 2018, <https://www.washingtonpost.com/news/powerpost/wp/2018/06/08/senators-continue-search-for-sexual-harassment-economic-data-after-labor-dept-refuses-to-help/>.

²⁷⁸ Elyse Shaw, Ariane Hegewisch, Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018.

²⁷⁹ *Ibid.*, Senators’ Letter to R. Alexander Acosta, Secretary of Labor and William Wiatrowski, Acting Commissioner, Bureau of Labor Statistics, Jan. 29, 2018, <https://www.gillibrand.senate.gov/imo/media/doc/1.29.18%20DoL%20BLS%20on%20Sexual%20Harassment.pdf>.

includes indirect costs such as decreased productivity, increased turnover, and reputational harm. All of this is an impediment to employee performance and employers' bottom-lines.²⁸⁰

Specifically, the Senators urged GAO to provide information about the prevalence of sexual harassment, the method by which the government tracks and compiles data on the prevalence and costs of sexual harassment in the workplace, and recommended actions to address this pervasive problem.²⁸¹ They further stated that it is important to consider that “[t]he economic impact of workplace sexual harassment extends beyond the cost of formal complaints and lawsuits. Sexual harassment also leads to decreased productivity, increased turnover, absenteeism, decreased job satisfaction, and reputational harm to employees and employers.”²⁸²

There are potentially even further costs. Heather Metcalf explained that her research has shown that “organizations unnecessarily lose talented employees and public trust when the culture of harassment is left unaddressed. These costs are even greater in environments...where harassment is normalized and downplayed, threats of retaliation are high, and a lack of trust in the reporting and investigative process all produce barriers to reporting and seeking support.”²⁸³ At the Commission’s briefing, several panelists also discussed these invisible costs of harassment, and specifically the concern about reputational harm and how that concern kept victims of alleged harassment from coming forward. For instance, Jenna Ben-Yehuda, Former Political-Military Advisor at the Department of State and current President and CEO at the Truman National Security Project, explained that she learned quickly that there was a “corridor reputation” at the State

²⁸⁰ Senator Gillibrand, Senator Patty Murray, Senator Feinstein, and Senator Elizabeth Warren, Letter to Gene Dodaro, Comptroller General of the United States, Government Accountability Office, May 29, 2018, <https://www.gillibrand.senate.gov/imo/media/doc/GAO%20Letter%205.29.18.pdf>, at 1.

²⁸¹ Ibid; *see also*, Gillibrand, Murray, Feinstein, Warren Call on Government Accountability Office to Investigate the Economic Effect of Sexual Harassment on U.S. Workforce, May 31, 2018, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-murray-feinstein-warren-call-on-government-accountability-office-to-investigate-the-economic-effect-of-sexual-harassment-on-us-workforce>. Note: at the writing of this report, the GAO has not responded or released a report in response specifically to the above cited letter. However, the GAO is currently conducting an investigation on sexual harassment in federal workplaces.

²⁸² Legal Aid at Work, submission to U.S. Commission on Civil Rights, June 10, 2019, at 5 (citing Joe Davidson, “#MeToo, #NoMore, now #HowMuch? What is the cost of sexual harassment?” *Washington Post*, June 8, 2018, <https://www.washingtonpost.com/news/powerpost/wp/2018/06/08/senators-continue-search-for-sexual-harassment-economic-data-after-labor-dept-refuses-to-help/>); *see also*, Chelsea Willness, Piers Steel, and Kibeom Lee, “A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,” *Personnel Psychology*, vol. 60, no. 1, 2007; Victor Sojo, Robert Wood, and Anna Genat, “Harmful Workplace Experiences and Women’s Occupational Well-Being: A Meta-Analysis,” *Psychology of Women Quarterly*, vol. 40, no. 1, 2016.

²⁸³ Renee Binder, Paul Garcia, Bonnie Johnson, and Elena Fuentes-Afflick, “Sexual Harassment in Medical Schools: The Challenge of Covert Retaliation as a Barrier to Reporting,” *Academic Medicine*, vol. 12, no. 1, 2018, https://journals.lww.com/academicmedicine/Fulltext/2018/12000/Sexual_Harassment_in_Medical_Schools_The_17.aspx#pdf-link; *see also*, Metcalf Statement, at 4. (hereinafter Metcalf Statement).

Department that matters “more than anything on your CV [curriculum vitae] or anything else. What that also becomes shorthand for is hearsay, and in a workforce where Foreign Service officers are changing positions and vying for new positions every one to three years, the corridor reputation becomes a major factor for selection and promotion.”²⁸⁴ Ben-Yehuda also explained that the fear of reputational harm has a lasting effect because “a number of these cases are taking 18 months, two years to adjudicate, [and] that silences people from coming forward, and it also can carry the rumor mill for years to come because it’s not adjudicated in a timely fashion.”²⁸⁵

Each of these issues could have a substantial economic impact on federal agencies. For example, in the same 1994 MSPB study discussed above, researchers found that employers sustained substantial costs due to sexual and gender harassment.²⁸⁶ That year, employee turnover cost federal employers \$24.7 million, workers taking sick leave cost federal employers \$14.9 million, and diminished productivity at work cost federal employers \$287.5 million, all of which were found to be the result of workplace sexual and gender harassment.²⁸⁷

The EEOC reported that from 2010-2018, employers paid out \$1.084 billion through the EEOC’s administrative enforcement pre-litigation process alone to employees whose charges included an allegation of harassment.²⁸⁸ These figures do not include the millions more paid to employees in

²⁸⁴ Ben-Yehuda Testimony, *Washington Briefing*, p. 75.

²⁸⁵ *Ibid.*, 81.

²⁸⁶ Merit Systems Protection Board, “Sexual Harassment in the Federal Workplace,” (1994), at 26.

²⁸⁷ Legal Aid at Work, submission to U.S. Commission on Civil Rights, June 10, 2019; Lynn Parramore, “#MeToo: The Economic Cost of Sexual Harassment,” Institute for New Economic Thinking, Jan. 2018, <https://www.ineteconomics.org/research/research-papers/metoo-the-economic-cost-of-sexual-harassment>; Merit Systems Protection Board, “Sexual Harassment in the Federal Workplace,” (1994), at 24, <https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>; Gillibrand and 21 Senate Colleagues Call on Department of Labor Secretary Acosta and Bureau of Labor Statistics Acting Commissioner Wiatrowski to Collect Data on Economic Costs of Sexual Harassment in the Labor Force, Jan. 29, 2018, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-and-21-senate-colleagues-call-on-department-of-labor-secretary-acosta-and-bureau-of-labor-statistics-acting-commissioner-wiatrowski-to-collect-data-on-economic-costs-of-sexual-harassment-in-the-labor-force>; Gillibrand, Murray, Feinstein, Warren Call On Government Accountability Office To Investigate The Economic Effect Of Sexual Harassment On U.S. Workforce, May 31, 2018, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-murray-feinstein-warren-call-on-government-accountability-office-to-investigate-the-economic-effect-of-sexual-harassment-on-us-workforce>.

²⁸⁸ See U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 - FY 2018), https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm. To note, this figure includes sexual harassment allegations, but EEOC does not disaggregate or isolate only sexual harassment benefits for these years. The EEOC noted that: “In addition, when a charge contains more than one allegation, the EEOC records the monetary benefits awarded to the Charging Party, to resolve the charge, but does not calculate separate monetary amounts for each allegation. The \$1083.7 million is the amount paid to resolve charges which include harassment allegations, but those charges may also include other allegations as well.” See EEOC, Affected Agency Review Responses to Commission on draft report, Nov. 14, 2019 [on file].

settlements after EEOC filed successful lawsuits for harassment.²⁸⁹ EEOC stated that “while we do not have strictly comparable cost data with respect to the various agencies of the federal government, we surmise it would likely be similar, given the diverse and varied nature of the federal workforce and its worksites.”²⁹⁰

While certainly not all employees separated from the federal government due to issues with harassment, data show that sexual harassment clearly contributes to employees leaving their jobs.²⁹¹ For instance, in the 1994 MSPB survey, researchers found that sexual harassment caused 19,727 federal employees – specifically the victims of sexual harassment— to leave their jobs through reassignment, being fired, being transferred, or quitting.²⁹² While more recent federal data is not available, a survey from the private sector found that over a quarter of women reported having experienced sexual harassment at their jobs, of those, 46 percent stated that harassment caused them to leave their jobs or switch careers.²⁹³ Heather McLaughlin, assistant professor of sociology at Oklahoma State University, found that those employees who experienced sexual harassment left their jobs within two years, which is higher than the average job turnover rate.²⁹⁴

²⁸⁹ Gillibrand, Murray, Feinstein, Warren Call On Government Accountability Office To Investigate The Economic Effect Of Sexual Harassment On U.S. Workforce, May 31, 2018, <https://www.gillibrand.senate.gov/news/press/release/gillibrand-murray-feinstein-warren-call-on-government-accountability-office-to-investigate-the-economic-effect-of-sexual-harassment-on-us-workforce>.

²⁹⁰ See EEOC Select Task Force June 2016 Report. (As we heard from one witness at the first public meeting of the Task Force: The federal government is the most diverse workforce in the world. We have federal grocery stores - over two hundred federal grocery stores, federal butchers, federal cashiers. We have park rangers who spend two months surveying the wilderness and VA hospitals that have the full range of medical professionals, doctors, and nurses. We have police departments, we have fire departments, so when people think of the federal government you think of bureaucracy you don't think of the traditional employment." *Oral Testimony of Dexter Brooks*, Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Meeting of the E.E.O.C. Select Task Force on the Study of Harassment in the Workplace (June 17, 2015). *Ibid*.

²⁹¹ See e.g., Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “The Economic and Career Effects of Sexual Harassment on Working Women.” *Gender & Society*, vol. 31 no. 3, (2017), p. 333–58. <https://doi.org/10.1177/0891243217704631>.

²⁹² U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, and Continuing Challenges*, 1995, at 24, <https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>. MSPB notes that these numbers have decreased from the estimated 36,647 employees who left their jobs due to sexual or gender harassment in 1987. *Ibid*.

²⁹³ Erika Beras, “Poll: Nearly half of the women who experienced sexual harassment leave their jobs or switch careers,” *Marketplace*, Mar. 9, 2018, <https://www.marketplace.org/2018/03/09/new-numbers-reflect-lasting-effects-workplace-harassment-women/>.

²⁹⁴ *Ibid*. (citing from Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “The Economic and Career Effects of Sexual Harassment on Working Women.” *Gender & Society*, vol. 31 no. 3, (2017), p. 333–58. <https://doi.org/10.1177/0891243217704631>).

She added that: “Many also suffered career stagnation. So, their earnings really plateaued when compared to women who continued on in those same career paths.”²⁹⁵

Bureau of Labor Statistics data suggest that the turnover costs resulting from harassment (e.g., due to quitting, transferring) have grown even more significant in the past several years. For example, in 2017, the overall federal government turnover rate increased to 16.7 percent (up from 16.4 percent in 2016), which equates to 468,000 employees who left the federal government that year, resulting in additional costs to replace them.²⁹⁶ Of the total, 189,000 employees quit federal service in 2017, which resulted in a rate of 6.7 percent, compared to 5.8 percent in 2016 and 5.4 percent in 2015.²⁹⁷ Therefore, utilizing the same measures the MSPB used in 1994 – after adjusting for inflation— data would indicate that the cost of federal employee turnover (or total separation) rose to about \$986 million.²⁹⁸ Making a more conservative estimate of cost, by isolating only those employees who quit, the cost to the federal government was over \$398 million in 2017. Looking at the cost in 2019, from January to April (the most current data available), BLS reported 140,000 employees separated from the federal government, which amounts to over \$305 million in turnover costs for those four months alone.²⁹⁹

In a study examining the costs of sexual harassment in the military, researchers found turnover costs represent the largest financial cost of sexual harassment, which was considerably higher than the costs related to litigation.³⁰⁰ Evaluating over 30 case studies, researchers found that for private

²⁹⁵ Ibid. (quoting McLaughlin).

²⁹⁶ According to BLS, turnover is the combined numbers of quits, layoffs and discharges, and other separations. See Bureau of Labor Statistics, “Job Openings and Labor Turnover,” April 2019, at 2, <https://www.bls.gov/news.release/pdf/jolts.pdf>.

²⁹⁷ Michal Wald, “Turnover Up as More Workers Quit the Federal Government,” *FedSmith*, March 22, 2018, <https://www.fedsmith.com/2018/03/22/turnover-workers-quit-federal-government/>. Note these numbers do not include other separations such as retirement, deaths, and disabilities. Ibid.

²⁹⁸ In the 1994 survey, the cost of turnover was based on 19,727 federal employees who left their jobs due to reassignment, being fired, being transferred, or quitting. The MSPB calculated these expenses by using the cost associated with replacing these employees which include the costs of recruitment and placement, cost of background checks for new or potential employees, and training costs of replacements. In the 1987 study, MSPB used a conservative estimate of \$1,000 per employee; in 1994, controlling for inflation, the researchers conservatively estimated the cost to be \$1,250 to replace employees which amounted to an estimated cost of \$24.7 million for federal agencies during the two-year study period. See U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, and Continuing Challenges*, 1994, at 24, <https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>. For the 2017 calculation, Commission staff utilized the BLS inflation calculator to determine the cost per employee to be \$2,107 for that year.

²⁹⁹ See Bureau of Labor Statistics, “Job Openings and Labor Turnover,” April 2019, at 2, <https://www.bls.gov/news.release/pdf/jolts.pdf>. Commission staff calculated the cost associated with employee turnover by readjusting the cost per employee to \$2,184 (controlling for inflation).

³⁰⁰ Robert Faley, Deborah Erdos Knapp, Gary Kustis, and Cathy Dubois, “Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army,” *Journal of Business and Psychology*, vol. 13, No. 4, 1999.

sector employers, replacing an employee on average cost 16 to 20 percent of an employee's annual salary, with that figure rising up to 213 percent of an employee's salary for experienced managerial and professional staff.³⁰¹ Further, the negative effects of sexual harassment are not isolated to just the target(s) of harassment, but can also include negative effects for other employees who may witness or hear about the harassing behavior (i.e., bystanders). Researchers found that "ambient sexual harassment"³⁰² had a damaging effect on team performance and was also linked to similar individual-level outcomes (e.g., job satisfaction, physical and psychological health, and turnover).³⁰³ "Coworkers are often aware of colleagues' experiences with sexual harassment and that incidents of sexual harassment in a group may create a generally stressful environment that others in the work group also experience."³⁰⁴

In sum, while there is an absence of data regarding the costs specific to the federal government, the Commission's research shows that the estimated costs discussed above are significant. Perhaps more importantly, research also suggests that people who file discrimination complaints often are "not seeking monetary damages, but simply want their job back, the perpetrator stopped, and to improve the working conditions for themselves and coworkers."³⁰⁵

Relationship of Wage Gaps to Sexual Harassment

Wage disparities between employees can represent a significant risk factor for harassment power imbalances, which may be heightened on the bases of race/ethnicity, gender, sexual orientation, and gender identity.³⁰⁶ According to Legal Aid at Work's written comments to the Commission:

³⁰¹ Heather Boushey and Sarah Jane Glynn, "There are Significant Business Costs to Replacing Employees," Center for American Progress, Nov. 16, 2012, <https://cdn.americanprogress.org/wp-content/uploads/2012/11/16084443/CostofTurnover0815.pdf>.

³⁰² Defined as a "general or ambient level of sexual harassment in a work group as measured by the frequency of sexually harassing behavior experienced by others in a woman's work group." Theresa Glomb, Wendy Richman, Charles Hulin, Fritz Drasgow, Kimberly Schneider, and Louise Fitzgerald, "Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences," *Organizational Behavior and Human Decision Processes*, vol. 71, no. 3, 1997.

³⁰³ Jana Raver and Michele Gelfand, "Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance," *Academy of Management Journal*, vol. 48, no. 3, 2005 at 388, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.530.198&rep=rep1&type=pdf>.

³⁰⁴ Jana Raver and Michele Gelfand, "Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance," *Academy of Management Journal*, vol. 48, no. 3, 2005 at 388, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.530.198&rep=rep1&type=pdf>.

³⁰⁵ Tomaskovic-Devey Written Statement, at 3.

³⁰⁶ See e.g., Alieza Durana, Amanda Lenhart, Roselyn Miller, Brigid Schulte, and Elizabeth Weingarten, "Sexual Harassment: A Severe and Pervasive Problem," Better Life Lab, Sept. 26, 2018, <https://www.newamerica.org/better->

these imbalances are especially prevalent for low-income workers, who are much more likely to be women, people of color, people with limited English proficiency and immigrants. Structural risk factors for sexual harassment often intersect and are exacerbated by racism, discrimination, and harassment on the basis of age, disability, and national origin.³⁰⁷

Comparing the civilian federal workforce to the private sector, federal employees are generally older than the American workforce at large (e.g., employees under 30 represent about 24 percent of the entire U.S. labor force, but only 6 percent of federal employees in 2017), and almost half are over age 50.³⁰⁸ In terms of demographics, there are fewer women in the federal government than in the private sector: women represent 42.7 percent and men represent 57.3 percent of federal employees.³⁰⁹ Federal sector employees are majority white (62.4 percent), followed by black employees representing 18.8 percent, Latinx employees 9.0 percent, Asian employees 6.0 percent, employees identifying as more than one race 1.7 percent, Native American employees 1.6 percent, and Native Hawaiian/Pacific Islander employees .50 percent.³¹⁰ By comparison, the private sector workforce is comprised of approximately 155,761 million employees: women comprise 46.9 percent, white employees account for 78 percent, followed by black employees at 12.3 percent, Latinx employees represent 17.3 percent, and Asian employees constitute 6.3 percent (see table 2).³¹¹

[life-lab/reports/sexual-harassment-severe-and-pervasive-problem/](https://onlinelibrary.wiley.com/doi/pdf/10.1111/1468-0432.00122); Fiona Wilson and Paul Thompson, “Sexual Harassment as an Exercise of Power,” *Gender, Work, and Organization*, vol. 8, no. 1, (Jan. 2001), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1468-0432.00122>; Shelley Cobb and Tanya Horeck, “Post Weinstein: gendered power and harassment in the media industries,” *Feminist Media Studies*, vol. 18, no. 3, (2018), <https://www.tandfonline.com/doi/full/10.1080/14680777.2018.1456155>; Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018, at 4, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf.

³⁰⁷ Legal Aid At Work, Public Comment submission to U.S. Commission on Civil Rights, June 10, 2019 at 1; *see also*, Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018, at 4, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf.

³⁰⁸ Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf.

³⁰⁹ *See* Table 1.

³¹⁰ Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf.

³¹¹ Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” (as of Jan 18, 2019) (last accessed Aug. 26, 2019), <https://www.bls.gov/cps/cpsaat18.htm>.

Table 2: Workforce Demographics

Demographics	Federal Sector	Private Sector
	2.1 million	155,761 million
Gender		
Women	42.7%	46.9%
Men	57.3%	53.1%
Race/Ethnicity		
White	62.4%	78%
Black	18.8%	12.3%
Latinx	9.0%	17.3%
Asian	6.0%	6.3%
Multi-Race	1.7%	*
Native American	1.6%	*
Native Hawaiian/Pacific Islander	0.5%	*

*Bureau of Labor Statistics did not report on these demographics

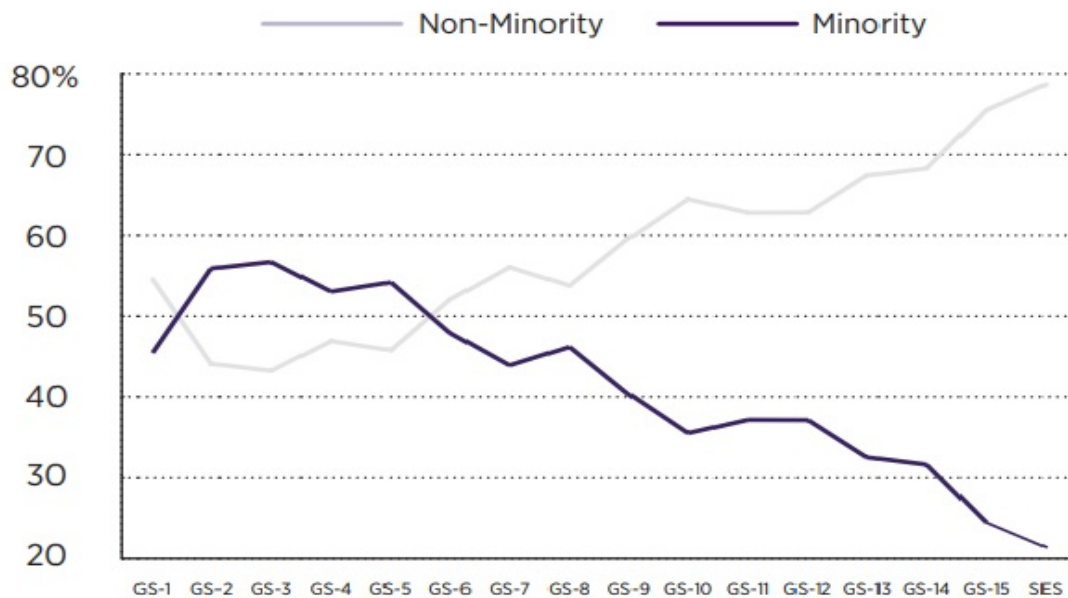
Source: Federal Sector Statistics, Source: Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf; Private Sector Statistics, Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” (as of Jan 18, 2019)(last accessed Aug. 26, 2019), <https://www.bls.gov/cps/cpsaat18.htm>.

Further, while people of color represent about 37.5 of the total federal workforce, this percentage drastically decreases at higher levels on the general schedule (GS) pay scale (see chart 4 below).³¹² The General Schedule Pay Scale is the pay system utilized in the federal government that represents the rate of basic pay based upon the specific level of work or range of difficulty, responsibility, and qualifications; and it is used to determine the salaries of the majority of white-

³¹² “The general schedule pay scale was established in 1949. According to the Office of Personnel Management, more than 75 percent of federal workers were in grade GS-7 or below in 1950. That’s compared to 20.5 at the end of June 2018, a 54.5 percent drop and another sign of the growing complexity of the work federal employees perform. In addition, more than 27 percent of employees are on pay plans outside of the GS-scale.” Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf.

collar civilian federal employees.³¹³ Breaking this scale down, people of color are more represented in positions at the GS-8 and lower levels, which consist mostly of entry-level to low-level positions within the federal government. These groups are underrepresented in top-level and supervisory positions in the GS-13 to GS-15 positions, where they represent about 25 to 30 percent; there are even fewer represented at the Senior Executive Service (SES) level.³¹⁴

Chart 4: Federal General Pay Scale by Race/Ethnicity



Source: Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf

In addition to racial wage disparities, it has been noted that the gender pay gap has also been a persistent issue in federal workplaces (see table 2).³¹⁵ In May 2013, President Obama signed a memorandum directing the director of the Office of Personnel Management (OPM) to submit a government wide strategy to address the gender pay gap among the federal workforce.³¹⁶

³¹³ See Office of Personnel Management, “Pay & Leave,” <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/>.

³¹⁴ Partnership for Public Service, “Federal Workplace,” Fed Figures 2019, https://ourpublicservice.org/wp-content/uploads/2019/01/FedFigures_19Shutdown.pdf.

³¹⁵ The White House, “Presidential Memorandum – Advancing Pay Equality in the Federal Government and Learning from Successful Practices,” May 10, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/10/presidential-memorandum-advancing-pay-equality-federal-government-and-le>.

³¹⁶ Ibid.

Table 3: Gender Breakdown of Federal Workers (2011-2015)

Fiscal Year	Female	Male	Total
2011	796,627	1,059,952	1,856,580
2012	790,085	1,060,226	1,850,311
2013	781,268	1,050,455	1,831,723
2014	777,455	1,048,305	1,825,762
2015	781,303	1,057,033	1,838,352
Avg. Salary in FY 2015	\$78,189	\$84,083	\$81,578

Source: Ralph Smith, “Gender, Age, and Salary in the Federal Workforce,” *FedSmith*, June 27, 2016, <https://www.fedsmith.com/2016/06/27/gender-age-and-salary-in-the-federal-workforce/>

In 2014, OPM conducted an audit and found that in 2012, the average gender pay gap among federal workers ranged from 11 to 13 percent, which equates to women earning about 87 to 89 cents to the dollar compared to men.³¹⁷ OPM posited that this gap was the result of other disparities, such as women only accounting for 36 percent of management or supervisory positions and generally holding lower GS positions.³¹⁸ While OPM has not released an updated audit on the gender pay gap,³¹⁹ others have noted that it has decreased among federal workers, but has yet to achieve full parity.³²⁰

Culture of Harassment

According to a National Academies of Sciences report, “organizational climate is, by far, the greatest predictor of the occurrence of sexual harassment, and ameliorating it can prevent people

³¹⁷ U.S. Office of Personnel Management, *Governmentwide Strategy on Advancing Pay Equality in the Federal Government*, April 2014, at 12, <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/governmentwide-strategy-on-advancing-pay-equality-in-the-federal-government.pdf>.

³¹⁸ *Ibid.*, 12.

³¹⁹ Niv Elis, “Equal pay for women elusive 55 years after landmark law,” *The Hill*, June, 13, 2018, <https://thehill.com/policy/finance/391965-equal-pay-for-women-elusive-55-years-after-landmark-law>.

³²⁰ See e.g., Richard Eisenberg, “What women, employers and the government can do about the gender pay gap,” *PBS*, April 9, 2019, <https://www.pbs.org/wnet/chasing-the-dream/stories/gender-pay-gap/>.

from sexually harassing others.”³²¹ Researchers have found that many employers do not address factors in workplace culture that may lead to sexual harassment, for example, where employees, including managers and supervisors, do not take harassing behaviors and misconduct seriously.³²² Many employers also do not promote an environment where victims of sexual harassment feel like they can safely report the behavior if it occurs.³²³

In 1996, Professor Louise Fitzgerald and her colleagues published a study finding that organizational climate and the gender makeup of a workplace can either work to facilitate or to inhibit sexual harassment. They also demonstrated that how employers, managers, and supervisors respond to issues of sexual harassment can have lasting effects on employees and influence an employee’s decision on whether to remain at the employee’s job.³²⁴ At the Commission’s May 2019 briefing, Professor Fitzgerald presented materials summarizing research showing that the organizational climate itself “exerts independent influence on outcomes, over and above the impact of sexual harassment itself. Women harassed in a tolerant organizational environment have worse outcomes of every sort, even after [] account[ing] for the impact of harassment itself.”³²⁵

Further, research has consistently shown that workplaces that are structured around a “masculine job gender context” have heightened likelihood of sexual harassment. These workplaces are structured by male-dominated occupations in which:

- 1) Job duties and tasks are those traditionally performed by men, and
- 2) Supervisory and managerial roles are more likely to be filled by men.³²⁶

Fitzgerald also explained how these factors together create an environment where sexual harassment has a greater likelihood to occur (see chart 5).

³²¹ National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, 2018, at 50, <https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic>

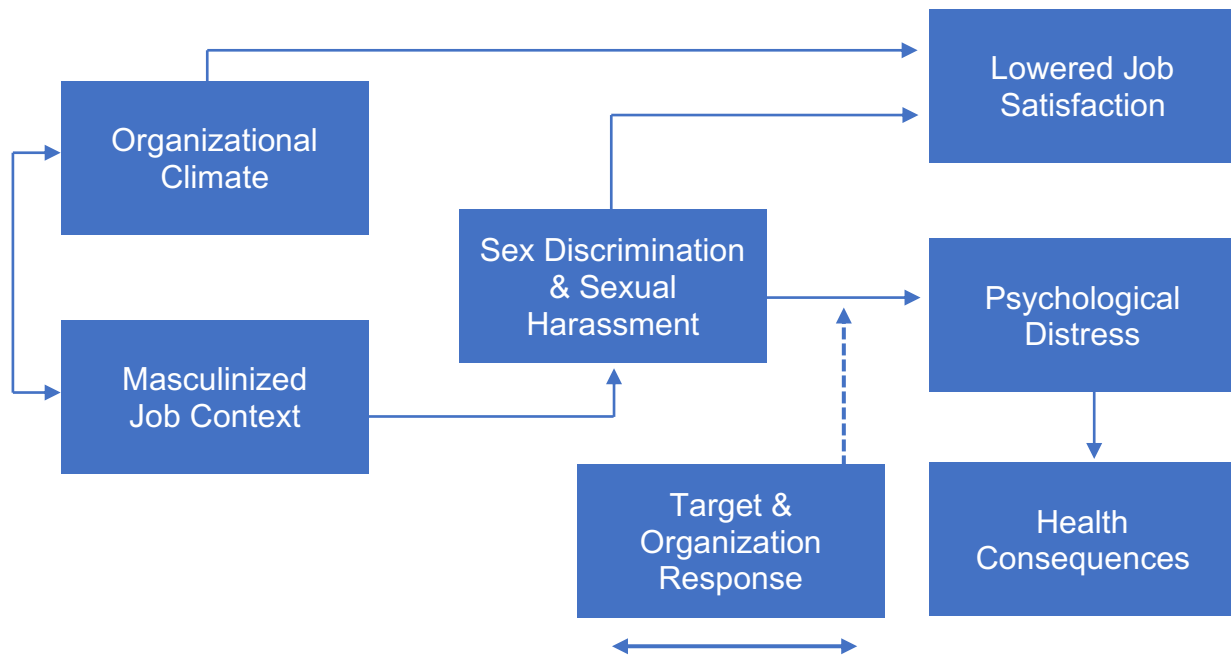
³²² Ibid.

³²³ National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, 2018, <https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic>.

³²⁴ Charles Hulin, Louise Fitzgerald, and Fritz Drasgow, “Organizational influences on Sexual Harassment,” in *Sexual Harassment in the Workplace*, ed. Margaret Stockdale, Sage Publications, 1996, 127-150, https://www.researchgate.net/publication/232470761_Organizational_influences_on_sexual_harassment;

³²⁵ Fitzgerald Materials, PowerPoint slide 20.

³²⁶ Fitzgerald Statement, at 3.

Chart 5: Core Antecedents and Consequences of Sexual Harassment

Source: Fitzgerald Materials submitted to U.S. Commission on Civil Rights

Some studies have found that sexual harassment decreases linearly as structural gender imbalances approach parity and others suggest that organizations where women are more represented in managerial and supervisory positions also face fewer issues with sexual harassment.³²⁷ And studies have shown that increasing the number of women in management and positions with organizational authority not only helps reduce harassment, but also is significantly more helpful at reducing harassment than training programs and reporting systems alone.³²⁸

Yet, other studies suggest that women who hold positions of authority in the workplace may also be more likely to experience sexual harassment, even after controlling for prior incidents that occurred before their promotion.³²⁹ The researchers found that women supervisors were 138

³²⁷ See e.g., Fitzgerald Statement, at 2-3; Frank Dobbin and Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

³²⁸ Frank Dobbin and Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

³²⁹ Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “Sexual Harassment, Workplace Authority, and the Paradox of Power,” *American Sociological Review*, vol. 77, no. 4, 2012, <https://journals.sagepub.com/doi/pdf/10.1177/0003122412451728>.

percent more likely to experience any harassing behavior, reported a rate of harassment 73 percent greater than non-supervisors, and were 3.47 times as likely to interpret these behaviors as sexual harassment.³³⁰ As a whole, the researchers found that female supervisors were not only more likely to experience harassment, but they also report more varied and sustained forms of harassment than in the “typical harassment scenario of a male boss and a female subordinate.”³³¹ The researchers argue that these findings may be due to women in managerial position within organizations being seen as threatening to the gender hierarchy, especially in predominately male-dominated industries.³³²

The federal government continues to struggle with gender parity among its workforce, especially at the leadership level. In fiscal year 2016 across the federal government, 56.8 percent of positions were held by men and 64.7 percent of the most senior-level non-political -appointee management positions – Senior Executive Services (SES) – were held by men, and in some federal agencies these gender imbalances were even more pronounced.³³³

Efforts to increase gender and racial diversity in the federal workplace continue to face challenges. From 2015 to 2016, there was an increase of 1 percent in women holding SES positions (from 34 to 35 percent, respectively), and people of color in these positions remained steady at 21 percent.³³⁴ Due to these structural imbalances, women and especially women of color are more likely to hold lower-paying and non-leadership positions within the federal government.

Research shows that if an organization’s leadership takes a strong anti-harassment stance and demonstrates ways that it is not tolerant of harassment and discrimination then sexual harassment

³³⁰ Ibid., 634.

³³¹ Ibid., 634, 636. It is significant to note, that the researchers tested the hypothesis that this finding could be the result of female supervisors being more aware of anti-harassment law and policies, thus more likely to report harassment. However, they compared these results from the prior year and conclude that while legal consciousness undoubtedly evolves over the life course, [] it is unlikely that supervisors’ consciousness changed so dramatically over a 12-month period. In addition, no evidence suggests that either consciousness or the lagged dependent variable would operate differently for male and female supervisors.

See Ibid., 640.

³³² Ibid., 639.

³³³ United States Office of Personnel Management, *Federal Equal Opportunity Recruitment Program (FEORP) Report to Congress*, Fiscal Year 2016, (Feb. 2018) at 1, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reports/feorp-2016.pdf>.

³³⁴ Ibid., 1.

seems to decrease.³³⁵ In contrast, in organizations that are perceived to be tolerant of sexual harassment:

- Employees may believe that sexual harassment is not taken seriously;
- Employees may believe that it is risky to complain about sexual harassment; and,
- Employees may believe there is little likelihood of meaningful action.³³⁶

These factors have a significant effect on employees. At the Commission's briefing, Tamara Chrisler, managing director of policy at the Leadership Conference on Civil and Human Rights, testified that to prevent sexual harassment from occurring, it is not enough for leadership to state that sexual harassment will not be tolerated. She explained that:

[Federal] agencies must live the policy, model the appropriate behavior they want to see, thoroughly address each claim of harassment and not turn a blind eye to inappropriate behavior or make excuses for it. Implement practices that reduce or prevent inappropriate behavior that become part of the daily operations, like inappropriate jokes and comments.³³⁷

Employers also need to establish trust and accountability that those who violate these policies – both co-workers and managers – will be held accountable.³³⁸ Thus, while an organization may have an official “zero tolerance” policy regarding sexual harassment, if it does not have mechanisms in place to address sexual harassment or if the leadership does not mirror that these behaviors will not be tolerated, then sexual harassment will be able to continue.³³⁹

The concern about organizational culture does not mean that individuals who engage in harassing and discriminatory behaviors should not be held individually responsible. However, more is needed to prevent sexual harassment, as data consistently have shown that the issue of sexual harassment is structural, and thrives in an environment that is tolerant of sexual harassment and/or dismissive of employees who report.³⁴⁰

³³⁵ John Pryor, Christine LaVite, and Lynnette Stoller, “A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction,” *Journal of Vocational Behavior*, vol. 42, no. 1, 1993; Chelsea Willness, Piers Steel, and Kibeom Lee, “A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,” *Personnel Psychology*, vol. 60, 2007, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1744-6570.2007.00067.x>.

³³⁶ Ibid.

³³⁷ Chrisler Testimony, *Washington Briefing*, at 88.

³³⁸ Ibid.

³³⁹ Ibid.

³⁴⁰ John Pryor, Christine LaVite, and Lynnette Stoller, “A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interaction,” *Journal of Vocational Behavior*, vol. 42, no. 1, 1993; Chelsea Willness, Piers Steel,

Another factor that is shown to increase the likelihood of sexual harassment in workplaces is existence of relative power differences.³⁴¹ While quid pro quo sexual harassment is defined specifically by an individual in a position of authority (explicitly or implicitly) coercing a subordinate, many other studies have shown that even when sexual harassment occurs between colleagues (e.g., in hostile work environment claims), it is still a manifestation of power imbalances within the workplace.³⁴² These power imbalances may be due to the organizational structure itself, for instance, in highly structured, stratified, and bureaucratic organizations. These types of workplaces have been found to be likely settings for sexual harassment. One study found that among four different work environments examined – academic, private-sector, state government, and the military – sexual harassment was the most prevalent in the military, followed by the private-sector, government, and then academia.³⁴³ The researchers suggest that “highly structured organizations with large differentials among organizational levels should pay increased attention to sexual harassment and implement specific training and prevention programs, as they are probably more sexual harassment prone than other organizations.”³⁴⁴ Yale Law Professor Vicki Schultz along with nine colleagues also point out that non-sexual forms of sexual harassment can manifest in a culture where sexism is prevalent and gender discrimination and sexist behaviors are considered routine. Some behaviors, such as hostile or ridiculing behavior, being patronizing or condescending, social ostracism, and work sabotage can make employees feel inferior, similar to a sexual advance.³⁴⁵ Schultz and her colleagues assert that:

and Kibeom Lee, “A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,” *Personnel Psychology*, vol. 60, 2007, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1744-6570.2007.00067.x>; Fitzgerald Statement, at 3-4.

³⁴¹ See e.g., Alieza Durana, Amanda Lenhart, Roselyn Miller, Brigid Schulte, and Elizabeth Weingarten, “Sexual Harassment: A Severe and Pervasive Problem,” New America Foundation, 2018; Chai Feldblum and Victoria Lipnic, *EEOC Select Task Force on the Study of Harassment in the Workplace*, June 2018; Jagdish Khubchandani and James Price, “Workplace Harassment and Morbidity Among U.S. Adults: Results from the National Health Interview Survey,” *Journal of Community Health*, vol. 40, no. 3, 2015.

³⁴² See e.g., Remus Ilies, Nancy Hauserman, Susan Schwochau, & John Stibal, “Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities,” *Personnel Psychology*, vol. 56, no.3, (Dec. 2006); Vicki Schultz, “Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,” 71 *Stan. L. Rev.*, June 2018, https://digitalcommons.law.yale.edu/fss_papers/5301; Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “Sexual Harassment, Workplace Authority, and the Paradox of Power,” *American Sociological Review*, Aug. 2012, vol. 77, no. 4, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3544188/pdf/nihms376621.pdf>.

³⁴³ Remus Ilies, Nancy Hauserman, Susan Schwochau, & John Stibal, “Reported incidence rates of work-related sexual harassment in the United States: Using meta-analysis to explain reported rate disparities,” *Personnel Psychology*, vol. 56, no.3, (Dec. 2006), at 624.

³⁴⁴ *Ibid.*

³⁴⁵ Schultz, *supra* note 8, at 20.

Bosses not only demand sexual favors; they also insist that women serve food or clean up, submit to their angry tirades, or behave or dress in ways that please them. Bosses and coworkers engage in sexual advances and ridicule; they also downplay or take credit of women's accomplishments, exclude them from meetings and information, undermine their work and reputation, and comment or otherwise convey that women don't belong.³⁴⁶

Research also has shown that other power differentials besides the internal structure of an organization may also be ripe for sexual harassment to occur. For instance, sexual harassment is more likely to occur against individuals who lack symbolic power in society and may mirror many of the same structural power imbalances that are present in society at large (e.g., race, gender, sexual orientation, class).³⁴⁷ While any individual can be the victim of sexual harassment, data show that marginalized groups (e.g., women of color, LGBT individuals, immigrants) are more likely to be the victims of harassment.³⁴⁸ In his statement to the Commission, Donald Tomaskovic-Devey stated that “[w]omen of course, are the primary targets [of sexual harassment], but Black women are at the highest risk. Most scholarship concludes that sexual harassment is fundamentally about the exercise of power. It is not surprising then to find that it is Black women who suffer the most.”³⁴⁹

At the Commission's briefing, Dariely Rodriguez Director of the Economic Justice Project at the Lawyers' Committee for Civil Rights Under Law, testified that:

Women of color are more likely to experience harassment in compounded ways on the basis of their gender and race or ethnicity. Most victims of harassment, however, will not come forward and file complaints for fear of retaliation or inaction on their claim. In fact, 68 percent of sexual harassment charges include an allegation of retaliation, with black women being the most likely to experience retaliation. Women of color with limited economic resources who rely on their jobs to support their families may feel even more deterred from filing a complaint for fear of losing their jobs.³⁵⁰

³⁴⁶ Ibid., 21.

³⁴⁷ Ibid.; National Academies of Sciences, Engineering, and Medicine, *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*, 2018, at 14-15, 44-45.

³⁴⁸ See e.g., Tomaskovic-Devey Statement, at 2; Metcalf Testimony *Washington Briefing*, p. 59; Rodriguez Testimony *Washington Briefing*, p. 117; Amanda Rossie, Jasmine Tucker, and Kayla Patrick, “Out of the Shadows,” National Women's Law Center, 2018, <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

³⁴⁹ Tomaskovic-Devey Statement, at 2.

³⁵⁰ Rodriguez Testimony *Washington Briefing*, p. 117.

In a survey regarding harassment in astronomy and the planetary science fields, Kathryn Clancy, associate professor at the University of Illinois, found that forty percent of women of color said that they felt unsafe in their current job as a result of harassment due to their gender or sex; and 28 percent of women of color reported feeling unsafe as a result of their race.³⁵¹ The survey also showed that women in the science fields, and especially women of color, often faced toxic work environments. For instance, Clancy found that almost 90 percent of the 474 participants reported witnessing sexist, racist, or other disparaging remarks while at work.³⁵² Nearly 40 percent reported being verbally harassed and almost 1 in 10 had been physically harassed in their workplaces.³⁵³ Most nonwhite respondents stated that they had heard their colleagues make racist comments and 22 percent said they heard such remarks from their supervisors.³⁵⁴ Lastly, 18 percent of women of color and 12 percent of white women reported declining to attend a professional event because they did not feel safe attending, due to a hostile environment, despite recognizing the significant loss of career opportunities.³⁵⁵

At the Commission's briefing, Jane Liu testified that data show that sexual harassment is also a significant problem for Asian American and Pacific Islander (AAPI) women for a multitude of reasons. For instance, stereotypes of AAPI women such as "the submissive geisha, the prostitute, and the mail order bride depict AAPI women as erotic and sensual, foreign and exotic, subservient, quiet, feminine, and passive. These stereotypes are racialized, and AAPI women often experience sexual harassment based on these generalizations."³⁵⁶ Liu explains that harassment is about reinforcing cultural norms and exerting power; and in workplaces with power imbalances and racial inequities, this type of misbehavior is even more likely. She testified that "AAPI federal workers continue to face a glass ceiling at the Senior Executive Service level, resulting in underrepresentation at the top levels of government. Moreover, a 2012 EEOC report found that AAPI federal employees continue to face pervasive racial and national origin discrimination by managers and barriers to promotion."³⁵⁷

³⁵¹ Kathryn Clancy, Katharine Lee, Erica Rodgers, and Christina Richey, "Double Jeopardy in astronomy and planetary science: Women of color face greater risks of gendered and racial harassment," *Journal of Geophysical Research: Planets*, vol. 122, no. 7, July 2017, <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2017JE005256>.

³⁵² *Ibid.*, 1614-15.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, 1617.

³⁵⁵ *Ibid.*, 1618-19.

³⁵⁶ Liu Testimony *Washington Briefing*, p. 122.

³⁵⁷ *Ibid.*, 122.

Heather Metcalf testified as to how some industries may be more susceptible to issues of sexual harassment. In her research, she found that every Science, Technology, Engineering, and Mathematics (STEM) professional in the federal government that she surveyed reported having at least one experience of sexual harassment or other identity-based harassment experience.³⁵⁸ Metcalf explained that there is a subset of the #MeToo movement called the #MeTooSTEM movement because of how pervasive the issue of harassment is in these fields. Metcalf found that between 21 and 69 percent of women in the federal workforce have experienced gender or sexual harassment. In a survey of astronomers and employees in planetary sciences, women of color experienced the highest rates of race and gender-based harassment and assault at their workplace (28 percent and 40 percent, respectively).³⁵⁹

Further, the American Physical Society found that lesbian and bisexual women, gender non-conforming and transgender physicists experience harassment and exclusionary behavior at three, four, and five times the rate of gay and bisexual men physicists, respectively.³⁶⁰ In a survey conducted by the Association for Women in Science, researchers found that 37 percent of white women with disabilities, 73 percent of women of color with disabilities, and 100 percent of LGBTQ women of color with disabilities reported experiencing disability-related stigma, discrimination, and harassment at work.³⁶¹

Another organizational factor that has been shown to increase the likelihood of sexual harassment occurring in workplaces is having an esteemed employee or “rainmaker” who supervises or mentors junior employees.³⁶² Rainmakers are individuals who are well-recognized, renowned, and highly-respected in organizations, and their status can lead them to believe that they do not have to abide by rules set out by the organization.³⁶³ Further, if these individuals do engage in harassing behavior, due to their prominent status, the claim may be overlooked and the alleged victim

³⁵⁸ Metcalf Testimony *Washington Briefing*, p. 59.

³⁵⁹ *Ibid.*, 59.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² See e.g., Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Oct. 15, 2018, at 4, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf; Chai Feldblum and Victoria Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai Feldblum & Victoria Lipnic, (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; Hannah Hayes, “Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond,” American Bar Association, Jan. 17, 2019, <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/december-january/is-time-really-for-sexual-harassment-the-workplace-companies-and-law-firms-respond/>.

³⁶³ Fran Sepler, President of Sepler & Associates, Written Testimony to U.S. Equal Employment Opportunity Commission, Meeting of Select Task Force on the Study of Harassment in the Workplace, Sept. 18, 2015, https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm.

silenced.³⁶⁴ Additionally, reporting may be even harder on the victim because the victim may be fearful of the rainmaker besmirching the victim's reputation, blacklisting the victim, and/or depriving the victim of recommendations and networking opportunities.³⁶⁵ Heather Metcalf testified that the "reputational piece is part of the reason why cases go decades without someone coming forward. [I]t's because people are waiting until they get to a position in their career where they have enough seniority to protect them[selves] from the potential ramifications of reputational harm."³⁶⁶ Fran Sepler, a consultant, trainer, and investigator on the issues of workplace sexual harassment, testified before EEOC about a case that she worked on with the following fact pattern:

[F]or decades an eminent professor had his exclusively Asian graduate students not only wash his feet daily, but on occasion, satisfy certain erotic desires. His Dean was aware of his abusive tendencies but took a hands-off approach. It took twenty-five years, the graduation of one of those students, and tenure for her own position at a different institution for her to find the courage to report it to senior institutional officials.³⁶⁷

Sepler argued that this unearned privilege in conjunction with lack of accountability by leadership is "the most pernicious underpinning of white-collar harassment."³⁶⁸

Strategies to Address and Prevent Sexual Harassment

While there may be debates regarding the causes for sexual harassment, most agree that these types of behaviors are unacceptable; employers are also bound by civil rights law not to commit sexual harassment.³⁶⁹ At the Commission's briefing, Mona Charen, senior fellow at the Ethics & Public Policy Center testified that the #MeToo Movement has been a "necessary corrective to years of gross behavior by powerful men. Most of the men in politics, media, sports, and entertainment who've been identified as sexual predators have not even attempted to deny the accusations."³⁷⁰

³⁶⁴ Chai Feldblum and Victoria Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai Feldblum & Victoria Lipnic, (2016).

³⁶⁵ Ibid.

³⁶⁶ Metcalf Testimony *Washington Briefing*, p. 76.

³⁶⁷ Fran Sepler, President of Sepler & Associates, Written Testimony to U.S. Equal Employment Opportunity Commission, Meeting of Select Task Force on the Study of Harassment in the Workplace, Sept. 18, 2015, https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm.

³⁶⁸ Ibid.

³⁶⁹ See *supra* notes 118-136.

³⁷⁰ Mona Charen Testimony, *Washington Briefing*, p. 119.

Similarly, researchers from the Center for Employment Equity argue that harassment should be “addressed proactively and affirmatively as managerial responsibilities, rather than leaving it to the targets of discrimination to pursue legal remedies as individuals.”³⁷¹

Louise Fitzgerald stated to the Commission that organizations need to adopt strategies that focus on two main areas: gender integration (both horizontal and vertical) and creating a workplace environment that does not tolerate sexual harassment.³⁷² She states that employers need to develop programs to “recruit, retain, and promote women” in combination with work and family policies that will allow women to more fully be integrated into an organization.³⁷³ Further, practices that have been shown to create an organizational climate that demonstrates to employees that sexual harassment is not tolerated include:

- 1) Taking a strong and visible leadership stance [against sexual harassment]
- 2) Raising the issue [of sexual harassment] proactively and repeatedly
- 3) Instituting clear policies and procedures
- 4) Following through with meaningful sanctions
- 5) Assessing progress with annual workplace audits and providing group level feedback to employees.³⁷⁴

Fitzgerald maintains that these practices have proven to be successful in reducing harassment across multiple industries and in cross-cultural settings.³⁷⁵

Tamara Chrisler of the Leadership Conference testified that changing an agency’s culture, while difficult, can play a significant role to help prevent sexual harassment. She stated that:

Changing the culture of an agency takes time, but it can be done through consistent messaging and consistent action that corresponds with that message. The first message must be that each agency component has its own anti-harassment policy that is periodically reviewed and updated and consistently distributed to all new hires. It is not enough that the component relies on the parent agency’s policy on anti-harassment. Having its own policies

³⁷¹ Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, “Employer’s Responses to Sexual Harassment,” Center for Employment Equity at the University of Massachusetts Amherst, Dec. 2018.

³⁷² Fitzgerald Statement, at 5.

³⁷³ Ibid.

³⁷⁴ Ibid., 6.

³⁷⁵ Ibid., 5.

directly condemning harassment sends the message that the head of the agency recognizes the severity of these claims, their impact on the workplace and the need to prevent the conduct that leads to such claims.³⁷⁶

Chrisler added that one way that agencies can do this is to implement policies and procedures that work to prevent or reduce inappropriate behavior before it rises to the level of creating a hostile work environment, such as having conversations with employees to refrain from making inappropriate jokes and comments.³⁷⁷

Another strategy discussed at the briefing was the use of climate surveys. Congresswoman Speier testified that climate surveys are already being utilized in the military in an effort to prevent sexual assaults and have found these surveys to be a “profound way to measure whether or not we’re making any improvement. We’ve just come out with the sexual assault review [of the military] and it shows that the numbers have actually increased.”³⁷⁸ She explained that climate surveys show that there are about 20,000 cases of sexual assault in the military a year, but only 5,000 are reported.³⁷⁹

As discussed previously, many victims are fearful of reporting incidents of harassment and assault, and Speier testified to this stating that “fear of retaliation [] is very serious and that’s why you have only 5,000 that report and of the 5,000 [alleged perpetrators], only about 500 go to court martial and only 250 are convicted. So, there’s a very strong message that goes out that why bother?”³⁸⁰ Thus, the Congresswoman suggests that implementing “climate surveys, [and] making them permanent, will have [] a very effective way of doing [] oversight... particularly in all of the departments where there are occupations where you have remote or isolated kinds of environments. You know that happens a lot in the Department of Interior, National Park Service, Fire Service, [and] Department of State.”³⁸¹

Similarly, Chrisler testified that requiring climate surveys to be conducted after a claim of harassment is filed is a way that agencies can build trust with their employees, stating that: “Harassment claims are not easy on the employees who bring them, those who are alleged as harassers, or staff who are involved in the claim. Trust is often diminished during this process. Employees feel deflated and there exists a question of how to move forward... A workplace

³⁷⁶ Chrisler Testimony, *Washington Briefing*, p. 88.

³⁷⁷ *Ibid.*

³⁷⁸ Speier Testimony, *Washington Briefing*, p. 24.

³⁷⁹ *Ibid.*, 29.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*, 24-29.

climate survey might be the tool to start that healing.”³⁸² Chrisler further argued that building and maintaining trust between employees and managers is an essential part of changing the culture of an agency. She stated that there must be trust that individuals who engage in inappropriate behavior will be held accountable and agencies need to demonstrate that the systems in place, such as the EEO process, are capable of redressing and resolving harassing or discriminatory behavior.³⁸³ This accountability must be applied to all employees, including management officials and if individuals need to be removed then agencies need to take proper corrective actions.³⁸⁴

Congresswoman Speier suggested that cases of sexual harassment and assault should be taken out of the chain of command and handled in “a separate office that would have the skills to do the investigations and the prosecutions and that would be independent, because there is an inherent conflict of interest that exists. Either the chain of command has the perpetrator in it, or is good friends with the perpetrator, or is concerned that it will reflect poorly on them for their next promotion if they have sexual assault cases under their command.”³⁸⁵ Further, she testified that agencies can create measures of accountability by adding transparency to the process. For instance, harassment investigations could focus on whose leadership the harassment occurred under and what kind of action took place and share this information among employees and the public.³⁸⁶

Other possible strategies that have been identified to address sexual harassment include instituting mandatory reporting requirements for managers and supervisors, increased transparency regarding the EEO process and its outcomes, creating systems of accountability for harassers, and providing institutional support for victims of harassment.³⁸⁷ For instance, in their written submission to the Commission, Kalpana Kotagal, partner and Stacy Cammarano, associate in the Civil Rights and Employment Group at Cohen Milstein Sellers & Toll PLLC asserted that organizations should provide resources such as counseling sessions, monetary stipends for wellness programs, and onsite professionals to help employees recover and heal from the trauma of sexual harassment.³⁸⁸

³⁸² Chrisler Testimony, *Washington Briefing*, p. 89.

³⁸³ *Ibid.*, 88.

³⁸⁴ *Ibid.*

³⁸⁵ Speier Testimony, *Washington Briefing*, pp. 28-29.

³⁸⁶ *Ibid.*, 29.

³⁸⁷ See e.g., Department of Justice, Gender Equality Network, Submission to U.S. Commission on Civil Rights for the #Federal Me Too Briefing, May 9, 2019; Amy Dahm, retired Foreign Service Officer, Submission to U.S. Commission on Civil Rights for the #Federal Me Too Briefing, May 9, 2019.

³⁸⁸ Kalpana Kotagal and Stacy Cammarano, Submission to U.S. Commission on Civil Rights for the #Federal Me Too Briefing, May 9, 2019, at 10.

The Commission also received a submission from the Justice Department’s Gender Equality Network, a network of over 400 members—many of whom have been personally affected by sexual harassment—that included a list of recommendations on how to better address sexual harassment at that agency.³⁸⁹ Further, the group notes that in December 2017, it sent a public letter to the Deputy Attorney General’s office suggesting a number of reforms for implementation at the Justice Department that could be applied across the federal sector.

For example, we urged the former DAG [Deputy Attorney General] to establish a Department-wide, uniform table of penalties to be used in disciplinary actions; to establish mandatory reporting requirements for managers that received sexual harassment and misconduct complaints; to ban serious perpetrators and those under investigation from receiving promotions and performance rewards; and to end the practice of responding to substantial findings of sexual harassment and misconduct by reassigning the perpetrator to another division.³⁹⁰

Inspired by the renewed activism of the #MeToo movement, Vicki Schultz Ford Foundation Professor of Law and Social Sciences at Yale Law School and nine other law professors argue that to address sexual harassment, the legal system must play an integral role in reforming the conditions that allow sexual harassment to flourish.³⁹¹ As discussed previously, Schultz and her colleagues found that sexual harassment is most often not about sexual desire or attraction, but an issue of cultural and institutional sexism.³⁹² One way to address this mischaracterization is to provide more empirical research and education on what harassment is and how it manifests, the underlying causes and what conditions sustain it, and how these behaviors are connected to broader patterns of discrimination and inequalities. Based on such research, Schultz and colleagues assert

³⁸⁹ Department of Justice, Gender Equality Network, Submission to U.S. Commission on Civil Rights for the #Federal Me Too Briefing, May 9, 2019.

³⁹⁰ *Ibid.*, 2.

³⁹¹ Schultz, *supra* note 22, at 17-18.

³⁹² See e.g., Heather McLaughlin, Christopher Uggen, and Amy Blackstone, “Sexual Harassment, Workplace Authority, and the Paradox of Power,” *American Sociological Review*, (2012), vol. 77, no. 4, at 636 (finding that female supervisors are more likely to be harassed than other women), <https://journals.sagepub.com/doi/pdf/10.1177/0003122412451728>; Chelsea R. Willness, Piers Steel, and Kibeom Lee, “A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,” *Personnel Psychology*, (Spring 2007), vol. 60, no.1, at 154 (citing studies showing that coworker harassment is more common than harassment by supervisors), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-6570.2007.00067.x>; Dana Kabat-Farr and Lilia M. Cortina, “Sex-Based Harassment in Employment: New Insights into Gender and Context,” *Law and Human Behavior*, 2014, vol. 38, no. 1, [https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20\(2014\).pdf](https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20(2014).pdf).

that sexual harassment has been found to be explicitly linked to sex segregated workplaces and gender inequality.³⁹³

Experts have long cited that gender imbalances and sex segregation, where men hold the majority of the top positions and/or prized jobs in an organization, field, or industry and women hold lower-status positions are a major cause of sexual harassment.³⁹⁴ Schultz and colleagues state that addressing this concern requires that organizations and industries must actively recruit and promote women and men in equal numbers into every job at every level, especially in senior level positions.³⁹⁵ This also requires that leadership is held accountable for implementing non-discrimination and equal inclusion strategies with measurable goals. The law professors also recommend that federal and state law enforcement agencies should bring litigation combining sex and gender-based harassment complaints with other discriminatory practices that contribute to sex segregation and inequality (e.g., discriminatory practices in hiring, promotions, and work assignments), to expose the connections between harassment and the broader issues of discrimination and sex and gender stereotyping.³⁹⁶

Sexual harassment can also occur between members of the same-sex,³⁹⁷ and the EEOC has taken the position that the anti-sex discrimination provision of Title VII also applies to lesbian, gay, bisexual, and transgender (LGBT) applicants and employees.³⁹⁸ Schultz and colleagues argue that the majority of conversations focus on men harassing women and do not address that men

³⁹³ Schultz, *supra* note 22, at 20.

³⁹⁴ See e.g., Frank Dobbin & Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>; Vicki Schultz, “Reconceptualizing Sexual Harassment, Again,” *The Yale Law Journal Forum*, Jun. 18, 2018, https://www.yalelawjournal.org/pdf/Schultz_k6kcog1p.pdf at 42-44 (highlighting the importance of eliminating sex segregation to end harassment), <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again>; Time’s Up, <https://www.timesupnow.com/>.

³⁹⁵ Schultz, *supra* note 22, at 22; Frank Dobbin and Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

³⁹⁶ Schultz, *supra* note 22, at 25.

³⁹⁷ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (holding that same-sex harassment is sex discrimination under Title VII).

³⁹⁸ “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (accessed Oct. 30, 2019); see also Schultz, *supra* note 8, at 25-26; see e.g., *Complaint v. U.S. Postal Service*, EEOC Appeal No. 0120133382 (Feb. 11, 2015) (holding that hateful nature of the alleged comments calling Complainant “homo” and telling him he was “living in sin” and would be “going to hell” coupled with the alleged lack of adequate response on the part of management, was sufficiently severe to state a viable claim of harassment due to gender-based stereotyping that required further investigation and processing).

sometimes harass other men through gender-based hostility and stereotyping. Women harassing other women, while potentially less visible than other forms, can occur especially in sex-segregated workplaces where women lack institutional power so they may ostracize, stigmatize, and harass other women.³⁹⁹ Further, harassment against LGBT workers is widespread, especially against transgender workers.⁴⁰⁰ “By attacking women, LGBTQ people, and heterosexual men who fail to conform to prescribed gender norms, harassers reinforce the masculine composition and character of their jobs and shore up their own sense of masculine identity.”⁴⁰¹ One way to address these forms of harassment is to include anti-harassment policies and trainings that discuss topics such as sexual orientation, gender identity, sex/gender stereotyping. Reforms to federal and state laws should include that these forms of harassment are also prohibited forms of discrimination and covered under Title VII protections.⁴⁰²

Scholars also cite a specific need to address the unique challenges that women of color face due to the intersection of race and sex/gender discrimination.⁴⁰³ As research has shown, women of color face the highest rates of sexual harassment in workplaces and this risk of harassment is linked to longstanding myths about their sexuality.⁴⁰⁴ Schultz and colleagues documented that this high rate of workplace sexual harassment can be tied to stereotypes of black women as “wanton and lascivious, Latinas as sexy and ‘spicy,’ Asian women as exotic and submissive, and Muslim women as meek and oppressed – images that invite unwanted sexual advances at work and elsewhere.”⁴⁰⁵ Black women are further faced with stereotypes of the “angry Black woman” and

³⁹⁹ Schultz *supra* note 22, at 27.

⁴⁰⁰ See e.g., U.S. Commission on Civil Rights, Working For Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans, Nov. 2017, https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf.

⁴⁰¹ Schultz *supra* note 22, at 27; see also Bethany Coston and Michael Kimmel, “Seeing Privilege Where It Isn’t: Marginalized Masculinities and the Intersectionality of Privilege,” *Journal of Social Issues* (March 2012) vol. 68, no. 1, <https://spssi.onlinelibrary.wiley.com/doi/full/10.1111/j.1540-4560.2011.01738.x>

⁴⁰² Schultz *supra* note 22, at 28.

⁴⁰³ *Ibid.*, 28-29.

⁴⁰⁴ See e.g., Jennifer L. Berdahl and Celia Moore, “Workplace Harassment: Double Jeopardy for Minority Women,” *Applied Psychology*, 2006, vol. 91, no. 2, (finding, based on a survey of employees in five organizations in a major North American metropolitan area, that harassment was more common for racial-ethnic minorities and “for those who reported working in groups dominated by an ethnicity that differed from their own”), at 432, <https://pdfs.semanticscholar.org/e5cd/8934b5d10b331560b24bcc3d7dc3c4a4818d.pdf>; Hart Research Associates, “Key Findings from a Survey of Women Fast Food Workers,” Oct. 5, 2016, <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf>; Elyse Shaw, Ariane Hegewisch, and Cynthia Hess, “Sexual Harassment and Assault at Work: Understanding the Costs,” Institute for Women’s Policy Research, Oct. 15, 2018, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf; Amanda Rossie, Jasmine Tucker, and Kayla Patrick, “Out of the Shadows,” National Women’s Law Center, 2018, <https://nwc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>

⁴⁰⁵ Schultz *supra* note 22, at 29-30.

being unqualified and incompetent on the job, all of which contributes to sex- and race-based harassment and discrimination.⁴⁰⁶ To address these forms of harassment, anti-harassment policies and trainings need to specifically cover race-based harassment and explicitly explain that harassment and discrimination are intersectional. Policies and anti-harassment programs need to be connected to broader reforms to end intersectional discrimination throughout an organization or agency; and equal opportunity measures need to ensure that people of color have equal representation and inclusion through all job levels and especially in top positions.⁴⁰⁷

Other reforms include strengthening protections against retaliation for those who report harassment – for both victims and bystanders.⁴⁰⁸ For instance, in 2017, an employee with the Department of Homeland Security filed a complaint with EEOC against the agency on the basis of sexual harassment and retaliation.⁴⁰⁹ An Administrative Judge found in favor of the complainant, however, the agency appealed the decision asserting that the Judge did not properly apply the Supreme Court’s ruling in *Vance* and *University of Texas Medical Center v. Nassar* regarding the agency’s liability.⁴¹⁰ EEOC upheld the Administrative Judge’s decision and ordered the agency, among other things, to issue the complainant an “outstanding” performance evaluation, which had been withheld, \$50,000 in financial compensation for damages, and approximately \$41,000 attorneys’ fees.⁴¹¹

⁴⁰⁶ *Ibid.*, at 30.

⁴⁰⁷ *Ibid.*, at 31.

⁴⁰⁸ *Ibid.*, at 38.

⁴⁰⁹ *Heidi B. v. Department of Homeland Security*, EEOC, Appeal No. 0720140004 (Feb. 2, 2017), <https://www.eeoc.gov/decisions/0720140004.txt>. Following a hearing, the AJ found that the Agency subjected Complainant to sexual harassment and retaliation. The EEOC affirmed the AJ’s findings on appeal.

Assuming, arguendo, that the Unit Leader (S1) was a co-worker rather than a supervisor, the [EEOC] found that the Agency was still liable for S1’s actions because it knew about S1’s conduct and did not take immediate and appropriate corrective action. Specifically, while the Agency took measures to stop the harassment, it did not take any action to correct its effects on Complainant or ensure that similar sexual harassment by another employee did not take place.

The EEOC agreed with the AJ that although the Agency promptly removed S1 from the workplace, it did not take any action to prevent further retaliatory harassment. In addition, “the Agency did not communicate to or educate the rest of the staff that sexually harassing conduct was against Agency policy and would not be tolerated.” The EEOC concluded that the AJ’s findings were supported by substantial evidence in the record. The EEOC rejected the Agency’s assertion that the “but for” standard articulated in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013) applied to Complainant’s retaliation claim, stating that the EEOC has previously held that the standard does not apply to retaliation claims by federal sector employees. The Agency was ordered, among other things, to issue Complainant an “Outstanding” performance evaluation, and pay proven compensatory damages and attorneys’ fees. *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

To prevent harassment, senior leadership, supervisors, and managers must create organizational cultures that are built on respect for all employees. Schultz and colleagues argue that the legal system fails to provide enough protection against retaliation which contributes to a culture of silence and allows harassment to flourish.⁴¹² One way to address this is to broadly define retaliation to “include any adverse action an employee believes in good faith is detrimental. Courts should [also] not second-guess employees, the people who are most familiar with and most affected by workplace power dynamics... [and] [l]awmakers, courts, and agencies should strengthen federal and state antidiscrimination laws to require organizations to offer these protections.”⁴¹³

Another possible strategy to possibly mitigate this unfair advantage could be to have an ombudsperson available to victims during the processing of harassment claims. Ombuds programs vary in their structure—some are organizational, whistleblower, or advocate-based, for example.⁴¹⁴ Ombuds programs already exist at some federal agencies, and have demonstrated benefits.⁴¹⁵ At the EEOC’s “Reconvening of the Select Task Force on the Study of Sexual Harassment” meeting, Lisa Gelobter, CEO and Founder of tEQuitable discussed that her company has developed a program “Organizational Ombuds” that seeks to proactively stop harassment through an alternative dispute resolution approach that includes using ombudspersons.⁴¹⁶ She cited the International Ombudsman Association description of the duties of Organizational Ombuds: “(1) to work with individuals and groups in an organization to explore and assist them in determining options to help resolve conflicts, problematic issues or concerns, and (2) to bring systemic concerns to the attention of the organization for resolution.”⁴¹⁷

Other strategies include setting up separate offices within agencies to aid in addressing harassment. For instance, Congresswoman Speier testified that in the military for sexual assault cases, they have established a “special victims counsel” (SVC) who is available to the victim and can help guide them through the process. She asserts that “if we can provide SVCs in the military for the

⁴¹² Schultz *supra* note 22, at 39.

⁴¹³ *Ibid.*, 41.

⁴¹⁴ Carole Houk, Mary Rowe, Deborah Katz, Neil Katz, Lauren Marx, and Timothy Hedeon, “A Reappraisal – The Nature and Value of Ombudsmen in Federal Agencies,” Administrative Conference of the United States, Nov. 14, 2016, https://www.acus.gov/sites/default/files/documents/PART%202_Research%20Final%20%2011.14.16%20%28ACUS%29.pdf

⁴¹⁵ *Ibid.*

⁴¹⁶ United States Equal Employment Opportunity Commission, Task Forces, Testimony of Liso Gelobter, tEQuitable, (June 11, 2019) https://www.eeoc.gov/eeoc/task_force/harassment/gelobter.cfm.

⁴¹⁷ *Ibid.*

1.3 million service members we have, we certainly could create an SVC program in the federal sector to provide counsel to those who are sexually harassed or assaulted.”⁴¹⁸

⁴¹⁸ Speier Testimony, *Washington Briefing*, p. 23.

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CHAPTER 2: EQUAL EMPLOYMENT OPPORTUNITY PROTECTIONS IN THE FEDERAL WORKPLACE

To understand the background of federal employee protections, this chapter provides an overview of equal employment opportunity protections in the federal workplace. It begins by discussing the history of equal employment in the federal workplace, followed by outlining the federal sector EEO complaints process along with exploring criticisms of the process. This chapter also provides an introduction to federal agencies' anti-harassment policies and programs. Finally, the chapter discusses how federal agencies discipline employees for harassment and the defense of any disciplinary action in front of the Merit Systems Protection Board.

History of Equal Employment Opportunity Protections in the Federal Workplace

The federal government has a long history of having policies of nondiscrimination in the workplace, starting in the 1940s with an executive order issued by President Truman.⁴¹⁹ The federal sector EEO process has never been restructured, and many of the procedures, once introduced, have remained.⁴²⁰ The Truman executive order required each agency head to design an internal process to assess department personnel actions, to receive discrimination complaints, and take corrective action.⁴²¹ The Truman Administration also set up an external board (the Fair Employment Board in the Civil Service Commission) to advise department heads on fair employment, and make recommendations to agency heads on individual complaints.⁴²² Prior to and following the passage of Title VII of the Civil Rights Act of 1964, subsequent U.S. presidents, using superseding executive orders, expanded upon nondiscrimination policy in federal employment and the federal sector discrimination complaint process.⁴²³

⁴¹⁹ Executive Order No. 9980, 13 Fed. Reg. 4,311 (July 28, 1948) (signed by President Harry S. Truman and prohibited discrimination in federal employment based on race, color, religion, or national origin).

⁴²⁰ Federal Sector Equal Employment Opportunity, Advance Notice of Proposed Rulemaking, 80 Fed. Reg. 6669, 6671 (Feb. 6, 2015) (seeking comments on all aspects of the federal sector EEO program).

⁴²¹ *Id.*

⁴²² *Id.* (The Fair Employment Board was authorized “to review decisions made by the head of any department which are appealed . . . or referred to the Board by the head of the department for advice, and to make recommendations to such head.”).

⁴²³ See *infra* notes 419-30; EEOC, *Management Directive 110*, Preamble, History of the Federal Sector Equal Employment Opportunity Complaint Process, https://www.eeoc.gov/federal/directives/md-110_preamble.cfm.

1964 marked the passage of Title VII of the Civil Rights Act 1964 which, among other things, prohibited discrimination in employment and established the Equal Employment Opportunity Commission (EEOC).⁴²⁴ One year later, in 1965, EEOC went into operation.⁴²⁵ At the time, however, EEOC's jurisdiction was much different from present day, and federal employees were not yet covered by Title VII.⁴²⁶

Still, throughout the 1960s, multiple executive orders provided for federal employees to have greater protections in the workplace.⁴²⁷ For example, President Lyndon Johnson issued Executive Order 11375, in October 1967, which prohibited discrimination in federal employment on the basis of sex.⁴²⁸ In 1969, President Richard Nixon, via Executive Order 11478, required department and agency heads to “establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment.”⁴²⁹ It was in this Order that the concept of EEO counseling for aggrieved employees was established and early resolution of informal complaints was encouraged. Most notably, the Order gave the Civil Service Commission the authority to review and evaluate agency EEO programs.⁴³⁰

In 1972, Congress passed the Equal Employment Opportunity Act of 1972 – a landmark piece of legislation for federal government employees as this law amended Title VII to extend its coverage to include federal as well as state and local government employees.⁴³¹ While the new legislation cemented antidiscrimination rights under federal law for federal employees, legislators expressed concern over the federal sector complaint process. At the time, the federal sector EEO complaint process was still administered by the Civil Service Commission and was considered inefficient and full of conflict of interest concerns.⁴³² Despite the fact that a number of Members of Congress

⁴²⁴ *Title VII of the Civil Rights Act of 1964*, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-4).

⁴²⁵ EEOC, Management Directive 110, Preamble.

⁴²⁶ *Ibid.*

⁴²⁷ *See infra* notes 428-30; EEOC, *Management Directive 110*, Preamble.

⁴²⁸ Executive Order No. 11375 (Oct 13, 1967).

⁴²⁹ Executive Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 12, 1969)

⁴³⁰ *Id.* Under this Order, the Civil Service Commission issued its initial regulations pertaining to complaint processing, 5 C.F.R. Part 1613 effective April 3, 1966. 5 C.F.R. Part 713 et seq. These regulations provided the timeframes for filing complaints, investigations, final agency decisions, and appeals to the Civil Service Commission's review board. Later, the requirement for informal EEO counseling was added among other changes.

⁴³¹ *Equal Employment Opportunity Act of 1972*, Pub. L. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16 and § 2000e-16c).

⁴³² Staff of S. Comm. On Labor and Public Welfare, 92 Cong. Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261), amending title VII of the Civil rights act of 1964 (Comm. Print.

pushed for an overhaul of the program, the process remained under the direction of Civil Service Commission for the majority of the 1970s.⁴³³

In 1979, under President Carter, the responsibility for the administration and enforcement of the equal opportunity in federal employment, including authority over the federal sector EEO complaint process, was transferred from the Civil Service Commission and the Department of Labor to the EEOC.⁴³⁴ EEOC adopted the Civil Service Commission's complaint processing procedures, which consisted of counseling, filing of a complaint with the agency accused of discrimination, investigation of the complaint by that agency, a hearing at complainant's request, an agency final decision, and an optional appeal. Despite the transfer of authority, the federal sector EEO complaint process remained largely unchanged until 1989 when the EEOC proposed new rules.⁴³⁵

In 1992, EEOC issued final rules modifying timeframes for the process but leaving the basic structure intact.⁴³⁶ The 1992 rule changed the initial timeframe in which employees are required to contact an EEO officer or lose their rights to file a claim from 30 to 45 days.⁴³⁷ In 1999, based on recommendations from a Federal Sector Workgroup, EEOC amended their regulations again.⁴³⁸ The 1999 rule, among other things, included a requirement that agencies establish an Alternative Dispute Resolution process and offer it to complainants.⁴³⁹ The rule also required agencies to issue a "notice of final action" informing the complainant of the agency's intent to fully implement an

1972). "Testimony reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal Employees. Complainants were skeptical of the Civil Service Commission's record in obtaining just resolutions of complaints and adequate remedies. This discourages persons from filing complaints with the Commission for fear that it would only result in antagonizing their supervisors and impairing any hope of future advancement. *Id.* at 84.

⁴³³ EEOC, Management Directive 110, Preamble.

⁴³⁴ Pursuant to the Reorganization Plan No. 1 of 1978 and Executive Order 12106 (Dec. 28, 1978), the Civil Service Commission's Title VII functions were transferred to the EEOC. Pursuant to Executive Order 12106, the EEOC was "made responsible for directing and furthering the implementation of the Policy of the Government of the United States to provide equal employment opportunity in Federal employment for all employees and applicants for employment * * * and prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap or age." EEOC's regulations were codified at 29 C.F.R. part 1613. 57 Fed. Reg. 6670 (Feb. 6, 2015).

⁴³⁵ EEOC Notice of Proposed Rulemaking, 54 Fed. Reg. 45747 (1989).

⁴³⁶ 57 Fed. Reg. 12634 (1992). The EEOC final rule abolished 29 C.F.R. part 1613 and replaced it with 29 C.F.R. part 1614.

⁴³⁷ *Id.*

⁴³⁸ 64 Fed. Reg. 37,644 (July 12, 1999).

⁴³⁹ 64 Fed. Reg. 37,644 (July 12, 1999) (codified at 29 C.F.R. § 1614.105).

administrative judge's decision, along with information about their right to appeal to EEOC, and rights to file a civil action in federal district court.⁴⁴⁰

The Notification and Federal Anti-Discrimination and Retaliation Act of 2002 (No FEAR Act) intended to improve federal agencies' accountability regarding anti-discrimination and whistleblower laws.⁴⁴¹ This law mandates that in whistleblower or discrimination cases, federal agencies pay for settlements, awards, or judgments against them from their own agency's budgets rather than from the general federal Judgment Fund.⁴⁴² The law further requires that employees are notified about their rights under antidiscrimination laws and the Whistleblower Protection Act.⁴⁴³ Other provisions of the statute require that federal agencies provide training to employees every two years about the rights and remedies available under employment discrimination and whistleblower protection laws. Agencies must also submit annual reports to Congress, EEOC, the Justice Department, and the Office of Personnel Management that detail their efforts to improve compliance with these laws and regarding the status of the complaints brought against the agency under these laws. Lastly, agencies must also post summary statistical data on their public websites about EEO complaints filed with them.⁴⁴⁴ These data, which are discussed in-depth in the following chapter, show that every federal agency has problems with ongoing allegations of sexual harassment.⁴⁴⁵

In 2004, EEOC established a working group to further consider ways to improve the federal sector complaint process.⁴⁴⁶ At that time, there was no consensus for large scale revisions to the federal sector EEO complaint process.⁴⁴⁷ The resulting 2012 final rule made a number of changes, most notably, it gave the EEOC Chair the authority to issue letters of non-compliance to agencies after finding deficiencies in agency EEO programs⁴⁴⁸ and required an agency to notify a complainant

⁴⁴⁰ 64 Fed. Reg. 37,644 (July 12, 1999) (codified at 29 C.F.R. § 1614.110).

⁴⁴¹ Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. 107-174, 116 Stat. 566 (codified as amended in scattered sections of 5 U.S.C.) (hereinafter the "No FEAR Act").

⁴⁴² No FEAR Act, § 201 (b) (codified as amended in scattered sections of 5 U.S.C.)

⁴⁴³ 5 U.S.C. § 2302(c).

⁴⁴⁴ Equal Employment Opportunity Commission, "Questions and Answers: No FEAR Act," <https://www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm> (last accessed Mar. 13, 2020).

⁴⁴⁵ See Equal Employment Opportunity Commission, Form 462 and MD-715 Data Tables for FY 2017 and FY 2018, <https://www.eeoc.gov/federal/reports/tables.cfm> (last accessed Mar. 13, 2020).

⁴⁴⁶ 77 Fed. Reg. 43,498 (July 25, 2012).

⁴⁴⁷ 80 Fed. Reg. 6669, 6671.

⁴⁴⁸ 77 Fed. Reg. 43,498 (July 25, 2012) (codified at 29 C.F.R. § 1614.102).

of an expired investigative period giving them the right to immediately request a hearing or file a civil action.⁴⁴⁹

In its most recent effort to address the federal sector complaint process, in 2015, EEOC issued an advance notice of proposed rulemaking explicitly asking the public to respond to a list of roughly twenty-five questions about the process and provide feedback.⁴⁵⁰ The notice explained that many of the executive orders discussed above were issued when the “EEOC either did not exist or did not have oversight authority for the Federal sector.”⁴⁵¹ EEOC received almost one hundred comments in response.⁴⁵² The comments came from federal agencies, people who had utilized the federal sector EEO process, and lawyers who have represented complainants in the process.⁴⁵³ This effort to revise and update the EEO complaints process for federal employees has not proceeded any farther than the notification.

Other proposed efforts to address the concerns with the federal sector complaint process includes legislation to revise the No FEAR Act. At the Commission’s briefing, EEOC’s Dexter Brooks explained that if enacted, the Federal Employee Antidiscrimination Act of 2019 would extend protections for more categories of workers and revise the No FEAR Act.⁴⁵⁴ Brooks explained that the Federal Employee Antidiscrimination Act of 2019 broadens the scope of the No FEAR Act not only with regard to sexual harassment, but to cover all forms of prohibited discrimination and retaliation.⁴⁵⁵ This bill is meant to make the complaint process more transparent and create more accountability for an agency’s actions to address discrimination. “Because one of the statutory limitations we have at EEOC [is that] we can’t punish a management official. We can remedy the victim. We can provide [] whole relief to the victim, but we don’t [have the] punitive authority to say fire, terminate, [or] demote that [offending] employee.”⁴⁵⁶ Brooks testified that bringing greater accountability and transparency is critical, especially when dealing with concerns about retaliation.

⁴⁴⁹ 77 Fed. Reg. 43,498 (July 25, 2012) (codified at 29 C.F.R. § 1614.108).

⁴⁵⁰ 80 Fed. Reg. 6669, at 6671 (Feb. 6, 2015), <https://www.federalregister.gov/documents/2015/02/06/2015-02330/federal-sector-equal-employment-opportunity>.

⁴⁵¹ *Id.*

⁴⁵² <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=EEOC-2015-0005>.

⁴⁵³ *Ibid.*

⁴⁵⁴ Federal Intern Protection Act of 2017, H.R. 653, 115th Cong. (2017-2018).

⁴⁵⁵ Brooks Testimony, *Washington Briefing*, p. 25.

⁴⁵⁶ *Ibid.*

Research and testimony received during the Commission's briefing show that retaliation (or fear of retaliation) is one of the main reasons why employees chose not to report harassment.⁴⁵⁷ Brooks explained that:

if a management official is not wary and worried about what the ramifications are, there's no dissuasion from not repeating the [behavior] [] or enhancing it, and so that's one of the critical things that's missing in this equation. So, we were very pleased and happy with what the House was proposing in terms of revisions to the No FEAR Act.⁴⁵⁸

Further, Brooks testified that EEOC has been working with behavioral scientists to help agencies better understand the causes of discrimination and how to address these problems before they escalate into a legal issue.⁴⁵⁹ Additionally, he told the Commission that EEOC has been working with the Federal Management Association to help managers understand why retaliation, in addition to being unlawful, can be disruptive to the team and the organization as a whole. Brooks explains that retaliation is "not just illegal, but allowing it to happen is detrimental to your mission outcome."⁴⁶⁰

Federal Sector Complaints Process

The EEOC's regulations set out the time limits to file complaints, govern financial awards and benefits, and requirements to seek EEO counseling.⁴⁶¹ In order to file an EEO complaint in the federal workplace, there are several steps that a complainant must take to file a claim (see chart 6 below for visual representation):

- 1) Contact an EEO counselor at the home agency within 45 days from when the discrimination occurred. In many cases the EEO counselor will give the complainant the choice to participate in EEO counseling or enter into an alternative dispute resolution (ADR) program, which can result in mediation of the allegations
- 2) If the informal complaint has not been settled during counseling or ADR, the complainant can then file a formal discrimination complaint against the agency. This must be filed within 15 days of receipt of the notice from the EEO counselor about how to file.

⁴⁵⁷ See e.g., Speier Testimony, *Washington Briefing*, pp. 9, 29; Ben-Yehuda Testimony, *Washington Briefing*, p. 52; Rodriguez Testimony, *Washington Briefing*, p. 117; Chuzi Testimony, *Washington Briefing*, p. 46.

⁴⁵⁸ Brooks Testimony, *Washington Briefing*, pp. 25-26; see also *supra* notes 213-22 (discussing under-reporting due to fear of retaliation).

⁴⁵⁹ *Ibid.*

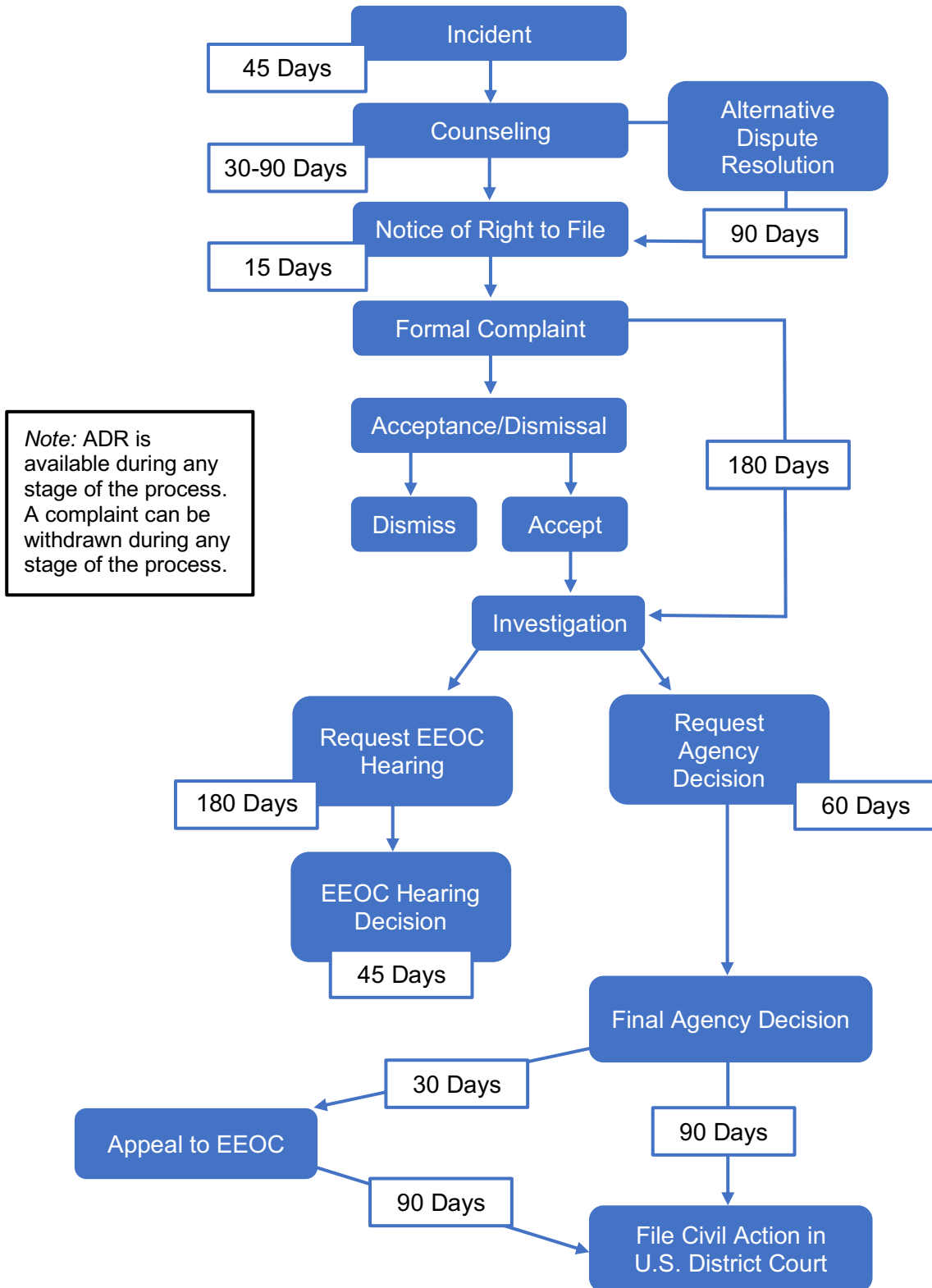
⁴⁶⁰ *Ibid.*, 26.

⁴⁶¹ 29 C.F.R. Part 1614.

- 3) Once a formal complaint has been filed, the agency conducts a review of the complaint and decides if the case should be dismissed for a procedural reason (e.g., the claim was filed past the 45-day deadline) or will begin an investigation into the claim. Agencies have 180 days from the day the formal complaint to complete the investigation.
- 4) Once the investigation is completed, the agency will issue a notice to the complainant: The complainant may elect either request a hearing before an EEOC Administrative Judge **or** the complainant may ask for the agency to issue a decision on whether discrimination occurred (known as a Final Agency Decision).
- 5) If the complainant opts for a Final Agency Decision and no discrimination was found or if the complainant disagrees with some part of the decision, the employee can then appeal the decision to the EEOC or pursue the issue in federal district court.
- 6) If the complainant elects an EEOC hearing, the employee has 30 days from the notification of the investigation's completion (Step 4) to request a hearing before an EEOC Administrative Judge.
- 7) After the EEOC Administrative Judge issues a decision, the agency has 40 days to issue a "final order" which states that it either agrees or disagrees with the decision and if it will grant the relief ordered by the Administrative Judge.
- 8) The complainant may appeal the agency's final order to the EEOC Office of Federal Operations. The appeal must be filed within 30 days upon receiving the final order. A complainant may also ask for a reconsideration no later than 30 days after receiving the EEOC Administrative Judge's decision.
- 9) If a complainant decides to file a lawsuit, the EEOC states that the employee must go through the full administrative process before pursuing this avenue. There are several different points during the process; however, when a complainant has the opportunity to quit the administrative process and file a lawsuit in court, including: after 180 days have passed from the day the complaint was filed, if the agency has not issued a decision and no appeal has been filed; within 90 days from the day the complainant receives the agency's decision, so long as no appeal has been filed; after the 180 days from the day the appeal was filed if the EEOC has not issued a decision; or within 90 days from the day the complainant receives the EEOC's decision on appeal.⁴⁶²

⁴⁶² See U.S. Equal Employment Opportunity Commission, "Overview of Federal Sector EEO Complaint Process," (last accessed June 12, 2019), https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm. (Note: in the private sector an EEOC sexual harassment claim is referred to as a "charge" and in the federal sector it is referred to as a "complaint."). Ibid.

Chart 6: Federal EEOC Process



Agency Self-Investigation

Practitioners who litigate sexual harassment complaints criticize the federal sector complaint procedure of requiring complainants to first file with the agency where the harm occurred, equating it with reporting to an offending supervisor, as the agency could take steps to dissuade the complainant or not thoroughly investigate the allegation.⁴⁶³ Yet in responding to comments in 1992, the EEOC stated that “[m]any agency commenters noted that counseling presented a very important opportunity to resolve complaints.”⁴⁶⁴

Initial 45 Days to File Informal Complaint

One of the most common critiques of the federal agency EEO process that the Commission heard was that the time required to file a complaint was too short.⁴⁶⁵ The Commission also heard testimony that the short time period was especially difficult considering the trauma that accompanies sexual harassment in the workplace.⁴⁶⁶ With some exceptions,⁴⁶⁷ under federal regulations, a federal employee or applicant who feels he or she has experienced sexual harassment must first contact an EEO counselor at the relevant federal agency within 45 days of the alleged harassment prior to filing a formal EEO complaint.⁴⁶⁸ Otherwise, the employee loses the right to file a complaint.⁴⁶⁹ When EEOC lengthened the period of time to contact an EEO counselor from 30 days to 45 days in 1992⁴⁷⁰ many commenters suggested lengthening the period to 180 days.⁴⁷¹ Some commenters suggested the then-30-day limit was sufficient because additional time “would introduce further delays, undermine quick resolution and result in faded memories, lost documents and unavailable witnesses.”⁴⁷² In 1992, EEOC justified the 45 days (and rejected the comparison to the private sector) for the following four reasons:

We do not believe that the analogy between the private sector filing period and the federal sector counseling time limit is apt. [1] Private employees must actually file a complaint

⁴⁶³ Chuzi Testimony, *Washington Briefing*, p. 39; see also *infra* notes 480-81 (testimony of Debra Katz).

⁴⁶⁴ 57 Fed. Reg. 12634-01, 12635.

⁴⁶⁵ See *infra* notes 479-85.

⁴⁶⁶ See *infra* notes 481-83.

⁴⁶⁷ See *infra* note 475 (discussing 4 regulatory exceptions to the 45-day rule).

⁴⁶⁸ 29 C.F.R. § 1614.105(a)(1).

⁴⁶⁹ *Id.*

⁴⁷⁰ Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12634-01, 12634 (Apr. 10, 1992).

⁴⁷¹ *Id.*

⁴⁷² *Id.*

within 180 days, not just contact an EEOC office about doing so. [2] Private employees may have to travel many miles or use the mail to file a charge with EEOC while federal employees only have to contact a counselor by telephone or often merely visit a counselor who is located in the same workplace in order to comply with the time limit. [3] Moreover, a comparison of private sector charge filings and federal sector charge filings indicates that federal employees file complaints at a rate three times greater than private sector employees file a charge. [4] Further, the earliest possible contact with a counselor aids resolution of disputes because the positions on both sides have not yet hardened. Therefore, we believe a significant lengthening of the pre-complaint period is not justified.⁴⁷³

Per EEOC's regulations, the agency "shall extend" the initial 45 day period under four circumstances when a complainant: 1) was not notified about the time frame, 2) did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, 3) despite due diligence was prevented by circumstances beyond his or her control from contacting a counselor, or 4) "for other reasons considered sufficient by the agency or the [EEOC]."⁴⁷⁴ On appeal, EEOC has issued decisions reversing agencies and finding that contact with an EEO counselor was timely.⁴⁷⁵

In contrast to the 45-day deadline to contact an EEO counselor,⁴⁷⁶ non-federal employees typically have 180 days, which is nearly four times the length of time available to federal employees.⁴⁷⁷ The private sector time frame can also be extended to 300 days – making it nearly seven times that afforded to federal employees—if a state or local agency enforces a law that prohibits employment discrimination on the same basis.⁴⁷⁸

⁴⁷³ 57 FR 12634 (1992).

⁴⁷⁴ *Id.* at § 1614.105(a)(2).

⁴⁷⁵ See e.g., *Bettyann B. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2019002089 (Apr. 24, 2019) (filing contact timely where complainant detailed numerous incidents of alleged harassment occurring within the 45 day period and agency dismissed based on one alleged incident being outside the time frame); *Lionel J. v. U.S. Postal Service*, EEOC Appeal No. 2019002925 (May 29, 2019) (reversing agency dismissal where agency told complainant that no one was available to take his complaint; the EEOC also noted that the agency has the burden of proving untimeliness); see *Madalene A. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2019002220 (Apr. 17, 2019) (finding that claimant had not shown that she was "so incapacitated [by depression] that she was unable to timely contact an EEO counselor.").

⁴⁷⁶ 29 C.F.R. § 1614.105(a)(1).

⁴⁷⁷ EEOC, "Time Limits For Filing A Charge," <https://www.eeoc.gov/employees/timeliness.cfm> (last accessed Mar. 13, 2020); Katz Testimony, *Washington Briefing*, p. 126.

⁴⁷⁸ EEOC, "Time Limits For Filing A Charge," <https://www.eeoc.gov/employees/timeliness.cfm> (last accessed Mar. 13, 2020).

At the Commission's briefing, Sunu Chandy testified that the federal time limits for EEO complaints cause a significant civil rights concern, stating that:

The federal government must be a model employer when it comes to eradicating sex harassment and indeed all forms of discrimination. At the outset, it must be noted that federal employees' civil rights protections are far less favorable than in the private sector. This is particularly appalling, given that there are tremendous gaps in the protections facing employees in the private sector, too... [W]e must extend the current statute of limitations. As noted in the private sector, we have 300 days or 180 days which is still far too short. In light of that for federal workers to have 45 days and then if they engage in the formal process to have 15 days and otherwise they lose their claims is completely appalling.⁴⁷⁹

Debra Katz also testified to possible civil rights concerns, stating that many lawyers who are passionate about harassment law will not litigate federal sector cases because they are "too expensive [and] too cumbersome."⁴⁸⁰ Time limits are a particularly significant impediment. Katz explained:

People in the private sector have either 180 days or 300 days, depending on their state of residence, to file a complaint with EEOC. Forty-five days is just not enough time. During a 45-day period, you often find people so traumatized, so unable to even consider their options, so fearful, that they do not initiate EEO counseling. And forever they lose their claims. That is just outrageous. And once the EEO office completes the counseling, they have only 15 days to file a formal complaint with the agency, or again, they lose their right to pursue their claims. Who is that benefitting? If we care about eradicating sexual harassment in the federal workforce, we need to extend the statute of limitations.⁴⁸¹

George Chuzi, another attorney who litigates sexual harassment cases, testified how these time limits play out in actual cases. In a case against the U.S. Postal Service, the agency issued a decision of no discrimination because the employees missed the time limit in filing their administrative sexual harassment complaints. However, EEOC exercised its discretion to forgive the time limit violations and sent the case back to the agency for adjudication. Chuzi argues though, while this was a good decision by EEOC, the concern is that "they were all rejected by the agency.

⁴⁷⁹ Chandy Testimony, *Washington Briefing*, pp. 14-16.

⁴⁸⁰ Katz Testimony, *Washington Briefing*, p. 126.

⁴⁸¹ *Ibid.*

The only way they get to the EEOC is because the employee brings it to the EEOC. And to me, that's a serious problem."⁴⁸²

The BE HEARD in the Workplace Act proposes to respond to these criticisms by extending the time limits for filing EEO complaints in the federal sector to up to four years.⁴⁸³ This would apply to all EEO complaints, not just sexual harassment complaints, and it could be particularly impactful for federal workers experiencing trauma or other factors that make it difficult to file a complaint within 45 days.

Sunu Chandy, Legal Director at the National Women's Law Center and a former EEOC district office director, testified that not only are these processes complicated and the associated time limits too short, complainants also have to navigate parallel formal and informal structures that are also ambiguous. She explained that in federal agencies there are separate offices where workers may be unclear on where to report an incident. For instance, agencies have a human resources office in which they can file an informal harassment complaint or some agencies also have an additional ombuds process, both of which are separate from an agency's EEO office, where employees can file a formal harassment complaint. Too often complainants are not aware of which office is the appropriate office with which to file a complaint, adding that:

There is a separate harassment office ... and it sounds like it was well intended to provide an alternative route that may be less time consuming and more informal. So, it sounds like a good idea. But if you go through that process, meanwhile your 45 days are ticking, ticking, gone and you've now lost your civil rights protections in the workplace because you were attempting to do what I think we all agree is a good thing, to resolve something in a timely way and in an informal way which is absolutely a benefit to federal agencies in terms of liability and everything else.⁴⁸⁴

⁴⁸² Chuzi Testimony, *Washington Briefing*, p. 19; *see also*, Chuzi Written Statement at 1, citing *Celine B. v. Postal Service*, 2015 WL 9685624 (Dec. 9, 2015) (The complainant alleged that her employer made "repeated sexually suggestive comments to her and touched her inappropriately. Co-workers testified that they were sufficiently concerned they took steps to ensure the employee was not left alone with her supervisor after hours. Following the employee's complaint, the Agency promptly investigated, but concluded the allegations were not substantiated. After the employee requested a hearing, the Administrative Judge awarded summary judgment to the Agency, finding that the Agency was entitled to the affirmative defense (*Faragher* and *Ellerth*) that it took prompt and effective corrective action. On appeal, for the first time, the EEOC held that agencies *are not* entitled to the defense *unless* the employee unreasonably failed to take advantage of opportunities to avoid harm. Because the employee promptly complained to the Agency, the affirmative defense was unavailable.").

⁴⁸³ Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, H.R. 2148, § 207, 116th Congress (2019-2020).

⁴⁸⁴ Chandy Testimony, *Washington Briefing*, p. 20.

One strategy to alleviate some of these concerns could be to change the EEO process so that the formal complaint time limits are tolled while a complainant is pursuing informal processes, such as going through an alternative dispute resolution (ADR) or mediation. Chandy testified that “I think that kind of tolling is firmly within the rights of agencies to implement and it is to everyone’s benefit. If the actual complaint timeline is tolled, maybe more people would use the informal system which could lead to more timely resolutions which is better for everyone.”⁴⁸⁵

Federal Employees versus Contractors

The federal government is the largest employer in the United States. As a whole, it accounts for about 9 million individuals or about 6 percent of the total employment in the nation.⁴⁸⁶ This figure includes approximately 2.1 million civilian employees, 4.1 million contractors, 1.2 million grant employees, 1.3 million active duty military, and 500,000 postal service employees.⁴⁸⁷ By comparison, the next largest employer is Walmart, which employs about 1.5 million employees.⁴⁸⁸

While federal law protects employees from sexual harassment, many critics of current federal workplace protections point out that contractors may not have the same rights under federal law as employees.⁴⁸⁹ At the Commission’s briefing, Katz explained that these workers are “particularly vulnerable, because of the work that they do, to issues of sexual harassment in the workplace. And yet, for many of these people, they have zero legal protection[.]”⁴⁹⁰

The definitions of employee versus contractor are important when looking at sexual harassment claims because as EEOC states, “in order to have standing to bring an action under the federal sector EEO complaint process, an individual must be a federal employee or applicant for employment.”⁴⁹¹ Federal law defines a federal employee as an individual who is –

⁴⁸⁵ Chandy Testimony, *Washington Briefing*, p. 20.

⁴⁸⁶ Kristin Tate, “The sheer size of our government workforce is an alarming problem,” *The Hill*, April 14, 2019, <https://thehill.com/opinion/finance/438242-the-federal-government-is-the-largest-employer-in-the-nation>; Joe Davidson, “How big is the federal workforce? Much bigger than you think,” *Washington Post*, Oct. 3, 2017, <https://www.washingtonpost.com/news/powerpost/wp/2017/10/03/how-big-is-the-federal-workforce-much-bigger-than-you-think/>.

⁴⁸⁷ Kristin Tate, “The sheer size of our government workforce is an alarming problem,” *The Hill*, April 14, 2019, <https://thehill.com/opinion/finance/438242-the-federal-government-is-the-largest-employer-in-the-nation>.

⁴⁸⁸ Valerie Bauman, “The Job Creators: Largest Employers in Every State Revealed – and Walmart Dominates in Nearly Half The Country,” *Daily Mail*, Mar. 22, 2019, <https://www.dailymail.co.uk/news/article-6840017/The-job-creators-Largest-employers-state-revealed-Walmart-dominates.html>.

⁴⁸⁹ Chandy Testimony, *Washington Briefing*, p. 22; Katz Testimony, *Washington Briefing*, p. 134.

⁴⁹⁰ Katz Testimony, *Washington Briefing*, p. 134.

⁴⁹¹ Equal Employment Opportunity Commission, *Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds*, Sept. 15, 2014, https://www.eeoc.gov/federal/reports/dismissals.cfm#I_proper_standard.

- 1) Appointed in the civil service by one of the following acting in an official capacity –
 - a. The President;
 - b. A Member or Members of Congress, or the Congress;
 - c. A member of a uniformed service;
 - d. An individual who is an employee under this section;
 - e. The head of a Government controlled corporation; or
 - f. An adjutant general designated by the Secretary concerned under section 7009(c) of title 32;
- 2) Engaged in the performance of a Federal function under authority of law or an Executive act; and
- 3) Subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.⁴⁹²

Many federal agencies also have contractors who are defined by Executive Order as:

an individual who performs work for or on behalf of any agency under a contract and who, in order to perform the work specified under the contract, will require access to space, information, information technology systems, staff, or other assets of the Federal Government. Such contracts, include, but are not limited to:

- (i) Personal services contracts;
- (ii) Contracts between any non-Federal entity and any agency; and
- (iii) Sub-contracts between any non-Federal entity and another non-Federal entity to perform work related to the primary contract with the agency.⁴⁹³

EEOC has noted that many harassment complaints are dismissed because the complainant was found to be a contractor, rather than a federal employee, and thus, lack legal standing to file an

⁴⁹² Government Organization and Employees, Pub. L. 89-554, 80 Stat. 378 (codified at 5 U.S.C. § 2105).

⁴⁹³ Exec. Order No. 13,488, 74 Fed. Reg. 4111 (Jan. 11, 2009).

EEO complaint against the federal agency.⁴⁹⁴ As a part of its oversight function, EEOC may review an agency's final action or dismissal of a complaint, including a claim of harassment and also, may also review its own decisions on appeal.⁴⁹⁵ At times, the Office of Federal Operations, on behalf of the Commission has ruled in favor of the complainant to reconsider the claim, even if the agency (or previous commission decision) had classified them as a contractor.⁴⁹⁶ At the Commission's briefing, Dexter Brooks, Associate Director of EEOC's Office of Federal Operations, stated that the issue with independent contractors is a "really tricky area" when it comes to determining if they are permitted to file a federal EEO claim.⁴⁹⁷

EEOC has issued guidance explaining the circumstances under which a federal contractor may be considered a "joint employee" (i.e., an individual who is employed by both the federal agency and a contracting firm).⁴⁹⁸ To aid in determining the status of an individual, EEOC has also set out a 15 factor test, known as the *Ma* factors, that was originally established in the case of *Ma v. Department of Health and Human Services*.⁴⁹⁹ EEOC investigators use this test when they are examining a federal sector discrimination or harassment claim.⁵⁰⁰

- 1) The employer has the right to control when, where, and how the worker performs the job.

⁴⁹⁴ 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.103; Equal Employment Opportunity Commission, Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds, Sept. 15, 2014, https://www.eeoc.gov/federal/reports/dismissals.cfm#I_proper_standard.

⁴⁹⁵ 29 C.F.R. § 1614.401 (appeals to the Commission); 29 C.F.R. § 1614.405 (decisions on appeals).

⁴⁹⁶ See e.g., *Complainant v. Department of State*, EEOC Request No. 0520110069 (April 26, 2012) (the fact that complainant worked under a blanket purchase agreement for the agency was not as relevant as the fact that the nature of the working relationship was such that the Agency retained a considerable degree of control over Complainant's job performance, establishing a de facto employer-employee relationship).

⁴⁹⁷ Brooks Testimony, *Washington Briefing*, pp. 21-22.

⁴⁹⁸ See Equal Employment Opportunity Commission, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002, December 3, 1997, <https://www.eeoc.gov/policy/docs/conting.html>; See also Equal Employment Opportunity Commission, Preserving Access to the Legal System (noting: "...a determination of joint employment requires an assessment of the comparative amount and type of control the "staffing firm" and the Agency each maintain over Complainant's work. Thus, a federal Agency will qualify as a joint employer of an individual if it has the requisite means and manner of control over the individual's work under the Ma criteria, whether or not the individual is on the federal payroll. See generally, *Complainant v. Department of the Army*, EEOC Appeal No. 01A45313 (March 16, 2006). It should be noted that the same type of analysis is used for other work relationships with agencies. See e.g., *Complainant v. Department of the Army*, EEOC Appeal No. 0120101877 (September 21, 2010) (agency found to be employer for the purposes of standing to bring a Part 1614 EEO complaint by a student volunteer).

⁴⁹⁹ *Ma v. Department of Health and Human Services*, Appeal Nos. 01962390, 01962390, Agency Nos. OEO-174-95, OEO-175-95, (May 29, 1998); see also *Serita B v. Department of the Army*, EEOC Appeal No. 0120150846 (November 10, 2016).

⁵⁰⁰ EEOC, *EEOC Compliance Manual*, No. 915.003, Section 2: Threshold Issues, <https://www.eeoc.gov/policy/docs/threshold.html>.

- 2) The work does not require a high level of skill or expertise.
- 3) The employer furnishes the tools, materials, and equipment.
- 4) The work is performed on the employer's premises.
- 5) There is a continuing relationship between the worker and the employer.
- 6) The employer has the right to assign additional projects to the worker.
- 7) The employer sets the hours of work and the duration of the job.
- 8) The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
- 9) The worker does not hire and pay assistants.
- 10) The work performed by the worker is part of the regular business of the employer.
- 11) The worker is not engaged in his/her own distinct occupation or business.
- 12) The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- 13) The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- 14) The employer can discharge the worker.
- 15) The worker and the employer believe that they are creating an employer-employee relationship.⁵⁰¹

Generally, these factors determine the relationship between workers with an employer, which “depends on whether the employer controls the means and manner of the worker's work.”⁵⁰²

⁵⁰¹ Ibid; the factors presented in *Ma v. Department of Health and Human Services* and the EEOC Compliance Manual, No. 915.003 are taken from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992). “In *Darden*, the Court adopted the ‘common law test’ for determining who qualifies as an ‘employee’ under the Employee Retirement Income Security Act of 1974 (ERISA). The *Darden* rationale applies under the EEO statutes because the ERISA definition of ‘employee’ is identical to that in Title VII, the ADEA, and the ADA. This test is used to determine whether an individual is an independent contractor or an employee, and whether an individual is employed by a particular entity.” Ibid., note 71.

⁵⁰² Ibid., Part 2-III, Covered Parties.

Attorney George Chuzi testified during the Commission’s briefing that while joint employees may not be paid by the federal agency, if the agency is providing equipment, managing the workload and tasks, and access to resources, then under the *Ma* factor test these employees, despite being categorized as contractors, should be regarded as joint employees and should be permitted to file EEO complaints.⁵⁰³ Elizabeth Tippet, Associate Professor, University of Oregon School of Law, testified at the EEOC’s “Reconvening of the Select Task Force on the Study of Sexual Harassment” that one strategy to protect these workers could be to change “the applicable tests for employment status in a way that would encompass gig workers” and “extend[] protections to workers regardless of their status as employees or independent contractors.”⁵⁰⁴

Civil rights advocates worry that federal agencies may also misclassify workers as contractors, thus depriving them of the civil rights protections offered to federal employees.⁵⁰⁵ Chuzi testified that in his over 40 years of experience practicing in anti-harassment and discrimination law, “I have not yet found an agency that would come to that conclusion [that a contractor was an employee] on its own. They will instead classify the employee as a contractor and only on appeal will the EEOC say no, they’re actually an employee.”⁵⁰⁶ For instance, in *Complainant v. Dept. of Air Force*, the complainant brought sexual harassment claims against the Air Force, but the agency’s EEO office initially dismissed her case stating that the complainant was not an employee and that the claims did not rise to the level to create a hostile work environment.⁵⁰⁷ However, upon appeal, the Director of EEOC’s Office of Federal Operations found that 9 of the 15 *Ma* factors showed that the Air Force was the complainant’s joint employer.⁵⁰⁸ The EEOC therefore reversed the dismissal,⁵⁰⁹ and required the agency to continue the administrative proceedings regarding the sexual harassment complaint.⁵¹⁰ In her written statement to the Commission, the National

⁵⁰³ Chuzi Testimony, *Washington Briefing*, p. 23.

⁵⁰⁴ Equal Employment Opportunity Commission, Task Forces, Testimony of Elizabeth C. Tippet, University of Oregon School of Law (June 11, 2019) https://www.eeoc.gov/eeoc/task_force/harassment/tippet.cfm.

⁵⁰⁵ Sunu Chandy, Legal Director, National Women’s Law Center, Written Statement for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019, at 14 (hereinafter Chandy Statement).

⁵⁰⁶ Chuzi Testimony, *Washington Briefing*, p. 23.

⁵⁰⁷ See *Complainant v. Department of the Air Force*, Appeal No. 012014207 (2015), <https://www.eeoc.gov/decisions/0120142407.txt>.

⁵⁰⁸ *Id.* at Issue 4 (“Factors 1 - 5, 7, 9 - 11, and 14 Indicate that the Agency Jointly Employed Complainant”).

⁵⁰⁹ *Developments at the EEOC: EEOC Overturns Dismissal in Passman & Kaplan Case*, Passman & Kaplan P.C., Feb. 13, 2015, <https://www.passmanandkaplan.com/blog/2015/02/developments-at-the-eeoc-eeoc-overturns-dismissal-in-passman-kaplan-case.shtml>; see also, Chandy Statement, at 14.

⁵¹⁰ Order, *Complainant v. Department of the Air Force*, Appeal No. 012014207 (E.E.O.C., Jan. 28, 2015), <https://www.eeoc.gov/decisions/0120142407.txt>.

Women’s Law Center’s Sunu Chandy stated that cases like these demonstrate the importance of EEOC monitoring the ways federal agencies classify employees to ensure that contractors and subcontractors who are working for the federal government are properly having their civil rights protections upheld.⁵¹¹

Debra Katz testified at EEOC’s “Reconvening of the Select Task Force on the Study of Sexual Harassment” that a number of measures that need to be taken in order to safeguard workers’ rights:

First, the existing criteria for categorizing employees should be properly enforced, ensuring that the current protections under Title VII reach all eligible workers. Looking beyond enforcement priorities, which are subject to drastic changes under different administrations, federal law must be amended to redefine “employees” to include all workers whose conduct is within the economic control of an employer. Without fundamental redefinition of employment protections, non-traditional workers will remain doubly vulnerable to harassment—more exposed to harm, and less empowered to secure any meaningful relief.⁵¹²

Paid versus Unpaid Interns

At the Commission’s briefing, EEOC’s Dexter Brooks explained that interns are also vulnerable to harassment and may not have the same protections as employees due to their employment status.⁵¹³ Paid and unpaid interns are treated differently under the law.⁵¹⁴ Unpaid interns, may or may not be considered employees and, therefore, their rights to bring a claim under Title VII may be limited.⁵¹⁵ In *O’Connor v. Davis*, a college student filed suit alleging that she was sexually harassed during her internship, but the Second Circuit held that O’Connor was not an employee based on her lack of compensation; and thus, did not have protections under Title VII.⁵¹⁶ The court ruled that compensation “is an essential condition to the existence of an employer-employee

⁵¹¹ Chandy Statement, at 14-15.

⁵¹² EEOC, Task Forces, Testimony of Debra S. Katz, Partner at Katz, Marshall & Banks LLP and Hannah Alejandro, Senior Counsel at Katz, Marshall & Banks LLP (June 11, 2019) https://www.eeoc.gov/eeoc/task_force/harassment/katz.cfm.

⁵¹³ Brooks Testimony, *Washington Briefing*, p. 22.

⁵¹⁴ EEOC Office of Legal Counsel letter to the public, Federal EEO Laws: When Interns May Be Employees, Dec. 8, 2011, https://www.eeoc.gov/eeoc/foia/letters/2011/eo_laws_when_interns_may_be_employees.html.

⁵¹⁵ Ibid; Jen Fifield, “Why Statehouse interns are especially vulnerable to sexual harassment,” *USA Today*, Feb. 24, 2018, <https://www.usatoday.com/story/news/2018/02/24/why-statehouse-interns-especially-vulnerable-sexual-harassment/363507002/>.

⁵¹⁶ *O’Connor v. Davis*, 126 F.3d 112 (2nd Cir. 1997).

relationship.”⁵¹⁷ Without direct or indirect remuneration from the employer, the court held that O’Connor’s Title VII claim failed.⁵¹⁸

Following *O’Connor*, the EEOC issued a guidance letter differentiating between paid and unpaid interns, and states that for unpaid or volunteer interns, coverage as an employee under EEOC-enforced laws depends on whether the individual receives some type of “significant remuneration.”⁵¹⁹ To potentially qualify as an employee, the remuneration does not have to come from the employer (in this case, the federal agency) and may come from a third party.⁵²⁰ For example, the EEOC found in favor of a complainant, who was a paid intern, when she filed against the Department of Defense despite the agency’s stance on her employment status.⁵²¹ On the other hand, the guidance letter explains that “an intern who receives only some small benefit that is an ‘inconsequential incident of an otherwise gratuitous relationship’ will not be an employee.”⁵²²

According to EEOC spokesperson Joseph Olivares, “at least with respect to the federal law that we enforce, an unpaid intern would not be legally protected by our laws prohibiting sexual harassment.”⁵²³ Moreover, the severity of the issue is unclear, because the EEOC does not track data on how many interns are sexually harassed at work.⁵²⁴ According to news reports, the lack of legal protections for unpaid interns is particularly troubling since interns rely upon recommendations and the networking opportunities that the internship provides them.⁵²⁵

⁵¹⁷ *Id.* at 115-16 (quoting *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990)) (further stating that: “This ‘essential condition’ of remuneration has been recognized in this Circuit as well. *Tadros v. Coleman*, 898 F.2d 10, 11 (2nd Cir. 1990).”).

⁵¹⁸ *Id.* at 119.

⁵¹⁹ EEOC Office of Legal Counsel letter to the public.

⁵²⁰ *Ibid*; see also EEOC, *EEOC Compliance Manual*, No. 915.003, part 2-III.A.1.c. Volunteers (discussing volunteers stating “[v]olunteers usually are not protected “employees.” However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance, workers’ compensation, and access to professional certification, even if the benefits are provided by a third party. The benefits constitute “significant remuneration” rather than merely the “inconsequential incidents of an otherwise gratuitous relationship.”).

⁵²¹ Brooks Testimony, *Washington Briefing*, p. 22.

⁵²² EEOC Office of Legal Counsel, letter to the public.

⁵²³ Blair Hickman and Christie Thompson, “How Unpaid Interns Aren’t Protected Against Sexual Harassment,” *ProPublica*, Aug. 9, 2013, <https://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment>.

⁵²⁴ *Ibid*.

⁵²⁵ See e.g., Blair Hickman and Christie Thompson, “How Unpaid Interns Aren’t Protected Against Sexual Harassment,” *ProPublica*, Aug. 9, 2013, <https://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment>; Vikki Ortiz Healy, “Sexually harassed interns often feel they have nowhere to turn,” *Chicago Tribune*, Nov. 25, 2011, <https://www.chicagotribune.com/news/ct-xpm-2011-11-25-ct-met-intern->

While unpaid interns may not be protected under federal civil rights laws, some private companies and state or local laws have started to extend workplace protections to them. For instance, in June 2013, Oregon became the first state to expand laws to protect both paid and unpaid interns from discrimination and harassment.⁵²⁶ The bill prohibits harassment and discrimination on the basis of race, religion, gender, disability, and sexual orientation and offers retaliation protections against wrongful termination tied to discrimination.⁵²⁷ According to Oregon Labor Commissioner Brad Avakian, “these principles of protecting people in the workplace have been in place for a long time, but they’ve never been applied to interns. It really left them with few options.”⁵²⁸

The late Representative Elijah Cummings introduced the Federal Employee Antidiscrimination Act of 2019, which included language that would not only extend reporting requirements for federal agencies, but also would extend protections to unpaid interns who worked at federal agencies and guarantee them the same protections as those given to federal employees.⁵²⁹ Cummings stated that:

I want to be clear that this bill responds to very real instances of interns being victimized within the federal government. Without this bill, victims would be forced to continue to rely on the discretion and integrity of the managers to prevent this behavior. I still say we can do better than that.⁵³⁰

Representative Virginia Foxx, a supporter of the bill, stated “discrimination disadvantages eager-to-work interns, but discrimination also disadvantages federal agencies by interfering with the selection of the best intern candidates.”⁵³¹ As of November 2019, the bill has been combined with the National Defense Authorization Act of 2020, which passed the House and Senate and is having its differences resolved in a conference committee.⁵³² There is an equally compelling rationale to ensure that both paid and unpaid interns work and begin their careers and formative professional experiences in harassment free environments.

[harassment-20111125-story.html](#); Jen Fifield, “Why Statehouse interns are especially vulnerable to sexual harassment,” *USA Today*, Feb. 24, 2018, <https://www.usatoday.com/story/news/2018/02/24/why-statehouse-interns-especially-vulnerable-sexual-harassment/363507002/>.

⁵²⁶ Or. Rev. State. § 259A.350 (2017), <https://www.oregonlaws.org/ors/659A.350>.

⁵²⁷ *Id.*

⁵²⁸ Hickman and Thompson, “How Unpaid Interns Aren’t Protected Against Sexual Harassment.”

⁵²⁹ Federal Employee Antidiscrimination Act of 2019, H.R. 135, 116th Cong. (2019-2020).

⁵³⁰ Katherine Tully-McManus, “House moves to protect federal interns from harassment and discrimination,” *Roll Call*, Jan. 15, 2019, <https://www.rollcall.com/news/congress/house-moves-protect-federal-interns-harassment-discrimination>.

⁵³¹ *Ibid.*

⁵³² Federal Employee Antidiscrimination Act of 2019, H.R. 135, 116th Cong. (2019-2020).

Anti-Harassment Policies

In FY 2003, in an attempt to establish consistency among federal agencies, the EEOC developed guidelines for what a model EEO program should look like. Part of that guidance (EEO Management Directive 715) established that agencies should have the following components in order to have an effective anti-harassment program:

- Demonstrated commitment from agency leadership;
- Integration of EEO into the agency's strategic mission;
- Management and program accountability;
- Proactive prevention of unlawful discrimination;
- Efficiency; and,
- Responsiveness and legal compliance.⁵³³

While federal agencies are responsible for establishing their own anti-harassment policies and maintaining their EEO offices, EEOC states that the EEO process is “designed to make individuals whole for discrimination that already has occurred through damage awards and equitable relief paid by the agency and to prevent the recurrence of the unlawful discriminatory conduct.”⁵³⁴ According to the EEOC model, anti-harassment programs established within federal agencies are intended to take “immediate and appropriate corrective action, including the use of disciplinary actions, to eliminate harassing conduct regardless of whether the conduct violated the law.”⁵³⁵ This is in part because EEOC does not have the ability to discipline a federal employee who is found to have committed discrimination nor does it have the ability to require an agency to discipline its employees for violation of anti-harassment policies.⁵³⁶ Thus, the purpose of an agency establishing

⁵³³ EEOC, Instructions to Federal Agencies for EEO MD-715, Section I, The Model EEO Program, <https://www.eeoc.gov/federal/directives/715instruct/section1.html> (last modified July 20, 2004).

⁵³⁴ EEOC, *Model EEO Programs Must Have An Effective Anti-Harassment Program*, https://www.eeoc.gov/federal/model_eeo_programs.cfm# (last accessed Mar. 13, 2020); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Clarke v. Department of Justice*, EEOC Appeal No. 01922561 (1992).

⁵³⁵ EEOC, *Model EEO Programs Must Have An Effective Anti-Harassment Program*.

⁵³⁶ *Ibid.*, note 10 (“*In West v. Gibson*, 527 U.S. 212, 222 (1999), the Supreme Court concluded that EEOC may award compensatory damages to complainants in the administrative EEO process. It found that although waivers of sovereign immunity must be interpreted narrowly, the federal government waived its immunity from suits for compensatory damages in discrimination claims in 1991 amendments to Title VII. Title VII makes no reference to allowing courts or the EEOC to order discipline for its employees, or similar corrective action. The EEO process

a clear and appropriate anti-harassment program is to prevent harassing conduct before it rises to the level of becoming “severe or pervasive.”⁵³⁷

At the Commission’s briefing, Dexter Brooks testified that from 2014-2016 the EEOC undertook a concerted effort to review anti-harassment programs of each federal agency under the EEOC jurisdiction to determine if the programs were effective. EEOC found that a vast majority of federal agencies still had ineffective anti-harassment programs, predominately due to missing “essential components” in their programs, not adequately implementing policies, or clear communication with employees.⁵³⁸ He stated that during the past two years EEOC received an increase in its budget, which allowed it to spend more time focusing on anti-harassment programs with federal agencies over the last few years.⁵³⁹ As Sunu Chandy testified, this increase is seen as positive by many in the civil rights community, because “it is only through increased staffing that EEOC can properly fulfill its mission.”⁵⁴⁰

Disciplinary Actions and Role of the Merit Systems Protection Board

A federal agency may want to address harassing conduct by taking disciplinary action against an employee. By statute, an agency may take an adverse (or disciplinary) action against an employee in advance of “the efficiency of the service.”⁵⁴¹ An agency must provide notice to an employee of the behavior that is the cause for the action, provide the opportunity for the employee to respond, and then provide a written decision with specific reasons for the action taken.⁵⁴² For disciplinary actions under this section, the agency’s actions must be supported by a preponderance of the evidence, meaning that the evidence reflects a likelihood more likely than not that the agency’s findings are supported.⁵⁴³ In determining the appropriate disciplinary action, the agency should consider the nature and seriousness of the offense, the employee’s job level, past disciplinary record, past work record, effect on the employee’s ability to perform the job, consistency of the

may not be capable of providing the same corrective action that an agency could impose upon its own employees through an internal anti-harassment policy.”)

⁵³⁷ Ibid.

⁵³⁸ Brooks Testimony, *Washington Briefing*, p. 13.

⁵³⁹ Brooks Testimony, *Washington Briefing*, p. 28.

⁵⁴⁰ Chandy Testimony, *Washington Briefing*, p. 15.

⁵⁴¹ 5 U.S.C. § 7513.

⁵⁴² *Id.*

⁵⁴³ 5 U.S.C. § 7701(c)(1)(B). Preponderance of the evidence means “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

penalty, notoriety of the offense, warning about the conduct, potential for rehabilitation, and any mitigating circumstances.⁵⁴⁴

If the employee disagrees with the agency's disciplinary action, and it falls within the Merit Systems Protection Board's jurisdiction, the employee may appeal the decision to the Board. The Board has jurisdiction over adverse actions – removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less.⁵⁴⁵ The Board does not have jurisdiction over a decision to reassign an employee, assuming the reassignment was to a job with the same series and grade, because such a reassignment is not considered an adverse action.⁵⁴⁶

When setting out the specific reasons for the action being taken, an agency is not required to label the charge of misconduct. But, if an agency does provide a label for the conduct taken by the employee, then the agency has to prove that element. Proving elements can become complex if an agency uses a label that has a specific meaning in a statute or is defined in more than one place. For example, if an agency labels conduct as “sexual harassment,” this term may be defined in agency policy as well as by EEOC policy. This can result in a situation where an agency that uses the term “sexual harassment” in a charge may be required to prove that the conduct meets a formal definition, regardless of whether that was the charging official's intent. In *Booker v. Department of Veterans Affairs*, neither the notice of proposed action nor notice of the decision defined the phrase “sexual harassment.”⁵⁴⁷ As a result, the agency was required to prove the Title VII definition because the agency's policy referenced Title VII, meaning the agency had to prove that the conduct was “unwelcome, severe or pervasive” and apply the objective reasonable person test, and that the misconduct was so “hostile” that it adversely affected the conditions of employment of another employee.

On the other hand, if the agency uses a more generic charge, such as “engaging in inappropriate conduct of a sexual nature” or “inappropriate conduct,” then there are no specific elements for the agency to prove. For example, the National Aeronautics and Space Administration asserted that the employee had loaded and displayed sexually explicit material onto a government

⁵⁴⁴ *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 330-332 (1981), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253434&version=253721&application=ACROBAT>.

⁵⁴⁵ 5 C.F.R. § 1201.3 (MSPB has appellate jurisdiction over adverse actions, which includes terminations, reductions in grade or pay, suspensions for more than 14 days, or furloughs for 30 days or less for cause that promotes the efficiency of the service); see also U.S. Merit Systems Protection Board, Jurisdiction, <https://www.mspb.gov/About/jurisdiction.htm> (last accessed Mar. 13, 2020).

⁵⁴⁶ *Maddox v. Merit Systems Protection Bd.*, 759 F.2d 9 (Fed. Cir. 1985) (holding that when a reassignment does not reduce federal employee's grade or pay, the Merit Systems Protection Board lacks jurisdiction to hear appeal).

⁵⁴⁷ *Booker v. Veterans Administration*, 110 M.S.P.R. 72 (2008).

computer and exposed other employees to that material in violation of agency policy.⁵⁴⁸ The Board upheld the 35-day suspension.⁵⁴⁹

⁵⁴⁸ *National Aeronautics and Space Administration*, 65 M.S.P.R. 352, 357-58 (1994). See also e.g., *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 496-99 (1991) (Agency charged employee with sexual harassment and conduct unbecoming a Postal Service employee based on the same behavior. The Board found that the Postal Service had not proved all the elements of sexual harassment, but had proven that the unbecoming conduct – sexually explicit comments within earshot of other employees -- was unacceptable in the workplace and that the 30-day suspension was reasonable.); *Cisneros v. Department of Defense*, 83 M.S.P.R. 390, ¶¶ 5-7, 17-20 (1999) (holding that the agency proved its charge of “conduct unbecoming a federal employee” when it described the employee’s physical acts and statements that had a sexual component), aff’d 243 F.3d 562 (Fed. Cir. 2000); *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 561-63 (1994) (sustaining the agency’s decision to remove an employee for “conduct prejudicial to the Postal Service” when the employee hired a prostitute to pose nude in the workplace, arranged for the photographs to be published in a magazine, and informed others in the workplace of what he had done), aff’d 56 F.3d 1376 (Fed. Cir. 1995).

⁵⁴⁹ *National Aeronautics and Space Administration*, 65 M.S.P.R. 352, 357-58 (1994).

CHAPTER 3: EEOC'S ROLES IN ENFORCING PROTECTIONS AGAINST SEXUAL HARASSMENT IN THE FEDERAL SECTOR

This chapter discusses the role of EEOC in the federal sector regarding the issue of sexual harassment. EEOC serves several critical roles in the federal sector, through its oversight, issuance of guidance, and adjudication of EEO complaints. EEOC provides oversight to federal agencies regarding their role as employers by providing guidance about their complaint procedures and agency anti-discrimination policies, and identifying best practices that “cultivate model work environments.”⁵⁵⁰ In addition, although federal agencies must have their own internal complaint procedures,⁵⁵¹ EEOC may adjudicate a formal complaint if a complainant requests an EEOC hearing. Additionally, EEOC’s decisions also help set the legal standards.⁵⁵² EEOC also has an important role in collecting data, and this chapter begins with a summary of the data that the Commission received and analyzed, then evaluates EEOC’s other federal roles.

Federal Sector Data and Trends

As discussed in Chapter 2, the No FEAR Act of 2002 requires each federal agency to annually track and post summary statistical data regarding complaints of employment discrimination that have been filed by employees, former employees, and applicants for employment.⁵⁵³ These data must be submitted annually to Congress, the Department of Justice, the Office of Management and Budget, as well as EEOC.⁵⁵⁴ Data that must be reported annually include the number of complaints, number of individuals filing them, the various bases of alleged discrimination, time for resolution, number of complaints dismissed, and the number of final actions that included findings of discrimination.⁵⁵⁵ Each agency must also post online (on their webpage) comparative data showing

⁵⁵⁰ See e.g., EEOC, “Best Practices for Employers and Human Resources/EEO Professionals,” <https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm>; Brooks Testimony, *Washington Briefing*, p. 18.

⁵⁵¹ 29 C.F.R. § 1614.104.

⁵⁵² See 29 C.F.R. § 1614.109; Brooks, testimony, *Washington Briefing*, p. 18.

⁵⁵³ See No FEAR Act, Pub. L. 107-174, 116 Stat. 566 (codified as amended 5 U.S.C. §301); see also 29 C.F.R. Subpart G §§1614.701 – 1614.707.

⁵⁵⁴ See e.g., 29 C.F.R. § 1614.704 *et. seq.*

⁵⁵⁵ 29 C.F.R. § 1614.704.

trends over the preceding five fiscal years,⁵⁵⁶ and EEOC must post data about the number of hearings, Administrative Judge decisions, appeals, and findings of discrimination.⁵⁵⁷ (For further information on the complaint adjudication process, see Chapter 2, Chart 6).

At the Commission's briefing, EEOC's Dexter Brooks testified that with additional funds EEOC could increase its "ability to manage data and help agencies track trends" in "real time."⁵⁵⁸ A majority of the matters currently addressed by EEOC focus on "bad actions" that have already happened, but EEOC would like to "have access to data and trends" in order to identify problem areas or "hot spots."⁵⁵⁹ Brooks testified that EEOC does not have the capability to identify and isolate a potential issue to review with their current resources.⁵⁶⁰

EEOC has posted on their website the total aggregated federal data on sexual harassment starting from 2002.⁵⁶¹ At the Commission's November 2018 briefing, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*, Carol Miaskoff, Associate Legal Counsel at EEOC, testified that federal charges alleging sexual harassment increased by approximately 13 to 14 percent in 2018 compared to 2017.⁵⁶² EEOC further noted that according to data submitted by federal agencies, from fiscal year 2015 to fiscal year 2018, there was a 36 percent increase in reported sexual harassment complaints (502 to 685).⁵⁶³

Across all federal agencies, EEOC reports that in fiscal year 2018 there were a total of 7,733 non-sexual harassment complaints and 685 sexual harassment complaints, which increased from the previous year (from 6,975 and 585, respectively).⁵⁶⁴ As discussed previously, hostile work environment claims can be understood as a type of sexual harassment, but the conduct is not overtly sexual in nature.⁵⁶⁵ Breaking the EEOC numbers down by gender show that women filed

⁵⁵⁶ 29 C.F.R. § 1614.705.

⁵⁵⁷ 29 C.F.R. § 1614.707.

⁵⁵⁸ Brooks Testimony, *Washington Briefing*, p. 27.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*, 28.

⁵⁶¹ See Equal Employment Opportunity Commission, "Equal Employment Opportunity Data Posted Pursuant to the No Fear Act," <https://www.eeoc.gov/eeoc/statistics/nofear/index.cfm> (last accessed, Mar. 13, 2020).

⁵⁶² Carol Miaskoff, Associate Legal Counsel, EEOC, testimony before U.S. Commission on Civil Rights, "Are Rights a Reality? Evaluating Federal Civil Rights Enforcement," Nov. 2, 2018, *Briefing Transcript*, p. 34.

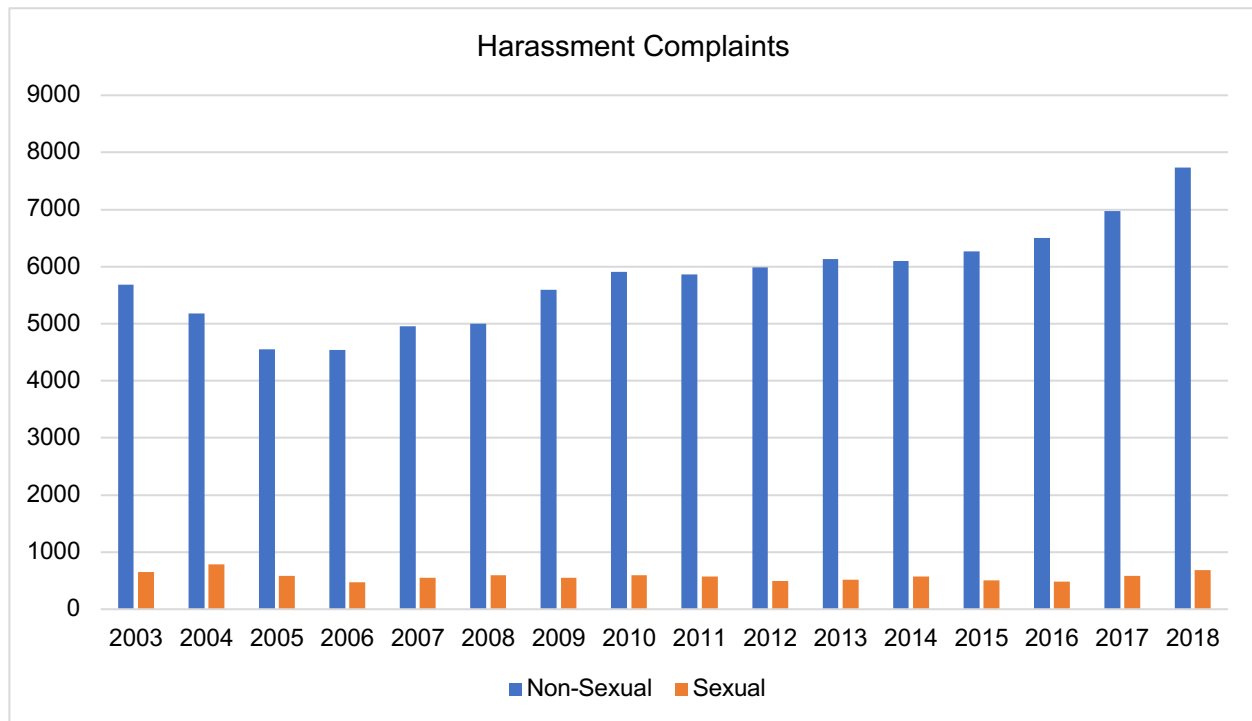
⁵⁶³ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 15.

⁵⁶⁴ See Equal Employment Opportunity Commission, Form 462 Complaints Tables, Federal Sector Reports, <https://www.eeoc.gov/federal/reports/tables.cfm>; see also, Chart 1 in Chapter 1 for trend data.

⁵⁶⁵ 29 C.F.R. §1604.11(a)(3); and see Equal Employment Opportunity Commission, "Sexual Harassment," https://www.eeoc.gov/laws/types/sexual_harassment.cfm.

far more harassment complaints both sexual and non-sexual than men. In 2018, women filed 2,232 non-sexual harassment complaints and 508 sexual harassment complaints; comparatively men filed 886 non-sexual and 118 sexual harassment complaints.⁵⁶⁶ Similar to previous research, EEO data show that non-sexual harassment complaints compared to sexual harassment complaints accounted for more harassment claims every year since 2003 (see chart 7).

Chart 7: Federal Sector Harassment Complaints (2003-2018)



Source: EEOC, Federal Sector Reports, <https://www.eeoc.gov/federal/reports/index.cfm>

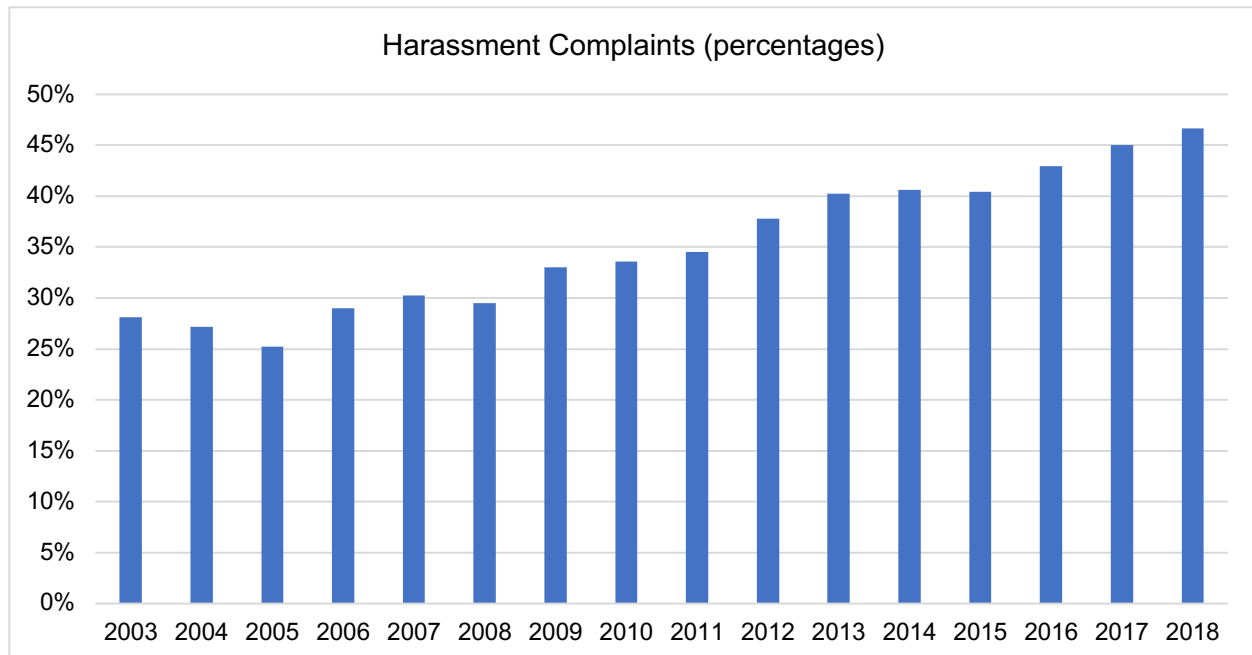
As of September 30, 2018 (most current data available), data on complaints by issue showed that sexual harassment complaints accounted for about 7.1 percent of complaints by issue for that year.⁵⁶⁷ For the majority of the other years since 2003, non-sexual harassment complaints have accounted for over a quarter to a half of complaints every year (see chart 8). Nonetheless, Louise Fitzgerald testified that even with these numbers being reported to EEOC, it is difficult to discern the scope of the problem since individuals who report harassment are “by definition, kind of

⁵⁶⁶ See Equal Employment Opportunity Commission, Form 462 Complaints Tables, B-8 FY 2018, Federal Sector Reports, <https://www.eeoc.gov/federal/reports/tables.cfm>.

⁵⁶⁷ EEOC breaks data down by “complaints by basis” and “complaints by issue.” These data are reporting the EEO “complaints by issue” numbers. EEOC’s No FEAR Act reporting does not disaggregate the data by basis and issue together (e.g., does not report demographic information on the complainants who file complaints).

outliers.”⁵⁶⁸ As discussed previously, while sexual harassment may be prevalent in many workplaces, very few individuals report incidents.⁵⁶⁹

Chart 8: Federal Sector Harassment Complaints (percentages)



Source: EEOC, Federal Sector Reports, <https://www.eeoc.gov/federal/reports/index.cfm>

After a complainant files a formal EEO complaint, the agency has 180 days to investigate the alleged harassment.⁵⁷⁰ Once the agency’s investigation has completed, a complainant has two choices: either request the agency to issue a final agency decision (FAD) as to whether it found that discrimination has occurred or request a hearing before an EEOC Administrative Judge.⁵⁷¹ If the agency issues a FAD finding no discrimination or if a complainant disagrees with some part of the decision, the individual maintains the right to appeal the decision to the EEOC or challenge the decision in federal district court.⁵⁷²

⁵⁶⁸ Fitzgerald Testimony, *Washington Briefing*, p. 106

⁵⁶⁹ See e.g., Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, “Employer’s Responses to Sexual Harassment,” Center for Employment Equity at the University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>.

⁵⁷⁰ EEOC, Overview of Federal Sector EEO Complaint Process, https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last accessed Mar. 13, 2020).

⁵⁷¹ Ibid.

⁵⁷² Ibid.

According to EEOC data for this investigation's timeframe, across the federal government, there were a total of 7 final agency decisions released that showed findings of discrimination in sexual harassment cases in FY 2018.⁵⁷³ This was an increase of findings from FADs in FY 2017, but a decrease from 2016 (6 and 10, respectively).⁵⁷⁴ In terms of non-sexual harassment cases, a similar trend emerged. In fiscal year 2018, there were 14 findings of discrimination from FADs, which was an increase from FY 2017, but a decrease from FY 2016 (16 and 22, respectively).⁵⁷⁵

Alternatively, if a complainant elects an EEOC hearing, then the individual must request a hearing within 30 days from receiving notice from the agency.⁵⁷⁶ Upon the request, an EEOC Administrative Judge is assigned to the case and will conduct a hearing, make a decision, and order relief if discrimination is found. Once the Administrative Judge has issued a decision, the agency has 40 days to issue a decision (final order), where it states to the complainant whether it agrees with the decision and whether it will grant the relief.⁵⁷⁷ The agency also maintains the right to appeal the Administrative Judge's decision to the EEOC. At this stage, the complainant has the right to appeal the final order, which includes a final order that dismisses the case, to the EEOC's Office of Federal Operations. The appeal must be filed within 30 days upon the receipt of the decision.⁵⁷⁸

The No FEAR Act also requires EEOC to post government-wide statistical summary data regarding complainants' hearing requests and appeals that are filed with EEOC.⁵⁷⁹ According to EEOC, these data are intended to assist Congress, federal agencies, and the public to assess if agencies are living up to their EEO responsibilities.⁵⁸⁰

Analyzing hearing data from 2010 through October 1, 2019 (most current available data) indicates that harassment claims (specifically non-sexual complaints) accounted for a majority of hearing requests for most years during that time frame. Specifically, examining the years since 2010, data show that the number of requested hearings has increased each year (see chart 9).

⁵⁷³ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, Interrogatory 14, p. 16.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

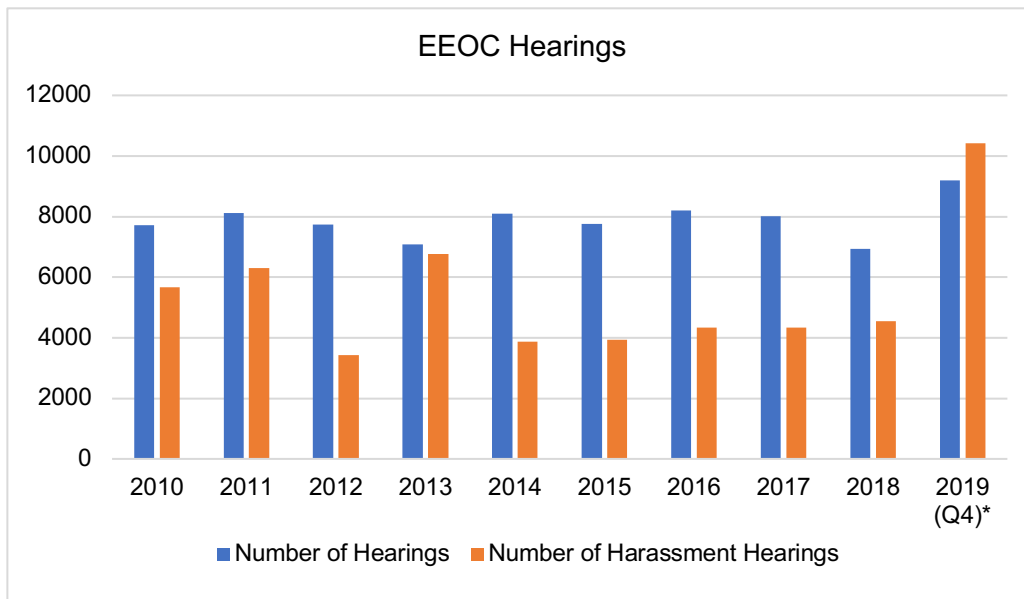
⁵⁷⁶ EEOC, Overview of Federal Sector EEO Complaint Process.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ 29 C.F.R. § 1614.707.

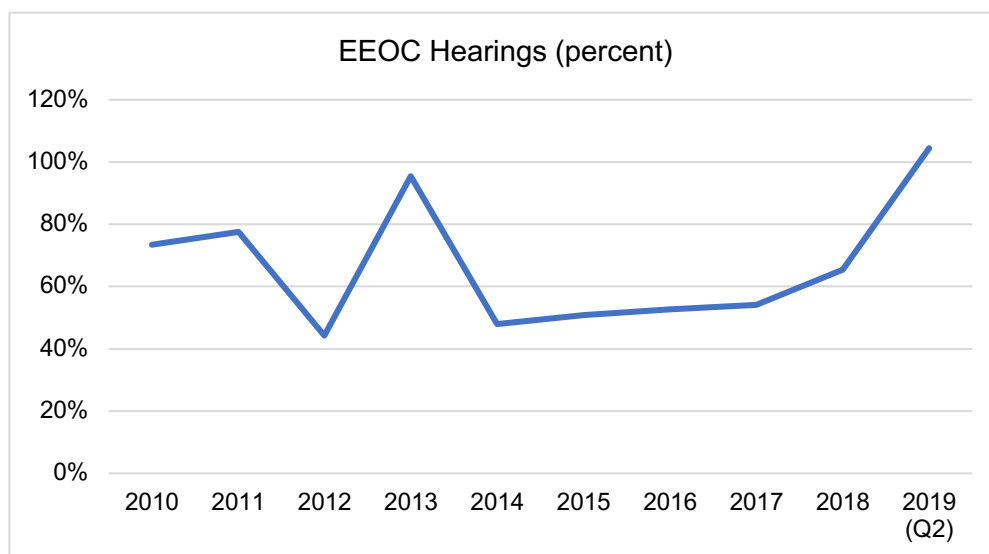
⁵⁸⁰ *Id.*

Chart 9: EEOC Hearings (FY 2010-FY 2019 Q4)

*The Commission recognizes that number of harassment hearings for 2019 (Q4) accounts for more than the total number of harassment hearings, but these data are recreated from the EEOC's data charts.

Source: EEOC No FEAR Act Reporting, <https://www.eeoc.gov/eeoc/statistics/nofear/index.cfm>

Data also show that harassment hearings account for almost 50 percent or more of the number of EEOC hearing requests (see chart 10). Further, comparing harassment hearings to other issues (e.g., evaluation/appraisal, pay/overtime, termination), thus far in 2019, harassment hearings are the most common issue for which complainants have requested a hearing before the EEOC.

Chart 10: Harassment Hearings (FY 2010-FY 2019 Q2)

Source: EEOC No FEAR Act Reporting, <https://www.eeoc.gov/eeoc/statistics/nofear/index.cfm>

In sexual harassment cases in particular, EEOC data show that a finding of discrimination is more likely to be issued when the complainant chooses a hearing. EEOC codes harassment data according to different categories than the definitional categories of sexual harassment found in Chapter 1 of this report. EEOC breaks out these data as follows: (1) first, EEOC data isolates sexual harassment cases to only those that are sexual in nature, i.e., those involving sexual coercion, quid pro quo, and sexual advances; and (2) second, EEOC also collects data on hostile work environment cases and puts them in another category called “non-sexual” (see table 4).⁵⁸¹

Table 4: Administrative Judge Rulings in Sexual Harassment Hearings (2010-2019)

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019 (Q4)
Total Harassment Hearings: Sexual*	344	412	161	295	185	232	239	200	246	599
Total Harassment Findings of Discrimination: Sexual*	4	4	0	8	3	0	1	1	2	4
Total Harassment Hearings: “Non-sexual”**	5331	5880	3263	6467	3695	3706	4092	4135	4292	9815
Total Harassment Findings of Discrimination: “Non-Sexual”	27	34	14	23	10	9	7	7	5	16

Source: EEOC, <https://www.eeoc.gov/eeoc/statistics/nofear/hearings.cfm>

*Sexual: any harassment with sexual connotation

**Non-sexual: harassment on any of the protected bases except those actions with a sexual connotation; hostile work environment claims

Although “non-sexual” (hostile environment) harassment complaints accounted for a large percentage of EEOC hearing requests, few cases ended in a finding of discrimination. For example, only .17 percent of “non-sexual” (hostile environment) hearings resulted in findings of discrimination in fiscal years 2016 and 2017, and this decreased to .11 percent in fiscal year 2018. Comparatively, a relatively higher percent of “sexual” cases resulted in findings of discrimination across all three years (.42, .50, and .41 percent, respectively). But notably, in some of the prior years, there were zero findings of discrimination in the “sexual” cases.

While EEOC posts these data in accordance with the No FEAR Act, it does not offer justifications on the rulings. At the Commission’s briefing, Dexter Brooks, the Associate Director of EEOC’s

⁵⁸¹ See EEOC, Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints User’s Instruction Manual, Fiscal Year 2016 Report, at 225.

Office of Federal Operations, offered some explanation. He testified that when analyzing cases in which there was a finding of discrimination, four common general trends emerge:

1. Isolated work environments are vulnerable to bad behavior;
2. One gender-dominated workplaces have increased vulnerability;
3. Ineffective anti-harassment programs increase risk of repeated harassment and organizational liability; and
4. Organizations fail to take the adequate personnel actions to address the conduct that is underlying the harassing behavior.⁵⁸²

Isolating just sexual harassment complaints for the investigation's timeframe shows that settlements with benefits were the most common resolution reported, which can include monetary (e.g., compensatory damages, attorneys' fees) or non-monetary benefits (e.g., promotion, apologies, training, restoration of leave, reassignment) (see table 5).

Table 5: Resolutions of Sexual Harassment Hearings (FY 2016-2018)

	2016	2017	2018	Total
Withdrawals with Benefits	4	1	2	7
Settlements with Benefits	86	83	87	256
No Discrimination Finding Issued through Summary Judgement	15	22	38	75
Discrimination Finding Issued through Summary Judgement	1	2	0	3
No Discrimination Finding Issued through Hearing	0	0	1	1
Discrimination Finding Issued through Hearing	3	8	6	17
Total Sexual Harassment Hearings Resolutions	109	116	134	359

Source: Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 27.

During this investigation's time frame (fiscal year 2016-2018), EEOC's Office of Federal Operations received 75 appeals from alleged sexual harassment complaints that were dismissed by federal agencies at the accept/dismiss stage.⁵⁸³ Of these appeals, the Office of Federal Operations reversed 44 agency dismissals regarding sexual harassment complaints and remanded the EEO

⁵⁸² Brooks Testimony, *Washington Briefing*, p. 12.

⁵⁸³ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 25.

complaint for further processing.⁵⁸⁴ According to the EEOC, these reversals were primarily due to the agency misapplying the criteria for dismissal. For instance, the Office of Federal Operations found that “in 20 of the reversals the agencies erred in dismissing for failure to state a claim, and in 15 of the reversals the agencies erred in finding untimely counselor contact.”⁵⁸⁵ Of these reversed agency dismissals in this time frame, the Office of Federal Operations issued five decisions applying the *Ma* factors to sexual harassment cases and finding contractors could proceed.⁵⁸⁶

EEOC states that in federal sector appeals, in fiscal year 2018, awards in sexual harassment cases increased by more than 180 percent for total monetary relief of \$443,066.⁵⁸⁷ By comparison, in fiscal year 2017, EEOC issued only two findings of discrimination on the issue of sexual harassment with a total monetary relief of \$156,925 for that year.⁵⁸⁸ This amount was a decrease from the previous year, where EEOC issued six findings of discrimination on the issue of sexual harassment and due to the increased findings, the total monetary relief was \$489,256 for fiscal year 2016.⁵⁸⁹

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 25; *see infra* notes 172 – 184 for the discussion on the *Ma* factors.

⁵⁸⁷ Equal Employment Opportunity Commission, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm>

⁵⁸⁸ Email correspondence with Commission staff and EEOC, Sept. 27, 2019. The EEOC further explains that:

Broadly speaking, the amount of monetary relief is roughly tied to the number of findings of sexual harassment discrimination issued by the EEOC in findings of sexual harassment discrimination for these years. However, it is important to note that a number of factors play into the relief available after each finding of sexual harassment discrimination, including: the nature and severity of the harm; whether the conduct was ongoing; whether the agency took steps to correct its actions; whether the employee mitigated the harm (by getting another job, for example); and the extent to which the discrimination impacted the complainant’s career and life -- such as whether the employee suffered pain and suffering and whether the complainant is entitled to back pay, front pay, or retroactive promotion. The EEOC weighs all of these factors when making awards of relief.

The figures above also reveal how the total relief obtained can be affected by how complainants pursue their claims – those represented by an attorney may be entitled to reasonable fees, which will vary depending on the expertise of the attorney and complexity of the case, while those who represent themselves or choose a union steward or non-attorney representative will not be entitled to such fees. Ibid.

⁵⁸⁹ Ibid.

EEOC reported that it also awarded other benefits to the victims of sexual harassment, such as restored pay, job referrals, compensatory damages, or fringe benefits. These totals also increased from \$10,025,380 in fiscal year 2016 to \$17,009,571 in fiscal year 2018.⁵⁹⁰

Caps on Monetary Damages and Lack of Legal Counsel

Another criticism of the federal process regarding sexual harassment stems from financial caps on damages and the lack of punitive damages that can be awarded if harassment is found to have in fact occurred.⁵⁹¹ Federal law sets limits on the amount of combined compensatory and punitive damages available in intentional employment discrimination lawsuits based on the size of the employer: for employers with 15-100 employees, the limit is \$50,000; for employers with 101-200 employees, the limit is \$100,000; for employers with 201-500 employees, the limit is \$200,000; for employers with more than 500 employees, the limit is \$300,000.⁵⁹² Critics of these caps further argue that they are problematic as they have not been adjusted since they were first passed in 1991, despite the fact that attorneys' cost have substantially increased over this 30-year period.⁵⁹³ Though available to private employees, punitive damages are barred entirely for federal workers.⁵⁹⁴

Katz explained that for attorneys, “most of our work is done with statutory fees or on a contingency fee basis. [And] the reality is most individuals cannot afford legal fees.”⁵⁹⁵ In fact, the TIME'S UP Legal Defense Fund, which provides legal assistance and funds for sexual harassment victims, reported that federal sector workers make up one of the top five groups who seek assistance from the Fund.⁵⁹⁶ Further, Katz explains that in federal sexual harassment cases “you're looking at the fact that the caps are low, there are no punitive damages, the delays are enormous, the process is

⁵⁹⁰ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 28-30.

⁵⁹¹ 42 U.S.C. 1981a (b).

⁵⁹² *Id.* at (b)(3). Note, that “intentional discrimination” in this context means disparate treatment. It does not imply that there is a standard of proof to determine intentionality. *Id.* Note: Since the federal government is considered one employer, so in federal sector cases the \$300,000 cap will always apply.

⁵⁹³ See e.g., Bureau of Labor Statistics, “Lawyers,” Occupational Outlook Handbook,” <https://www.bls.gov/ooh/legal/lawyers.htm#tab-1>; National Association for Law Placement, Inc., “What Do New Law Graduates Who Go into Private Sector Practice Earn? A 25-Year Retrospective,” NALP Bulletin, Oct. 2018, <https://www.nalp.org/1018research>; EEOC, *Enforcement Guidance: Compensatory and Punitive Damages*, July 14, 1992, <https://www.eeoc.gov/policy/docs/damages.html>; Civil Rights Act of 1991, S.1745, 102nd Congress (1991-1992), <https://www.congress.gov/bill/102nd-congress/senate-bill/1745>.

⁵⁹⁴ 42 U.S. Code § 2000e-16b; Katz Statement at 16.

⁵⁹⁵ Katz Testimony, *Washington Briefing*, p. 126-27.

⁵⁹⁶ TIME'S UP Legal Defense Fund Factsheet, March 1, 2019, https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2018/10/2019.03.04-Final_nwlc_TimesUpOneSheet.pdf; see also, Chandy Statement at 4.

Byzantine, the results are really often quite uncertain, these are cases that most plaintiff's lawyers do not take. And it makes access to legal counsel very, very difficult."⁵⁹⁷ Similarly, Chuzi testified to the hardships that both client and the firm have to take on in some federal sector cases. He stated that at his firm, he has had to "carry" federal worker's attorneys' fees, which he considers "extraordinary," and added "who's got the resources for a ten-year legal battle against the United States of America essentially?"⁵⁹⁸

This issue is another significant hurdle for complainants because it may limit their options to seek legal counsel. Katz argued that the lack of resources and the lack of proper counsel is a grave concern because "[l]egal representation is central to the vindication of civil rights. And in the context of sexual harassment specifically, barriers to access can seriously erode protections of workers who already face unique personal and professional harms."⁵⁹⁹

The lack of legal counsel not only forces complainants to navigate the complicated system and laws on their own, but it also deprives them of an advocate during the EEO process, whereas the accused federal employer may have representation as the agency is a party to the proceedings.⁶⁰⁰ The lack of a victim advocate throughout the process can take a significant toll on the complainant, especially since the offices that are likely to be involved in these claims (e.g., Office of the General Counsel, Human Resources office) will be advocating on behalf of the agency. At the Commission's briefing, Congresswoman Jackie Speier testified that in federal sector cases the harasser has an "unfair advantage" over the harassed "because typically – certainly it was the case in Congress – the House counsel represented the office of the member and the victim was on their own."⁶⁰¹ Sunu Chandy testified that in federal sector cases there is an inherent "conflict of interest," because the EEO process "does not seem to be set up in a way that the employee has an advocate... maybe if the individual has an attorney, that would be different, but to have to navigate [] all of these [] systems alone – that's the issue that came up again and again when I spoke to attorneys who represent federal workers."⁶⁰²

⁵⁹⁷ Katz Testimony, *Washington Briefing*, pp. 126-27.

⁵⁹⁸ Chuzi Testimony, *Washington Briefing*, p. 40

⁵⁹⁹ Katz Testimony, *Washington Briefing*, p. 127.

⁶⁰⁰ See e.g., 29 C.F.R. §§ 1614.109 (hearings before administrative judge; agency is party); 1614.110 (final action by agencies includes notifying complainant as to whether the agency will fully implement the administrative judge's decision; agency has duty to notify the complainant as to right to appeal to the EEOC or to file a civil action in federal court); 5 U.S.C. § 7702(a)(2)(EEOC procedures involving federal agencies); see also 5 U.S.C. § 7702(a)(2)(EEOC procedures involving federal agencies) deals with the Merit Systems Protection Board which sometimes has jurisdiction over personnel actions related to a discrimination claim.

⁶⁰¹ Speier Testimony, *Washington Briefing*, p. 23.

⁶⁰² Chandy Testimony, *Washington Briefing*, p. 20.

Similarly, the Association of Women in Science's Heather Metcalf also testified to these seemingly unequal procedures stating that:

In talking with people across all the sectors and in the [Science, Technology, Engineering, and Mathematics] STEM disciplines, there's this desire to believe that there's justice in this situation, and a lot of time the decision ends up coming down to [] resources... Whether that's emotional resources because this takes a toll, health resources, financial resources, other kinds of support that are there. So, having an advocate who is genuinely on the side of a person who's experiencing this is really important. A lot of people also expect that HR would have that role, and then find that HR is there to protect the institution. So that's one more situation that they find themselves in, where they're disappointed and this is not really the way things work. Justice isn't really a thing that exists in this process. It comes down to who can hire the best attorney, and then I have to decide whether I'm going to walk away.⁶⁰³

EEOC's Technical Assistance and EEO Complaint Processing Guidance

EEOC's role is to provide leadership and guidance to agencies regarding internal agency EEO programs and ensure that agencies are complying with EEOC regulations.⁶⁰⁴ EEOC also provides technical assistance to federal agencies regarding the agencies' EEO programs, conducts training, provides guidance and assistance to Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.⁶⁰⁵

Through its Commission Management Directives (a form of agency guidance),⁶⁰⁶ EEOC sets the parameters for agency policies regarding counseling, investigations, and EEO structure.⁶⁰⁷

⁶⁰³ Metcalf Testimony, *Washington Briefing* pp. 73-74.

⁶⁰⁴ See Executive Order 12,067, 43 FR 19807 (1978).

⁶⁰⁵ *Id.*; Equal Employment Opportunity Commission, Federal Sector, <https://www.eeoc.gov/federal/index.cfm>.

⁶⁰⁶ Guidance fits in the hierarchy of the federal legal system as follows: At the top level are statutes, in which Congress provides authority to agencies; statutes are legally binding. Next, federal regulations implement statutes and are legally enforceable. Third, agency guidance "may explain how regulations are implemented," but guidance is not legally binding. U.S. Gov't Accountability Office, Statement of Michelle A. Sager, Director, Strategic Issues, Testimony Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes*, GAO-15-834-T, p. 6, Figure 1: Hierarchy of Statutory and Regulatory Authority (Sept. 23, 2015), <https://www.gao.gov/assets/680/672687.pdf>.

⁶⁰⁷ See EEOC, Management Directive 715; EEOC, Management Directive 110.

EEOC's enforcement powers include issuing rules and regulations,⁶⁰⁸ approving national and regional equal employment opportunity plans, and taking some steps to ensure compliance with rules and regulations.⁶⁰⁹ In the private, state, and local sectors, EEOC's authority includes investigation and conciliation of charges brought by workers or by an EEOC Commissioner alleging discrimination, as well as the litigation authority to bring individual, class, and systemic pattern or practice cases in federal court.⁶¹⁰ During the fiscal years studied, the EEOC has actively filed lawsuits challenging sexual harassment in the private sector. For example, of seven harassment lawsuits EEOC filed one week in August 2018, five involved allegations of sexual harassment.⁶¹¹

EEOC has oversight responsibilities with the authority to review, approve, and evaluate federal agencies' equal opportunity plans and affirmative action programs, and to review and evaluate the operation of all federal sector EEO programs.⁶¹² At the Commission's briefing, the EEOC's Dexter Brooks testified that the agency has authority to audit or conduct a program evaluation of federal agencies' EEO programs. "We have an audit function, where we go in and we do a more aggressive type of IG [Inspector General] look where we make recommendations and we put them on a compliance plan and monitor what they're doing. We can't force them to do it, but we can stay on their cases."⁶¹³ According to EEOC's responses to the Commission's interrogatories, the Office of Federal Operations typically conducts two in-depth agency-specific program evaluations every year on selected federal EEO programs.⁶¹⁴

⁶⁰⁸ Executive Order 12,067, 43 FR 19807 (1978); Michelle A. Sager, Director, Strategic Issues, Testimony Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Processes*, GAO-15-834-T, p. 6, Figure 1: Hierarchy of Statutory and Regulatory Authority (Sept. 23, 2015), <https://www.gao.gov/assets/680/672687.pdf>.

⁶⁰⁹ Executive Order 12,067, 43 FR 19807 (1978); Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 1-4.

⁶¹⁰ 29 C.F.R. Part 1601, Subpart B, §§ 1601.6 – 1601.29; *see also* Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 2.

⁶¹¹ *See* Press Release, EEOC Files Seven More Suits Against Harassment: Agency Charges Harassment and Retaliation Across the Country, Aug. 9, 2018, <https://www.eeoc.gov/eeoc/newsroom/release/8-9-18h.cfm>.

⁶¹² Executive Order 12,067, 43 FR 19807 (1978); Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 4.

⁶¹³ Brooks Testimony, *Washington Briefing*, p. 36. We note that during the time of this study's investigation and the writing of the report, the EEOC reviewed the Commission's EEO program and made a number of recommendations to the agency. The Commission is actively implementing the recommendations by the EEOC.

⁶¹⁴ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 17.

In addition, EEOC requires agencies to annually report information regarding activities taken in enforcing their equal employment opportunity programs under Title VII on EEOC Form 715.⁶¹⁵ This information includes a description of the specific agency's Title VII program measured up against the model programs identified by EEOC, description of self-assessment activities, and identification of barriers to ensuring equal employment opportunities.⁶¹⁶ EEOC requires each agency to evaluate internal policies, procedures, and practices to determine if the agency's leadership can do more to demonstrate a commitment to equal employment opportunity. If the agency identifies barriers to equal opportunity (e.g., identifies prejudice or discrimination in personnel practices or policies), the agency must take steps to eliminate the barrier and work to demonstrate the agency's commitment to equal participation in the workforce.⁶¹⁷ EEOC is then responsible for analyzing the data and identifying gaps or programmatic deficiencies and conducting site visits every three years on average.⁶¹⁸

While the EEOC does not directly report when an agency's EEO program is deficient to Congress, the agency does issue an annual report to Congress that identifies select deficiencies within federal agencies, such as timeliness of processing EEO matters.⁶¹⁹ EEOC staff also have periodic meetings with Congressional committees and the Government Accountability Office (GAO) to provide detailed information regarding deficiencies within particular federal agencies.⁶²⁰

Under Executive Order 12,067, EEOC is also responsible for coordinating the federal government's efforts to prevent and reduce discrimination in the workplace.⁶²¹ Specifically, EEOC is required to review regulations and other EEO policy-related documents before they are issued to ensure consistency in the Federal government's effort to combat workplace discrimination.⁶²² The agency states that while federal laws concerning workplace discrimination are enforced by different federal agencies, it is important that the government has laws and policies that are

⁶¹⁵ See EEOC, Management Directive 715 at Part C; Brooks Testimony, *Washington Briefing*, p. 11-12.

⁶¹⁶ EEOC, Management Directive 715 at Part C (IV).

⁶¹⁷ EEOC, Management Directive 715 at Part A(IV).

⁶¹⁸ Brooks Testimony, *Washington Briefing*, pp. 35-36.

⁶¹⁹ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 18.

⁶²⁰ *Ibid.*

⁶²¹ Executive Order 12,067, 43 FR 19807 (1978), <https://www.eeoc.gov/federal/eo-12067.cfm>.

⁶²² *Id.* at § 1-303; see also "EEOC Coordination of Federal Government Equal Employment Opportunity," Equal Employment Opportunity Commission <https://www.eeoc.gov/federal/coordination.cfm> (accessed Aug. 21, 2019).

consistent among all of its agencies to ensure that workers know their rights and how to protect themselves if discrimination does occur.⁶²³

EEOC's Sexual Harassment Guidance

EEOC's 1990 *Policy Guidance on Current Issues of Sexual Harassment* was issued four years after the Supreme Court's decision in *Meritor v. Vinson*, and states that [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct impacts the employment of an individual.⁶²⁴ This Guidance is still in force. The agency drafted an updated guidance on unlawful harassment and submitted it to the Office of Management and Budget (OMB) on January 10, 2017, but OMB has not yet finalized it, and therefore, it has not been issued as a final agency guidance.⁶²⁵ As drafted, the guidance would include explanations of protections based on sexual orientation and gender identity.⁶²⁶

While relying on federal case law distinguishing criteria for proving quid pro quo or hostile work environment harassment, the EEOC guidance also states that investigations into allegations of sexual harassment should not be limited and should consider all evidence and testimony.⁶²⁷ The 1990 Guidance spends some time discussing the issue of whether behavior was welcome. When determining whether an act was welcome, EEOC looks “at the record as a whole and at the totality

⁶²³ Equal Employment Opportunity Commission, EEOC Coordination of Federal Government Equal Employment Opportunity,” <https://www.eeoc.gov/federal/coordination.cfm> (last accessed Mar. 13, 2020).

⁶²⁴ EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, 1990, <https://www.eeoc.gov/policy/docs/currentissues.html> (hereafter cited as EEOC, *Policy Guidance Sexual Harassment*).

⁶²⁵ See EEOC, *Proposed Enforcement Guidance on Unlawful Harassment*, Jan. 10, 2017, <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>; Chris Opfer, “White House Leaves Harassment Guidance in Limbo,” *Bloomberg Law*, June 13, 2018, <https://news.bloomberglaw.com/daily-labor-report/white-house-leaves-harassment-guidance-in-limbo>.

⁶²⁶ See EEOC, *Proposed Enforcement Guidance on Unlawful Harassment*, Jan. 10, 2017, <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>.

⁶²⁷ EEOC, *Policy Guidance Sexual Harassment*, at A. To note, experts in the field talk about “gender-based harassment” which while not formally recognized as a “type” of sexual harassment by the EEOC, behaviors that would constitute this type of harassment would most often fall under the category of hostile work environment. See e.g., Metcalf Testimony *Washington Briefing*, p. 59; Louise F. Fitzgerald, Sandra Shullman, Nancy Bailey, Margaret Richards, Janice Swecker, Yael Gold, Mimi Ormerod, & Lauren Weitzman, “The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace,” *Journal of Vocational Behavior*, vol. 32, no. 2, (1988), 152–175, (describing gender-based harassment); Emily Leskinen, Lilia Cortina, & Dana Kabat, “Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work,” *Law and Human Behavior*, vol. 35, no. 1, (2011), at 32.

of circumstances.”⁶²⁸ Specific to sexual harassment, EEOC “recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct.”⁶²⁹ Citing federal regulations, the guidance states that if the complainant delayed in complaining about the harassment, the investigation must determine the reason for the delay, and the relevance of whether the complainant reported will vary depending on the nature of the sexual advances.⁶³⁰ EEOC provides the following example:

Charging Party (CP) alleges that her supervisor subjected her to unwelcome sexual advances that created a hostile work environment. The investigation into her charge discloses that her supervisor began making intermittent sexual advances to her in June, 1987, but she did not complain to management about the harassment. After the harassment continued and worsened, she filed a charge with EEOC in June, 1988. There is no evidence CP welcomed the advances. CP states that she feared that complaining about the harassment would cause her to lose her job. She also states that she initially believed she could resolve the situation herself, but as the harassment became more frequent and severe, she said she realized that intervention by EEOC was necessary. The investigator determines CP is credible and concludes that the delay in complaining does not undercut CP's claim.⁶³¹

In evaluating evidence of harassment, in the 1990 Guidance, EEOC acknowledges harassing sexual conduct may appear consensual or may occur in private or be unacknowledged.⁶³² But it also states that in the *Meritor v. Vinson* case, although “the Court said the gravamen of a sexual harassment claim is that the alleged sexual advances were “unwelcome,””⁶³³ “the Supreme Court made clear that voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry ‘is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.’”⁶³⁴ EEOC advises investigators to “question the charging party and the alleged harasser in detail, to interview other relevant parties, to make appropriate credibility

⁶²⁸ See 29 C.F.R. § 1604.11(b); EEOC, *Policy Guidance Sexual Harassment* at A.

⁶²⁹ EEOC, *Policy Guidance Sexual Harassment*, at A.

⁶³⁰ *Id.*, citing 29 C.F.R. § 1604.11(b).

⁶³¹ *Id.*

⁶³² EEOC, *Policy Guidance Sexual Harassment*, at A.

⁶³³ *Id.*, citing *Meritor v. Vinson*, 477 U.S. 57, 68 (1986).

⁶³⁴ *Id.*, citing *Meritor*, 477 U.S. at 68 and “See also Commission Decision No. 84-1 (‘acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual’).”

assessments, and to search for corroborating evidence of parties' claims."⁶³⁵ Among other relevant individuals, testimony may be obtained from anyone who observed the complainant's demeanor immediately after the alleged harassment and those with whom the complainant discussed the incident.⁶³⁶

In determining whether the unwelcome sexual conduct creates a hostile environment, EEOC notes that a key question is whether the alleged conduct unreasonably interferes with the complainant's work performance or creates "an intimidating, hostile, or offensive working environment."⁶³⁷ EEOC utilizes the "reasonable person" standard to evaluate harassment claims, and advises that investigators should give consideration to the context surrounding the alleged harassment.⁶³⁸ The reasonable person standard is an objective standard that also considers the victim's perspective and is not based on assumed standards of behavior. In 1990, EEOC noted in its guidance that "a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant;"⁶³⁹ however, the agency maintains that in 2019, particularly given the heightened attention to sexual harassment over the recent years, most people would no longer consider these behaviors as harmless or insignificant.⁶⁴⁰

EEOC has clarified that, in contrast to a "quid pro quo" case, which may involve a single sexual advance tied to the granting or denial of employment benefits, a "hostile environment" case usually requires more than a single sexual incident. If the single incident is unusually severe, such as intentional touching of a complainant's intimate body areas, the EEOC identifies less need to demonstrate repeated acts of harm.⁶⁴¹ If the sexual harassment is verbal in nature, an EEOC investigation will seek to understand the "nature, frequency, context, and intended target of the remarks."⁶⁴² EEOC believes that a woman "does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment."⁶⁴³

⁶³⁵ EEOC, Policy Guidance Sexual Harassment, at B.

⁶³⁶ *Id.*

⁶³⁷ 29 C.F.R. § 1604.11(a)(3).

⁶³⁸ EEOC, Policy Guidance Sexual Harassment, at C.

⁶³⁹ *Id.* at C(1).

⁶⁴⁰ EEOC, Affected Agency Review Responses to the Commission on draft report, Nov. 14, 2019 [on file].

⁶⁴¹ EEOC, Policy Guidance Sexual Harassment, at C(2).

⁶⁴² *Id.* at C(3).

⁶⁴³ *Id.*

The 1990 EEOC Guidance encourages employers to conduct sexual harassment prevention by taking steps “such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under [T]itle VII, and developing methods to sensitize all concerned.”⁶⁴⁴ The guidance also states that, among other things, the policy should be clear and communicated often with staff, encourage complainants to come forward, and not require complainants to first complain to an offending supervisor.⁶⁴⁵

EEOC Best Practices to Reduce Sexual Harassment

As the EEO enforcer and oversight agency for the federal government, the EEOC recommends several “best practices” that federal agencies should follow to help prevent and address sexual harassment in their workplaces. Some of these practices include:

- Employees who are responsible for receiving sexual harassment complaints should take employee complaints seriously.
- Managers and supervisors should have easy-to-understand and realistic methods for dealing with harassment or harassing conduct that they observe, that is reported to them, or of which they have knowledge or information. Including practical suggestions on how to respond to different levels and different types of offensive behavior, and clear instructions on how to report harassing behavior up the chain of command.
- Internal reporting systems should provide timely responses and investigations.
- The EEO system should provide a supportive environment where employees feel safe to express their views and do not experience retribution.
- Investigators should be well-trained, objective, and neutral, especially where investigators are internal employees.
- The privacy of both the accuser and the accused be protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation.
- Investigators document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all relevant parties.
- Employers should remain alert for any possibility of retaliation against an employee who reports harassment and take steps to ensure that such retaliation does not occur.
- Agencies’ harassment policies should include a statement assuring employees that individuals who make complaints or provide information related to complaints, witnesses,

⁶⁴⁴ *Id.* at E(1) (citing 29 C.F.R. § 1604.11(f)).

⁶⁴⁵ *Id.*

and others who participate in the investigation of sexual harassment will be protected against retaliation.

- Agencies should ensure that their internal complaint system is easy to navigate and is a positive experience, since employees will be reluctant to report internally if an employee has had a negative experience.⁶⁴⁶

Addressing and preventing sexual harassment in workplaces is the responsibility of many individuals and each component has to be dedicated to ending the improper and negative behavior. In addition to the best practices outlined above, EEOC states that it is imperative that supervisors and managers are held responsible for monitoring and stopping harassment by employees who are under their supervision.⁶⁴⁷ Accountability is another essential component that senior leadership is responsible for managing to ensure that employees feel supported to report harassment. EEOC emphasizes that if a supervisor fails to respond to a report of harassment or fails to protect an employee from retaliation, then that supervisor needs to be held accountable. Further, if individuals who are responsible for investigating harassment complaints do not engage in a thorough and fair investigation or commence or conclude an investigation promptly, those individuals need to be held accountable. Similarly, if those individuals who are responsible for issuing corrective actions fail to take appropriate action when offending conduct is found, they should also be held accountable.⁶⁴⁸

At the Commission's briefing, panelists also offered several suggestions of best practices for the EEOC. For instance, Sunu Chandy, posited that sexual harassment claims should be "fast-tracked" or "triaged" in order to resolve these complaints faster, specifically agencies should "prioritize systemic or egregious matters for more prompt review."⁶⁴⁹ As discussed previously, sexual harassment complaints often take a significant time to reach a resolution; thus, she testified that "the EEOC could tell agencies that they are allowed to triage complaints, so at least the more egregious ones can be addressed in a more timely fashion."⁶⁵⁰ Chandy asserts that agencies take in complaints on a "first come, first serve [basis], which can seem fair, but actually these complaints run the gamut."⁶⁵¹ She maintains that this would make the federal sector process similar

⁶⁴⁶ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 11.

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid.

⁶⁴⁹ Chandy testimony, *Washington Briefing*, p. 40.

⁶⁵⁰ Ibid., 45.

⁶⁵¹ Ibid.

to the private sector that allows for triaging and handling of the more serious claims more immediately.⁶⁵²

Conversely, EEOC stated that it does not believe that sexual harassment complaints should be “fast-tracked” or “triaged” and argues that “expediting sexual harassment claims over other types of discrimination claims may suggest that such claims are more important than other types of discrimination claims, generally, and specifically, other types of harassment.”⁶⁵³ The agency also told the Commission that victims of sexual harassment in the federal sector already have access to other expedited processes, such as internal anti-harassment programs that the EEOC requires all federal agencies to maintain.⁶⁵⁴

Role of EEOC in the Federal Complaint Process

EEOC encourages federal employers, when they are made aware of sexual harassment, to take necessary action to end the harassment, attempt to make the complainant whole, and prevent the harassment from recurring.⁶⁵⁵ EEOC’s guidance reminds federal employers that the law (Title VII) requires the investigation of complaints or allegations of sexual harassment “promptly and thoroughly,”⁶⁵⁶ and that discipline against an offending supervisor or employee may range from a reprimand to discharge, and that the corrective action should match the harm of the conduct.⁶⁵⁷ EEOC may also be involved in their adjudication of the complaints filed by federal employees, through the hearings and appeals processes.

In the federal sector, EEOC handles, assesses, and makes determinations on claims based on federal law, the Code of Federal Regulations, Management Directives, and other guidance documents.⁶⁵⁸ As discussed in Chapter 2, whether a worker is eligible to file an EEO complaint in

⁶⁵² Ibid., 40.

⁶⁵³ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 12.

⁶⁵⁴ Ibid.

⁶⁵⁵ EEOC, Policy Guidance Sexual Harassment at E(1).

⁶⁵⁶ EEOC, Policy Guidance Sexual Harassment at E(2).

⁶⁵⁷ Ibid.; *Waltman v. International Paper Co.*, 875 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps). *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309-10, 44 EPD ¶ 37,557 (5th Cir. 1987) (the employer's remedy may be “assessed proportionately to the seriousness of the offense”).

⁶⁵⁸ See 29 C.F.R. Chapter XIV, Part 1614; EEOC; EEOC, *Management Directive 715*; EEOC, *Management Directive 110*; EEOC, Federal Sector Quality Practices for Effective Hearings, Appeals and Oversight, https://www.eeoc.gov/federal/quality-practices.cfm#_ftnref3 (accessed July, 31 2019).

the federal sector depends on whether the person is an employee or contractor.⁶⁵⁹ According to testimony from EEOC, the control test is applied to determine if the individual is eligible to have a complaint adjudicated; specifically, the control test looks for evidence “where the agency exercised exceeding control over their working conditions.”⁶⁶⁰ An EEOC informal discussion letter states that interns may or may not be covered and distinguishes between unpaid or volunteer interns and paid interns.⁶⁶¹ Unpaid or volunteer interns may be covered if they receive “significant remuneration” of some form (e.g., pension, insurance, workers’ compensation, or access to professional certifications).⁶⁶² Paid interns would be covered employees if the agency controlled the means and manner of their work.⁶⁶³ Testimony shared at the briefing alleged that many contractors are not protected because agency EEO offices do not apply all the factors of the control test and look only to who pays the paycheck; therefore, the complainant may not be protected unless the complainant appeals to the EEOC and seek the agency’s oversight and determination as to whether the complainant is covered under federal law.⁶⁶⁴ As also discussed above, at the Commission’s briefing, Sunu Chandy suggested that statutory protections should be expanded to include federal contractors and interns, while federal EEO practice should also be expanded to ensure all factors of the control test are applied.⁶⁶⁵ EEOC notes, however, that charges against federal contractors can be filed with EEOC using its charge filing procedures for the private sector.⁶⁶⁶

⁶⁵⁹ See *supra* notes Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), <https://www.eeoc.gov/policy/docs/conting.html>; *Ma v. Department of Health and Human Services*, Appeal Nos. 01962390, 01962390, Agency Nos. OEO-174-95, OEO-175-95, May 29, 1998, <https://www.eeoc.gov/decisions/01962389.txt>; see also, Brooks Testimony, *Washington Briefing*, p. 21; EEOC Compliance Manual, No. 915.003, Section 2: Threshold Issues, <https://www.eeoc.gov/policy/docs/threshold.html>.

⁶⁶⁰ Brooks Testimony, *Washington Briefing*, pp. 21-22.

⁶⁶¹ Equal Employment Opportunity Commission, “Federal EEO Laws: When Interns May Be Employees,” Dec. 8, 2011, https://www.eeoc.gov/eeoc/foia/letters/2011/eeo_laws_when_interns_may_be_employees.html.

⁶⁶² *Id.* (noting that even if volunteer or unpaid interns do not receive significant remuneration, they may be covered employees if their work is required for regular employment, or regularly leads to paid employment with that employer). Equal Employment Opportunity Commission, “Federal EEO Laws: When Interns May Be Employees,” Dec. 8, 2011, https://www.eeoc.gov/eeoc/foia/letters/2011/eeo_laws_when_interns_may_be_employees.html.

⁶⁶³ *Id.* (noting that other factors may also apply, such as whether the primary role of the paid intern was as a student); see also EEOC, Compliance Manual, Section 2: *Threshold Issues* 2-III.A.1, <http://www.eeoc.gov/policy/docs/threshold.html> (last modified Aug. 6, 2009) (listing relevant factors).

⁶⁶⁴ Chandy Testimony, *Washington Briefing*, pp. 16-17.

⁶⁶⁵ *Ibid.* See also *supra* notes 164-66 (discussing other factors of the control test such as *Ma*).

⁶⁶⁶ See EEOC, Affected Agency Review Responses to Commission on draft report, Nov. 14, 2019 [on file].

EEOC is one of few federal agencies that address intersectional discrimination claims – discrimination because of the combination of two or more protected bases.⁶⁶⁷ EEOC advises agencies to prevent the fragmentation of EEO claims to avoid related claims and materials from being processed separately. Agencies are advised to instead identify the overarching unlawful employment practice or policy by separating the claim from the evidence.⁶⁶⁸ For example:

A female employee complains to the EEO Counselor that she is being subjected to a hostile work environment due to the ongoing sexual harassment by her male co-workers. This is the complainant's legal claim. In support of this claim, the complainant tells the EEO Counselor of specific incidents of a sexual advance, a sexual joke and a comment of a sexual nature. These individual incidents are evidence in support of the complainant's claim and should not be considered as separate claims in and of themselves.⁶⁶⁹

Remedies and Enforcement Tools

This section discusses tools of federal agencies and the EEOC, all of which are influenced by EEO policy and decisions. According to federal regulations, when discrimination against an employee or applicant is found, the agency should provide full relief.⁶⁷⁰ Specific to an employee, agency relief should include but is not limited to, one or more of the following remedies:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back-pay computation where sovereign immunity has

⁶⁶⁷ See e.g., *Sauer v. Belfor USA Group, Inc.*, 205 F. Supp. 3d 209, 215 (D. Mass. 2016) (discussing aggregation of discrimination claims in the First Circuit).

⁶⁶⁸ EEOC, *Management Directive 110*, at Chapter 5, https://www.eeoc.gov/federal/directives/md-110_chapter_5.cfm.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ 29 C.F.R. § 1614.501 (a)(1)-(5) (“(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur; (2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur; (3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position; (4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and (5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.”).

been waived. The back-pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).⁶⁷¹

Although this language is broad, there are some limits. As discussed herein, under federal law, any monetary restoration of the aggrieved employee is limited to compensatory or actual damages.⁶⁷²

Under EEOC's regulations, the duty to "eliminate any discriminatory practice and ensure it does not recur" falls on the agency and not on EEOC.⁶⁷³ As discussed in Chapter 2, when agencies do take disciplinary action, the agency is also concerned about whether MSPB will uphold the action. According to Dexter Brooks, EEOC cannot order discipline of a manager who failed to act to eradicate harassment, but EEOC can order training, and the "whole management team to try to provide some remedy for the employee."⁶⁷⁴ EEOC decisions have ordered training and held agencies in contempt in egregious sexual harassment situations that evidence contempt or disrespect for the EEO process, including when a supervisor instructed the EEO manager to not investigate a complaint⁶⁷⁵ and when an Agency's Office of General Counsel interfered with the investigation.⁶⁷⁶ EEOC sometimes also recommends that an agency consider taking disciplinary

⁶⁷¹ 29 C.F.R. § 1614.501(c)(1)-(5).

⁶⁷² See *supra* notes 218-219.

⁶⁷³ 29 C.F.R. § 1614.501(c)(2).

⁶⁷⁴ Brooks Testimony, *Washington Briefing*, pp. 34-35.

⁶⁷⁵ *Taryn S. v. Dep't of Veteran Affairs*, EEOC Appeal No. 0120162172 (Sept. 14, 2018) (Director of office instructed EEO Manager to not investigate sexual harassment allegations by a medical support assistant against a doctor).

⁶⁷⁶ *Complainant v. Dep't of Defense*, EEOC Appeal No. 0120084008 (June 6, 2014) (The General Counsel's Office, which is responsible for defending the agency, "acted with gross impropriety" by interviewing witnesses before the EEO investigator, appearing to represent the employee responsible for harassing Complainant, and threatening to cancel Complainant's pre-approved leave in order to schedule a deposition).

action against a harasser.⁶⁷⁷ Brooks also stated that EEOC recommends that remedies be proportionate to the harm because the complainant might not come forward if the discipline is too drastic; the complainant might just want the harassment to stop and nothing more.⁶⁷⁸ National Women's Law Center's Legal Director Sunu Chandy agreed that the response should match the conduct at issue, but suggested that attention must be paid to the "transferring [of] harassers from agency to agency, location to location, as a common way of addressing the problem," claiming that this action continues to support the harm by transferring it to a new workplace.⁶⁷⁹ Additionally, Sunu Chandy asserts there should be a record of conversations, warnings, and actions taken by the agency, and agencies should pay attention to multiple factors including race when responding to complaints. Chandy testified that considering these factors is important because

[w]ho is going to be more likely to be disciplined or not disciplined often has racial implications. All of these pieces must be looked at holistically in coming up with a system to address complaints based on the seriousness, based on [] repeated complaints? Based on [if] there [are] multiple people who have come forward []? So all of these elements must be considered together, we cannot have an easy answer of save people's jobs or fire everyone. [It] is important to be nuanced and to consider all the equities. But at the end of the day, the workplace must know that the issues will be taken seriously and the employee who brought the complaint must be informed about what happened.⁶⁸⁰

An agency, Administrative Judge, or the EEOC may determine that the complainant is entitled to attorney's fees or costs.⁶⁸¹ If so, the complainant's attorney must then submit a verified statement of attorney's fees and the agency or Administrative Judge will determine the amount of fees due to the complainant based in part on that statement.⁶⁸² The decision will provide a notice of a right to appeal if the amount awarded is not deemed adequate by the complainant.⁶⁸³ However, as previously discussed, statutory limits on attorneys' fees in federal EEOC cases make it difficult for victims of sexual harassment to access counsel.⁶⁸⁴

⁶⁷⁷ See e.g., *Blanca B. v. Dep't of State*, EEOC Appeal No. 0120151876 (July 7, 2016) (recommending the Stat Department consider disciplinary actions after finding discrimination and sexual harassment based on sexual jokes and other workplace conduct).

⁶⁷⁸ Brooks Testimony, *Washington Briefing*, p. 33.

⁶⁷⁹ Chandy Testimony, *Washington Briefing*, p. 31.

⁶⁸⁰ *Ibid.*

⁶⁸¹ 29 C.F.R. § 1614.501(e)(2)(i).

⁶⁸² 29 C.F.R. § 1614.501(e)(2)(ii).

⁶⁸³ 29 C.F.R. § 1614.501(e)(2)(ii)(A).

⁶⁸⁴ See *supra* notes 591-98.

Compliance with EEOC orders is mandatory and the ordered relief should be provided within 120 days of receiving the final decision.⁶⁸⁵ Complainants are able to seek enforcement of an EEOC order by providing the Office of Federal Operations (OFO) with evidence of the agency's noncompliance with the decision. In response to a request for enforcement or on its own accord, OFO may issue a clarification for a prior decision, which does not change the original decision, but further explains the "meaning or intent" of the earlier decision.⁶⁸⁶ If OFO is not satisfied, the OFO Director will submit recommendations to the EEOC, or if directed by the EEOC submit the matter to the appropriate agency.⁶⁸⁷ EEOC is authorized to submit a notice to the head of any Federal agency that has not complied with the ordered relief to provide an explanation for the lack of compliance.⁶⁸⁸ In another limiting provision of its legal authority, EEOC may recommend discipline, but does not have the authority to order discipline, and must refer the matter out to the Office of Special Counsel for enforcement action.⁶⁸⁹ A "Memorandum of Understanding Between U.S. Office of Special Counsel and Equal Employment Opportunity Commission," (MOU) is currently used to facilitate compliance with EEOC orders.⁶⁹⁰ Proposed revisions to the No FEAR Act which passed the U.S. House in February 2019 and await action in the U.S. Senate include a provision requiring every finding of discrimination to be automatically referred to the Special Counsel, expanding the reach of the current efforts under the MOU.⁶⁹¹

If an agency continues to not comply with EEOC orders and EEOC has exhausted all administrative efforts to enforce agency compliance, EEOC will notify the complainant of the completion of administrative efforts and the right to file a civil action for enforcement.⁶⁹² EEOC may also order compliance with a settlement agreement, if it determines that the noncompliance is not due to the actions of the complainant.⁶⁹³ EEOC mandates that each agency utilize specific

⁶⁸⁵ See 29 C.F.R. § 1614.502(a); EEOC, *Management Directive 110*, at Chapter 9 (IX)(A).

⁶⁸⁶ 29 C.F.R. § 1614.503(c).

⁶⁸⁷ 29 C.F.R. § 1614.503(d).

⁶⁸⁸ 29 C.F.R. §1614.503(e).

⁶⁸⁹ See 29 C.F.R. §1614.503(f); Brooks Testimony, *Washington Briefing*, p. 34.

⁶⁹⁰ EEOC, *Memorandum of Understanding Between U.S. Office of Special Counsel And Equal Employment Opportunity Commission*, https://www.eeoc.gov/laws/mous/eeoc_osc.cfm (last accessed August, 12 2019).

⁶⁹¹ See Brooks Testimony, *Washington Briefing*, p. 33; H.R. 135, Federal Employee Antidiscrimination Act of 2019, <https://www.congress.gov/bill/116th-congress/house-bill/135/text>.

⁶⁹² 29 C.F.R. §1614.503(g).

⁶⁹³ 29 C.F.R. §1614.504(c).

language to notify the complainant of the right to file civil action in every final action or decision.⁶⁹⁴

In the private and public sector, when sexual harassment claims are resolved by settlement agreement, some employers may require victims to sign some form of nondisclosure agreement (NDA).⁶⁹⁵ This type of NDA creates a binding legal obligation on the victim to refrain from discussing the settlement – or even the harassment that gave rise to the complaint – with anyone not a party to the NDA.⁶⁹⁶ According to a *Harvard Business Review* article, these agreements can have a problematic effect on workplace anti-harassment efforts because employers can write NDAs using broad or ambiguous language that can leave victims confused about what they can and cannot say and fearful of being sued.⁶⁹⁷ By silencing victims, NDAs can work to shield serial harassers from reputational harm and leave future potential victims without any forewarning, thus enabling continued abuse.⁶⁹⁸

NDAs run the risk of interfering with the federal government's ability to investigate and prosecute cases of sexual harassment, by deterring victims from assisting authorities in future cases.⁶⁹⁹ The First Circuit acknowledged this risk in a 1996 decision when it held an NDA provision contained in a sexual harassment settlement agreement created a chilling effect for victims that improperly

⁶⁹⁴ EEOC, *Management Directive 110*, at Chapter 10, Part III(A) (“within 90 days of receipt of this final action or final decision (as appropriate) if no appeal has been filed, or within 90 days after receipt of the EEOC’s final decision on appeal, or after 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.”)

⁶⁹⁵ Elizabeth Harris, “Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short,” *New York Times*, June 14, 2019, <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html>.

⁶⁹⁶ Daniel Hemel, “How Nondisclosure Agreements Protect Sexual Predators,” *Vox* (updated Oct. 13, 2017), <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda>.

⁶⁹⁷ Orly Lobel, “NDAs Are Out of Control. Here’s What Needs to Change,” *Harvard Business Review*, Business Law (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change?utm_campaign=hbr&utm_source=twitter&utm_medium=social.

⁶⁹⁸ Stacy Perman, “#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases,” *Los Angeles Times*, Dec. 31, 2018, <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html>.

⁶⁹⁹ *Equal Empl. Opportunity Comm’n v. Astra U.S.A., Inc.*, 94 F.3d 738 (1st Cir. 1996); see also Public comment submission to Commission (correspondence with State Department employees who were hesitant to assist with the Commission’s investigation) [on file].

interfered with an EEOC investigation.⁷⁰⁰ That is why EEOC has a policy against the use of NDAs in settlements of EEOC claims.⁷⁰¹ EEOC's Regional Attorney's Litigation Manual states that:

[N]o individual can be required as a condition of obtaining relief on a Commission claim to agree to refrain from seeking future employment with the defendant *or to keep the terms of his or her recovery confidential*. As with the waiver of separate claims, a represented claimant can agree to such conditions, but his or her right to relief on the Commission's claims cannot be conditioned on such an agreement.⁷⁰²

EEOC also requires public release of all settlement terms, stating that this is because “one of the principal purposes of enforcement actions under the antidiscrimination statutes is to deter violations by the party being sued and other entities subject to the laws. Other entities cannot be deterred by the relief obtained in particular case unless they learn what the relief was.”⁷⁰³ While the EEOC and the First Circuit have limited the use of NDAs because of their chilling effect in settlement agreements, there is nothing that prevents private sector employers or federal agencies from continuing to utilize them. In fact, the Commission received public comment correspondence from State Department employees expressing hesitation about participating in the Commission's investigation because they were bound by NDA agreements.⁷⁰⁴

As of 2019, twelve states have passed legislation restricting or outright prohibiting the use of NDAs in instances of sexual harassment and assault.⁷⁰⁵ Though no similar measures have been taken at the federal level, Senators Kamala Harris (D-CA) and Lisa Murkowski (R-AK), and Representative Lois Frankel (D-FL) and several Republican House Members have introduced bipartisan legislation that would prohibit the use of NDAs in sexual harassment cases.⁷⁰⁶

⁷⁰⁰ *Id.*

⁷⁰¹ See EEOC, About EEOC, Litigation, Regional Attorney's Manual, A. Settlement Standards and Procedures, § 8(d) and (e), https://www.eeoc.gov/eeoc/litigation/manual/3-4-a_settlement_standards.cfm#section2e (accessed Nov. 25, 2019).

⁷⁰² *Id.* at § 8 (d) (emphasis added).

⁷⁰³ *Id.* at § 8(e).

⁷⁰⁴ *Equal Empl. Opportunity Comm'n v. Astra U.S.A., Inc.*, 94 F.3d 738 (1st Cir. 1996); see also Public comment submission to Commission (correspondence with State Department employees who were hesitant to assist with the Commission's investigation) [on file].

⁷⁰⁵ Elizabeth Harris, “Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short,” *New York Times*, June 14, 2019, <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html>.

⁷⁰⁶ S.575, EMPOWER Act, 116th Cong. (2019-2020), § 4, Prohibiting Nondisparagement and Nondisclosure Clauses that Cover Workplace Harassment, Including Sexual Harassment, <https://www.congress.gov/bill/116th-congress/senate-bill/575/text>; H.R. 1521, EMPOWER Act (companion bill), Co-sponsors,

Training and Other Tools

According to testimony, since the creation of EEOC, employer education about ways to eliminate harassment in the workplace has been an integral part of its charge. As a part of this mission EEOC offers no-cost outreach programs to federal agencies (as well as private companies) that provides general information about the agency, the laws it enforces, and the charge or complaint process.⁷⁰⁷ The agency also provides more in-depth training for a fee for federal government employees through the EEOC Training Institute.⁷⁰⁸ See table 6 below for an example of EEOC's 2019 available training courses. The EEOC states that its training is tailored for supervisors, EEO counselors and investigators, and agency representatives and attorneys.⁷⁰⁹ These training courses are meant to give EEO practitioners the knowledge and skills to understand EEO laws, how to meet federal training requirements for counselors, investigators, special emphasis program managers, and attorneys.⁷¹⁰ Lastly, EEOC has also developed other courses that were implemented for federal managers and anti-harassment program coordinators, in addition to EEO practitioners who are responsible for analyzing EEO barriers and drafting final agency decisions and letters of acceptance and dismissal.⁷¹¹

Table 6: EEOC Training Institute Courses (2019)

EEOC Training for New Counselors	Washington, D.C.	4.5 days	\$1,100 per participant
EEOC Training for New Investigators	Washington, D.C.	4.5 days	\$1,100 per participant
Drafting Acceptance and Dismissal Decisions	Washington, D.C.	2 days	\$625 per participant
Drafting Final Agency Decisions	Washington, D.C.	3 days	\$925 per participant

Source: EEOC Training Institute,

<https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2585d350&varPage=activity>

While EEOC training courses are a positive tool to help address harassment, unfortunately they also may be cost prohibitive for smaller federal agencies due not only to registration costs but also travel expenses if the agency is not located in the city where the training is being held. See table 7

<https://www.congress.gov/bill/116th-congress/house-bill/1521/cosponsors> (including Representatives Kayto (R-NY), Fitzpatrick (R-PA), Stefanik (R-NY), Gonzalez-Colon (R-PR), and 64 Democrats) (accessed Nov. 25, 2019).

⁷⁰⁷ “No-Cost Outreach Programs,” EEOC, <https://www.eeoc.gov/eeoc/outreach/nocost.cfm> (accessed Oct. 30, 2019).

⁷⁰⁸ Equal Employment Opportunity Commission, EEOC Training Institute, <https://eetraining.eeoc.gov/profile/web/index.cfm?PKWebId=0x2547b105>.

⁷⁰⁹ Ibid.; see also EEOC Training Institute, “Federal Programs,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547d970&varPage=agenda>.

⁷¹⁰ “No-Cost Outreach Programs,” EEOC, <https://www.eeoc.gov/eeoc/outreach/nocost.cfm> (accessed Oct. 30, 2019).

⁷¹¹ EEOC Training Institute, “Federal Programs,” <https://eetraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x2547d970&varPage=agenda>.

below for an example of EEOC’s fee-based training and no cost outreach over this investigation’s timeframe. For each of the years studied, agencies have taken advantage of both programs and participation has increased; however, the data provided by EEOC shows that it hosted one fewer free event in 2018 compared to 2017, but 4 more fee-based trainings.

Table 7: EEOC Training and Outreach

		2016	2017	2018
Fee-based Training	Events	128	137	141
	Number of Participants	3840	4110	5330
	Cost to agencies	\$789,000	\$948,250	\$969,700
No-Cost Outreach	Events	18	28	27
	Number of Participants	2040	3110	3360

Source: Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, Document Request 4.

EEOC’s employer education efforts have included relevant parts of the launch of the Select Task Force on the Study of Harassment in the Workplace in 2015, culminating in the release of a report in 2016.⁷¹² Further, in response to increased cultural awareness surrounding sexual harassment, EEOC has developed a “What to do if you believe you have been harassed at work” webpage to explain the various options that may be utilized by an individual who believes he or she may have experienced harassment.⁷¹³ EEOC states these efforts are intended to increase its role as an “enforcer, educator, and leader,” and that they continue to remain a top priority.⁷¹⁴

The Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace released a report of its findings and recommendations in June 2016.⁷¹⁵ The report focused on prevention of workplace harassment, identifying both the current efforts and areas for growth. The report

⁷¹² Equal Employment Opportunity Commission, *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> (hereafter cited as EEOC, Preventing Workplace Harassment).

⁷¹³ EEOC, Preventing Workplace Harassment; Equal Employment Opportunity Commission, *What You Should Know: What to Do if You Believe You have Been Harassed at Work*, https://www.eeoc.gov/eeoc/newsroom/wysk/harassed_at_work.cfm.

⁷¹⁴ EEOC, Preventing Workplace Harassment; Equal Employment Opportunity Commission, *What You Should Know: What to Do if You Believe You have Been Harassed at Work*, https://www.eeoc.gov/eeoc/newsroom/wysk/harassed_at_work.cfm.

⁷¹⁵ U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria Lipnic, Executive Summary and Recommendations, June 2016, 2, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf (hereafter cited as EEOC, Select Task Force on the Study of Harassment in the Workplace).

identified five fundamental principles that have been effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.⁷¹⁶

EEOC believes that these principles may enhance employers' compliance efforts.⁷¹⁷

Among all the tools, the EEOC Task Force emphasized the important role of employer leadership as follows:

The importance of leadership cannot be overstated—effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation.⁷¹⁸

In an effort to continue the conversation, EEOC reconvened the Select Task Force on the Study of Harassment in the Workplace in 2018 for a public meeting focused on finding ways to prevent

⁷¹⁶ EEOC, “Promising Practices for Preventing Harassment,” (citing Chai Feldblum and Victoria Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai Feldblum & Victoria Lipnic*, (2016)), <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

⁷¹⁷ The EEOC notes that while it cannot require employers to follow these practices, that “refraining from taking certain actions recommended here as promising practices may increase an employer’s liability risk in certain circumstances. For example, failing to develop and implement an adequate anti-harassment policy and complaint procedure may preclude an employer from establishing an affirmative defense to a supervisory harassment complaint, or a defense to a coworker harassment complaint.” See EEOC, *Promising Practices for Preventing Harassment*, (accessed Aug. 21, 2019), <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm#>.

⁷¹⁸ EEOC, “Promising Practices for Preventing Harassment,” (citing Chai Feldblum and Victoria Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai Feldblum & Victoria Lipnic*, (2016), at 7).

harassment in the workplace, discussing various reporting options and the role technology can play in increasing access to resources.⁷¹⁹

In 2018, EEOC also released a “Promising Practices for Preventing Harassment” fact sheet. This fact sheet recommended that employers adopt several proactive measures to prevent sexual harassment in workplaces, including, among other things, establishing “strong and comprehensive harassment policies” that are clearly and regularly communicated to all employees. The agency states that a robust sexual harassment policy that is supported and encouraged by leadership is an essential element of an effective harassment prevention strategy.⁷²⁰ Some of these recommendations include:

- Having a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;
- Regularly and effectively train all employees about the harassment policy and complaint system;
- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints;
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.
- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;

⁷¹⁹ EEOC, “A Reconvening of the Select Task Force on the Study of Harassment in the Workplace,” June 11, 2018, https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm.

⁷²⁰ See Equal Employment Opportunity Commission, “Promising Practices for Preventing Harassment,” <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.⁷²¹

In October 2017, EEOC Training Institute released two new trainings focused on eliminating harassment in the workplace. The first “Leading for Respect” focused on supervisors’ roles in preventing harassment; the second, “Respect in the Workplace” was created for all employees.⁷²² Both trainings discuss the value of bystanders being willing to report discrimination, and emphasize the importance of not “[] dwelling on legal standards and what NOT to do,” but to focus on “the words and actions that promote respect and fairness, and participants’ responsibility for contributing to respect in the workplace.”⁷²³ While there are no prominent studies evaluating bystander training efficacy in the federal sector, the utilization of the bystander methodology by EEOC is supported by numerous studies and best practice within the violence prevention industry.⁷²⁴

Further, EEOC wrote in response to the Commission’s interrogatory requests that while the agency supports bystander training, it offers the caveat that “it should be voluntary and may not be very useful in workplaces with pre-existing severe harassment problems.”⁷²⁵ At the Commission’s

⁷²¹ Ibid.

⁷²² Equal Employment Opportunity Commission Training Institute, *Harassment Prevention and Respectful Workplaces Training*, 2017, <https://eeotraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x25479b9f&varPage=attende> (hereafter cited as EEOC, Respectful Workplaces Training).

⁷²³ Equal Employment Opportunity Commission Training Institute, *Resect in the Workplace: Creating A Respectful Environment For All Employees*, 2017, https://eeotraining.eeoc.gov/accounts/register123/eeoc/events/website/Outline_All_Employees_Respect_in_the_Workplace.pdf.

⁷²⁴ Ann Coker, Heather Bush, Patricia Cook-Craig, Sarah DeGue, Emily Clear, Candace Brancato, Bonnie Fisher, Eileen Recktenwald, “RCT Testing Bystander Effectiveness to Reduce Violence,” *American Journal of Preventive Medicine*, vol. 52, no. 5 (May 2017), p. 566-578 (“Implementation of Green Dot in Kentucky high schools significantly decreased not only sexual violence perpetration but also other forms of interpersonal violence perpetration and victimization”); Claire Cain Miller, “Sexual Harassment Training Doesn’t Work. But Some Things Do.,” *New York Times*, Dec. 11, 2017, <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html>; Mark Diamond, “SDDC employees encouraged to become active bystanders,” U.S. Army, Nov. 21, 2013, https://www.army.mil/article/115485/sddc_employees_encouraged_to_become_active_bystanders.

⁷²⁵ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 8.

briefing, Debra Katz testified that she believed that bystander training is a critical part of addressing sexual harassment. She stated that:

Often, people are uncomfortable with the discrimination and sexual harassment they see in the workplace and they don't have the words to interrupt it. And people, not just the victim of harassment, but coworkers, feel very disempowered because they don't know how to step forward and they fear retaliation. And I think bystander training is a very vital part of this whole thing.⁷²⁶

Current trends in violence prevention focus on continuing technical trainings, but emphasize that in order to prevent harassment, a cultural shift to one of respect and equality must occur within the organization.⁷²⁷ The shift in the training techniques was reinforced by another hearing panelist. Sunu Chandy testified:

And the last thing I will just say in terms of making the system better is bystander training which goes to the larger point of changing the culture. [I]f you're going to bring a complaint to HR in the private or public sector, most people do not feel like this is someone who will be on my side, but rather feels like this is someone here to defend the employer. [C]reating a massive culture change where these complaints are welcomed, and everyone is on the same team of having a safe and effective workplace, [] still needs to be done.⁷²⁸

EEOC has also developed internal training protocols on how to properly investigate harassment charges and interview sexual harassment complainants. Further, the EEOC's external training programs address concerns such as implicit bias and cultural considerations "with some reference to stereotypes as a general matter, social messaging, and how that relates to implicit bias."⁷²⁹ For instance, EEOC's Respectful Workplace and Leading for Respect trainings specifically mention that there are pervasive stereotypes and pejorative societal notions about gender that have many associated implicit biases, which may contribute to harassment.⁷³⁰

EEOC reported to the Commission that in fiscal year 2018, it conducted 35 training sessions on "Leading for Respect" and "Respectful Workplaces" for 1,400 federal supervisors and non-

⁷²⁶ Katz Testimony, *Washington Briefing*, p. 136.

⁷²⁷ Claire Cain Miller, "Sexual Harassment Training Doesn't Work. But Some Things Do.," *New York Times*, Dec. 11, 2017, <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html>.

⁷²⁸ Chandy Testimony, *Washington Briefing*, pp. 40-41.

⁷²⁹ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 23.

⁷³⁰ *Ibid.*

supervisory employees.⁷³¹ EEOC states that the Respectful Workplaces training “teaches skills that promote and contribute to respect in the workplace, including how to step in when problematic behavior happens to others.”⁷³²

In June 2018, EEOC reconvened the Select Task Force for a public meeting in order to examine legal issues, barriers to reporting, and innovative strategies on how to better protect all workers from harassment.⁷³³ Several of the witnesses discussed concerns with harassment training practices. Elizabeth C. Tippet, Associate Professor, University of Oregon School of Law testified that these practices may not be as effective as commonly assumed:

In my own research, I reviewed training materials for several dozen harassment training programs in a number of formats. The trainings tended to conform to a genre, consisting of an authority figure presenting large quantities of legal information interspersed with examples of prohibited conduct. They tended to overemphasize sexual harassment and sexual misconduct, at the expense of gender-based harassment, and harassment on the basis of other protected categories. They did so to an extent that was out of step with EEOC statistics about the frequency with which claims are filed. The trainings also tended to overlook the relationship between harassment and discrimination, and thus failed to remind participants that inclusion of underrepresented groups is equally as important as the prohibition on harassment when those groups are included.⁷³⁴

Therefore, Tippet advocated for the creation of training and prevention measures that “encourage the kind of innovation, diversity approaches, and rigorous measurement that is currently lacking in the market today.”⁷³⁵

Similarly, Debra Katz asserted that “specific, clear, and accessible” mandatory training programs targeting every level of employee are necessary to prevent harassment in the work place. Katz

⁷³¹ Equal Employment Opportunity Commission, EEOC Responses to U.S. Commission on Civil Rights Interrogatories, Sept. 6, 2019, at 9.

⁷³² Equal Employment Opportunity Commission, “What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment,” (accessed, Aug. 21, 2019), <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm>.

⁷³³ Equal Employment Opportunity Commission, “A Reconvening of the Select Task Force on the Study of Harassment in the Workplace (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm.

⁷³⁴ United States Equal Employment Opportunity Commission, Task Forces, Testimony of Elizabeth C. Tippet, University of Oregon School of Law (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/tippet.cfm (internal citations omitted).

⁷³⁵ Ibid.

cited the fact that many victims testified that they endured prolonged harassment often because they did not know their rights or to whom to report such abuse.⁷³⁶

In 2018, witnesses at EEOC's "Reconvening of the Select Task Force" also discussed proposed state legislation on preventing and redressing sexual harassment of state government employees, many of which included a strong training component. For instance, Program Director in the Employment, Labor & Retirement program at the National Conference of State Legislatures (NCSL) Suzanne Hultin testified that NCSL found in 2018 that at least 20 states introduced new legislation to combat sexual harassment in the workplace.⁷³⁷ Hultin reported that:

Over 125 pieces of legislation have been introduced this year in 32 states. The response has varied from state to state. Some legislatures have conducted reviews of their internal sexual harassment policies and updated them in response to the renewed interest in the subject. Other states have made more sweeping changes. Notably, Illinois requires all state offices to have a written sexual harassment policy, to conduct mandatory sexual harassment training and require all lobbyists to attend training and to have a written sexual harassment policy in place at the time of registration.

Indiana passed legislation that mandates sexual harassment training for legislators and Virginia passed legislation mandating training for legislators and legislative employees and Maryland's new policy extends that training to all state employees and all registered lobbyists. In addition to passing direct legislation, numerous chambers created committees to examine their internal policies and procedures. California, Connecticut, Louisiana, Maryland, Minnesota and Washington, just to name a few, created committees and commissions to review their practices and update them when necessary. Finally, two legislators have been expelled by their chamber due to sexual harassment allegations and 15 more have resigned.⁷³⁸

While initiatives to train workers are positive, some researchers remain skeptical of whether training actually works to prevent and adequately address sexual harassment. At the Commission's

⁷³⁶ United States Equal Employment Opportunity Commission, Task Forces, Testimony of Debra S. Katz, Partner at Katz, Marshall & Banks LLP and Hannah Alejandro, Senior Counsel at Katz, Marshall & Banks LLP (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/katz.cfm.

⁷³⁷ United States Equal Employment Opportunity Commission, Task Forces, Testimony of Suzanne Hultin, National Conference of State Legislatures, (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/hultin.cfm.

⁷³⁸ United States Equal Employment Opportunity Commission, Task Forces, Testimony of Suzanne Hultin, National Conference of State Legislatures, June 11, 2018, https://www.eeoc.gov/eeoc/task_force/harassment/hultin.cfm. According to updated National Conference of State Legislatures numbers, in 2019, 29 states have introduced over 100 pieces of legislation. See National Conference of State Legislatures, "Legislation on Sexual Harassment in the Legislature," Feb. 11, 2019, <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx>.

briefing, Louise Fitzgerald testified that training can be unproductive because most trainings are conducted in a broad and general manner.⁷³⁹ She asserts that you cannot have workers “50 at a time and have them sit in a room and look at a slideshow and have a discussion by lawyers. It doesn’t work. And sometimes it’s counterproductive. It needs to be done in small groups; it needs to be interactive.”⁷⁴⁰ Similarly, Director of the Center for Employment Equity and professor of Sociology at University of Massachusetts, Donald Tomaskovic-Devey also testified that he is skeptical of training. He stated that much of the research on anti-bias training show that it does not work and that is in part

because it’s trying to change, kind of deep-seated cultural stuff. It’s a hard thing to change, especially in a couple of hours. Any of you have sat through it, painfully, probably know what I’m saying. Legal training is even worse. Legal training tends to produce backlash...Now that doesn’t mean there is no training that could work. [T]he kinds of things that [can work, such as] accountability, transparency, and [] formalization... these are things that decision makers and managers and workers can be trained about. But if you try to just eradicate the bias or threaten them with legal consequences, training is unlikely to work.⁷⁴¹

Similarly, Frank Dobbin, professor of sociology at Harvard University and Alexandra Kalev, associate professor of sociology at Tel Aviv University posit that while training can be a mechanism to begin addressing workplace harassment, the actual solution is relatively clear: “hire and promote more women.”⁷⁴² As discussed previously, “harassment flourishes in workplaces where men dominate in management and women have little power.”⁷⁴³ In terms of training, Dobbin and Kalev argue that at the organizational level, research shows that anti-harassment training for managers is correlated to an increase of women in both management and non-managerial roles.⁷⁴⁴ Training can help teach managers how to identify harassment, and what actions are necessary to take when they see it, which will help reduce those behaviors and retain employees. At the individual level, however, findings are more mixed. The researchers find that while some workers who undergo anti-harassment training are more able to define, recognize, and intervene if they see harassment, these results do not hold for all employees. They find that in some cases training can

⁷³⁹ Fitzgerald Testimony, *Washington Briefing*, p. 113.

⁷⁴⁰ Ibid.

⁷⁴¹ Tomaskovic-Devey Testimony, *Washington Briefing*, p. 113-14.

⁷⁴² Frank Dobbin and Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

⁷⁴³ Ibid.

⁷⁴⁴ Ibid.

exacerbate the problem and result in significantly worse attitudes about harassment (e.g., believing that it is not a big deal). The researchers suggest that since institutional change to promote more women into management and “core” jobs takes considerable time and effort, employers in the meantime can fix their complaints and grievance process to ensure that those employees who do report are not punished.⁷⁴⁵

At the Commission’s briefing, both Louise Fitzgerald and Tamara Chrisler maintained that some forms of training such as “civility training” and developing respectful workplaces can be productive because these forms focus on changing the overall culture of an organization.⁷⁴⁶ Therefore, many of the experts who testified at the Commission briefing agree that the focus should not necessarily be on how often employees are being trained, but rather on the content of the training. Lastly, Chrisler maintains that “putting some thought into what type of training for the particular agency is important. But having that training, sending that message and holding employees and managers accountable, is essential to eradicating harassment in the workplace.”⁷⁴⁷

⁷⁴⁵ Ibid.

⁷⁴⁶ Fitzgerald Testimony, *Washington Briefing*, p. 114; Chrisler Testimony, *Washington Briefing*, p. 114.

⁷⁴⁷ Chrisler Testimony, *Washington Briefing*, pp.114-15.

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CHAPTER 4: INVESTIGATION OF TWO FEDERAL AGENCIES

The Commission investigated two federal agencies to determine what practices and policies each have in place to address and prevent workplace sexual harassment. Through independent research and examination of EEOC's data, preliminary fact-finding regarding the processing of sexual harassment complaints, and trends in academic research, the Commission selected the U.S. Department of State (State) and the National Aeronautics and Space Administration (NASA) for investigation.

The Commission chose these agencies for a focused investigation based upon multiple criteria, such as each agency's number of sexual harassment complaints, demographics of their workforce, and the different structures of the agencies (i.e., highly structured and regimented versus team-oriented and collegial). According to EEOC data in 2016, among the ten large federal agencies (10,000-74,999 employees),⁷⁴⁸ the State Department ranks fifth in the number of sexual harassment complaints and NASA ranks tenth in the total number of sexual harassment complaints for that fiscal year (see table 8 below).⁷⁴⁹

Table 8: Number of Sexual Harassment Complaints in Large Federal Agencies in FY 2016

Large Federal Agencies	Sexual Harassment Complaints
Social Security Administration	518
Department of Interior	348
Department of Transportation	294
Department of Commerce	256
Department of State	180
Department of Labor	139
General Services Administration	95
Department of Energy	94
Environmental Protection Agency	86
National Aeronautics and Space Administration	52

Source: EEOC Data Charts, Total Sexual Harassment Complaints, Fiscal Year 2016

⁷⁴⁸ Based among the criteria set by the Office of Personnel Management (OPM), the 10 large federal agencies are: Department of State, Interior, Social Security Administration, Transportation, Commerce, National Aeronautics and Space Administration, Labor, Environmental Protection Agency, Energy, and the General Services Administration, <https://www.opm.gov/fevs/>.

⁷⁴⁹ EEOC Data Charts, Total Sexual Harassment Complaints, Fiscal Year 2016.

Conversely, when examining the total number of sexual harassment complaints as the percentage total of complaints for that fiscal year, NASA ranks eighth and State ranks ninth among large federal agencies (1.92 percent, 1.67 percent, respectively).⁷⁵⁰ As discussed previously, reported incidents do not necessarily encompass the total number of incidents that are occurring in a workplace.⁷⁵¹ Moreover, agencies with higher reported incidents could actually indicate a positive environment, where workers feel safe to report if incidents do occur, which will be discussed further below.⁷⁵²

While neither of these agencies ranked the highest in sexual harassment complaints among large federal agencies, these agencies both have characteristics recent EEOC data and longstanding research identify as increased risk factors for perpetration of workplace sexual harassment, including workforces with gender disparities that consist of multiple “types” of workers, such as full-time employees, contractors, grant recipients, and interns, and isolated or decentralized workplaces. The goal of this agency assessment is to evaluate their contemporary policies and practices and to determine what is effective at addressing the issues as well as where more attention and reforms may be needed to prevent, detect and correct sexual harassment in federal workplaces.

Like many federal agencies and institutions, both NASA and State have a history of discrimination because of sex. For example, at NASA, after women were excluded based on gender stereotypes, Sallie Ride became the first U.S. woman to serve as an astronaut in 1983, and Eileen Collins was the first woman to pilot the Space Shuttle in 1995.⁷⁵³ Similarly, at the State Department, EEO litigation by Alicia Palmer in 1968 challenged structural barriers to women at the agency—for example, married women could not be posted overseas and therefore could not become Ambassadors—and after her victory in 1971 she brought a class-action lawsuit on behalf of all women at the U.S. Foreign Service in 1976, which was not settled until 2010.⁷⁵⁴

The chapter begins with an analysis of the information the Commission received from NASA regarding its strategies and policies to address sexual harassment among its workforce. The chapter then moves to an analysis of the agency-level data and policies at the State Department. The evaluation of both of these agencies comes from information provided at the Commission’s briefing and public comments, data provided by the agencies in response to the Commission’s

⁷⁵⁰ Ibid.

⁷⁵¹ See e.g., *supra* notes 59; 213-222; 245; 250; 350.

⁷⁵² See *infra* note 765 (regarding NASA) and *infra* notes 1092-1095 (State),

⁷⁵³ See e.g., NASA, Women in Space, General Facts, <https://history.nasa.gov/women.html> (last accessed Mar. 13, 2020); Claire Boothe Luce, “The U.S. Team is Still Warming Up the Bench,” *Life Magazine*, June 28, 1963, at pp. 32-33, <https://books.google.com/books?id=00sEAAAAMBAJ&pg=PA32#v=onepage&q&f=false> (discussing women who had passed all tests to become astronauts but were excluded).

⁷⁵⁴ See e.g., Andrea Strano, “Foreign Service Women Today: The Palmer Case and Beyond,” *The Foreign Service Journal*, American Foreign Service Association, March 2016, <http://www.afsa.org/foreign-service-women-today-palmer-case-and-beyond>.

interrogatories and document requests, and publicly available data. Both agencies testified at the briefing, and provided responses to the Commission's interrogatories and document requests.

National Aeronautics and Space Administration (NASA)

As discussed in Chapter 1, all job sectors and occupations struggle to prevent and address sexual harassment among their workforces and the science fields are no exception. In light of the attention that the #MeToo movement brought onto the entertainment industry, other job sectors have also begun their own hashtags using the #MeToo to call attention to sexual harassment and assault in a variety of professions. According to the #MeToo STEM movement, women in the STEM fields have the highest rate of sexual harassment outside of the military.⁷⁵⁵ Regarding NASA specifically, according to the Merit Systems Protection Board's 2016 survey, 9.5 percent of NASA's workforce reported experiencing sexual harassment.⁷⁵⁶ Of these, about 13 percent of women reported experiencing sexual harassment compared to about 6 percent of men.

Concern about women in the STEM fields has led Congress to propose legislation to try and address and prevent sexual harassment. For example, in January 2019, Representative Eddie Bernice Johnson, Chairwoman of the House Committee on Science, Space, and Technology proposed implementing further steps to combat sexual harassment in the STEMs and for grant-giving federal agencies. The Combatting Sexual Harassment in Science Act would (if enacted) force federal, research grant-giving agencies to formulate better policies for removing grant funding from researchers who are guilty of sexual harassment. Specifically, the bill would direct the National Science Foundation to award grants to institutions of higher education or nonprofit organizations to:

- expand research into sexual harassment in the STEM workforce, including students and trainees; and
- examine interventions for reducing the incidence and negative consequences of such harassment.⁷⁵⁷

⁷⁵⁵ #MeToo Stem, <https://metoostem.com/>.

⁷⁵⁶ U.S. Merit Systems Protection Board, "Update on Sexual Harassment in the Federal Workplace," March 2018, at 5; *see also* Eric Katz, "The Federal Agencies With the Most (and Least) Sexual Harassment," *Government Executive*, June 4, 2018, <https://www.govexec.com/management/2018/06/federal-agencies-most-and-least-sexual-harassment/148673/>.

⁷⁵⁷ Combating Sexual Harassment in Science Act of 2019, 116th Congress (2019-2020), <https://www.congress.gov/bill/116th-congress/house-bill/36/text>.

At the Commission's briefing, Stephen Shih, Associate Administrator of Diversity and Equal Opportunity at NASA, testified that due to the increased attention to harassment over the past several years, NASA has worked to proactively address concerns and focus on enhancing its policies on diversity and inclusion among its workforce.⁷⁵⁸ Shih stated that this emphasis on empowering employees has been positively reflected in annual federal surveys where NASA has been "ranked by the Partnership for Public Service as the best place to work among large federal agencies for seven consecutive years."⁷⁵⁹ As discussed below, NASA has seen an increase in the number of complaints through their anti-harassment program, but in terms of formal EEOC complaints, NASA had the lowest complaint rate in the federal government.⁷⁶⁰

Shih explained that NASA's goal in addressing and preventing workplace harassment is two-fold: first, to enhance the safety and effectiveness of its workforce, and second, to enhance the safety and effectiveness of its mission.⁷⁶¹ Shih testified to this point as follows: "At NASA . . . we embrace a saying, if we take care of our workforce, they'll take care of the mission."⁷⁶² The anti-harassment campaign that NASA launched in 2018 also consists of two strategies: (1) the campaign aims to proactively prevent harassment through leadership setting official anti-harassment policies, conducting agency-wide trainings with employees, and conducting briefings with senior officials, executives, and managers; and (2) its policy focuses on promptly addressing and correcting harassing behavior when it occurs.⁷⁶³

From 2016-2018 NASA reported no formal incidents of sexual harassment (filed pursuant to the agency's EEO complaint process) to EEOC.⁷⁶⁴ The agency has seen a rise in harassment claims through its internal anti-harassment program during this timeframe, however, which could reflect several factors.⁷⁶⁵ For example, it is possible that these increases are the result of employees' confidence in reporting incidents and their access to better information about how to file a complaint, or that they result from employees being more aware of what behaviors constitute harassment. Alternatively, there could be an increase in these behaviors, or some combination of these factors, or some other explanation.

⁷⁵⁸ Shih Testimony, *Washington Briefing*, pp. 53-54.

⁷⁵⁹ *Ibid.*, 54.

⁷⁶⁰ See National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 571; Brooks Testimony, *Washington Briefing*, p. 13.

⁷⁶¹ *Ibid.*, 55.

⁷⁶² Shih Testimony, *Washington Briefing*, p. 53.

⁷⁶³ *Ibid.*, 55.

⁷⁶⁴ NASA Interrog. Resp. to U.S. Comm'n Civil Rights, July 15, 2019, at 573.

⁷⁶⁵ NASA Interrog. Resp. to U.S. Comm'n Civil Rights, July 15, 2019, at 571.

This section offers an analysis of the Commission’s investigation into the work that NASA undertook from 2016-2018. It is broken down into several sub-sections, starting with an overview of the demographic makeup of the agency’s workforce, and then moves to a discussion of NASA’s sexual harassment policy for employees and non-employees (i.e., contractors and grant recipients), followed by an examination of training procedures, an analysis of the data regarding prevalence and processing times, and finally an examination of outcomes of investigations and the ways in which the agency addresses allegations of sexual harassment among its workforce. It should be noted that the Commission is not positing that these actions represent the only steps an agency can take, nor are these actions necessarily examples of best practices. The examination of these agencies represents an analysis of the practices that each are undertaking to end sexual harassment in their respective workforces.

Overview of Agency and Workforce

According to NASA’s fiscal year 2017 equal opportunity annual report to EEOC, its total workforce consists of 17,515 employees.⁷⁶⁶ NASA employees are located across the country in 10 field centers and its headquarters in Washington, D.C.⁷⁶⁷ Breaking NASA’s employees down by demographic characteristics shows that the majority of the workforce are white (12,553) and men (11,520).⁷⁶⁸

Table 9: NASA’s Number of employees by job location

Total number of employees	17,515	Kennedy Space Center	1,981
Ames Research Center	1,180	Langley Research Center	1,821
Armstrong Flight Research Center	566	Marshall Space Flight Center	2,322
Glenn Research Center	1,590	Stennis Space Center	300
Goddard Space Flight Center	3,230	NASA Shared Services Center	142
NASA Headquarters	1,281	Johnson Space Center	3,112

Source: NASA, “Where We Work,” <https://www.nasa.gov/careers/where-we-work>; see also NASA responses to Affected Agency Review to Commission on Draft Report, Nov. 13, 2019 [on file].

⁷⁶⁶ NASA *Equal Employment Opportunity Strategic Plan: FY 2017-19, FY 2017 Annual Report and Update*, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 5.

⁷⁶⁷ NASA Center Assignments by State, https://www.nasa.gov/pdf/313552main_NASA_Center_Assignments_by_State.pdf.

⁷⁶⁸ NASA *Equal Employment Opportunity Strategic Plan: FY 2017-19, FY 2017 Annual Report and Update*, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 5.

As a component to the annual EEOC report, under federal regulations, agencies are expected to determine which demographics are underrepresented in an agency's workforce.⁷⁶⁹ EEOC does not define "underrepresentation" in terms of statistical significance for federal agencies; rather, it leaves it to agencies to define the term.⁷⁷⁰ EEOC, however, instructs federal agencies that underrepresentation by any demographic group within an organization should be considered a "trigger" – or a potential possibility that there are barriers to equal employment opportunities.⁷⁷¹ EEOC also explains that underrepresentation can also exist within an agency, in terms of a group not represented in particular roles, receiving promotions, and awards. While a trigger does not necessarily mean there is a barrier to equal opportunity, it can indicate that a federal agency needs to monitor and analyze to ensure that a barrier does not exist.⁷⁷² According to NASA, it considers a "difference of 2 percentage points or more to be an area of potential concern, regardless of statistical significance."⁷⁷³ Table 10 illustrates demographics of NASA's workforce and which disparities are statistically significant. To be clear, the 2 percent or more differential that would trigger monitoring is a differential between total workforce and opportunity for advancement. For example, in the table below, data shows that although women represent 34.2 percent of the total NASA workforce, they are only 28.1 percent of Senior Executive Service Employees (a 4 percent differential), and therefore that more than 2 percent differential would trigger internal monitoring at NASA.

⁷⁶⁹ 29 C.F.R. § 1614.102(b)(3).

⁷⁷⁰ EEOC, Instructions to Federal Agencies for EEO MD-715, "Section II: Barrier Identification and Elimination," <https://www.eeoc.gov/federal/directives/md715/section2.cfm>.

⁷⁷¹ EEOC defines a "trigger" as "a trend, disparity, or anomaly that suggest the need for further inquiry into a particular policy, practice, procedure, or condition." See EEOC, Instructions to Federal Agencies for EEO MD-715, "Section II: Barrier Identification and Elimination," <https://www.eeoc.gov/federal/directives/md715/section2.cfm>.

⁷⁷² Ibid.

⁷⁷³ NASA *Equal Employment Opportunity Strategic Plan: FY 2017-19, FY 2017 Annual Report and Update*, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 3.

Table 10: Total NASA Workforce

	AAPI	Black	Latinx	Multi-racial	AIAN	White	Male	Female	IWD	IWTD
TOTAL (n=17,515)	7.5%	11.6%	7.8%	0.3%	1.1%	71.7%	65.8%	34.2%	6.8%	1.2%
Senior Executive Service (SES) (n=395)	4.8%	9.6%	4.6%	0.3%	1.0%	79.7%	71.9%	28.1%	4.8%	0.0%
Supervisory (n=2,052)	5.8%	11.7%	5.5%	0.2%	1.0%	75.6%	67.2%	32.8%	5.8%	0.5%
Senior Level (SL) & Senior Scientific (ST) (n=161)	7.5%	1.3%	3.8%	0.0%	1.3%	86.3%	83.9%	16.1%	6.9%	1.3%
GS-14 & 15 (n=9,028)	7.5%	8.6%	6.3%	0.2%	0.9%	76.4%	71.7%	28.3%	5.8%	0.7%
Science & Engineering (n=11,171)	8.9%	6.2%	7.2%	0.2%	0.8%	76.6%	77.0%	23.0%	5.5%	0.8%
Professional Administrative (n=5,268)	5.0%	22.0%	8.4%	0.7%	1.5%	62.3%	42.7%	57.3%	12.1%	1.8%
Comparison Populations										
Federal STEM workforce (n=301,384)	9.7%	10.1%	5.8%	1.6%	0.9%	71.9%	71.5%	28.5%	--	--
U.S. Population, 18+	5.8%	12.1%	15.7%	1.5%	0.7%	64.3%	48.7%	51.3%	15.0%	--

Source: https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf at 4.

*Numbers in red represent “triggers” identified by NASA.

The demographic breakdown among employees in terms of race and gender among several of the highest level of employees at NASA shows some striking disparities. In terms of gender demographics, women represent about 34 percent of the total NASA workforce; yet, women account for only 16 percent of employees in Senior Scientific and Professional (ST) and Senior Level (SL) positions and 23 percent of those in Science and Engineering (S&E) positions. Further, women account for 28 percent in GS-14, 15, and Senior Executive Service (SES) positions, which represent the highest paid and most senior employees at an agency. Among all women employed at NASA, 43 percent are in S&E positions and about half are in Professional Administrative (PA) positions (see Table 3). Further, comparing NASA’s employees in fiscal year 2018 to the relevant civilian labor force illustrates that women employed at NASA are underrepresented in the Physical

Sciences positions at the agency (27 percent of the Physical Sciences positions at NASA compared to 37 percent of the Physical Science positions in the relevant civilian labor force).⁷⁷⁴

Black employees account for 11.6 percent of the total NASA workforce, but only 1.3 percent of SL and ST positions, 8.6 percent of those in grades GS-14 and GS-15, and 9.6 percent of the SES. Further, while black employees account for 10 percent of the federal STEM workforce, they are only 6 percent of NASA's S&E workforce. Among black employees at NASA, 57 percent are in PA positions and 34 percent are in S&E positions.⁷⁷⁵

Breaking down other groups in NASA's workforce shows that Asian and Pacific Islander (AAPI) employees make up 7.5 percent of the total workforce, yet account for only 5 percent of SES employees and PA employees (see Table 3). Among all of NASA's AAPI employees, 76 percent are in S&E occupations and 20 percent are in PA jobs.⁷⁷⁶

Latinx employees account for almost 8 percent of the total NASA workforce. These employees account for 7 percent of S&E employees, which is slightly higher than their overall representation in the federal STEM workforce. Yet, Latinx employees only account for 3.8 percent of SL and ST employees, 4.6 percent in SES roles, and 5.5 percent of NASA's supervisors. Among all of NASA's Latinx employees, 59 percent are in S&E occupations and one-third in PA occupations (see Table 3).⁷⁷⁷

Native American and Alaska Native (AIAN) employees at NASA account for only 1.1 percent of NASA's total workforce (186 employees). These employees represent fewer than 1 percent of those in GS-14 and GS-15 positions, and 1 percent in SES and Supervisory roles (see Table 3).⁷⁷⁸

Individuals with disabilities (IWD) account for about 7 percent of the total NASA workforce, but not quite 5 percent of those in SES. Further, individuals with targeted disabilities (IWTD)⁷⁷⁹

⁷⁷⁴ NASA Interrog. Resp. to U.S. Comm'n Civil Rights, July 15, 2019, at 12.

⁷⁷⁵ NASA *Equal Employment Opportunity Strategic Plan: FY 2017-19, FY 2017 Annual Report and Update*, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 3.

⁷⁷⁶ Ibid.

⁷⁷⁷ Ibid.

⁷⁷⁸ Ibid.

⁷⁷⁹ The IWTD label is a subgroup of the larger IWD category. The EEOC states that the federal government has "recognized that qualified individuals with certain disabilities, particularly manifest disabilities, face significant barriers to employment, above and beyond the barriers faced by people with the broader range of disabilities. These barriers are often due to myths, fears, and stereotypes about such disabilities. The federal government calls these 'targeted disabilities.' They are:

- developmental disabilities, for example, cerebral palsy or autism spectrum disorder;
- traumatic brain injuries;

account for 1.2 percent of the total NASA workforce. There are no individuals with targeted disabilities in the SES and individuals with targeted disabilities represent few of those in SL, ST, GS-14, and GS-15 positions. Among all IWD, 44 percent are in S&E positions and 46 percent are in PA positions (see Table 3).⁷⁸⁰

These numbers show that while NASA is working to diversify its workforce, there are still many workers who are underrepresented in the most senior and highest paid positions in the agency such as in Senior Executive Service (SES) positions. For example, women, individuals with disabilities, Latinx employees, black employees, and Asian and Pacific Islander employees are all underrepresented in the SES. As the table above illustrates, many of these same groups are underrepresented in other senior level and supervisory positions, yet overrepresented in administrative positions.

Sexual Harassment Policies

Federal agencies are expected to establish their own internal anti-harassment programs that are separate from the formal EEO process to address sexual harassment.⁷⁸¹ NASA first instituted its Anti-Harassment Program in 2009. The NASA program was developed as a complement to the formal EEO process under which the agency can address inappropriate employee conduct that may violate its internal policies, but not Title VII.⁷⁸² Stephen Shih explained that the program was developed to help “assure safety and workplace and mission success ... and involves a highly collaborative and well-coordinated community of practice, including EEO offices, anti-harassment

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- deafness or serious difficulty hearing, benefiting from, for example, American Sign Language;
 - blindness or serious difficulty seeing even when wearing glasses;
 - missing extremities (arm, leg, hand and/or foot);
 - significant mobility impairments, benefitting from the utilization of a wheelchair, scooter, walker, leg brace(s) and/or other supports;
 - partial or complete paralysis (any cause);
 - epilepsy and other seizure disorders;
 - intellectual disabilities (formerly described as mental retardation);
 - significant psychiatric disorders, for example, bipolar disorder, schizophrenia, PTSD, or major depression;
 - dwarfism; and
 - significant disfigurement, for example, disfigurements caused by burns, wounds, accidents, or congenital disorders.

See, Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment, <https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm>.

⁷⁸⁰ *Ibid.*, 4.

⁷⁸¹ *See e.g.*, EEOC, “Model EEO Programs Must Have An Effective Anti-Harassment Program,” https://www.eeoc.gov/federal/model_eeo_programs.cfm.

⁷⁸² National Aeronautics and Space Administration, “Policy Statement on Anti-Harassment,” Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 30.

coordinators, Office of General Counsel, Office of Chief Counsel, NASA's Office of the Chief Human Capital Officer, and senior NASA leaders."⁷⁸³

NASA defines harassment in its general anti-harassment policy, which includes sexual harassment as:

any unwelcome verbal or physical conduct, based on an individual's race, color, gender, national origin, religion, age, disability, genetic information, sexual orientation, status as parent, or gender identity, which can reasonably be considered to adversely affect the work environment or an employment decision affecting the employee based upon the employee's acceptance or rejection of such conduct.⁷⁸⁴

NASA's internal definition of harassment is more broadly written than the legal definition of the term, which requires that discrimination be "because of" sex or another characteristic, and further, the Supreme Court has held that it must be "severe or pervasive."⁷⁸⁵ The last phrase of NASA's definition, however, alludes to the harassment having to be either part of a hostile environment or *quid pro quo*.

NASA representatives told the Commission that its policy aims to address harassment before it reaches the legal standard of discrimination, because NASA's policy is "designed to prevent or address harassment at the earliest possible opportunity, before it causes greater harm to the individual and potential legal liability for the agency."⁷⁸⁶ The agency states that where behavior is in violation of the policy, management officials can take preemptive measures (e.g., verbal counseling, supervisory coaching, and training) to keep the behavior from escalating.⁷⁸⁷

NASA's sexual harassment policy states that employees should immediately notify a management official or supervisor, the Center Anti-Harassment Coordinator, or any other official(s) as designated by the Center Director if an incident of harassment occurs. It explains that upon receiving the allegation, the appropriate official will investigate the incident and take "appropriate corrective or disciplinary action, up to and including removal, to ensure that no further harassing

⁷⁸³ Shih Testimony, *Washington Briefing*, p. 56.

⁷⁸⁴ National Aeronautics and Space Administration, "Policy Statement on Anti-Harassment," Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 30.

⁷⁸⁵ 42 U.S.C. § 2000e-2(a); *See also supra* notes 50-53 (discussing the *Meritor* case).

⁷⁸⁶ Memo from NASA Associate Administrator for Diversity and Equal Opportunity to Officials-in-Charge of Headquarters Offices and Directors, NASA Centers, re Anti-Harassment Program Report for FY 2018 and Comparisons FYs 10-18, dated Mar. 28, 2019, at 2; *see also* National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 10.

⁷⁸⁷ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 10.

conduct occurs.”⁷⁸⁸ If management officials do not adequately address the allegation, they too can be subject to disciplinary action.⁷⁸⁹ NASA states that its anti-harassment policy is separate and distinct from the formal EEO complaint process and reminds employees that if they want to file a formal complaint, they must do so within 45 days.⁷⁹⁰

According to NASA, since the anti-harassment policy’s inception in 2009, it has been re-issued annually. The policy is posted on several NASA websites and information regarding the agency’s Anti-Harassment Program is also included for employees, such as frequently asked questions and a flowchart detailing the complaint process.⁷⁹¹ NASA officials also stated that each field center and headquarters also distributes anti-harassment messages annually that are typically signed by the Center Director.⁷⁹² For example, one recent anti-harassment brochure offered employees an overview on NASA’s anti-harassment policy and procedures, examples of harassing conduct, an overview of how to report harassment to the Anti-Harassment Program, a statement on harassment between contractors and employees, the differences between the informal program and the formal EEO process, and resources for employees who want additional information.⁷⁹³

Sexual Harassment Policy for Contractors and Grant Recipients NASA’s Anti-Harassment Policy does not make explicit distinctions between employees and contractors, and the agency utilizes the same anti-harassment program for both types of workers.⁷⁹⁴ According to responses provided to the Commission, however, its EEO policies appear to only apply to employees.⁷⁹⁵ Notably, NASA states that it does not have the power “to address contractor-on-contractor issues pertaining to harassment; however, it is expected that all contract employees on NASA facilities will refrain

⁷⁸⁸ Ibid. at 30.

⁷⁸⁹ Ibid.

⁷⁹⁰ National Aeronautics and Space Administration, “Policy Statement on Anti-Harassment,” Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 30.

⁷⁹¹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019 at 6.

⁷⁹² Ibid.

⁷⁹³ National Aeronautics and Space Administration, “NASA Anti-Harassment Policy and Procedures,” https://www.nasa.gov/sites/default/files/atoms/files/anti-harassment_brochure-final.pdf.

⁷⁹⁴ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019 at 2.

⁷⁹⁵ Ibid.

from engaging in harassing conduct.”⁷⁹⁶ NASA also explained that it does not have the authority to compel contract employees to participate in investigations conducted under this program.⁷⁹⁷

While NASA’s anti-harassment policy does not explicitly cover grantees who receive federal money, grantees (or those working with grantees) can file allegations of discrimination or harassment directly to its Office of Diversity and Equal Opportunity.⁷⁹⁸ The agency issues a specific “Federally Assisted Programs” brochure that pertains to its fellowship programs.⁷⁹⁹ In this brochure, NASA provides information to its approximately 600 grantee institutions (also known as federally assisted programs because they receive financial assistance from NASA typically in the form of grants) on how to file allegations with the agency; and the agency also provides information on how grantees can file a claim on its reporting page.⁸⁰⁰ NASA’s policy states that:

As authorized by Federal laws and NASA civil rights regulations and policies, we are...fully committed to helping...partner organizations...that participate in NASA-conducted programs or receive funding from NASA...adhere to all applicable civil rights authorities, and refrain from discrimination on the bases of race, color, and national origin, sex (including sexual harassment), disability, and age.

[These] institutions are required under Federal civil rights laws to designate an administrative official responsible for administering antidiscrimination policies and programs... including providing an internal administrative grievance process for filing complaints of discrimination or harassment.

Additionally, beneficiaries who believe they have been subjected to discrimination or harassment based upon race, color, national origin (including Limited English Proficiency), sex (including pregnancy, sexual harassment, sex stereotyping, sexual

⁷⁹⁶ Ibid. at 12.

⁷⁹⁷ NASA, Affected Agency Review Responses to Commission on draft report, Nov. 14, 2019 [on file].

⁷⁹⁸ See National Aeronautics and Space Administration, NASA Interrog. Resp. to U.S. Comm’n Civil Rights Interrogatories, May 23, 2019 at 2; see also, National Aeronautics and Space Administration, NASA Diversity & Equal Opportunity, <https://www.nasa.gov/offices/odeo/title-IX-compliance-program>; see also NASA, “Federally Assisted Programs” brochure, https://www.nasa.gov/sites/default/files/atoms/files/2016_tvix-et-al-brochure_508_tagged.pdf.

⁷⁹⁹ Ibid.

⁸⁰⁰ NASA, Affected Agency Review Responses to Commission on draft report, Nov. 14, 2019 [on file].

orientation, or gender identity), disability, or age may file a complaint directly with NASA.⁸⁰¹

Despite this policy, NASA claims its only role in ensuring that these institutions are providing a safe work space for their employees is to (1) assess the grantees in regard to previously filed discrimination complaints and (2) assess these grantees' compliance with civil rights laws on a regular basis.⁸⁰² NASA also has to perform two Title IX compliance reviews per year, pursuant to NASA's Authorization Act of 2005.⁸⁰³ In September 2018, the head of NASA issued a statement to NASA grantee institutions that reaffirmed the agency's commitment to aid NASA-funded programs and activities to adhere to civil rights laws and refrain from discrimination.⁸⁰⁴

Recently, multiple articles were published that discuss the culture of sexual harassment and misogyny in grant-receiving research institutions and its effect on women and minorities in science. NASA notes that in recent years there has been increased attention to the gender inequities in the STEM fields, where men still heavily outnumber women and women's participation remains relatively low especially in fields such as physics, aerospace, electrical engineering, and computer science.⁸⁰⁵ Women from a variety of STEM industries have described how a pervasive culture of gender bias against women can deter individuals from entering the aerospace community.⁸⁰⁶

Though white men are only a third of the entire United States population, they are half of the engineering and science workforce. For example, "[t]here were 250,000 college-educated women in the U.S. with engineering jobs in 2015, compared with 1.5 million men. Computer science jobs that year employed 700,000 college-educated women and 2.1 million men."⁸⁰⁷ Furthermore, there is evidence that a pervasive culture of sexism including sexual harassment persists in STEM industries, and that this culture likely contributes to the high attrition rate of female engineers.⁸⁰⁸

⁸⁰¹ National Aeronautics and Space Administration, Office of the Administrator, NASA Policy Statement on Antidiscrimination in NASA Conducted or Funded Programs, Activities, and Institutions (Sept. 2018) at 1, https://missionstem.nasa.gov/docs/Bridenstine_Title_IX_Policy_Statement_TAGGED.pdf.

⁸⁰² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 3-4.

⁸⁰³ Ibid. at 4.

⁸⁰⁴ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 8.

⁸⁰⁵ National Aeronautics and Space Administration, NASA Diversity & Equal Opportunity, <https://www.nasa.gov/offices/odeo/title-IX-compliance-program>.

⁸⁰⁶ Tom Risen, "U.S. students, executives discuss diversity in tech sector," *Aerospace America* (Mar. 16, 2018), <https://aerospaceamerica.aiaa.org/u-s-students-executives-discuss-diversity-in-tech-sector/>.

⁸⁰⁷ Ibid.

⁸⁰⁸ See e.g., Peter Meiksins, Peggy Layne, Kacey Beddoes, Marc Lewis, Adam S. Masters, and Jessica Deters, "Women in Engineering: A Review of the 2018 Literature," April 9, 2019,

Moreover, many women do not enter the fields or leave their profession due to the seeming lack of accountability when an incident of harassment does occur. For instance, Aki Roberge, a research astrophysicist at NASA's Goddard Space Flight Center, stated that there are "very famous" professors who are allowed to remain in their positions despite multiple reports of sexual harassment. She asserted that "you can't really leave this [enforcement] in the hands of universities."⁸⁰⁹ Similarly, Heather Metcalf recounted the many incidents of sexual and gender harassment she and her colleagues experienced during their years in graduate school and the inaction of university leadership.⁸¹⁰ As such, advocates propose "tougher enforcement" of the anti-discrimination and anti-harassment laws that protect individuals in federally funded institutions under Title IX.⁸¹¹

In contrast, for its direct employees, NASA has a number of anti-harassment programs, including an anti-harassment policy statement, anti-harassment procedures and requirements, an anti-harassment implementation guide, and anti-harassment brochures and FAQs.⁸¹² It also has a complaint process with a strong policy statement and a policy directive.⁸¹³ Its more comprehensive anti-harassment policy is designed to

ensure that immediate and appropriate action is taken in response to allegations of harassing conduct, including the use of disciplinary action, and to eliminate harassing conduct regardless of whether the conduct violated the law. The overarching goal of the policy and procedures is to address harassing conduct at the earliest possible stage, before it can become severe or pervasive, e.g., behavior that is widespread, common, or repeated.⁸¹⁴

<https://alltogether.swe.org/2019/04/women-in-engineering-a-review-of-the-2018-literature/>; Kathleen N. Smith and Joy Gaston Gayles, "'Girl Power': Gendered Academic and Workplace Experiences of College Women in Engineering," *Social Sciences*, 2018, vol. 7, no. 11; National Research Council, *Women Scientists and Engineers Employed in Industry, Why So Few?* National Academies Press, 1994, <https://www.nap.edu/read/2264/chapter/1>; Paula Johnson, Shelia Widnall, and Frazier Benya, eds., *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*, National Academies of Sciences, Engineering, and Medicine, 2018, <https://www.linguisticsociety.org/sites/default/files/24994.pdf>.

⁸⁰⁹ Tom Risen, "U.S. students, executives discuss diversity in tech sector," *Aerospace America* (Mar. 16, 2018), <https://aerospaceamerica.aiaa.org/u-s-students-executives-discuss-diversity-in-tech-sector/>.

⁸¹⁰ Metcalf Testimony, *Washington Briefing*, p. 58.

⁸¹¹ Tom Risen, "U.S. students, executives discuss diversity in tech sector," *Aerospace America* (Mar. 16, 2018), <https://aerospaceamerica.aiaa.org/u-s-students-executives-discuss-diversity-in-tech-sector/>.

⁸¹² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 2-3.

⁸¹³ *Ibid.*, 3.

⁸¹⁴ *Ibid.*, 6.

These policies aimed at addressing harassing conduct “at the earliest possible stage” are limited to direct employees, which may leave other workers such as interns at NASA unprotected.⁸¹⁵ As mentioned above, NASA’s anti-harassment policy does include both civil servants and contractors.⁸¹⁶ The agency stated that in sexual harassment cases in which one of the affected parties is a contractor, it will engage in procedural requirements to address the conduct under its anti-harassment program, but it may need to rely on procurement offices to work in connection with contract employers to aid in the investigation. However, in cases involving harassment allegations where both parties are contractors, NASA stated that it does not have the legal authority to compel either of the parties to participate in investigations under its Anti-Harassment Program.⁸¹⁷

In early 2018, the House Committee on Science, Space, and Technology wrote to the Government Accountability Office (GAO) asking them to investigate the sexual harassment policies and practices of federal science agencies.⁸¹⁸ The letter asks for federal agencies, such as the National Science Foundation, National Institutes of Health, Department of Agriculture, Department of Energy, and NASA to report on the number of sexual harassment or assault cases that have been investigated at their agencies, what steps they take when they receive complaints about a grantee, and whether they require grantees to inform them of allegations of sexual harassment or gender discrimination.⁸¹⁹

In the subsequent months following the initial request to the GAO, a number of independent reports and substantiated allegations of sexual misconduct emerged within the broader scientific community.⁸²⁰ As such, the House Committee on Science, Space, and Technology sent another

⁸¹⁵ Ibid.

⁸¹⁶ See National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019 at 2.

⁸¹⁷ Email Correspondence with NASA and USCCR regarding Affected Agency Review on Draft Report, Nov. 13, 2019 [on file].

⁸¹⁸ Azeen Ghorayshi, “Congress is Demanding Answers About Why Grants Are Given To Sexual Harassers in Science,” *Buzzfeed News* (Jan. 18, 2018), <https://www.buzzfeednews.com/article/azeenghorayshi/lamar-smith-investigates-sexual-harassment>.

⁸¹⁹ Ibid.

⁸²⁰ Committee on Science, Space, & Technology, Press Release: House Science Committee Report and Recommendations to Curb Sexual Misconduct in the Scientific Community (Sept. 18, 2018), <https://republicans-science.house.gov/news/press-releases/house-science-committee-report-and-recommendations-curb-sexual-misconduct>; See also Committee on Science, Space, & Technology, Letter: Smith, Comstock letter to GAO re: sexual misconduct within the scientific community (Sep. 19, 2018), https://republicans-science.house.gov/sites/republicans.science.house.gov/files/documents/09_19_2018%20CLS%20Comstock%20-%20GAO%20re%20Sexual%20Misconduct.pdf.

letter to the GAO, which included the following four recommendations to be applied to U.S. government science agencies and their grantees:

1. Consistent and effective training across the concerned communities to reduce sexual misconduct.
2. Clear, accessible structures to make reporting sexual misconduct easier.
3. Reconsidering the academic model of having a single advisor responsible for overseeing a student or trainee. This dynamic, and the resulting fear of reprisal, discourages reporting of sexual misconduct.
4. Implementing and enforcing effective consequences, including the cancelation of federal grants.⁸²¹

In response to the Committee, NASA officials explained that a large majority of its grantees are in academia and the agency has “ensured strong lines of communication” with the institutions to provide ongoing anti-harassment information.⁸²² According to NASA, the agency conducts two Title IX compliance reviews of academic institutions that it provides grants to each year and has implemented reporting methods between employees and other individuals who are working with the agency. The Committee stated that it had no reason “to doubt the effectiveness of NASA’s initiatives.”⁸²³

Training

NASA testified to the Commission that all supervisors and employees should receive training when they are initially hired and at least on an annual basis thereafter. The agency testified that at its Centers and at headquarters, EEO training is provided to new employees (both supervisory and non-supervisory); and if an employee is promoted to a supervisory position the promoted employee receives EEO training at the time of appointment.⁸²⁴ However, NASA testified that contractors and other individuals who may work at NASA are able to take the online anti-harassment training,

⁸²¹ Committee on Science, Space, & Technology, Press Release: House Science Committee Report and Recommendations to Curb Sexual Misconduct in the Scientific Community (Sept, 18, 2018), <https://republicans-science.house.gov/news/press-releases/house-science-committee-report-and-recommendations-curb-sexual-misconduct>.

⁸²² Committee on Science, Space, & Technology, Letter: Smith, Comstock letter to GAO re: sexual misconduct within the scientific community (Sep. 19, 2018), at 7.

⁸²³ Ibid.

⁸²⁴ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 12.

but are not typically offered the opportunity to take the classroom-based training programs.⁸²⁵ And while the agency stated that it continues to support further employee training and its online training system SATERN (System for Administration, Training, and Educational Resources for NASA) sends reminders and alerts to an employee and the employee's manager when a mandatory training is expiring or has expired, there are not formal repercussions if training is not completed.⁸²⁶

The agency utilizes anti-harassment training modules that have been offered since 2017: classroom trainings for executive leadership and one for managers and supervisors, and a virtual training solution for the entire workforce. The first module is broad in scope and discusses legal issues and social science topics regarding harassment, and is being used by the NASA Centers for training for the entire workforce.⁸²⁷ The second training module is focused on how to address a report of harassment under NASA's Anti-Harassment Policy and is meant to aid supervisors on how to receive and handle reports of harassment.⁸²⁸ The third type of training focuses on bystander intervention through scenario-based simulation,⁸²⁹ because bystander training has proven to be an effective way to reduce incidents of sexual harassment.⁸³⁰

In fiscal year 2018, NASA conducted a mandatory training for supervisors and managers regarding the agency's Alternative Dispute Resolution (ADR) process, which they are required to take every other year thereafter. The agency also stated that it meets the required training mandate to provide No FEAR Act training to its employees on a biennial basis.⁸³¹ The agency told the Commission that beyond the mandated EEO training, NASA also conducts training on specific topics related to

⁸²⁵ Ibid., 13.

⁸²⁶ Ibid., 15.

⁸²⁷ Ibid., 13.

⁸²⁸ Ibid., 13.

⁸²⁹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 16.

⁸³⁰ See e.g., Ann Coker, Heather Bush, Patricia Cook-Craig, Sarah DeGue, Emily Clear, Candace Brancato, Bonnie Fisher, Eileen Recktenwald, "RCT Testing Bystander Effectiveness to Reduce Violence." *American Journal of Preventive Medicine*, vol. 52, no. 5 (May 2017), 566-578 ("Implementation of Green Dot in Kentucky high schools significantly decreased not only sexual violence perpetration but also other forms of interpersonal violence perpetration and victimization"); Claire Cain Miller, "Sexual Harassment Training Doesn't Work. But Some Things Do.," *New York Times*, Dec. 11, 2017, <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html>; Mark Diamond, "SDDC employees encouraged to become active bystanders," U.S. Army, Nov. 21, 2013, https://www.army.mil/article/115485/sddc_employees_encouraged_to_become_active_bystanders.

⁸³¹ Ibid., 12.

EEO concerns, such as: diversity and inclusion, implicit bias and sexual harassment, and the ADR process through voluntary online and face-to-face trainings that are offered on a regular basis.⁸³²

Regarding the efficacy of training, NASA advised the Commission that it uses course evaluations and also incorporated agency-specific questions into the 2019 Federal Employee Viewpoint Survey (FEVS) that asked: “[Do] NASA leaders take proactive steps to prevent harassment in the workplaces (for example, senior leadership, messages to the workforce, use of posters and other communication materials, training, dialogues, or similar activities)?”⁸³³

As discussed previously, studies have suggested that vertical and horizontal integration of women into management and supervisory positions is a mechanism to help reduce incidents of sexual harassment.⁸³⁴ NASA recognizes that women’s representation in certain positions and occupations among its workforce lags behind the broader civilian workforce, and that women at NASA may face barriers to enter those positions and in receiving promotions.⁸³⁵ For instance, women make up 48.2 percent of the national civilian labor force, but 34 percent of the NASA workforce. Latinx employees account for 7.6 percent of NASA’s workforce, but 10 percent of the national civilian labor force.⁸³⁶ Further, among the highest ranking employees at the Senior Executive Service (SES) level, AAPI, Latinx, women, and individuals with disabilities make up a lower percentage of these employees compared to their overall representation of the NASA workforce. For instance, AAPI employees account for 8 percent of NASA’s workforce, yet 5 percent of those in SES positions.⁸³⁷

In response to the Commission’s interrogatory requests, NASA stated that its Office of Diversity and Equal Opportunity (ODEO), Center EO offices, and employee resource groups conduct a variety of briefings, trainings, and presentations that encourage vertical and horizontal integration

⁸³² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 13.

⁸³³ *Ibid.*, 15.

⁸³⁴ See Frank Dobbin and Alexandra Kalev, “Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will,” *Harvard Business Review*, Nov. 15, 2017, <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>; Fitzgerald Statement, at 5; Vicki Schultz, “Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,” 71 *Stan. L. Rev.*, June 2018, https://digitalcommons.law.yale.edu/fss_papers/5301.

⁸³⁵ NASA Interrog. Resp. to U.S. Comm’n Civil Rights, July 15, 2019, at 12.

⁸³⁶ National Aeronautics and Space Administration, MD -715, Part E.3, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 178.

⁸³⁷ *Ibid.*

of women and minorities into the agency's workforce.⁸³⁸ The agency told the Commission that its EO offices "proactively engaged HR offices in discussion regarding potential barriers to increasing representation of women, minorities, and individuals with disabilities in both non-technical and technical work roles."⁸³⁹ According to the Office of Personnel Management in its annual Federal Employment Viewpoint Survey (FEVS),⁸⁴⁰ there are new measures for employees to rate the level of inclusion at their federal agency. The FEVS uses measures of inclusion in its "New IQ" scores, which includes questions about how employees would rank their agency in fairness, openness, cooperative, supporting, and empowering which is then combined into a New IQ total score.⁸⁴¹ In 2018, NASA's scores showed an overall New IQ score of 78%, with 66% Fair, 81% Open, 77% Cooperative, 89% Supporting, and 79% Empowering (with 82 percent of NASA workforce reporting)⁸⁴²(see table 11); and these numbers have remained relatively constant from 2016-18. Across each of the five new IQ measures, NASA percentages were higher than averages government-wide and other large agencies (with 10,000-79,000 employees).

It is important to note, however, that surveys such as the FEVS do not fully capture the viewpoints of all federal employees because they exclude political appointees from participating in the survey. Implementing other surveys alongside the FEVS, such as issuing annual climate surveys, could be an additional mechanism to measure the opinions of all federal employees and perhaps also other workers such as contractors at an agency.⁸⁴³

⁸³⁸ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 11.

⁸³⁹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 11.

⁸⁴⁰ The Federal Employee Viewpoint Survey is an annual survey that is issued by the Office of Personnel Management (OPM) to all federal employees. The FEVS measures employees' perceptions of whether, and to what extent, conditions characteristic of successful organizations are present in their agencies. The FEVS serves as a tool for employees to share their perceptions in many critical areas including their work experiences, their agency, and leadership. The FEVS provides results at lower levels allowing managers to see where improvements within their work unit are necessary. The results provide agency leaders insight into areas where improvements have been made, as well as areas where improvements are needed. See <https://www.opm.gov/fevs/about/>.

⁸⁴¹ The New IQ results were "built on the concept that individual behaviors, repeated over time, form the habits that create the essential building blocks of an inclusive environment. These behaviors can be learned, practiced, and developed into habits of inclusiveness and subsequently improve the inclusive intelligence of organizational members. The New IQ consists of 20 items that are related to inclusive environments. These 20 items are grouped into "5 Habits of Inclusion": Fair, Open, Cooperative, Supportive, and Empowering." See Office of Personnel Management, Federal Employee Viewpoint Survey, <https://www.opm.gov/fevs/reports/data-reports>.

⁸⁴² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 391, 409.

⁸⁴³ Chrisler Testimony, *Washington Briefing*, p. 89; Speier Testimony, *Washington Briefing*, pp. 24-29.

Table 11: NASA New IQ Results (2018)

	Fair	Open	Cooperative	Supporting	Empowering	Overall
Government Wide	48%	60%	58%	78%	60%	61%
Large Agencies (10k-79,9k employees)	51%	62%	61%	81%	62%	64%
NASA (overall)	66%	81%	77%	89%	79%	78%

Source: Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 391, 409, *see also* <https://www.opm.gov/fevs/reports/data-reports>.

Prevalence

NASA claims that the recent attention to workplace sexual harassment and the #MeToo movement has not impacted the number or type of sexual harassment claims among its workforce.⁸⁴⁴ It also stated the informal and formal EEO complaints process has not been affected.⁸⁴⁵ There has been a spike of harassment claims under the Anti-Harassment Program, however, which is a part of NASA's Anti-Harassment Campaign that was launched in February 2018 to specifically address the types of issues that the #MeToo movement is drawing attention to in workplaces and educational institutions.⁸⁴⁶

Between 2016 and 2018, NASA conducted 209 anti-harassment inquiries or fact-finding investigations.⁸⁴⁷ In fiscal year 2018, NASA completed 94 percent of its investigations in a timely manner,⁸⁴⁸ which is an increase from 86 percent in 2017, and exceeds the government-wide average of 73 percent in 2018.⁸⁴⁹

⁸⁴⁴ *Ibid.*, 17

⁸⁴⁵ *Ibid.*

⁸⁴⁶ *Ibid.*, 5

⁸⁴⁷ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 7.

⁸⁴⁸ The EEOC states that federal agencies should complete all investigations timely, that is within 180 or 270 calendar days, as pursuant to 29 CFR §1614.108 (Part H-4).

⁸⁴⁹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 180.

Table 12: Anti-Harassment Program Cases – Time in Inventory

	2016	2017	2018
Greater than 120 days	7	2	8
60 days to 120 days	10	12	19
30 days to 60 days	20	17	12
Less than 30 days	21	24	38
Less than 14 days	9	13	23
Average number of days in inventory	52	42	51

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 7.

In fiscal year 2018, 95 employees reported incidents of harassment to the Anti-Harassment Program, which was a 73 percent increase from the previous year. This is a significant increase from previous years where reports have not risen above 65 cases (in 2014). Specifically isolating sexual harassment, there were 24 cases (representing about 25%) compared to 9 of 55 cases (16%) in fiscal year 2017. Including non-sexual harassment incidents, in 2018 there were 68 reported incidents, compared to 46 in 2017 (see table 13).

Table 13: NASA Anti-Harassment Program Reports of Harassment (2014-2018)

Type of Harassment Reported	2014	2015	2016	2017	2018
Non-Sexual	52	45	50	46	71
Sexual	13	19	9	9	24
Total	65	64	59	55	95

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 571⁸⁵⁰

NASA asserts that this increase is due to the success of the Anti-Harassment Campaign, as it associates the “spike in reports of harassment” with “the Agency’s Anti-Harassment Campaign that was launched to address the kinds of issues that MeToo is striving to tackle in workplaces and

⁸⁵⁰ The source states 92 cases, however, Commission staff reached out to NASA to verify the correct number of cases and agency staff stated that it was a total of 95 cases, because 3 complaints were filed late in the year after the report was developed.

educational programs nationwide.”⁸⁵¹ The agency stated that this campaign is working to advance a culture of safety that supports reporting incidents of harassment.⁸⁵²

In 2018, the highest percentage of harassment reports at NASA did not involve an EEO basis protected by law.⁸⁵³ Allegations falling into this category (“Other/Unknown”) comprised 27 of the 95 reports filed (28 percent). Sexual harassment (which includes gender-based harassment, e.g., hostile work environment) claims accounted for 25 percent of all 2018 harassment complaints by basis. Another prevalent category was “bullying” that was also raised in 25 percent of the cases.⁸⁵⁴

NASA’s tracking of complaints about bullying is significant, because many scholars argue that sexual harassment can be a form of bullying, especially when it is used to intimidate.⁸⁵⁵ While these categories are not the same, they may reflect overlapping behaviors and these statistics may suggest there are larger issues affecting NASA’s workforce than analyzing them individually would reveal.⁸⁵⁶ Donald Tomaskovic-Devey testified that employers need to also consider low-level harassing behaviors, such as bullying, because it can set the tone for what is considered

⁸⁵¹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 17.

⁸⁵² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 8.

⁸⁵³ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 123. EEO protected bases include: race, color, national origin, religion, age, sex (gender), sexual orientation, physical or mental disability, and reprisal. Reprisal is defined as Unlawful restraint, coercion or discrimination against complainants, their representatives, witnesses, EEO Counselors, investigators, and other agency officials with responsibility for processing EEO complaints. See NASA, Goddard Space Flight Center, Equal Opportunity Programs Office, <https://eeo.gsfc.nasa.gov/introduction/eopo-terminology>, (last accessed, Aug. 21, 2019).

⁸⁵⁴ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 123.

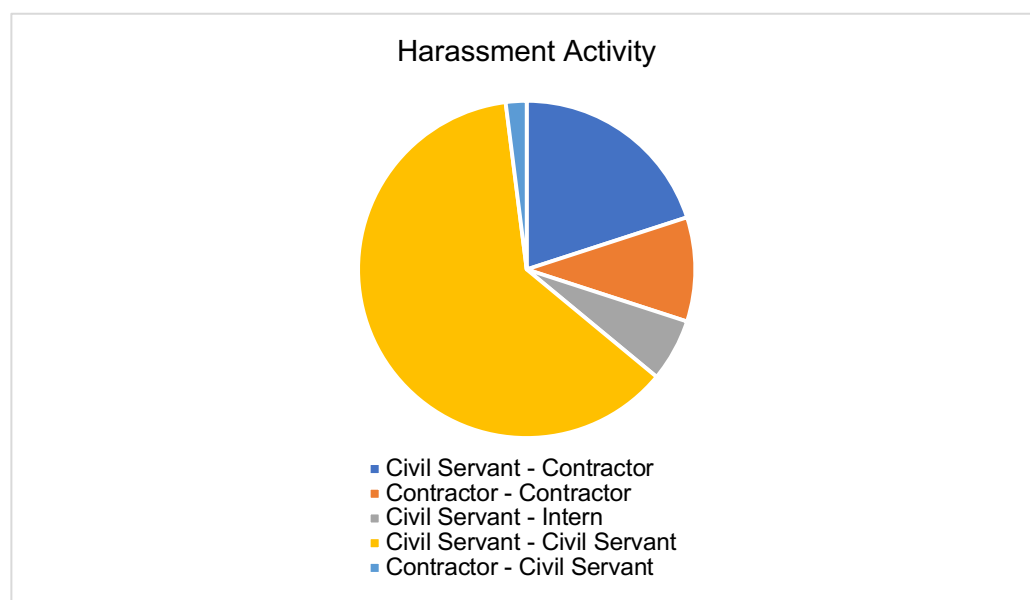
⁸⁵⁵ Ellery Miller Jr., and Eric Mondschein, “Sexual Harassment and Bullying: Similar, but not the Same. What School Officials Need to Know,” *The Clearing House: A Journal of Educational Strategies, Issues, and Ideas*, vol. 90, no. 5-6, 2017, <https://www.tandfonline.com/doi/abs/10.1080/00098655.2017.1366799>; Christina Richey, “Anti-Harassment Policy: The Workplace & DPS,” NASA Postdoctoral Program Fellow, Goddard Space Flight Center, <http://epsc.wustl.edu/~ksinger/DPSWomen2012-Anti-Harrassment.pdf>; Amanda B. Nickerson, Ariel M. Aloe, Jennifer A. Livingston, and Thomas Hugh Feeley, “Measurement of the bystander intervention model for bullying and sexual harassment,” *Journal of Adolescence*, vol. 37 (2014), <http://isiarticles.com/bundles/Article/pre/pdf/36787.pdf>; Gary Namie, “Workplace Bullying: Escalated Incivility,” *Ivey Business Journal*, Nov/Dec. 2003, <http://www.workplacebullying.org/multi/pdf/N-N-2003A.pdf>

⁸⁵⁶ See e.g., Christina Richey, “Anti-Harassment Policy: The Workplace & DPS,” NASA Postdoctoral Program Fellow, Goddard Space Flight Center, <http://epsc.wustl.edu/~ksinger/DPSWomen2012-Anti-Harrassment.pdf>; Amanda B. Nickerson, Ariel M. Aloe, Jennifer A. Livingston, and Thomas Hugh Feeley, “Measurement of the bystander intervention model for bullying and sexual harassment,” *Journal of Adolescence*, vol. 37 (2014), <http://isiarticles.com/bundles/Article/pre/pdf/36787.pdf>; Gary Namie, “Workplace Bullying: Escalated Incivility,” *Ivey Business Journal*, Nov/Dec. 2003, <http://www.workplacebullying.org/multi/pdf/N-N-2003A.pdf>

acceptable behavior in a workplace.⁸⁵⁷ Tomaskovic-Devey asserts that identifying and stopping these behaviors is important, because most incidents of harassment do not necessarily rise to the legal level or hit the severe or pervasive standard to violate Title VII.⁸⁵⁸ NASA recognizes that bullying and harassment may be correlated and stated that it “accepts such reports for processing under the anti-harassment program to address workplace conflict at the earliest opportunity and to ensure that the behavior does not adversely affect the workplace.”⁸⁵⁹

In 2018, reports of alleged harassing behaviors were the most common among similarly defined employees (i.e., civil servant to civil servant) (62 percent), followed by civil servant to contractor (20 percent), contractor to civil servant (10%), civil servant to intern (6 percent), and contractor to civil servant (2 percent) (see chart 11 below). This trend of harassment between similarly defined coworkers (i.e., civil servant to civil servant) accounting for the highest number of incidents has been consistently the highest since 2013.⁸⁶⁰ The data does not, however, indicate whether the relationship was between two lateral employees or if the perpetrator was in a supervisory or management position.

Chart 11: Relationship between Parties (2018)



Source: NASA Interrogatory Responses

⁸⁵⁷ Tomaskovic-Devey Testimony, *Washington Briefing*, p. 93.

⁸⁵⁸ Ibid.

⁸⁵⁹ National Aeronautics and Space Administration, Letter from Associate Administrator for Diversity and Equal Opportunity, Mr. Shih, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 123.

⁸⁶⁰ 2013 was the earliest data the agency provided. Ibid., 129-30.

This trend is similar to other years, where most alleged incidents of harassment occurred between civil servant employees, during the years of analysis (see table 14).

Table 14: Relationship between Parties (2016-2018)

	2016	2017	2018
Civil Servant – Contractor	19	11	19
Contractor – Civil Servant	0	1	2
Civil Servant- Civil Servant	30	35	58
Contractor – Contractor	10	8	9
Civil Servant – Intern	--	--	6

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019

The above data represent the number of harassment claims across the entire NASA workforce, but examining specific space centers and facilities⁸⁶¹ shows that some centers may have more issues with harassment than others. During the study’s time frame, the Goddard Space Flight Center (Goddard) has consistently had the highest number of harassment reports (in both anti-harassment reporting and formal EEO No FEAR Act reporting) among all of NASA’s space centers.⁸⁶² For example, in fiscal year 2018 there were 13 claims of harassment (non-sexual), which accounted for almost half of the entire agency’s reports of harassment for that year.⁸⁶³ The employee demographic breakdown at Goddard generally reflects the makeup of NASA’s workforce overall (see table 15 below), and the particular cause(s) for these increased reports are unknown, but are important to note.

Table 15: Employee Demographics at Goddard and NASA

	Goddard	NASA (overall)
Sex		
Male	63%	65.8%
Female	37%	34.2%
Race/Ethnicity		

⁸⁶¹ NASA has 10 field centers and a Headquarters. NASA Center Assignments by State, https://www.nasa.gov/pdf/313552main_NASA_Center_Assignments_by_State.pdf.

⁸⁶² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 134, 150, 163.

⁸⁶³ NASA Equal Employment Opportunity Data Posted Pursuant to the No Fear Act: Goddard Space Flight Center, (last accessed, Aug. 21, 2019), https://www.nasa.gov/sites/default/files/atoms/files/gsfcc_2nd_quarter_tagged.pdf.

AAPI	9%	7.5%
Black	16%	11.6%
Latinx	7%	7.8%
AIAN	<1%	1.1%
White	67%	71.7%
Disability		
IWD/IWTD	10%	8%

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019

NASA also stated that it may take several measures to help mitigate a complainant's concern while it is conducting a harassment investigation. The agency stated that these interim measures include:

- Requiring a temporary transfer of the alleged harasser to a position that requires the same general skills, with retention of all compensation and benefit levels;
- Making a scheduling change for the alleged harasser to prevent further contact between the parties, e.g., telework;
- Reassigning the alleged harasser to a different building, floor, or department, or to a special project that can be completed either at home or in a different work area;
- Placing the alleged harasser on non-disciplinary (administrative) leave with pay, pending the conclusion of the Fact-Finding (this should be a last resort);
- Having the alleged harassee report to a different supervisor (in case the actual supervisor is the alleged harasser); and
- If parties have to be separated, then the separation should not burden the employee who has reported the harassing conduct. Any impact to a term, condition, or benefit of employment for the alleged harassee could constitute unlawful retaliation.⁸⁶⁴

NASA's EEO Complaint Process

As a part of EEOC's oversight responsibility, in May 2014, EEOC conducted a technical assistance visit to NASA. The EEOC review found that NASA had several areas of non-compliance, which included issues regarding its EEO policies, pre-complaint process, processing times, and decision-making. For instance, the EEOC found that managers and supervisors are not required to

⁸⁶⁴ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 7.

participate in ADR after the complainant has elected to participate in the process; the EEOC also reversed more than 50 percent of NASA's dismissal decisions during 2014-2016 (100% in FY 2014, 71% in FY 2015, and 50% in FY 2016); and all FADs based on merits had not been timely issued between 2014 and 2016 (9% in FY 2014, 18% in FY 2015, and 20% in FY 2016).⁸⁶⁵

In 2018, NASA reported to the EEOC in its annual report on its workforce⁸⁶⁶ that there were 74 incidents of harassment across all protected EEOC bases (i.e., protected groups) which was the highest number of complaints (29) filed for that year. In terms of employee demographics black employees filed the greatest number of alleged discrimination complaints across all issues (21 reported), followed by individuals with physical disabilities (16 reported), women (17 reported), age (17 reported), individuals with mental disabilities (9 reported), men (10 reported), color (10 reported), "other" national origin employees (5 reports), Asian employees (3 reports), Latinx employees (2 reports), and religion (2 reports).⁸⁶⁷

In fiscal year 2017, NASA updated its policies on the ADR process to make it a requirement that ADR be offered to the aggrieved and/or complainant in all cases unless there is a legitimate reason why ADR is not appropriate for that particular case.⁸⁶⁸ Pursuant to this updated policy, NASA established an ADR Management Team at each Center and established a "cadre of mediators for immediate, quality, and cost-effective response to solutions to ADR needs Agency wide."⁸⁶⁹ In the informal process in fiscal year 2017, ADR was offered in 86 percent of cases, which is an increase from the previous year (50 percent), but lower than the government-wide rate of 88 percent.⁸⁷⁰ The

⁸⁶⁵ Ibid., 1235.

⁸⁶⁶ The Office of Federal Operations at the EEOC produces an Annual Report on the Federal Workforce that includes, among other data, information on federal equal employment opportunity complaints and ADR activities. These data are collected from each agency in the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (EEOC Form 462). See Equal Employment Opportunity Commission, 462 Data Collection Resources, (last accessed Aug. 21, 2019), <https://www.eeoc.gov/federal/form462/index.cfm>.

⁸⁶⁷ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 1252-55.

⁸⁶⁸ National Aeronautics and Space Administration, "Equal Employment Opportunity Strategic Plan: FY 2017-19," FY 2017 Annual Report and Update, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 15.

⁸⁶⁹ Ibid.

⁸⁷⁰ Ibid. Note: NASA stated to the Commission that in order ensure that it was accurately capturing the ADR status agency-wide, it took the total number of new informal and formal complaints within the reporting period instead of only measuring the closed cases. Therefore, the agency recalculated its ADR numbers based on the total of new informal and formal complaints, how many of those were offered ADR, and out of those who were offered, how many accepted and participated in ADR. So based on this measurement, in 2017, in the informal process NASA offered ADR to 86 percent of complaints which is lower than the government wide average of 87 percent; with a participation rate of 65 percent that is higher than the government average of 53 percent. In the formal process, NASA offered ADR to 53 percent which is higher than the government-wide average of 18 percent; and a

participation rate for ADR at the informal stage also increased from fiscal year 2016 to 2017 (51 percent, 65 percent, respectively) and exceeded the government-wide rate of 53 percent. During the formal stage in fiscal year 2017, the offer of ADR was 53 percent, compared to 40 percent in fiscal year 2016. The participation rate of ADR was 75 percent, compared to 72 percent the previous year and much higher than the government-wide rate of 9 percent in the formal stage.⁸⁷¹

In fiscal year 2018, NASA reported to the EEOC that it conducted 85 counseling sessions during the informal pre-complaint process.⁸⁷² There were 66 reports of ADR being offered by NASA to 59 individuals, 31 of these individuals rejected the ADR process. Of those employees who went into the ADR process, mediation was the technique most utilized in counseling. In total, NASA closed cases with 29 individuals through ADR counseling. Of these, 7 settled with benefits (either monetary or non-monetary) and 3 did not file a formal complaint. Of the closed ADR cases where a complaint was filed, 15 were closed with no resolution and 6 had no ADR attempt.⁸⁷³ Conversely, in the cases where an accuser filed a formal complaint, the agency offered ADR in 12 cases with 11 complainants and all accepted to the ADR process. Mediation was again the most common technique used in this process. There were 8 cases settled with monetary and non-monetary benefits. While the EEOC report does not track settlements by issue (e.g., harassment, reasonable accommodation, promotion, time and attendance, etc.), NASA paid out \$89,653.40 across the 8 settlement cases. There were 7 complaints that were settled with non-monetary benefits and these ranged from a reassignment, accommodations, to having leave restored or a performance evaluation modified.⁸⁷⁴

Regarding resolutions of complaints, NASA's records show that there was a significant increase in the rate of offers, participation, settlements, and withdrawals for both the informal and formal ADR process from fiscal year 2015 to fiscal year 2016.⁸⁷⁵ For the formal stage in fiscal year 2016, NASA's offer rate was 48 percent, which was above the government-wide rate of 20 percent. Of the cases where ADR was offered, participation was at 68 percent, which was the highest rate for NASA in this study's timeframe and above the government-wide rate of 9 percent. At the informal stage in fiscal year 2016, NASA had the largest increase of ADR offers at 66 percent compared to other years, but was below the government-wide rate of 88 percent. Of these cases where ADR

participation rate of 75 percent which is also higher than the government average of 9 percent. *See* Email Correspondence with Commission Staff and NASA, Nov. 20, 2019 [on file].

⁸⁷¹ *Ibid.*, 15.

⁸⁷² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 1250.

⁸⁷³ *Ibid.*, 1267.

⁸⁷⁴ *Ibid.*, 1268.

⁸⁷⁵ *Ibid.*, 1379.

was offered, the participation rate was 54 percent, which is on par to the government-wide rate at 53 percent.⁸⁷⁶

The EEOC report shows that in 2018, NASA had 32 closures that took a total of 14,230 days and an average of 444.69 days. There were two withdrawals that were both non-ADR withdrawals that took 231 days and an average of 115.50 days. There were 11 settlements that spanned 4,527 days and an average of 411.55 days, which were 3 non-ADR and 8 ADR settlements. NASA issued 19 final agency decisions (FAD) that took a total of 9,472 days and an average of 498.53 days. Of the FADS, 15 did not involve an EEOC Administrative Judge. Of these, 9 cases were dismissed, there were 6 findings of no discrimination, and zero findings of discrimination. Of the 4 FADs with an Administrative Judge, there were 3 findings of no discrimination and 1 finding of discrimination, but the Judge's decision was not fully implemented and NASA appealed both the finding and the remedy.⁸⁷⁷

Comparatively, in terms of the findings in the cases that went through the anti-harassment program, in 2018, NASA shows that it closed 73 cases, and 13 were closed with a finding of harassment and 36 cases were closed with no finding, however the agency still took action in an effort to reduce the potential for future harassing behavior (see table 16). NASA stated that of the concluded cases in fiscal year 2018, "corrective action, such as verbal counseling and mandatory EEO training, was taken to resolve 28 (36%) even in the absence of a finding of a policy violation."⁸⁷⁸

Table 16: Anti-Harassment Program – Cases and Findings

	2016	2017	2018
Total Cases (Reported)	59	55	95
Findings of Sexual Harassment	2	5	8
Findings of Non-Sexual Harassment	2	2	5
Total Cases Closed	58	52	77
Total Cases Closed with Finding	4	7	13
Total Cases Closed with No Finding but Action Taken	16	19	36
Average Processing Time (Calendar Days)	52 days	42 days	56 days

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, at 572.

⁸⁷⁶ Ibid., 1379.

⁸⁷⁷ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 1264.

⁸⁷⁸ Ibid., 123.

Moreover, comparing the cases that went through the internal anti-harassment program to those that went through the formal EEO complaint process shows that from 2013 to 2018, there were zero findings of discrimination for each of those years (see table 17).

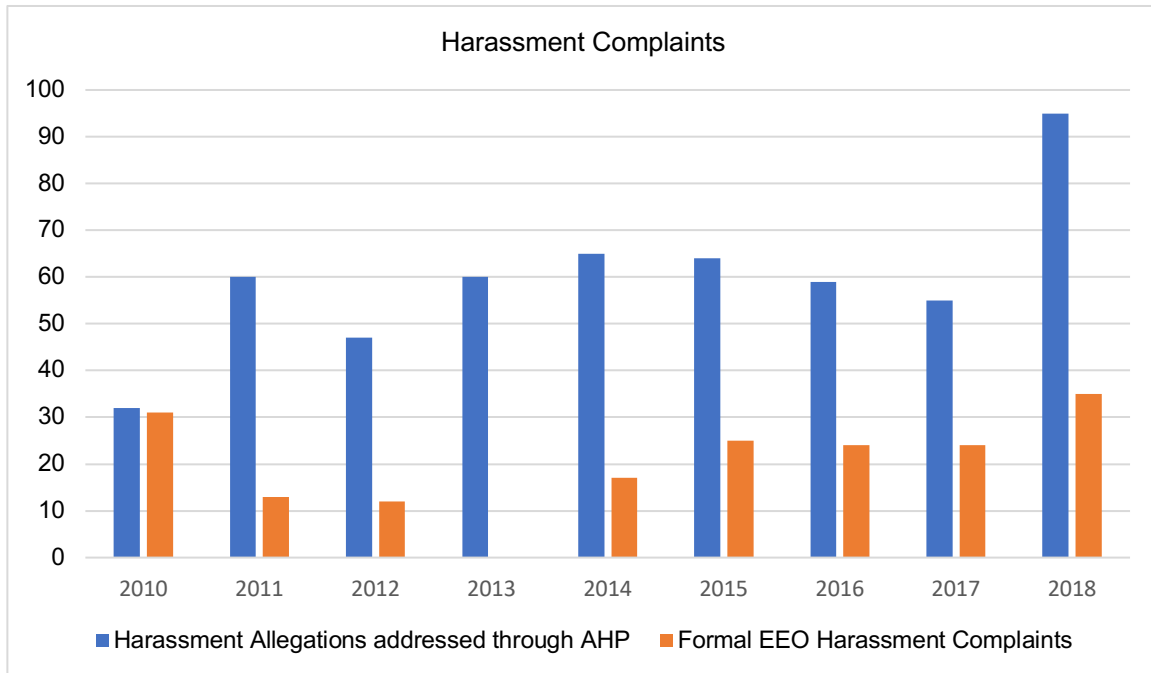
Table 17: NASA EEO Harassment Complaints

Type of Harassment	2013	2014	2015	2016	2017	2018
Non-Sexual	13	20	21	27	24	30
Sexual	2	1	2	0	0	0
Total	15	21	23	27	24	30
Findings of Discrimination	0	0	0	0	0	0

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights at 573.

Since the implementation of the anti-harassment program, employees have sought to address their harassment claims through the internal program rather than pursuing a formal EEO complaint (see chart 8). This trend is not divergent from the literature that shows that many employees want to settle the workplace issue as quickly and efficiently as possible, and thus may not want to go through the complex and timely formal EEO process.⁸⁷⁹

⁸⁷⁹ The anti-harassment program is an internal NASA administrative process that is separate to the EEO complaints process. The agency states that this program was created to provide an additional avenue for managers and supervisors to handle allegations of harassment as “promptly and effectively as possible.” According to NASA, the EEO complaints process is driven by statute and regulation and is designed to redress legally impermissible harassment. The anti-harassment program, by comparison, is designed to address harassment at the earliest possible level, before it becomes legally impermissible. The agency also notes that the legal standard of “severe or pervasive” that is applicable in EEO cases for establishing a case of hostile work environment harassment is a higher bar to meet than the standard in NASA anti-harassment policy (i.e., conduct that “can reasonably be considered to adversely affect the work environment”). See National Aeronautics and Space Administration, “NASA Anti-Harassment Policy and Procedures,” Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 48.

Chart 12: Anti-Harassment Program vs. Formal EEO Complaints (2010-2018)

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights

Since 2016, some employees have chosen to report incidents of harassment both through the anti-harassment program and the informal and formal EEO complaint process (see Table 18). However, the majority of complainants did not.

Table 18: Harassment Reports

	2016	2017	2018
Total anti-harassment program complaints	59	55	95
Total anti-harassment program, where complainant also filed formal EEO complaint	8	7	4
Total anti-harassment program, where complainant also filed informal EEO complaint	6	8	3

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights at 128.

In fiscal year 2016, during the informal stage of the EEO process, 79 EEO counseling activities that involved 69 complainants were completed, which is similar to its fiscal year 2015 number of

74 completed counseling activities with 65 complainants.⁸⁸⁰ In fiscal year 2018, NASA established a “cadre of counselors” in order to facilitate timely and effective counseling during the informal EEO process. In 2018, 75 percent (64 of 85) of NASA’s counseling activities were completed in a timely manner,⁸⁸¹ which was a small decrease from 2017 at 76 percent (41 of 54), but a significant improvement from 2016 at 66 percent.⁸⁸²

In fiscal year 2016, there were 52 formal complaints filed by the 43 employees, compared to 46 complaints filed by 41 employees the previous year. The three leading bases for complaints filed during 2016 were reprisal (cited in 36 complaints), disability, and race (both cited in 27 complaints). The leading issues were non-sexual harassment (cited in 23 complaints), followed by evaluation/appraisal (cited in 19 complaints).⁸⁸³ In fiscal year 2017, formal complaints decreased even further, to an all-time low at 30, and the percentage of employees filing complaints declined from 0.25 percent in fiscal year 2016 to 0.16 percent. Yet, despite this decrease, harassment (non-sexual) continues to be the most prevalent claim.⁸⁸⁴

In fiscal year 2016, NASA’s Office of Diversity and Equal Opportunity completed 73 percent of its formal complaint investigations in a timely manner, which was an improvement from the previous year at 61 percent. The average processing time for each investigation that year was 230 days.⁸⁸⁵ In fiscal year 2018, NASA decreased the amount of time it takes for investigations, where it completed investigations in 94 percent of cases, compared to 86 percent in fiscal year 2017. This time is faster than the government-wide average of 73 percent timeliness in EEO investigations and an increase from 2016 where the agency had an average of 73 percent. In fiscal year 2017,

⁸⁸⁰ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 1377.

⁸⁸¹ Ensure all counseling is completed timely within 30 or 90 calendar days, pursuant to 29 CFR §1614.108 (Part H3).

⁸⁸² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 211.

⁸⁸³ *Ibid.*, 1377.

⁸⁸⁴ National Aeronautics and Space Administration, “Equal Employment Opportunity Strategic Plan: FY 2017-19,” FY 2017 Annual Report and Update, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 14.

⁸⁸⁵ According to EEOC regulation C.F.R. §1614.106(e)(2) requires agencies to conduct an investigation and issue a report to the complainant within 180 days of the filing of a complaint unless: 1) the parties agreed to an extension of no more than 90 days (may not exceed 270 days); or 2) the complaint was amended or consolidated, which can add another 180 days to the period but may not exceed a total of 360 days. *See* National Aeronautics and Space Administration, “Equal Employment Opportunity Strategic Plan: FY 2017-19,” FY 2017 Annual Report and Update, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf. National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 1377.

NASA's average time to complete investigations increased to 254 days (29 cases) from 230 days (33 cases) in fiscal year 2016.⁸⁸⁶

NASA stated to the Commission this increase in case processing time is due to additional steps taken to improve the quality of investigations such as increased training and mentoring of employees who are responsible for reviewing cases, drafting acceptance notices, tracking, establishing a more streamlined and standardized process, and soliciting feedback from stakeholders (i.e., Center EEO staff and Agency legal staff) and external customers (i.e., complainants).⁸⁸⁷

Processing Times

NASA's average processing time for Anti-Harassment Program complaints (i.e., the time from when an allegation is raised to when the case is closed) was 51 days in fiscal year 2018, which was an increase from 42 days in 2017. As discussed, the Anti-Harassment Program is separate and distinct from the EEO process. If a complainant elects to file in the anti-harassment program and does not simultaneously file an EEO complaint, the timeframe to file (i.e., 45 days) may expire before the complaint is settled in the anti-harassment program, thus leaving the complainant without recourse or the option to file an EEO complaint.

Over the two years the Commission reviewed, the agency's average processing time for sexual harassment allegations through its anti-harassment program was 48.33 days.⁸⁸⁸ In the nine years of the program to date, NASA's average processing times have ranged between 42 and 61 days.⁸⁸⁹ These times are much lower than the agency's EEO average processing time (average of 503 days) and its ADR process (average of 74 days).⁸⁹⁰

⁸⁸⁶ National Aeronautics and Space Administration, "Equal Employment Opportunity Strategic Plan: FY 2017-19," FY 2017 Annual Report and Update, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf, at 14.

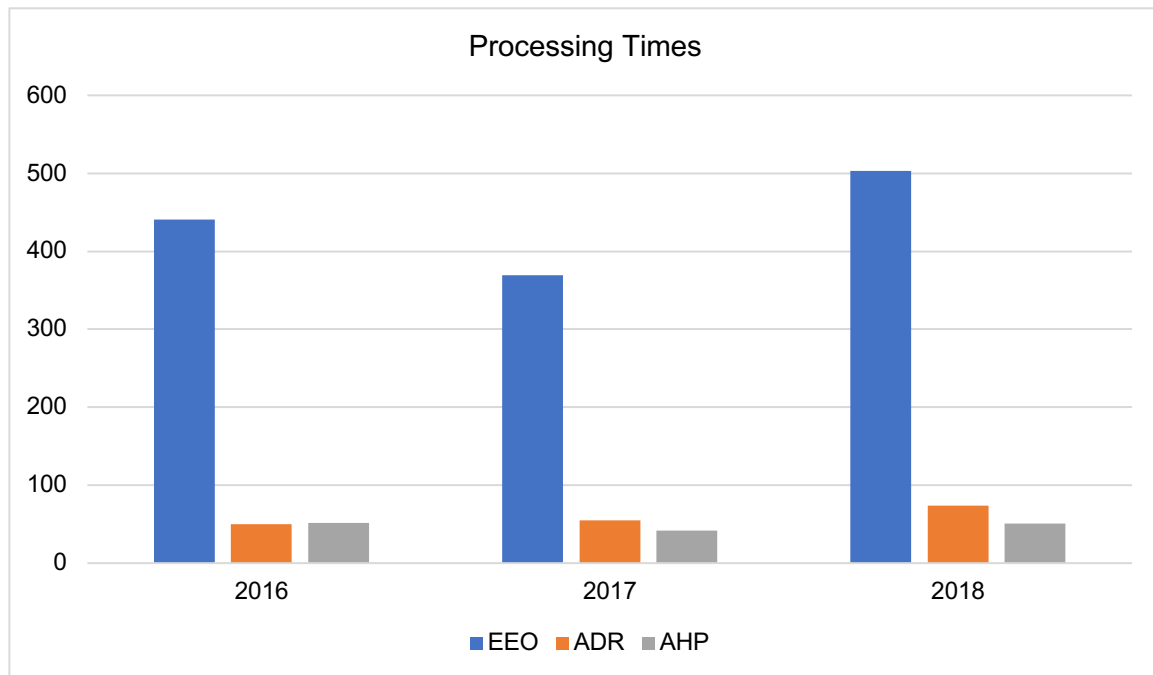
⁸⁸⁷ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019 at 210.

⁸⁸⁸ *Ibid.*, at 18. While the underlying document shows the average time of 34.87 days, Commission staff corresponded with NASA staff to verify that the correct number is 48.33 days. According to the Interrogatory responses to the Commission, it shows that the average case processing times were 2016 (52), 2017 (42), and 2018 (51). *See* National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, at 127.

⁸⁸⁹ National Aeronautics and Space Administration, "Letter from Associate Administrator for Diversity and Equal Opportunity, Mr. Shih," Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 123.

⁸⁹⁰ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019 at 133.

Chart 13: Overall Average Processing Times for Anti-Harassment Program Complaints (2016-2018)



Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, at 133.

Claims Processing Efficacy

NASA has a broad anti-discrimination policy and a complaint processing procedure for its NASA workforce governed by an EEO policy statement that proclaims:

It is NASA's policy to provide equal employment opportunity (EEO) for all employees and applicants for employment regardless of race, color, national origin, sex (including pregnancy, sexual harassment, sex stereotyping, sexual orientation, gender identity, and caregiving responsibilities), religion, age, disability, genetic information (including family medical history), or status as a parent. Pursuant to this policy, NASA prohibits discrimination on these bases in the workplace and the Agency's employment practices. NASA strives to provide and maintain a work environment that is free of all forms of discrimination, including discriminatory harassment, as well as reprisal or retaliation for engaging in protected EEO activity. NASA also seeks to address harassing conduct at the earliest possible stage, before it can become severe or pervasive.⁸⁹¹

⁸⁹¹ National Aeronautics and Space Administration, NASA Policy Directive: Federal EEO Program of NASA (Feb. 2016) at 1, https://www.nasa.gov/sites/default/files/atoms/files/n_pd_3713_002j_main.pdf.

NASA delegates authority to the Associate Administrator for Diversity and Equal Opportunity (the AA) to establish policy in regards to complaint processing.⁸⁹² There are a number of others, including the Director of the Complaints Management Division and the Deputy General Counsel (serving as the Dispute Resolution Specialist), who regulate and supervise the implementation of the AA's complaint processing policy.⁸⁹³ The AA has the authority to “ensure that the EEO complaint resolution process, including ADR, is prompt, fair, and impartial,”⁸⁹⁴ “receive formal individual and class complaints of employment discrimination and accepting or dismissing formal individual complaints,”⁸⁹⁵ “issue final orders implementing or appealing decisions of an EEOC Administrative Judge, in regard to the certification of class complaints,”⁸⁹⁶ “conduct necessary investigations and inquiries, delegating EEO Investigators authority to administer oaths or obtain notarized statements and requiring statements of witnesses to be under oath or affirmation,”⁸⁹⁷ and “render final Agency decisions (FADs) on the merits of complaints,”⁸⁹⁸ among other powers. NASA also has case processing manuals, the NASA EEO Counselor's Guide and NASA Contingent Worker Guidance, which are used to determine the merits of an alleged sexual harassment claim.⁸⁹⁹

For the formal EEO process, NASA stated that it has struggled to meet the regulatory timelines established by the EEOC for multiple parts of the complaint process.⁹⁰⁰ For instance, investigations and adjudications have not met guidelines and issuing final agency decisions (FADs) continues to be the most challenging area in complaints processing at the agency. In fiscal years 2017 and 2018, NASA was only able to timely issue 17 percent (1 of 6 in fiscal year 2018) of its FADs.⁹⁰¹ In order to decrease this time, in fiscal year 2018, NASA entered into an agreement with another federal

⁸⁹² National Aeronautics and Space Administration, NASA Policy Directive: Delegation of Authority to Act in Matters Pertaining to Discrimination Complaints (Mar. 2018) at 1, https://www.nasa.gov/sites/default/files/atoms/files/n_pd_3713_006q_main.pdf.

⁸⁹³ *Ibid.* at 2.

⁸⁹⁴ *Ibid.* at 3.

⁸⁹⁵ *Ibid.*

⁸⁹⁶ *Ibid.*

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

⁸⁹⁹ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 797, 925.

⁹⁰⁰ National Aeronautics and Space Administration, “Equal Employment Opportunity Strategic Plan: FY 2017-19,” FY 2017 Annual Report and Update, at 14, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf.

⁹⁰¹ Ensure all FADs are issued within 60 calendar days, pursuant to 29 CFR §1614.110(b) (Part H-5).

agency and acquired two detailees who have extensive knowledge in the drafting and reviewing of FADs to help alleviate the backlog.⁹⁰²

In order to protect complainants while a complaint is being processed, NASA has adopted a number of procedures.⁹⁰³ For instance, the agency first counsels and offers advice to complainants about their rights and NASA's sexual harassment policy.⁹⁰⁴ Supervisors and responsible management official (RMOs) are also informed of their reporting and investigatory obligations and are reminded about the regulations against retaliation.⁹⁰⁵ However, NASA stated that while an investigation is underway, NASA does not reassign complainants or RMOs unless "it is necessary to separate the parties, and management believes that a transfer is warranted."⁹⁰⁶ In such a case, "the harasser will be transferred (unless the complainant specifically requests a move)."⁹⁰⁷ In no previous case has either the complainant or the RMO been reassigned or transferred.⁹⁰⁸

As discussed in Chapter 2, advocates argue that some sexual harassment allegations, especially those that are systemic or particularly egregious should be fast-tracked or triaged over other types of discrimination claims.⁹⁰⁹ NASA stated that it had not considered fast-tracking or triaging sexual harassment complaints.⁹¹⁰ The agency wrote:

In the Anti-Harassment Program, the Agency seeks to resolve all reports, sexual and otherwise, promptly. Where allegations of sexual harassment have been concerned, especially inappropriate touching or visual matter, the Agency is keenly aware of the need to take any necessary interim measures to alleviate the situation and to move as quickly and efficiently as possible to case conclusion.⁹¹¹

NASA's Stephen Shih testified that the way the Anti-Harassment Program has achieved its relatively short case processing time is because NASA has ensured that it is "not asset poor because

⁹⁰² National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 209.

⁹⁰³ *Ibid.*, 17.

⁹⁰⁴ *Ibid.*

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*, 17.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*

⁹⁰⁹ Chandy Testimony, *Washington Briefing*, p. 40.

⁹¹⁰ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 18.

⁹¹¹ *Ibid.*

it involves a collaboration of all of the organizations across the agency with equities and responsibilities that address this, and that includes the Offices of General Counsel, it includes HR, it includes senior leadership.”⁹¹²

Outcomes of Investigations

As stated above, there were zero findings of sexual harassment through NASA’s formal EEO complaint process from fiscal year 2016 to fiscal year 2018.⁹¹³ Under the anti-harassment program, NASA found 15 incidents of sexual harassment that were considered inconsistent with NASA’s anti-harassment policy (2 in 2016, 5 in 2017, and 8 in 2018).⁹¹⁴ In these cases, sanctions have ranged from written counseling and memoranda in personnel files to required training to reassignment and suspensions for up to 30 days (see table 19).⁹¹⁵

⁹¹² Shih Testimony, *Washington Briefing*, p. 77

⁹¹³ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 573.

⁹¹⁴ *Ibid.*, 21.

⁹¹⁵ *Ibid.*

Table 19: Disciplinary Actions after Internal Investigations

Actions Taken	Number of Incidents
Reassignment	3
Removal from Supervisory Position	1
One-Day Suspension	1
Five-Day Suspension	1
30-Day Suspension	1
Letter of Counseling	1
Letter of Reprimand	1
Verbal Reprimand	3
Training	5

Source: National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, at 22.

NASA also stated that during the period of investigation (fiscal year 2016-2018), one contract employee had been terminated in a joint decision between NASA and the contracting agency.⁹¹⁶

While more reporting and participation is a good step in preventing sexual harassment, women are still underrepresented at NASA, which can create barriers and potentially a culture that is permissive of harassment.⁹¹⁷ For instance, Julie Rathbun, Senior Scientist at the Planetary Science Institute, argues that participation of women in spacecraft science teams can be particularly difficult.⁹¹⁸ Rathbun explains that working on a spacecraft science team is an especially desired employment opportunity for planetary scientists, as the job often offers unique data, a sense of wonderment, and financial security.⁹¹⁹ Through her research, she found that “[t]he pre-2000 average is 5.7% women on spacecraft teams. Since 2000, the percentage of women has remained flat at 15.8%.”⁹²⁰ Further, she notes that “while the percentage of women in planetary science appears to be increasing, their representation on spacecraft science teams has not been

⁹¹⁶ National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm’n Civil Rights, May 23, 2019, at 21.

⁹¹⁷ See *Ibid.*, 12 (underrepresentation of NASA’s workforce); see e.g., Dana Kabat-Farr and Lilia M. Cortina, “Sex-Based Harassment in Employment: New Insights into Gender and Context,” *Law and Human Behavior*, 2014, vol. 38, no. 1, [https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20\(2014\).pdf](https://lsa.umich.edu/psych/lilia-cortina-lab/Kabat-Farr%20&%20Cortina%20(2014).pdf) (discussion of underrepresentation of women can have correlations to higher risks of harassment).

⁹¹⁸ Julie Rathbun, “Participation of women in spacecraft science teams,” *Nature Astronomy* 1 (2017).

⁹¹⁹ *Ibid.*, 1.

⁹²⁰ *Ibid.*, 2.

commensurate, demonstrating that the planetary science community is not benefiting from the expertise of many qualified women scientists.”⁹²¹

This lack of representation was highlighted in March 2019 when NASA was set to have the first all-female spacewalk, but it had to be canceled due to “spacesuit availability” because NASA did not have two spacesuits available for the women astronauts.⁹²² This is not the first time the availability of spacesuits for women has been an issue for NASA. In 2006, NPR reported that women’s opportunities to spacewalk have been limited due to the fact that suits only came in medium, large, and extra-large sizes.⁹²³ And while they previously were manufactured in small, that size has not been available since the 1990s. Therefore, anyone who needed a smaller suit would not be able to make a spacewalk.⁹²⁴ As of 2006, more than 150 male astronauts had spacewalked, but only 7 women had gone outside.⁹²⁵ When the agency first investigated the issue in 2003, it found that about a third of its female astronauts could not fit into the existing suits.⁹²⁶

But the lack of spacesuits for women astronauts is far from the only issue. As discussed in Chapter 1, harassment is more likely to occur in isolating environments, and *Vice* has reported that space can increase risk factors for sexual harassment and abuse.⁹²⁷ *Vice* News Editor Daniel Oberhaus argues that “[i]n space, mission crews will not have recourse to their terrestrial mission control when problems... arise, which can be especially troubling when these instances of sexual violence or harassment are carried out by the leader of the mission.”⁹²⁸ Oberhaus cites a case that occurred in 1999, where Canadian astronaut candidate Judith Lapierre was sexually assaulted by a Russian mission commander. After the mission was completed the Russian scientific coordinator, Valery

⁹²¹ Ibid.

⁹²² Matthew Schwartz, “NASA Scraps First All-Female Spacewalk For Want of a Medium Spacesuit,” *NPR*, March 26, 2019, <https://www.npr.org/2019/03/26/706779637/nasa-scraps-first-all-female-spacewalk-for-want-of-a-medium-sized-spacesuit>.

⁹²³ Ibid.

⁹²⁴ Nell Greenfieldboyce, “When It Comes to the Spacewalk, Size Matters,” *NPR*, Dec. 15, 2006, <https://www.npr.org/templates/story/story.php?storyId=6627320>; Matthew Schwartz, “NASA Scraps First All-Female Spacewalk For Want of a Medium Spacesuit,” *NPR*, March 26, 2019, <https://www.npr.org/2019/03/26/706779637/nasa-scraps-first-all-female-spacewalk-for-want-of-a-medium-sized-spacesuit>.

⁹²⁵ Nell Greenfieldboyce, “When It Comes to the Spacewalk, Size Matters,” *NPR*, Dec. 15, 2006, <https://www.npr.org/templates/story/story.php?storyId=6627320>.

⁹²⁶ Ibid.

⁹²⁷ Daniel Oberhaus, “Sexism in Space,” *Vice*, Apr. 2, 2015, https://www.vice.com/en_us/article/539498/sexism-in-space.

⁹²⁸ Ibid.

Gushchin claimed that Lapierre had “ruined the mission [and] the atmosphere, by refusing to be kissed.”⁹²⁹

Oberhaus also describes how the culture of the aerospace industry can be harmful:

One factor that’s contributed to strained social dynamics between astronauts is the cultural image of the astronaut and the machismo attitude that swirls around it. Astronauts, particularly males, have known that their job description—not unlike that of the test pilots that paved the way to space, or fighter pilots—affords them a certain desirability among the opposite sex, something which can lead to an arrogance in sexual matters.⁹³⁰

And while NASA stated that it is increasing its recruitment and outreach efforts to encourage more women to apply, Joan Kuhl, writer for *Forbes*, argues that early education in the STEM fields and recruitment is only half the issue.⁹³¹ Kuhl states that:

We must place a more urgent effort around disrupting a gender biased system that derails the few women who make it past the education and professional hurdles in STEM to actually get jobs in tech and science companies. The covert and overt sexism that women in STEM jobs face on a daily basis shows up in every aspect of the business. We can't underestimate the issues that could arise when representation of half our global population does not have a seat at the table where key decisions are made and ideas are proposed.⁹³²

⁹²⁹ Ibid.

⁹³⁰ Ibid.

⁹³¹ Joan Kuhl, “NASA Decision Ignites Dialogue Around Gender Barriers in STEM Careers,” *Forbes*, Mar. 27, 2019, <https://www.forbes.com/sites/joankuhl/2019/03/27/nasa-decision-reinforces-gender-barriers-in-stem-careers/#43c2780a36f8>.

⁹³² Ibid.

Department of State (State)

As discussed, the Commission decided to evaluate sexual harassment at the State Department based on a variety of factors, including studies showing that geographic isolation in a male-dominated field can correlate with higher risks of sexual harassment.⁹³³ As with EEOC and NASA, the Commission invited the agency's testimony and sent formal interrogatories and document requests. The Commission also conducted a review of publicly available data and analyzed the public comments it received from current and former employees.⁹³⁴

At the Commission's briefing, Gregory Smith, Director of the Office of Civil Rights and Chief Diversity Officer at the State Department, stated that the agency has a "zero tolerance" policy towards harassment, and while there is still work to be done, it is actively pursuing bringing an end to harassment among its workforce.⁹³⁵ He stated that this effort involves at least three components. First, the effort involves establishing a clear policy that "fairly and objectively investigate[s] harassment allegations."⁹³⁶ Second, the effort involves raising awareness through training of employees that not only focuses on preventing harassment, but also reminds employees of their rights and protections.⁹³⁷ Third, the agency recognizes that managers, supervisors, and senior leadership must be aware of their responsibilities and engaged in ending harassment at the State Department.⁹³⁸ State therefore instituted a policy that all management officials must report if they "observe, reasonably suspect or become aware [of a behavior] that may be considered discriminatory or sexual harassment."⁹³⁹ Smith asserted that the mandatory reporting requirement

⁹³³ See e.g., Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, "Employer's Responses to Sexual Harassment," Center for Employment Equity at University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>; Heather McLaughlin, Christopher Uggen, and Amy Blackstone, "Sexual Harassment, Workplace Authority, and the Paradox of Power," *American Sociological Review*, vol. 77, no. 4, 2012, <https://journals.sagepub.com/doi/pdf/10.1177/0003122412451728>; Elyse Shaw, Ariane Hegewisch, Cynthia Hess, "Sexual Harassment and Assault at Work: Understanding the Costs," Oct. 15, 2018, https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf; EEOC, Select Task Force on the Study of Harassment in the Workplace, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm; Marina Koren, "When Scientists Are Sexually Harassed in the Field," *The Atlantic*, Oct. 11, 2017, <https://www.theatlantic.com/science/archive/2017/10/sexual-harassment-fieldwork-science/542559/> (for research breaking down these criteria and finding correlation with increased sexual harassment).

⁹³⁴ See e.g., Leila Johnson Testimony, *Washington Briefing*, pp. 149-51; Alissa Redmond Testimony, *Washington Briefing*, pp. 156-58.

⁹³⁵ Smith Testimony, *Washington Briefing*, p. 48.

⁹³⁶ Ibid.

⁹³⁷ Ibid., 48.

⁹³⁸ Ibid.

⁹³⁹ Ibid., 49.

sets State apart from other agencies, and perhaps more importantly, that half of the allegations coming into his office are from supervisors who are complying with this requirement.⁹⁴⁰ The Commission notes that other agencies, such as NASA, have somewhat similar mandatory reporting policies and that all federal employers do have some duties to report harassment; however, as discussed herein, State has emphasized this reporting obligation in their recent policies issued to combat sexual harassment.⁹⁴¹

As discussed herein, preventing and addressing sexual harassment at the State Department also poses particular challenges, because, unlike most other federal agencies that have exclusively domestically-stationed workers, State has employees who are located in embassies and consulates in 200 countries around the world.⁹⁴² This international reach is significant because studies have shown that isolated work environments correlate with higher risks of sexual harassment.⁹⁴³ Gregory Smith testified that the State Department ensures, and advertises to its staff, that due to the agency's global workforce, in an effort to ensure that employees feel supported worldwide, individuals can report incidents 24 hours a day, 7 days a week due to the agency's global presence. Smith further pointed to then-Secretary of State Rex Tillerson's 2018 agency-wide speech to address and prevent misconduct and harassment as an indication that senior leadership is dedicated to fostering a workplace culture of respect.⁹⁴⁴ This speech mandated that all employees, locally employed staff, and contractors be re-trained on anti-harassment policies within 90 days and State asserted that it achieved a 97 percent participation rate for over 77,000+ employees around the world.⁹⁴⁵

In addition to geographic issues, the fact of serving in the national security field in general may also impact incidence of sexual harassment among State employees. For instance, in November 2017, 223 women, including former Ambassadors and high-ranking officials from the Department of Defense wrote in a public letter that their field has been male-dominated, and their prime example was that even though women enter the State Department as Foreign Service officers at the same rate as men, they are under-represented in senior positions.⁹⁴⁶ They also assert that in

⁹⁴⁰ Smith Statement, p. 2.

⁹⁴¹ See NASA Anti-Harassment Policies and Procedures, Implementation Guide, 2nd Edition, Dec. 2016, at § 3.5.1, citing EEOC Vicarious Liability Guidance, § V.C.1.d ("Inaction by the supervisor in such circumstances could lead to Agency liability and possible disciplinary action against the supervisor.").

⁹⁴² Smith Testimony, *Washington Briefing*, p. 48.

⁹⁴³ See *supra* notes 27; 179; 246.

⁹⁴⁴ Smith Testimony, *Washington Briefing*, p. 49.

⁹⁴⁵ *Ibid.*

⁹⁴⁶ #MeTooNatSec, Open Letter to the National Security Community, Nov. 28, 2017, <https://time.com/5039104/we-too-are-survivors-223-women-in-national-security-sign-open-letter-on-sexual-harassment/>.

national security agencies “many women are held back or driven from this field by men who use their power to assault at one end of the spectrum and perpetuate—sometimes unconsciously—environments that silence, demean, belittle or neglect women at the other.”⁹⁴⁷ Given the importance of serving in these posts and representing the values of American democracy, they call for change at State and other agencies.⁹⁴⁸ The data the Commission reviewed also show a pattern of increasing sexual harassment complaints at the agency,⁹⁴⁹ as well as some challenges in the timely resolution of complaints,⁹⁵⁰ and a complex system that can be difficult for employees to navigate.⁹⁵¹ These data and the relevant harassment and discrimination policies at the State Department are analyzed herein.

Overview of Agency and Workforce

As of June 2019, the State Department employed 77,012 people.⁹⁵² Of these, 13,814 were Foreign Service employees, 10,024 were Civil Service employees, and 9,371 employees total from both of these categories were stationed overseas.⁹⁵³ Breaking this population down by demographic characteristics shows that the majority of State’s workforce were white (71.0 percent) and male (56.2 percent) (see Table 20).⁹⁵⁴

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.

⁹⁴⁹ See *infra* notes 1090-93.

⁹⁵⁰ See *infra* notes 1168-79.

⁹⁵¹ See *infra* notes 1014-26.

⁹⁵² Department of State, HR Fact Sheet, June 30, 2019, <https://www.state.gov/wp-content/uploads/2019/07/Human-Resources-Fact-Sheet-as-of-032019.pdf>.

⁹⁵³ Ibid.

⁹⁵⁴ Department of State Diversity Statistics: Department of State, Full-time Permanent Workforce by ERGD, June 30, 2019, (accessed, Oct. 16, 2019), <https://www.state.gov/wp-content/uploads/2019/07/Department-of-State-%E2%80%93-Diversity-Statistics-Full-time-Permanent-Workforce.pdf>. To note, the State Department disaggregates the demographic data race and ethnicity, so there may be some overlap between racial and ethnic categories. In other documents, however, the State Department reports the categories together (see Chart 1 at <https://2009-2017.state.gov/documents/organization/254251.pdf>) When Hispanic was counted as a race in 2011 (see chart at 5), the overall data did not change significantly (Ibid). This seems to indicate that at State, Latinx employees do not over-identify as white, as is sometimes the case. See e.g., Ana Gonzalez-Barrera and Mark Hugo Lopez, “Is being Hispanic a matter of race, ethnicity, or both?” Pew Research Center, June 15, 2015, <https://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both/> (for relevant data trends on how Latinx identify).

Table 20: Department of State, Demographic Breakdown, FY 2017 (percentages)

	NH/PI	AIAN	Asian	Black	Latinx	White	Multi-Race	Unsp*	Female	Male	IWD	IWTD
Civil Service	0.1	0.4	6.6	24.4	6.7	60.7	4.8	2.5	54.1	45.8	14.7	2.7
Foreign Service Generalist	0.0	0.3	6.7	5.3	6.2	81.2	4.2	1.8	41.2	58.7	6.5	1.0
Foreign Service Specialist	0.1	0.5	5.9	8.8	10.0	74.8	5.9	3.6	29.1	70.8	8.4	0.6
Senior Executive Service (SES)	0.0	0.0	4.4	3.1	4.4	89.7	1.3	1.3	39.7	60.2	5.8	1.3
Senior Foreign Service (SFS)	0.0	0.2	3.2	3.0	4.9	89.1	1.9	2.4	31.7	68.2	14.3	0.5
Total	0.1	0.4	6.5	14.2	7.3	71.0	4.9	2.6	43.7	56.2	10.4	1.6

*Unsp=Unspecified or employee did not self-identify or disclose their race or ethnicity

**Senior Executive Service and Senior Foreign Service percentages are included within the Foreign Generalist & Specialist and Civil Service percentages

Source: Department of State Diversity Statistics: <https://www.state.gov/wp-content/uploads/2019/07/Department-of-State-%E2%80%93-Diversity-Statistics-Full-time-Permanent-Workforce.pdf>

The demographic breakdown of some of the highest level of employees at State shows some striking disparities. The majority of both Senior Executive Service and Senior Foreign Service positions are held by white, male employees. The data in Table 12 show that many people of color, women, and persons with disabilities are underrepresented in these upper-management and leadership positions. In its response to the Commission’s interrogatories, the agency also identified another potential EEO trigger in fiscal year 2018, specifically concerning two job series in the Bureau of Diplomatic Security.⁹⁵⁵ State relayed that in these job series there was a statistically significant difference in the attrition rate for all women and all non-white employees, which could pose a potential EEO barrier.⁹⁵⁶

In its Management Directive (MD) 715 fiscal year 2017 report, State explains that it has been increasing its diversity efforts at all levels and “any analysis of senior leadership ... must take into account that any gains we have made in forging a more diverse and inclusive Foreign Service at the entry and mid-levels are not necessarily reflected at senior leadership levels, which typically

⁹⁵⁵ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 120.

⁹⁵⁶ Ibid.

take 20 years to achieve.”⁹⁵⁷ The report further asserts that the gender gap in the Foreign Service Specialist position can be “largely attributed to the gender make-up of the Foreign Service Specialist personnel category,”⁹⁵⁸ clarifying that the majority of FS Specialists work in either security or IT, both which are male-dominated fields.⁹⁵⁹

The report also states that in FY 17, the agency “[t]rained an employee... to fulfill the Federal Women’s Program Manager (FWPM) duties. The FWPM has developed guidance on how embassies and consulates around the world can support the employment and career advancement of women and established a SharePoint site to register all appointed Federal Women’s Program Coordinators. This site also functions as a resource that connects FWPCs and allows them to exchange best practices and engage in dialogue about issues of concern at multiple locations.”⁹⁶⁰ According to the FY 2018 MD-715, however, State noted that there are still vacancies remaining in the Federal Women’s Program.⁹⁶¹

State’s Office of Civil Rights (S/OCR) also noted that the office works closely with employee affinity groups, such as the Executive Women@State group to better identify possible barriers to advancement and retention of women at the agency.⁹⁶² Specifically, these endeavors have focused on encouraging women to apply for senior positions within the agency, to serve on promotion panels, and to “capitalize on opportunities to communicate directly with Department leadership” through attending events such as the Deputy Secretary’s quarterly Diversity Forum.⁹⁶³ Other efforts that State reported to EEOC as activities designed to encourage the advancement of women in the agency have included providing more work-life balance opportunities such as teleworking, creating lactation spaces in every State building and at posts overseas, developing training courses such as a course entitled: “Mitigating Unconscious Bias,” and funding a third-party study on the barriers that women and other underrepresented groups at the State Department face for entry into the Senior Foreign Service.⁹⁶⁴

⁹⁵⁷ U.S. Department of State, Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report, Fiscal Year 2017, p. 11 (hereinafter U.S. Department of State, *MD 715 Report FY 2017*).

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.*

⁹⁶⁰ Department of State, *MD 715 Report FY 2017*, p. 39.

⁹⁶¹ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 83.

⁹⁶² Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 37.

⁹⁶³ *Ibid.*

⁹⁶⁴ *Ibid.*, 37-38. State notes that this study is set to be completed in Q1 of FY 2020 and the findings will be used to develop strategies on diversity and inclusion and in State’s 2020 Diversity and Inclusion Strategic Plan. *Ibid.*

The agency also reported that it continues to have an underrepresentation in Latinx workers and highlights that issue as a potential trigger in its Civil Service professions.⁹⁶⁵ Moreover, the agency recognizes that since fiscal year 2013, it has lacked a Hispanic Employment Program Manager who would work with the Office of Civil Rights' Diversity Management and Outreach (DMO) section.⁹⁶⁶

Further, State's number of individuals with disabilities (IWD) and individuals with targeted disabilities (IWTG) may both be a trigger for purposes of categories EEOC directs agencies to report,⁹⁶⁷ specifically when it comes to new hires to the permanent workforce.⁹⁶⁸ However, State's largest workforce representational growth during fiscal year 2017 was from employees who self-identified as individuals with disabilities in both its Civil and Foreign Service (51.4 percent, 10.8 percent, respectively).⁹⁶⁹ This growth was despite the fact that State reported a decrease in the number of employees in both the Civil and Foreign Service in FY17 due to the federal hiring freeze.⁹⁷⁰ Some of these losses came from a decrease in the percentage of black employees that year in the Civil Service (-2.06 percent). In the Foreign Service, there was also a negative percent growth for both Asian employees (-1.05 percent) and Native Hawaiian and Native American employees (-5.56 percent).⁹⁷¹

⁹⁶⁵ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 9, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>

⁹⁶⁶ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 38, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>; see also, Executive Order 13781, Office of Management and Budget memoranda. March 16, 2017, <https://www.federalregister.gov/documents/2017/03/16/2017-05399/comprehensive-plan-for-reorganizing-the-executive-branch>.

⁹⁶⁷ EEOC defines a "trigger" as "a trend, disparity, or anomaly that suggest the need for further inquiry into a particular policy, practice, procedure, or condition." See EEOC, Instructions to Federal Agencies for EEO MD-715, "Section II: Barrier Identification and Elimination," <https://www.eeoc.gov/federal/directives/md715/section2.cfm>.

⁹⁶⁸ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 59, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>. Note: State said due to the hiring freeze at the beginning of 2017, it could not produce a full analysis of new hires for FY17.

⁹⁶⁹ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 8, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

Sexual Harassment Policies

State explains that the Department's anti-harassment policies have been in place for more than a decade, when they were codified in the Foreign Affairs Manual at 3 FAM 1525-26.⁹⁷² According to the agency, the policies "emphasize the Department's commitment to providing a workplace free from discriminatory, including sexual, harassment and to taking prompt and appropriate corrective action as necessary. The policies [also] set expectations for professionalism in the workplace and outline what options, rights, and responsibilities individuals have in addressing and reporting harassment."⁹⁷³

At the Commission's briefing, Gregory Smith explained that in 2013, the Department sent out a notice to employees that it would not tolerate sexual misconduct and harassment, and the S/OCR office began tracking data about sexual harassment reports and administrative inquiries in FY 2014.⁹⁷⁴ The official policy of the State Department is that it is "committed to providing a workplace that is free from sexual harassment. Sexual harassment in the workplace is against the law and will not be tolerated. When the Department determines that an allegation of sexual harassment is credible, it will take prompt and appropriate corrective action."⁹⁷⁵ The State Department's current policy, first published in 2013, reviewed annually, and recertified in January 2019 defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. An employment decision affecting that individual is made because the individual submitted to or rejected the unwelcome conduct; or
2. The unwelcome conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or abusive work environment.⁹⁷⁶

State's policy lists several examples of what constitutes sexual harassment:

- Sexual pranks, or repeated sexual teasing, jokes, or innuendo, in person or via e-mail;
- Verbal abuse of a sexual nature;

⁹⁷² State Department, Affected Agency Review Responses to the Commission, Nov. 6, 2019 [on file].

⁹⁷³ Ibid.

⁹⁷⁴ Smith Statement at 5-6.

⁹⁷⁵ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, (accessed Oct. 15, 2019), <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/>.

⁹⁷⁶ Ibid.

- Touching or grabbing of a sexual nature;
- Repeatedly standing too close to or brushing up against a person;
- Repeatedly asking a person to socialize during off-duty hours when the person has said no or has indicated he or she is not interested (supervisors in particular should be careful not to pressure their employees to socialize);
- Giving gifts or leaving objects that are sexually suggestive;
- Repeatedly making sexually suggestive gestures;
- Making or posting sexually demeaning or offensive pictures, cartoons or other materials in the workplace;
- Off-duty, unwelcome conduct of a sexual nature that affects the work environment.

A victim of sexual harassment can be a man or a woman. The victim can be of the same sex as the harasser. The harasser can be a supervisor, co-worker, other Department employee, or a non-employee who has a business relationship with the Department.⁹⁷⁷

The policy also notes that if State receives an allegation of sexual harassment – or has reason to believe sexual harassment is occurring—it will promptly investigate the claim. If the Department determines that an allegation is credible, then it will “take immediate and effective measures to end the unwelcome behavior.”⁹⁷⁸ The agency states that it prohibits any “unprofessional or inappropriate conduct” regardless if it meets or rises to the legal definition of sexual harassment.⁹⁷⁹ Further, the policy states that State is committed to act if it has reason to believe sexual harassment is occurring, regardless of whether the complainant chooses to file a formal EEO complaint.⁹⁸⁰

Unlike NASA, the Department of State’s definition of sexual harassment seems limited to the EEO definition.⁹⁸¹ State clarified, however, that misconduct does not have to rise to this level to be

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ See Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 35.

⁹⁸⁰ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019 (accessed Oct. 15, 2019), <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/>.

⁹⁸¹ See *supra* note 784 (discussing NASA policy, defining sexual harassment as: “any unwelcome verbal or physical conduct, based on an individual’s race, color, gender, national origin, religion, age, disability, genetic information, sexual orientation, status as parent, or gender identity, which can reasonably be considered to adversely affect the work environment or an employment decision affecting the employee based upon the employee’s acceptance or rejection of such conduct”).

actionable.⁹⁸² Although State recognizes that victims of sexual harassment can be of the same sex, State does not explicitly state that the policy applies to persons harassed based on their gender identity, and does not explicitly reach “any” unwelcome conduct “which can reasonably be considered to adversely affect the work environment or an employment decision.”⁹⁸³

Internal investigations into allegations of sexual harassment are handled by the Office of Civil Rights (S/OCR), which has the responsibility for investigating and overseeing all investigations of sexual harassment allegations. Gregory Smith of S/OCR stated that S/OCR does not have authority to decide on the outcome of allegations it investigates; instead S/OCR has investigative authority only and refers the case to the State Department’s Conduct, Suitability, and Discipline Division in the Bureau of Human Resources’ Office of Employee Relations (HR/ER/CSD) for possible disciplinary actions.⁹⁸⁴ The HR office is thus responsible for determining whether and how much to discipline staff if investigations confirm the existence of sexual harassment.⁹⁸⁵ These actions can range from a letter of reprimand, to suspensions without pay, to separation for cause or removal.⁹⁸⁶

Smith added that the Office of Civil Rights’ “aim is to ensure that potential victims are relieved of the harassing behavior as immediately as possible, and that at the conclusion of a thorough investigation, the alleged harasser is promptly disciplined if it so warranted.”⁹⁸⁷ However, Smith also testified that: “I am not familiar with [the] HR process” at State.⁹⁸⁸ Therefore, without the ability to determine the outcome of an investigation, S/OCR not only lacks ability to achieve the aim Smith described but also Smith confirmed his lack of familiarity with the process that does have responsibility to deliver that result.⁹⁸⁹ However, State explained that:

by delegating disciplinary authority to HR (and other relevant authorities), S/OCR can maintain neutrality throughout the investigation, which facilitates candor from victims, witnesses, and those accused. Further, since HR has delegated authority to discipline all forms of misconduct—harassment, bullying, issues of waste, fraud, and/or abuse, security

⁹⁸² State Department, Affected Agency Review Responses to Commission on draft report, Nov. 6, 2019 [on file].

⁹⁸³ *Ibid.* and *Cf.* U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 15, 2019).

⁹⁸⁴ *See* Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 5.

⁹⁸⁵ Smith Testimony, *Washington Briefing*, pp. 63; 64-65.

⁹⁸⁶ *See* Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 18.

⁹⁸⁷ Smith Testimony, *Washington Briefing*, p. 48.

⁹⁸⁸ *Ibid.*, 79.

⁹⁸⁹ *Ibid.*, 48.

violations, etc.—then this helps ensure that each matter can be addressed holistically, more efficiently, by discipline subject-matter-experts, and consistency throughout the agency.⁹⁹⁰

The policy states that supervisors and other State officials must report any suspected incidents to S/OCR and failure to do so will be in violation of the policy and may result in disciplinary action.⁹⁹¹ Smith said that this policy sets State apart from other agencies.⁹⁹² Commission research shows that NASA has a similar policy, which is based on the following section of EEOC Guidance: “While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.”⁹⁹³

The policy further states that supervisors are responsible to take necessary measures to ensure that no further harassing behaviors take place during the investigation process.⁹⁹⁴ Under the Foreign Affairs Manual, any allegation of sexual harassment must be reported to S/OCR, which is mandated to conduct an administrative inquiry into the allegations that may lead to disciplinary actions if the allegation is found to be credible.⁹⁹⁵ In cases of sexual harassment, S/OCR serves as a “neutral, independent fact-finder.”⁹⁹⁶

The policy states that once an investigation is complete, employees who have been found to have committed sexual harassment – “whether the behavior meets the legal definition of sexual harassment or not”—will be subject to discipline or other action deemed appropriate by

⁹⁹⁰ State Department, Affected Agency Review Responses to Commission on draft report, Nov. 6, 2019 [on file].

⁹⁹¹ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 30, 2019).

⁹⁹² Smith Statement at 2.

⁹⁹³ NASA Anti-Harassment Policies and Procedures, Implementation Guide, 2nd Edition, Dec. 2016, at § 3.5.1, citing EEOC Vicarious Liability Guidance, § V.C.1.d (“Inaction by the supervisor in such circumstances could lead to Agency liability and possible disciplinary action against the supervisor.”).

⁹⁹⁴ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 30, 2019).

⁹⁹⁵ U.S. Department of State, Foreign Affairs Manual, 3 FAM 1750 Sexual Assaults Involving Department Personnel and Facilities in the United States (accessed Aug. 21, 2019), https://fam.state.gov/searchapps/viewer?format=html&query=sexual%20harassment&links=SEXUAL_HARASS&url=/FAM/03FAM/03FAM1750.html#.

⁹⁹⁶ Ibid at 3 FAM 1756.2-3.

management.⁹⁹⁷ Disciplinary actions can range from a verbal or written admonishment, a reprimand letter, to suspensions without pay, or loss of one's job.⁹⁹⁸ State explained that:

Employees have the option to respond in writing, orally, or both, to a proposal for disciplinary action before the Deciding Official, who is in most cases a Deputy Assistant Secretary for Human Resources, [and] makes a final discipline decision. Employees may be represented by a union representative or an attorney during these proceedings. The Deciding Official may choose to sustain or mitigate the proposed disciplinary action. In making the final discipline determination, the Deciding Official will also consider the “Douglas Factors,” or the factors codified in 3 FAM 4375, factors established by federal precedent, that may have a mitigating or aggravating impact on the penalty imposed.⁹⁹⁹

State's policy also notes that a complainant has several avenues to resolve the complaint. These options include mediation, which is an informal process where a trained mediator facilitates communication between the complainant and the alleged harasser. If a resolution is not reached, the complainant may choose to pursue another option. The policy reminds all employees – both domestic and international— that it is their right to pursue a formal EEO complaint and reminds employees of the statutory timeframes (45 days from the incident) associated with this process in which they must contact an EEO counselor.¹⁰⁰⁰ These procedures mirror federal EEO regulations.¹⁰⁰¹

According to interviews with current and former State employees conducted by investigative journalists with *Foreign Policy*, due to systemic challenges at the agency, including pressure from colleagues and even from HR officials not to bring sexual harassment complaints, some impacted employees elect not to go through the EEO process.¹⁰⁰² For example:

one woman, who complained that a male colleague was playing with his genitals while talking to her, was told by a colleague that several men at post did that “to help them think” — that is, that this was not an offense worth reporting. Another woman who says she was grabbed and groped twice by the consul general at her post says she was told by the human

⁹⁹⁷ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Aug. 21, 2019).

⁹⁹⁸ Ibid.

⁹⁹⁹ Department of State, Affected Agency Review responses to the Commission, Nov. 6, 2019 [on file].

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ See 29 C.F.R. §§ 1614.101 – 1614.110.

¹⁰⁰² Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

resources unit that there was no need to report what happened, and that she would only create problems for herself were she to do so.¹⁰⁰³

Although State Department supervisors clearly have a duty to report sexual harassment,¹⁰⁰⁴ supervisors themselves can be the problem. In addition, it is also not clear whether the policy is routinely followed. One attorney dealing with sexual harassment cases reportedly stated that she has not found State's mandatory reporting policy to be a great deterrent, as "the good managers do it, and the bad managers don't."¹⁰⁰⁵ This reality may be even more complicated for foreign nationals, whose complaints are handled "at post" and may be more reluctant to speak out.¹⁰⁰⁶

State notes that the agency has attempted to offer certain safeguards to address the concern for foreign nationals. For instance, besides its mandatory reporting requirements, it has also established a Locally Employed Staff Liaison program that "empowers locally employed staff to communicate with fellow foreign nationals, who coordinates with S/OCR, and both employees have full retaliation protections."¹⁰⁰⁷

Another woman interviewed by *Foreign Policy* relayed that delay can also be a problem: a State Department employee reportedly stated that her sexual harassment and retaliation complaint sat for 16 months before an EEO Administrative Judge and State lawyer were assigned to the case.¹⁰⁰⁸ After interviewing more than a dozen current and former State Department employees, the article also discussed that procedures vary from post to post, and while claims are pending, personnel may be moved from post to post, making the investigation more complicated.¹⁰⁰⁹ As discussed herein, there have been some case processing delays: in FY 2017, a final agency decision was issued on time (within 60 days) in 86 percent of State Department harassment cases.¹⁰¹⁰

¹⁰⁰³ Ibid.

¹⁰⁰⁴ See *supra* note 991.

¹⁰⁰⁵ Emily Tamkin and Robbie Gramer, "Will State Miss Its #MeToo Moment?" *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/> (quoting Lynne Bernabei, a partner at Bernabei & Kabat, PLLC).

¹⁰⁰⁶ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 15, 2019).

¹⁰⁰⁷ State Department, Affected Agency Responses to Commission on draft report, Nov. 6, 2019 [on file].

¹⁰⁰⁸ Emily Tamkin and Robbie Gramer, "Will State Miss Its #MeToo Moment?" *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ See *infra* note 1168. State notes that in FY 2018, it has significantly increased its timeliness for issuing FADs. See State Department, Affected Agency Review responses to Commission on draft report, Nov. 6, 2019 [on file].

Similar to NASA's sexual harassment policy,¹⁰¹¹ the State Department told the Commission that it extends direct access to S/OCR without going through an intermediary, to Locally Employed (LE) staff, interns, contractors (including those stationed overseas), Eligible Family Members, and Members of Household.¹⁰¹² But State also reported that its policy requires that issues raised by LE staff and Third Country Nationals (TCNs) are handled at post if the incident occurred abroad; and contractors are encouraged to first contact their own company's HR or EEO office, but may speak to an EEO counselor or LE Liaison at post.¹⁰¹³

Therefore, State Department employees can lodge an informal complaint to the S/OCR office, and they can also file a formal EEO complaint (as can contractors and others, who may or may not be covered).¹⁰¹⁴ The EEO process is a separate and distinct process from the informal S/OCR process, and does not require an employee to inform the employee's supervisor before filing a complaint.¹⁰¹⁵ However, to file an EEO complaint, under federal regulations, they must consult an agency EEO Counselor within 45 days to start the formal process.¹⁰¹⁶ State's January 2019 policy, however, does not explicitly remind employees that if they do seek resolution through the informal process that process will count against their 45-day time limit.¹⁰¹⁷ The Commission received testimony that this could lead to confusion and ambiguity for a complainant who does not realize that his or her time in which to file a formal EEO complaint has started and could run out before a decision is made in the informal process.¹⁰¹⁸ At the Commission's briefing, several panelists and members of the public testified that this ambiguity is problematic and that sexual harassment policies should make clear to employees what their rights are.¹⁰¹⁹ For instance, Stacey Young, senior litigator at the Department of Justice, testified that federal agencies should "supplement training requirements with regular reminders about the ways employees can report allegations and education those new to the department about their rights. It's critical that employees understand how they can report complaints to the EEO, and that unlike the private sector, they only have 45

¹⁰¹¹ See *supra* notes 794-797 (discussing NASA's policy of including contractors).

¹⁰¹² Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 6.

¹⁰¹³ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 28.

¹⁰¹⁴ See *supra* notes 138-149; 159-162 (in Chapter 1, regarding contractors, interns and federal other workers).

¹⁰¹⁵ EEOC, "Alternative Dispute Resolution for EEO Matters," Chapter 3, MD 110, https://www.eeoc.gov/federal/directives/md-110_chapter_3.cfm.

¹⁰¹⁶ 29 C.F.R. § 1614.105(a)(1).

¹⁰¹⁷ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 15, 2019).

¹⁰¹⁸ Chandy Testimony, *Washington Briefing*, p. 20; Katz Testimony, *Washington Briefing*, pp. 125-26 (regarding the 45-day timeframe).

¹⁰¹⁹ Chandy Testimony, *Washington Briefing*, p. 20; Katz Testimony, *Washington Briefing*, p. 126; Young Testimony, *Washington Briefing*, p. 155.

days to do so.”¹⁰²⁰ State, however, explains that it highlights the 45-day limit in all of its briefings and training courses.¹⁰²¹

State employees may encounter another potentially complicated process to navigate if they choose to file a sexual harassment complaint under the agency’s negotiated grievance procedures.¹⁰²² The Foreign Service Manual defines a negotiated grievance procedure as “negotiated by a labor union and the Department, must be the exclusive procedure available to bargaining unit employees for resolving grievances, and fall within its coverage.”¹⁰²³ Employees who are not covered under a negotiated grievance procedure or collective bargaining unit cannot this procedure cannot bring a grievance on EEO matters. For those Civil Service employees who are covered under this procedure, they can “only file a grievance alleging sexual harassment or other EEO matters if permitted by the governing collective bargaining agreement.”¹⁰²⁴ Further, employees in the Foreign Service can file grievances on EEO matters for adjudication by the Federal Service Grievance Board, but EEO regulations require them to choose to either file a grievance *or* an EEO complaint.¹⁰²⁵ If the employee elects to file a grievance, the incident is investigated and recommendations for resolution are made to the Deputy Assistant Secretary responsible for rendering the agency’s decisions on grievances.¹⁰²⁶ According to the Foreign Affairs Manual, the grievance procedure is designed for swift resolution through open communication, while at the same time providing for representation of the employee by the employee union, and adjudication “without fear of interference, coercion, or reprisal.”¹⁰²⁷

In fiscal year 2014, State received 14 reported grievances alleging discrimination.¹⁰²⁸ These reports have decreased in the subsequent years, and in fiscal year 2018 there were three grievances reported by Foreign Service employees alleging discrimination. Of these, two grievances alleged

¹⁰²⁰ Young Testimony, *Washington Briefing*, p. 155

¹⁰²¹ State Department, Affected Agency Review Responses to Commission on draft report, Nov. 6, 2019 [on file].

¹⁰²² U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 30, 2019).

¹⁰²³ 3 FAM 4715, U.S. Department of State, Foreign Affairs Manual, <https://fam.state.gov/FAM/03FAM/03FAM4420.html> (accessed Oct. 30, 2019).

¹⁰²⁴ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 30, 2019).

¹⁰²⁵ 3 FAM 4428, U.S. Department of State, Foreign Affairs Manual, <https://fam.state.gov/FAM/03FAM/03FAM4420.html> (accessed Oct. 30, 2019).

¹⁰²⁶ U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (accessed Oct. 30, 2019).

¹⁰²⁷ See 3 FAM 4714, U.S. Department of State, Foreign Affairs Manual, <https://fam.state.gov/FAM/03FAM/03FAM4420.html> (accessed Oct. 30, 2019).

¹⁰²⁸ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 157.

discrimination based on sex and one based on disability; none resulted in findings of discrimination, but one is active on appeal with the Foreign Service Grievance Board.¹⁰²⁹

A current State Department employee submitted a written statement to the Commission that described the grievance process as one that is not intended to offer redress to the complainant. She stated that:

HR has drafted an informal policy specially intended to make life miserable for those grievants who are denied tenure and placed on interim relief by the Foreign Service Grievance Board. By default, their overseas assignments are broken and they are sent back to Washington. When I was sent back, I was also denied all normal benefits afforded to Washington-based Foreign Service Officers.¹⁰³⁰

According to the person who submitted the comment, this matter is now pending in a federal appellate court.¹⁰³¹

Moreover, locally employed (LE) staff at U.S. embassies and consulates abroad do not have access to the grievance board process, and their colleagues have and they are often times also outranked by their diplomatic colleagues.¹⁰³² The Commission received a written submission from a current Foreign Service Officer that further explained this concern. The officer wrote that:

LE staff are uniquely vulnerable to sexual harassment at Missions. As a Foreign Service Officer who also served as an Equal Employment Opportunity (EEO) Counselor in previous assignments, I was dismayed to discover there are limited remedies under the current EEO system for LE Staff to pursue. They are precluded from filing formal complaints, and must instead engage in mediation sessions. There is very little incentive to come forward, and these (often, but not always) women feel they have everything to lose. While retaliation is prohibited, the onus is on victims to bring forward another

¹⁰²⁹ Ibid.

¹⁰³⁰ Foreign Service Officer at the State Department who wishes not to be named in the report, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019. While the officer did not specify which benefits the officer was referring to, according to the State Department's website, these benefits include annual leave, child care, family leave, health and life insurance, long term care insurance, access to credit unions and fitness facilities, to name a few. See U.S. Department of State, Foreign Service Officer Benefits, <https://careers.state.gov/work/benefits/fso/>.

¹⁰³¹ Ibid.

¹⁰³² Laura Koran and Elise Labott, “#StateToo: Retired ambassador calls out ‘persistent’ sexual harassment at State Dept,” *CNN*, March 1, 2018, <https://www.cnn.com/2018/03/01/politics/sexual-harassment-state-department/index.html>.

complaint alleging retaliation. Furthermore, many LEs face cultural stigmas and are often afraid that they will be subject to office gossip and loss of reputation.¹⁰³³

Similarly, a former EEO counselor at the State Department stated that “while [harassment] cases involving locally employed staff are not commonplace, they are unique because of the lack of formal recourse, and because victims can face additional cultural stigmas that sometimes lead to self-censorship.”¹⁰³⁴ President and CEO at the Truman National Security Project Jenna Ben-Yehuda also testified that locally employed staff in foreign countries are by definition not American citizens and are citizens of the host country. Therefore, “[t]hese are the most vulnerable people at a given post... People have a lot of pride in working for our government overseas. So that means also that they’re least in the position to be able to come forward.”¹⁰³⁵

As discussed above, for Foreign Service Nationals (FSNs) or Locally Employed Staff, if an incident occurs at one of these posts, it is handled at post.¹⁰³⁶ This policy has raised some concerns since incidents of sexual harassment have occurred at these international posts and critics have argued that they have not been addressed adequately. For example, a 2011 State Department Inspector General’s audit found that the German embassy and consulates were not “attentive” or “proactive” in handling harassment claims.¹⁰³⁷ The report shows that the most common type of harassment was on the basis of gender or sexual orientation, and seemed to be more prevalent at the U.S. embassy in Berlin.¹⁰³⁸ The audit also found that “some allegations of racial and sexual harassment within the mission have not been addressed effectively.”¹⁰³⁹ Additionally, harassment policies were not publicly posted anywhere in the embassy’s three office buildings or on the mission’s private website.¹⁰⁴⁰

¹⁰³³ Anonymous submission by Foreign Service Officer at the State Department, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019.

¹⁰³⁴ Laura Koran and Elise Labott, “#StateToo: Retired ambassador calls out ‘persistent’ sexual harassment at State Dept,” *CNN*, March 1, 2018, <https://www.cnn.com/2018/03/01/politics/sexual-harassment-state-department/index.html>.

¹⁰³⁵ Ben-Yehuda Testimony, *Washington Briefing*, p. 68.

¹⁰³⁶ See U.S. Department of State, Sexual Harassment Policy, Jan. 29, 2019, <https://www.state.gov/key-topics-office-of-civil-rights/sexual-harassment-policy/> (last accessed Aug. 21, 2019).

¹⁰³⁷ Kathrine Landergan, “Audit: Under Murphy, U.S. Embassy in Germany wasn’t ‘proactive’ with harassment claims,” *Politico*, Oct. 15, 2018, <https://www.politico.com/states/new-jersey/story/2018/10/15/us-embassy-in-germany-was-not-proactive-with-harassment-claims-2011-audit-found-649828>.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*

State explains that while LE staff do not have access to the formal EEO process, the agency does allow them to have full access to EEO counseling and are not precluded from the same internal harassment inquiry process as other State workers.¹⁰⁴¹ State further mentions that LE staff, while not protected by the EEO process since they are not American citizens, they are protected by local labor laws, which are not available to American citizens working overseas.¹⁰⁴²

A subsequent Office of Inspector General (OIG) report in November 2014 found that one of the issues in addressing sexual harassment (and other forms of discrimination) at the State Department is a “complex and somewhat disjointed” agency disciplinary system for which the process “can involve a half dozen department offices and non-department agencies, department and non-department appeals entities and investigative entities, private attorneys, unions and professional associations, and the charged employee.”¹⁰⁴³ The report noted that despite that the agency was making efforts to address the issue of harassment, the lack of consistent tracking and reporting across disciplinary systems could result in wide variation in resolution times and inconsistent statements of agency decisions.¹⁰⁴⁴

Moreover, when instituting disciplinary actions, the report noted there was no policy requiring recusal of personnel in that process who had an existing relationship with the employee being disciplined, thereby unfair and inconsistent results were alleged. This absence of a recusal requirement can jeopardize the independence of a disciplinary decision and permit a conflict of interest.¹⁰⁴⁵ Lastly, the OIG report pointed out that timeliness remained one of the central challenges for the Conduct, Suitability, and Discipline Division in the Bureau of Human Resources’ Office of Employee Relations offices to address complaints. For example, analyzing 891 discipline cases from 2010 to May 2014, showed that the average time from case receipt to decision letter was 114 days, which is much longer than the target of 30 days from receipt to resolution.¹⁰⁴⁶ In a subsequent June 2015 OIG report, investigators noted that senior department officials must “emphasize the need for action offices to process cases in a timely manner and hold individuals accountable for their inappropriate actions.”¹⁰⁴⁷ Current and former State employees remarked that these issues laid out in the OIG report are just some of the challenges that the agency

¹⁰⁴¹ State Department Affected Agency Review Responses to Commission on draft report, Nov. 6, 2019 [on file].

¹⁰⁴² Ibid.

¹⁰⁴³ U.S. Department of State, Office of the Inspector General, *Review of the Department of State Disciplinary Process*, Nov. 2014, https://www.stateoig.gov/system/files/isp-i-15-04_1.pdf, at 21.

¹⁰⁴⁴ Ibid., 16, 21.

¹⁰⁴⁵ Ibid., 20.

¹⁰⁴⁶ Ibid., 21.

¹⁰⁴⁷ U.S. Department of State, Office of the Inspector General, *Inspection of The Office of Civil Rights*, June 2015, <https://www.stateoig.gov/system/files/isp-i-15-26.pdf>, at 9.

faces when trying to curb sexual harassment among its workforce. In an American Foreign Service Association journal article, Leslie Bassett, retired Senior Foreign Service officer, former U.S. Ambassador to Paraguay, and deputy chief of mission in Seoul, Manila, Mexico City, and Gaborone, argued that “the combination of complex processes, inadequate accountability at senior levels, a lack of training and other issues means that repeat offenders can continue to abuse.”¹⁰⁴⁸

To address some of these concerns, the #MeTooNatSec letter signed by 223 women in the national security field calls for the following reforms in State and other national security agencies:

- Clear leadership from the very top that these behaviors are unacceptable;
- Creating multiple, clear, private channels to report abuse without fear of retribution;
- External, independent mechanisms to collect data on claims and publish them anonymously;
- Mandatory, regular training for all employees;
- Mandatory exit interviews for all women leaving Federal service.¹⁰⁴⁹

State’s current policies meet some, but not all, of these criteria. Strong statements from leadership have been made. For instance, in March 2018, Heather Nauert, a State Department’s spokeswoman released a statement to *Foreign Policy* reporting that:

Sexual harassment will not be tolerated at the Department of State... This has been made clear to Department employees — both domestic and international — and our senior-most officials have taken the lead in efforts to staunch unacceptable workplace behavior.

Nauert asserted that a town hall that then-Secretary of State Rex Tillerson hosted in 2018 in conjunction with a panel discussion hosted by Deputy Secretary of State John Sullivan regarding sexual harassment demonstrated State’s dedication to addressing the issue. In her statement, she wrote:

¹⁰⁴⁸ Leslie Bassett, “#StateToo: Ending Harassment at the State Department,” <https://www.afsa.org/statetoo-ending-harassment-state-department>. State notes that the November 2014 OIG report and the accompanying testimonials predate the implementation of its 2013-14 anti-harassment policies and procedures. However, it does not have an update on the changes HR/ER/CSD has implemented after the report was released or the impact of any changes. See State Department, Affected Agency Review responses to Commission, Nov. 6, 2019 [on file].

¹⁰⁴⁹ U.S. Department of State, Office of the Inspector General, *Inspection of The Office of Civil Rights*, June 2015, at 2.

Addressing sexual harassment is one of Secretary Tillerson's priorities and he has been hands on in this effort, drawing a clear line in the sand regarding behaviors that will not be tolerated at the State Department.¹⁰⁵⁰

Despite these statements, full protection of women from sexual harassment at the Department of State may still be lacking. According to the State Department's written testimony to the Commission, data regarding sexual harassment as reported under the anti-harassment policies has only been collected since fiscal year 2014.¹⁰⁵¹ Further, while there may be multiple channels for complaints or reports, these processes lag in processing times.¹⁰⁵² Moreover, there does not seem to be an external method to collect and publish data about sexual harassment anonymously;¹⁰⁵³ and although retaliation is legally prohibited, the Commission received multiple stories of impacted women that include fear of retribution.¹⁰⁵⁴

In response to the #MeTooNatSec letter, in January 2018, Senators Ben Cardin and Jeanne Shaheen of the Senate Foreign Relations Committee sent a letter to then-Secretary of State Rex Tillerson and USAID Administrator Mark Green regarding the sexual harassment and abuse allegations at their respective agencies noting:

This letter speaks to what we believe remains a critical issue that too many of our national security institutions have been too slow to address: sexual assault and harassment and its effects on the professionalism and effective functioning of those institutions. These incidents and the pervasive culture that all too frequently excuses these behaviors and actions have had serious and detrimental consequences for the careers and lives of those affected - and by depriving the United States of the service of some of our best and brightest, a deep and negative effect on our national security.¹⁰⁵⁵

Senator Shaheen specifically called on the Foreign Relations Committee and the Trump Administration to address "this longstanding cultural problem at these federal agencies" and

¹⁰⁵⁰ Emily Tamkin and Robbie Gramer, "Will State Miss Its #MeToo Moment?" *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹⁰⁵¹ Smith Statement at 5; *see also* State Department, Affected Agency Review responses to Commission on draft report, Nov. 6, 2019 [on file].

¹⁰⁵² *See infra* notes 1168, 1174-84.

¹⁰⁵³ *Cf. supra* note 843, regarding the Federal Employee Viewpoint Survey, which does not specifically address sexual harassment.

¹⁰⁵⁴ *See e.g., infra* notes 1129; 1148-51.

¹⁰⁵⁵ U.S. Senate Committee on Foreign Relations, "Cardin, Shaheen Lead SFRC Democrats in asking Tillerson, Green for Information on Addressing Sexual Harassment, Abuse at State Department, USAID," Jan. 17, 2018, <https://www.foreign.senate.gov/press/ranking/release/cardin-shaheen-lead-sfrc-democrats-in-asking-tillerson-green-for-information-on-addressing-sexual-harassment-abuse-at-state-department-usaid>.

“ensure [that] women are treated equally and represented at all levels” in “an environment that rewards their achievements and is free from harassment and intimidation.”¹⁰⁵⁶

In response to the senators’ letter, in February 2018, then-Secretary of State Rex Tillerson gave a speech to the embassy staff in Cairo stating that all employees at the State Department will be required to take mandatory sexual harassment training that was to be completed by June 1 of that year. Tillerson also discussed the importance of bystanders intervening if they witness misconduct. He stated that “there is no form of disrespect for the individual that I can identify, anything more demeaning than for someone to suffer this kind of treatment. It’s not okay if you’re seeing it happen and just look away. You must do something. You must notify someone. You must step in and intervene.”¹⁰⁵⁷ At the Commission’s briefing, Gregory Smith stated that in this speech Tillerson had

on the spot, [] designated or required us to do mandatory training for the [State] Department department-wide, and that’s 75,000 employees, which we did. I’m proud to say that we did. It was a heavy lift, but we did it...everything that we’ve done in the Office of Civil Rights has been supported by our leadership both visibly and vocally, and I think that is key in terms of the type of environment or work culture that you want to create.¹⁰⁵⁸

While Tillerson’s statement is a positive step that demonstrates that State leadership is taking the issue of sexual harassment seriously, others remain critical, questioning whether the work is actually being done to help prevent harassment and hold violators of the policy accountable. Retired Foreign Service Officer Leslie Bassett asserts that the first thing the agency needs to do is adopt and implement a “no tolerance” policy for sexual harassment, abuse, and assault. Bassett suggests that State should create a special committee that includes individuals from various hiring categories, ranks and bureaus within the agency in order to ensure that all forms of sexual harassment are properly investigated from which this committee can create specific recommendations for structural reform to be instituted in a reasonable timeframe.¹⁰⁵⁹ Retired Foreign Service Officer Bassett offers a detailed list of suggested institutional remedies which include:

- Fully implementing the policies on sexual harassment and sexual assault.

¹⁰⁵⁶ Ibid.

¹⁰⁵⁷ Reuters Staff, “Top U.S. diplomat urges action on harassment as issue roils White House,” *Reuters*, Feb. 12, 2018, <https://www.reuters.com/article/us-usa-misconduct-statedept/top-u-s-diplomat-urges-action-on-harassment-as-issue-roils-white-house-idUSKBN1FW1BN>.

¹⁰⁵⁸ Smith Testimony, *Washington Briefing*, p. 49.

¹⁰⁵⁹ Leslie Bassett, “#StateToo: Ending Harassment at the State Department,” *The Foreign Service Journal*, Mar. 2018, <https://www.afsa.org/statetoo-ending-harassment-state-department>.

- Updating employee handbooks.
- Requiring mandatory, ongoing sexual harassment training.
- Holding supervisors accountable for maintaining respectful workplaces.
- Ensuring prompt processing of harassment/assault complaints by responsible offices.
- Establishing a recusal policy for HR, DS, the Bureau of Medical Services and OIG when asked to investigate harassment or assault by their own employees.
- Improving resources and support for employees, family members, locally employed staff and contractors who face sexual harassment or assault.
- Creating a separate, confidential and responsive channel for victims to report sexual assault and receive physical and mental support.
- Imposing transparent penalties against perpetrators that factor in the severity and frequency of the harassment, including penalties such as suspension, criminal charges, revocation of security clearance and separation.
- Providing statistical information on complaints and outcomes.
- Conducting vigorous and timely investigations of sexual assault reports and provide accurate statistical reporting of cases/timelines/outcomes.
- Reinvigorating the Federal Women’s Program at all State Department facilities.¹⁰⁶⁰

Training

State maintains that its training program is “robust, collaborative, and inclusive [and its] goal is to provide effective training not just ‘check the box’ training.”¹⁰⁶¹ The Director of State Department Office of Civil Rights Gregory Smith testified before the Commission that the agency conducts “proactive” and “awareness” training for all of its employees with the intention of trying to prevent harassment from occurring.¹⁰⁶² Smith also testified that every employee is mandated to undergo training, both domestically and internationally; and the agency also has specific training for

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ State Department, Affected Agency Review Responses to the Commission on draft report, Nov. 6, 2019 [on file].

¹⁰⁶² Smith Testimony, *Washington Briefing*, p. 48.

interns.¹⁰⁶³ In its response to the Commission’s interrogatories, State noted that the “average employee will receive EEO/anti-harassment training approximately every two to three years, though many receive training more often.”¹⁰⁶⁴ For managers and supervisors, there is a mandatory EEO Diversity and Awareness training that they must complete within one year of acquiring their first managerial or supervisory position; and following, they are required to take a subsequent training course every five years thereafter.¹⁰⁶⁵ One of the successive courses, entitled Leading a Diverse Workforce, focuses on EEO concerns, while the other four course choices such as The Ambassadorial Seminar, Fundamentals of Supervision, and The Deputy Chiefs of Mission Seminar “incorporate an EEO/diversity module.”¹⁰⁶⁶

The State Department has developed training in conjunction with the Foreign Service Institute, which is responsible for all training at the agency.¹⁰⁶⁷ Training programs includes modules for new civil service employees, interns, new Foreign Service officers, Ambassadors, and Human Resource officers that are going out on a post regarding issues related to foreign languages, security threats preparation, and public diplomacy.¹⁰⁶⁸ According to the Foreign Service Institute’s website, it conducts trainings for new EEO counselors and also offers a “refresher” course for EEO counselors.¹⁰⁶⁹

In addition to new employee orientation training, Smith also explained that training is conducted upon request, both domestically and internationally at embassies and consulates. “[F]or example, for an embassy, [the training] may be anywhere from two to five days, and we’re trying to train the whole post, not only our direct hire American employees, but also locally employed staff.”¹⁰⁷⁰ Smith testified that State’s training not only helps employees know their legal rights, but also explains the responsibility that supervisors and senior leadership have to address harassment.¹⁰⁷¹ Further, State reported to EEOC that in fiscal year 2018, the agency piloted a program for bureaus

¹⁰⁶³ Ibid., 49.

¹⁰⁶⁴ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 23.

¹⁰⁶⁵ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 52.

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Smith Testimony, *Washington Briefing*, p. 67.

¹⁰⁶⁸ Ibid., 66; Foreign Service Institute Training, <https://fsitraining.state.gov/>.

¹⁰⁶⁹ Foreign Service Institute Training, <https://fsitraining.state.gov/>.

¹⁰⁷⁰ Smith Testimony, *Washington Briefing*, p. 67.

¹⁰⁷¹ Ibid.

called “Mitigating Unconscious Bias,” to aid in addressing unconscious bias that may make the bidding process for Foreign Service positions unfair and possibly discriminatory.¹⁰⁷²

Smith testified that “leadership participation and support is key at all levels, and also consistent follow-up on both the [anti-harassment] policy and [] awareness [on how to address harassment].”¹⁰⁷³ He further mentioned that supervisors have specific anti-harassment training to ensure they know their responsibilities, which Smith reasons is “key to what we’re trying to accomplish in terms of the culture that we would like to create.”¹⁰⁷⁴

While these trainings are important to inform employees about sexual harassment and what behaviors are prohibited under the State Department’s anti-harassment policy, reports have shown that these may not be sufficient in addressing the agency’s issues. The State Department OIG’s November 2014 report noted that the agency needed to have more effective means “to communicate that addressing misconduct is a priority” and to support supervisors in dealing with issues of harassment and discrimination.¹⁰⁷⁵ For instance, while there appeared to be trainings related to dealing with misconduct, such as ethics, personnel management, supervision, and leadership courses that were well attended (40,380 enrollments completed between 2010 and 2014), many of the courses that addressed misconduct specifically, were not heavily attended. During the same time period, only 20 enrollments were recorded in the “Documenting Discipline” online course and the “Workplace Harassment for Supervisors and Managers” course had only 26 enrollments.¹⁰⁷⁶ The OIG report states that while State has taken steps to inform employees of policies regarding proper conduct, it has also “missed opportunities” to inform employees on the expectations of behavior, how to report and address misconduct, and how harassment can have real-life consequences.¹⁰⁷⁷

A current State female employee who identified herself as a survivor of sexual assault by her male supervisor submitted an anonymous comment to the Commission stating that the Human Resource

¹⁰⁷² Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 72. State reports that the training course is an eight-hour, in-person course and an online version is expected to be released later in 2019 and will be accessible to all agency employees, both domestically and abroad. See Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 52.

¹⁰⁷³ Smith Testimony, *Washington Briefing*, p. 48.

¹⁰⁷⁴ *Ibid.*, 49.

¹⁰⁷⁵ U.S. Department of State, Office of the Inspector General, *Review of the Department of State Disciplinary Process*, Nov. 2014, https://www.stateoig.gov/system/files/isp-i-15-04_1.pdf, at 6.

¹⁰⁷⁶ *Ibid.*, 6-7.

¹⁰⁷⁷ *Ibid.*, 1.

office and the Office of Civil Rights refuse to enforce or train employees on EEO laws and policies.¹⁰⁷⁸ She further stated that:

when I reported an EEO violation, [the] Bureau's HR said that my supervisors weren't aware they had to follow EEO laws (even though they attended numerous EEO trainings), and asked me to teach my supervisors the EEO laws. [And] [d]espite leading numerous EEO training sessions, OCR did not have the authority to force supervisors to follow EEO law.¹⁰⁷⁹

Jenna Ben-Yehuda President and CEO at the Truman National Security Project also argued that there were several deficiencies in the State Department's training procedures during her tenure at the State Department. She stated that not only are locally employed staff not regularly trained, but contractors for State are also not being trained at FSI since it is not mandatory. Further, many of the contract companies themselves are also not going through training, depending on the size of their workforce.¹⁰⁸⁰ She explained that the Department already has a training continuum in place, but she recommends that the training can be improved and conducted on a more regular basis. And specifically, Ben-Yehuda argues that "sexual harassment and assault training and prevention efforts should be integrated as a part of that regular training continuum" because currently it is not.¹⁰⁸¹

The women who wrote the #MeTooNatSec letter state also that training can be "erratic" and "irregular" and policies are often ignored by staff.¹⁰⁸² State employees told investigative journalists at *Foreign Policy* that "there's a photo floating around of a person reading during the required harassment seminar. They brought a book. They had it open. That gives you a sense of how important people think it is."¹⁰⁸³

According to the State Department's fiscal year 2017's MD 715 report, not all employees are encouraged to use Alternative Dispute Resolution, and the agency does not require that all

¹⁰⁷⁸ Anonymous submission by Foreign Service Officer at the State Department, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces Briefing before the U.S. Commission on Civil Rights, May 9, 2019.

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ Ben-Yehuda Testimony, *Washington Briefing*, p. 68.

¹⁰⁸¹ Ibid., 69.

¹⁰⁸² Maya Rhodan, "'We, Too, Are Survivors,' 223 Women in National Security Sign Open Letter on Sexual Harassment," *Time*, Dec. 1, 2017, <https://time.com/5039104/we-too-are-survivors-223-women-in-national-security-sign-open-letter-on-sexual-harassment/>.

¹⁰⁸³ Emily Tamkin and Robbie Gramer, "Will State Miss Its #MeToo Moment?" *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

managers and supervisors receive Alternative Dispute Resolution training.¹⁰⁸⁴ Specifically, State notes that: “We present information on the ADR process in our EEO training, but not all managers and supervisors receive the training.”¹⁰⁸⁵ Perhaps relatedly, EEOC found that the Alternative Dispute Resolution participation rate during the pre-complaint stage declined from 25 percent in fiscal year 2013 to 23 percent in fiscal year 2016, which is below EEOC’s goal of 50 percent participation.¹⁰⁸⁶ In response, State told EEOC that it had a target date of June 29, 2018 to determine what the perceived barriers are for employees to participate in the ADR process.¹⁰⁸⁷ According to State’s FY 2018 462 data, of the 387 individuals in the pre-complaint process, the agency offered ADR to each of the 387 individuals.¹⁰⁸⁸ Of these, 310 individuals rejected the offer and 77 accepted.¹⁰⁸⁹

Prevalence

According to the State Department’s Office of Civil Rights data from fiscal year 2014, a high percent of complaints involved allegations of sex discrimination and harassment: 38 percent of formal EEO complaints alleged incidents of reprisal and sex discrimination and 43 percent alleged harassment, promotion/non-selection, and appointment/hire as issues for complaints.¹⁰⁹⁰ In his written testimony to the Commission, Gregory Smith regarding State’s internal anti-harassment program reporting, he stated that:

In FY 2014 we recorded 236 reports [of harassment], in FY2015, there were 320, in FY2016, 365, in FY2017, 483 and in FY2018, 731. Since the Department has a mandatory reporting requirement, some of the reports are duplicate and not all are, in fact, harassment.¹⁰⁹¹

According to the State Department’s Office of Inspector General June 2015 report, Office of Civil Rights data shows that harassment cases almost tripled from fiscal year 2011 (88 cases) to fiscal

¹⁰⁸⁴ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 25, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>.

¹⁰⁸⁵ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 28.

¹⁰⁸⁶ *Ibid.*, 40.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ *See* Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 150.

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ U.S. Department of State, Office of the Inspector General, *Inspection of The Office of Civil Rights*, June 2015, <https://www.stateoig.gov/system/files/isp-i-15-26.pdf>.

¹⁰⁹¹ Smith Statement at note 2.

year 2014 (248 cases).¹⁰⁹² Since 2016, the Office of Civil Rights has investigated over 850 allegations of harassment since 2016.¹⁰⁹³ The Office notes that these investigations have continued to increase each year since 2014, and asserts that this increase is due to measures such as employees being more familiar and aware of reporting practices, victims and bystanders being more comfortable reporting allegations, and management and supervisors fulfilling their duty as mandatory reporters.¹⁰⁹⁴ Like information received from NASA, Gregory Smith's testimony and State's responses to the Commission's interrogatories emphasized that increasing awareness, training, as well as the #MeToo movement help explain the increase in complaints or reports of sexual harassment.¹⁰⁹⁵ State told the Commission that it has witnessed a 50 percent increase of harassment reports since 2014, despite the fact that the number of investigations to the number of workers covered under the anti-harassment policy have remained the same since 2016.¹⁰⁹⁶ Further, since 2016, there have been 41 total informal sexual harassment complaints out of the total 1160 informal complaints, accounting for about 3.5 percent of the total agency complaints.¹⁰⁹⁷ Of these 41 informal complaints, 15 resulted in formal complaints being filed.¹⁰⁹⁸

According to State Department data, complaints have continued to increase since 2014, besides a slight decrease in 2017 compared to 2016 complaint levels.¹⁰⁹⁹ A reported 181 official EEO complaints were filed in 2016, which decreased to 174 in 2017, but then increased to its highest number of 217 complaints in 2018. Further, harassment claims accounted for almost a majority of each year's claims (see table 21). For instance, in 2017, the total number of harassment claims accounted for over 60 percent of the total number of complaints for that year. State reports that among all formal complaints, harassment was the most frequently alleged issue, and specifically,

¹⁰⁹² U.S. Department of State, Office of the Inspector General, *Inspection of The Office of Civil Rights*, June 2015, <https://www.stateoig.gov/system/files/isp-i-15-26.pdf>.

¹⁰⁹³ See Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 30. This number includes all forms of alleged harassment (i.e., discriminatory and sexual harassment) and some allegations of bullying and other forms of misconduct that were initially reported as harassment. Ibid.

¹⁰⁹⁴ Ibid., 30-31.

¹⁰⁹⁵ Smith Statement at 5; Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 31, 55; National Aeronautics and Space Administration, Interrog. Resp. to U.S. Comm'n Civil Rights, May 23, 2019, at 17.

¹⁰⁹⁶ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 56.

¹⁰⁹⁷ Ibid., 67.

¹⁰⁹⁸ Ibid., 68.

¹⁰⁹⁹ Equal Employment Opportunity Data Posted pursuant to the No Fear Act, 3rd Quarter 2019 to June 20, 2019, <https://www.state.gov/wp-content/uploads/2019/08/nofear-3rd-Quarter-Ending-June-30-2019.pdf>.

sex and disability discrimination increased while race, color, and religious-based discrimination complaints decreased.¹¹⁰⁰

Table 21: Federal EEO Harassment Complaints (2014 through June 30, 2019)

	2014	2015	2016	2017	2018	2019 (thru 06-30)
Number of Complaints	130	164	181	174	217	97
Harassment						
Non-sexual	42	70	72	103	119	67
Sexual	4	8	3	6	6	2

Source: EEOC, No Fear Act Data, <https://www.state.gov/wp-content/uploads/2019/08/nofear-3rd-Quarter-Ending-June-30-2019.pdf>

Regarding sexual harassment specifically, State employees formally reported 6 complaints in fiscal year 2018, which remained stable from the previous year, but an increase from 2016.¹¹⁰¹ Formal sexual harassment complaints accounted for 2.78 percent of the agency’s total formal complaints that year, which was lower than the government-wide average of 4.17 percent.¹¹⁰²

In 2018, State reported to EEOC that there were 241 reported incidents of harassment (6 sexual and 115 non-sexual) across all protected EEOC bases (i.e., protected groups) which was the highest number of complaints (121) filed for that year.¹¹⁰³ In terms of employee demographics women filed the highest number of alleged discrimination complaints across all issues (58 reports), followed by individuals with physical disabilities (49 reports), black employees (35 reports), “other” national origin employees (25 reports), individuals with mental disabilities (22 reports), men (21 reports), color (19 reports), religion (9 reports), Latinx (8 reports), white employees (7 reports), LGBT employees (5 reports), Asian employees (3 reports), employees of two or more races (2 reports), and Native Hawaiian or Pacific Islander employees (1 report).¹¹⁰⁴ Moreover, women filing formal discrimination claims reached its highest number in FY18 across this investigation’s timeframe (50 reports in 2016, 31 reports in 2017), while several other groups witnessed a decreased number of reported incidents.

¹¹⁰⁰ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 156.

¹¹⁰¹ *Ibid.*, 2.

¹¹⁰² *Ibid.*

¹¹⁰³ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Addenda, Oct. 17, 2019, at 135.

¹¹⁰⁴ *Ibid.*, 135-38.

State notes that in fiscal year 2018, 2.8 percent of the agency's formal EEO complaints alleged sexual harassment, which is lower than the government-wide average of 4.1 percent and other Cabinet-level agencies at 4.2 percent.¹¹⁰⁵ Additionally, less than 1 percent (0.28 percent) of its workforce filed a formal EEO complaint in FY 2018, compared to other Cabinet-level agencies and the government-wide average of 0.52 percent.

While these numbers suggest that some employees are willing to report incidents of discrimination, as discussed in Chapter 1, the number of reported sexual harassment complaints may be underrepresenting the severity of the issue due to many issues, such as the fear of retaliation.¹¹⁰⁶ Further, according to the Merit Systems Protection Board 2016 survey, 15.3 percent of the employees at the State Department reported experiencing sexual harassment.¹¹⁰⁷ According to State's reported numbers, since 2016 in the formal complaint process, there have been 8 retaliation claims stemming from sexual harassment complaints.¹¹⁰⁸ Moreover, in fiscal year 2018 annual EEOC status report, the agency declared that it had not been able to successfully ensure that its workplace was free from all forms of discrimination, which includes harassment and retaliation.¹¹⁰⁹

In 2017, the #MeTooNatSec specifically called attention to the problem of sexual harassment in the national security field. The writers of the letter state that:

This is not just a problem in Hollywood, Silicon Valley, newsrooms or Congress. It is everywhere. These abuses are born of imbalances of power and environments that permit such practices while silencing and shaming their survivors. Indeed, in our field, women

¹¹⁰⁵ Department of State, Affected Agency Review responses to Commission on draft report, Nov. 6, 2019 [on file].

¹¹⁰⁶ See e.g., Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, "Employer's Responses to Sexual Harassment," Center for Employment Equity at the University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>; EEOC, Select Task Force on the Study of Harassment in the Workplace, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report_summary.pdf; *PBS NewsHour*, Mar. 1, 2018, <https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began>.

¹¹⁰⁷ U.S. Merit Systems Protection Board, "Update on Sexual Harassment in the Federal Government," March 2018, at 5, <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACR-OBAT>; see also Eric Katz, "The Federal Agencies With the Most (and Least) Sexual Harassment," *Government Executive*, June 4, 2018, <https://www.govexec.com/management/2018/06/federal-agencies-most-and-least-sexual-harassment/148673/>.

¹¹⁰⁸ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 65.

¹¹⁰⁹ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 89.

comprise a small fraction of the senior leadership roles—30% or fewer in most federal agencies.¹¹¹⁰

Retired Ambassador Nina Hachigian, one of the co-authors of the letter stated that much of the research on sexual harassment has been focused on low-paying, blue collar jobs, but assault and harassment are just as prevalent for diplomats.¹¹¹¹ The letter states that women and men enter the Foreign Service at the same rates, yet “with each subsequent promotion, the numbers of foreign service women decline, especially at senior levels.”¹¹¹² Furthermore:

Assault is the progression of the same behaviors that permit us to be denigrated, interrupted, shut out, and shut up. These behaviors incubate a permissive environment where sexual harassment and assault take hold. Assault is the progression of the same behaviors that permit us to be denigrated, interrupted, shut out, and shut up. These behaviors incubate a permissive environment where sexual harassment and assault take hold.¹¹¹³

The letter states that the national security community needs to address the gender imbalances in senior leadership positions because of the correlation between male-dominated teams and sexual harassment and abuses, which is consistent with the research on sexual harassment and where it is more likely to occur.¹¹¹⁴ For example, several ambassadors stated that it was extremely common for them to be at a meeting where they were only woman or were in the minority in the room. Ambassador Jennifer Zimdahl Galt described that throughout her career, she has been

the only woman or one of the only women in the room at virtually every meeting. Some of this may have to do with the fact that I’ve served much of my career in the Bureau of East Asia and Pacific Affairs, where societies continue to be male-dominated. But the same has been true of country teams at posts where I’ve served. The largest number of women I’ve

¹¹¹⁰ #MeTooNatSec, Open Letter to the National Security Community, Nov. 28, 2017, at 1.

¹¹¹¹ Maya Rhodan, “‘We, Too, Are Survivors,’ 223 Women in National Security Sign Open Letter on Sexual Harassment,” *Time*, Dec. 1, 2017, <https://time.com/5039104/we-too-are-survivors-223-women-in-national-security-sign-open-letter-on-sexual-harassment/>.

¹¹¹² #MeTooNatSec, Open Letter to the National Security Community, Nov. 28, 2017, at 1.

¹¹¹³ *Ibid.*, at 1.

¹¹¹⁴ #MeTooNatSec, Open Letter to the National Security Community, Nov. 28, 2017; Carly McCann, Donald Tomaskovic-Devey, and M.V. Lee Badgett, “Employer’s Responses to Sexual Harassment,” Center for Employment Equity at University of Massachusetts Amherst, Dec. 2018, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment/>; Fitzgerald Statement at 2-3.

ever had on a country team was three out of 12. I've never served with a female principal officer or ambassador.¹¹¹⁵

Similarly, Ambassador Gina Abercrombie-Winstanley explained that:

In most meetings over the years, I was the only minority at the table and that continues to be the case. I am often one of only two or three women. After 30 years, it is still not easy. I have to fight my own insecurity, as well as any unspoken, even unconscious, bias against the value of my contributions. The recognition of my performance and potential that came from reaching my goal of being an ambassador, however, has given me the space to feel like I don't always have to know the answer. I have brilliant staff to help me get it right.¹¹¹⁶

The Ambassador discussed further how she has to navigate these spaces as a woman, but also a woman of color. She stated that "I have found low expectations of me as a minority to be a bigger obstacle than low expectations of me as a woman, though they both remain in good supply in the State Department."¹¹¹⁷ Similar to other job sectors, women of color not only have to deal with harassment based on their gender, but also based on their race.¹¹¹⁸ Data reviewed by the Commission indicates that incidents of sexual harassment are generally higher among women of color.¹¹¹⁹

Leslie Bassett wrote that she tried to ignore being sexually harassed, make jokes, or avoid harassers, but ultimately, she never filed a formal complaint. The former Foreign Service Officer maintains that "in an institution where 'corridor reputation' drives assignments and opportunity, the cost of being a troublemaker is high, and the professional consequence grave."¹¹²⁰ Similarly, at the Commission's briefing, former State employee and the Truman National Security Project's Jenna Ben-Yehuda explained that some women described their experiences as becoming a "problem child" after reporting harassment; and "there's a real kind of 'put up or shut up' culture"¹¹²¹ that "certainly doesn't create an environment that was conducive to coming

¹¹¹⁵ Leslie Bassett, "Making It Work: Conversations with Female Ambassadors," *The Foreign Service Journal*, July/Aug. 2017, <https://www.afsa.org/making-it-work-conversations-female-ambassadors>

¹¹¹⁶ Ibid.

¹¹¹⁷ Ibid.

¹¹¹⁸ Ibid.

¹¹¹⁹ See e.g., *supra* notes 403-406.

¹¹²⁰ Leslie Bassett, "#StateToo: Ending Harassment at the State Department," *The Foreign Service Journal*, Mar. 2018, <https://www.afsa.org/statetoo-ending-harassment-state-department>.

¹¹²¹ Emily Tamkin and Robbie Gramer, "Will State Miss Its #MeToo Moment?" *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

forward.”¹¹²² Another retired Foreign Service Officer, Amy Dahm, explained that “the largest threats are two-fold: the harasser will write a damaging Employee Evaluation Report (EER) and/or poison the employee’s corridor reputation.”¹¹²³

Ben-Yehuda testified that the “corridor reputation” was “one of the first terms [she] learned when [she] entered into the [State] Department.”¹¹²⁴ She explained that since Foreign Service officers are changing positions and vying for new ones every one to three years, this “corridor reputation” becomes a major factor in selection and for promotion.¹¹²⁵ More than a dozen women who are current or former State employees told investigative journalists with *Foreign Policy* that the agency has a culture in which “patriotism and pursuit of the diplomatic mission meant ignoring or downplaying complaints of harassment.”¹¹²⁶ One woman explained that when someone does try and report an incident the person is treated as “unpatriotic” by colleagues and she stated that the attitude from co-workers is: “you’re distracting from the mission of defending America – you need to step it up and stop complaining.”¹¹²⁷ Another ex-employee reported that the promotion and placement process rely heavily upon reputation and informal recommendations and “from the third tour one, it’s an internal lobbying process, very driven by who you know. I could see where people would feel disincentivized to come forward. You have no privacy in these environments.”¹¹²⁸

In written testimony provided to the Commission, Dahm explained that due to the structure of the Foreign Service, harassment victims are quite hesitant to come forward because they fear it will “blemish” their careers; and since the Foreign Service is extremely competitive

no one wants to be known as ‘difficult.’ In the Foreign Service, the onus for maintaining a good relationship with the superiors falls on the subordinate, not the manager. A harassment claim is viewed as a reflection on the victim as having poor interpersonal skills

¹¹²² Maya Rhodan, “‘We, Too, Are Survivors,’ 223 Women in National Security Sign Open Letter on Sexual Harassment,” *Time*, Dec. 1, 2017, <https://time.com/5039104/we-too-are-survivors-223-women-in-national-security-sign-open-letter-on-sexual-harassment/>.

¹¹²³ Amy Dahm, retired Foreign Service Officer, U.S. State Department, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces, May 9, 2019, at 2.

¹¹²⁴ Ben-Yehuda Testimony, *Washington Briefing*, p. 75.

¹¹²⁵ Ibid.

¹¹²⁶ Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹¹²⁷ Ibid.

¹¹²⁸ Ibid.

(the kiss of death in the Foreign Service); the perception is that she is somehow not managing her relationship with her superiors correctly.¹¹²⁹

This sentiment mirrors what many women in other fields have also said when it comes to reporting harassment and misconduct that they do not want to be seen as the woman who cannot handle something that is supposedly “just a joke” or they have to carefully manage their male colleague’s egos.¹¹³⁰ For instance, former Ambassador Gina Abercrombie-Winstanley explained that she has been subjected to sexual harassment in her career, and had to learn to be “careful of male egos (and power).”¹¹³¹ And if harassment did occur, she often was forced to do the “usual and laugh it off, avoid[] the person where I could or made excuses to reject the advances.”¹¹³² But recalling an incident where she tried to stand up for herself, the Ambassador explained that “there was one occasion in the department when a boss touched me and I told him if he did it again, I’d knock the s*** out of him. He did not repeat it, but he did try to get me to curtail from the position.”¹¹³³

State Department employees also reportedly described a culture where rank and reputation were privileged over the well-being of workers. The *Foreign Service Journal* recounted incidents of sexual harassment, assault, bullying, and rape of women inside the State Department, which has long been dominated by men.¹¹³⁴ The women described the inability to report incidents because they were afraid going public could hinder their careers; and in most cases, the accused went unpunished and the accuser’s career suffered.¹¹³⁵ For instance, one woman described incidents where she was grabbed and groped twice by the consul general at her post, yet she was told by

¹¹²⁹ Amy Dahm, retired Foreign Service Officer, U.S. State Department, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces, May 9, 2019, at 4.

¹¹³⁰ Jana Pershing, “Why Women Don’t Report Sexual Harassment: A Case Study of an Elite Military Institution,” *Gender Issues*, (Fall 2003); L. Camille Hebert, “Why Don’t ‘Reasonable Women’ Complain About Sexual Harassment,” *Indiana Law Journal*, vol. 82, no. 3, 2007; Louise Fitzgerald, Suzanne Swan, and Karla Fischer, “Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment,” *Journal of Social Issues*, vol. 51, no. 1, 1995; Susan Hinze, “‘Am I being over-sensitive?’ Women’s experience of sexual harassment during medical training,” *Health: An Interdisciplinary Journal for the Social Study of Health, Illness and Medicine*, vol. 8, no. 1, 2004.

¹¹³¹ Lulu Garcia-Navarro, “Sexual Harassment In National Security,” *NPR*, Dec. 3, 2017, <https://www.npr.org/2017/12/03/568133013/sexual-harassment-in-national-security>.

¹¹³² *Ibid.*

¹¹³³ Leslie Bassett, “Making It Work: Conversations with Female Ambassadors,” *The Foreign Service Journal*, July/Aug. 2017, <https://www.afsa.org/making-it-work-conversations-female-ambassadors>.

¹¹³⁴ *Ibid.*

¹¹³⁵ *Ibid.*

human resources that not only was there no reason to report, and that it would negatively affect her career if she chose to report.¹¹³⁶

In a civil rights complaint filed in federal court, the former Director of the Office of Public Diplomacy in the Bureau of European and Eurasian Affairs, alleges that she told her then-supervisor, who was at the time a Deputy Assistant Secretary of State, that there were issues of male supervisors bullying female employees.¹¹³⁷ She alleges that her supervisor attempted to block her attempts to bring these issues to light and he told her that she was “paranoid and believed everyone was against her” and while she was a capable Foreign Service Officer, she was “too emotional and personal in her outlook.”¹¹³⁸ She also alleges that her supervisor later tried to sabotage her promotion to Deputy Chief of Mission.¹¹³⁹

Another concern about reporting stems from employees not being sure of whom they can report to. For instance, one former State Department official stated that reporting an incident “becomes even more complicated when the person in charge of security is the problem.”¹¹⁴⁰ In her public comment to the Commission, former officer Amy Dahm also explained her experience and confusion regarding whom at the State Department she could turn to after she had to endure several incidents of harassment during her tenure at State. She wrote that:

When I went to report my harassment and its aftermath, several mentors and peers that I reached out to actively dissuaded and advised me, “Don’t fight it.” Not sure where to go, I confided in my former Deputy Chief of Mission (DCM) a mandatory reporter, who did nothing and admitted as much. When I reported the series of incidents to a representative in EUR/HR, the officer squeezed her eyes shut, plugged her ears, and said to me, ‘No names!’ It was her JOB to listen and investigate, and even she did not want to hear it.¹¹⁴¹

Further, sometimes an alleged harasser may be moved to a different post during the investigation, but other times, the alleged harasser remains at post and the complainant is forced to work alongside his or her assailant. This may cause a stressful or tense work environment for both parties

¹¹³⁶ Ibid.

¹¹³⁷ See Complaint ¶ 2, *Ruppe v. Tillerson*, Case 1:17-cv-02823 (D.D.C., Dec. 28, 2017), <http://src.bna.com/vjW>. As of the writing of this report, settlement negotiations failed, discovery is underway, and a status conference is scheduled for February 2020. Since Tillerson was replaced as Secretary of State, the case is now filed as: *Ruppe v. Pompeo*.

¹¹³⁸ *Id.* at ¶ 106.

¹¹³⁹ *Id.* at ¶ 95.

¹¹⁴⁰ Ibid.

¹¹⁴¹ Amy Dahm, retired Foreign Service Officer, U.S. State Department, submitted for Federal Me Too: Examining Sexual Harassment in Government Workplaces, May 9, 2019, at 5.

involved. Moreover, this failure to separate can be particularly problematic at some posts that are staffed by a small workforce, since a victim may not be able to distance themselves from an alleged harasser.¹¹⁴²

The reporting process is further complicated due to multiple posts (there are 276 posts, as of June 30, 2019)¹¹⁴³ and the leadership of a particular post can play a significant role – as either supportive or a barrier— which speaks to a high level of inconsistency across the agency.¹¹⁴⁴ While current and former State officials spoke well of some supervisors, the turnover at different posts can make the complaint process more difficult. For example, Jenna Ben-Yehuda testified that “you have in the system a large percentage of the workforce that turns over every two years. The reality is that few managers are in roles for longer than two years, [but you have a] system in which these kinds of issues take many more years to resolve.”¹¹⁴⁵ So even when a manager wants to investigate a complaint and try and hold an employee accountable for the employee’s actions, Ben-Yehuda argues that the solution sometimes becomes, “John did a bad thing. We’ll just have John do a rotation somewhere else.”¹¹⁴⁶

After the #MeTooNatSec letter was released a State Department official told reporters that it reviews its anti-harassment policies and the recent scandals have given the agency “an opportunity to assess its anti-harassment program and determine that additional resources are necessary to ensure that each report and allegation receives attention.”¹¹⁴⁷

Following the attention to the State Department from the #MeTooNatSec letter and the calls from Members of Congress to address sexual harassment at the agency, in February 2018, the State Department’s Office of the Inspector General stated that it was going to conduct a follow-up

¹¹⁴² Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹¹⁴³ Department of State, HR Fact Sheet, June 30, 2019 (accessed, Aug. 21, 2019), <https://www.state.gov/wp-content/uploads/2019/07/Human-Resources-Fact-Sheet-as-of-032019.pdf>.

¹¹⁴⁴ Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Ibid.; see also *infra* notes 1188-90 (Outcomes of Investigations).

¹¹⁴⁷ Maya Rhodan, “‘We, Too, Are Survivors,’ 223 Women in National Security Sign Open Letter on Sexual Harassment,” *Time*, Dec. 1, 2017, <https://time.com/5039104/we-too-are-survivors-223-women-in-national-security-sign-open-letter-on-sexual-harassment/>.

¹¹⁴⁷ Leslie Bassett, “#StateToo: Ending Harassment at the State Department,” *The Foreign Service Journal*, Mar. 2018, <https://www.afsa.org/statetoo-ending-harassment-state-department>.

investigation about how the agency is handling these allegations of sexual harassment.¹¹⁴⁸ A spokeswoman for the Office of the Inspector General reported that the review is still “in an early stage” but would focus on the prevalence of sexual harassment and assault, internal procedures on how complaints are investigated, what disciplinary actions are taken when an allegation is substantiated, and the roles of the S/OCR, Bureau of Human Resources, and Bureau of Diplomatic Security.¹¹⁴⁹ Several State officials told reporters for *Foreign Policy* that while they welcome the investigation, they are not optimistic that it will result in any lasting reforms. For instance, one State official said that: “I don’t have much faith in their ability to effect change. A number of people have been afraid to report stuff to the [Office of Inspector General] . . . I don’t trust their ability to protect sources.”¹¹⁵⁰ Another current State official stated that “It is well known that even when the [Office of the Inspector General] investigates and makes recommendations, including disciplinary action against senior employees, that enforcement and implementation of those recommendations is, at best, lackluster.”¹¹⁵¹

In another report, issued by the Office of the Inspector General in August 2019, investigators found several incidents of leadership and management officials treating employees inappropriately and disrespectfully, which contributed to a hostile work environment in the Bureau of International Organizational Affairs.¹¹⁵² Further, the Office of the Inspector General investigators found incidents of retaliation and serious morale concerns among staff.¹¹⁵³ Several employees and former employees in the bureau reported that two high level officials (one male and one female) “frequently berated employees, raised their voices, and generally engaged in unprofessional behavior towards staff. Senior Department officials outside of [Bureau of International Organization Affairs] were particularly concerned about such treatment directed at junior

¹¹⁴⁸ Robbie Gramer and Emily Tamkin, “State Department Watchdog Reviewing Sexual Harassment, Assault Policies,” *Foreign Policy*, April 13, 2018, <https://foreignpolicy.com/2018/04/13/state-department-watchdog-reviewing-sexual-harassment-assault-policies/>.

¹¹⁴⁹ Ibid.

¹¹⁵⁰ Robbie Gramer and Emily Tamkin, “State Department Watchdog Reviewing Sexual Harassment, Assault Policies,” *Foreign Policy*, April 13, 2018, <https://foreignpolicy.com/2018/04/13/state-department-watchdog-reviewing-sexual-harassment-assault-policies/>. This fear of reporting seems to be a significant hurdle for current employees at the State Department. In the Commission’s call for public testimony and submissions in connection to the Washington Briefing, the Commission received an email from an individual who claims to be a current state employee who stated that they were afraid to divulge information about the practices at the State Department due to retaliation. While the Commission could not substantiate these claims, it does raise concern.

¹¹⁵¹ Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

¹¹⁵² U.S. Department of State, Office of the Inspector General, Review of Allegations of Politicized and Other Improper Personnel Practices in the Bureau of International Organization Affairs (Aug. 2019) <https://www.stateoig.gov/system/files/esp-19-05.pdf>.

¹¹⁵³ Ibid., 19.

employees.”¹¹⁵⁴ For instance, there was an incident where these two officials publicly berated a junior employee and caused her to cry.¹¹⁵⁵ Moreover, approximately 50 of 300 domestic Internal Organizational Affairs employees left the office since the new Assistant Secretary began his position in April 2018; and nearly all of the employees interviewed by the Office of Inspector General stated that poor leadership contributed to their decision to leave the bureau.¹¹⁵⁶ The report also notes that nearly every employee who was interviewed by the investigators stated concerns regarding the behavior of leadership in the Internal Organizational Affairs and the overall treatment of the staff.¹¹⁵⁷ Further, the Office of the Inspector General investigators found that a Principal Deputy Assistant Secretary was dismissed from her position by the Assistant Secretary specifically because she raised concerns about the misconduct of management and concerns of retaliation. The Office of Inspector General notes that the Principal Deputy Assistant Secretary had a tenure of 25 years in the Foreign Service, was a career member of the Senior Foreign Service, and served as an Ambassador and as the Acting Assistant Secretary of Internal Organization Affairs for several months prior to new Assistant Secretary’s confirmation; plus, she has received numerous awards from State, including a Presidential Rank of Meritorious Executive Award. When she brought her concerns to the Assistant Secretary, however, he dismissed them and stated that he supported his advisor’s conduct and she was being named as his Senior Advisor which meant she could manage the office as she deemed appropriate.¹¹⁵⁸ The Office of Inspector General report suggests that the Principal Deputy’s dismissal was unrelated to merit-based factors, and that it may cause concern under the State Department’s non-retaliation policy.¹¹⁵⁹

While not specifically investigating allegations of sexual harassment, the results of the Office of Inspector General investigation demonstrate that a hostile workplace culture may exist in at least one component of State in recent years. As discussed previously, the culture of an agency plays a crucial part in preventing harassment and fostering an environment where employees can confidently report incidents, develop trust in management and leadership officials, and be reassured that they will not be retaliated against if they report an incident.¹¹⁶⁰

The State Department explained to the Commission that one of the two high-level officials in the Office of Inspector General 2019 report was no longer employed at the agency by the time of the

¹¹⁵⁴ *Ibid.*, 6.

¹¹⁵⁵ *Ibid.*, 13.

¹¹⁵⁶ *Ibid.*, 13.

¹¹⁵⁷ *Ibid.*, 13.

¹¹⁵⁸ *Ibid.*, 14.

¹¹⁵⁹ *Ibid.*, 16.

¹¹⁶⁰ *See e.g., supra* notes 321-25; 335-40.

report’s release.¹¹⁶¹ Further, the second official named in the report who was a senior official responsible for overseeing the bureau during the OIG investigation has announced his resignation from the agency.¹¹⁶² In light of the investigation, State told the Commission that the “bureau is undertaking appropriate rebuilding and resilience efforts, in collaboration and coordination with S/OCR and other Agency resources.”¹¹⁶³

Another measure of gauging employees’ perception of their work experiences at the State Department, although it does not specifically address sexual harassment, is to analyze the Federal Employment Viewpoint Survey (FEVS).¹¹⁶⁴ Since the inception of the “New IQ” scores in 2014, State’s New IQ total has remained consistent – except a slight increase in 2017 at 64 percent – at about 62 percent from 2014-2018.¹¹⁶⁵ The State Department’s total score is slightly lower compared to other similarly sized federal agencies, but is one percent higher than the overall government-wide average (see Table 22). This total is a combination of the other individual ratings of: fair, open, cooperative, supportive, and empowering.

Table 22: FEVS, New IQ Scores (2018)

	Fair	Open	Cooperative	Supportive	Empowering	Total
Government-Wide	48%	60%	58%	78%	60%	61%
Large Agencies (10-74,999k)	51%	62%	61%	81%	62%	64%
Department of State	49%	61%	59%	79%	60%	62%

Source: Office of Personnel Management, Federal Employment Viewpoint Survey, 2018, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2018/2018-governmentwide-management-report.pdf>.

Most of the annual totals have remained relatively consistent among all five categories from 2014 to 2018.¹¹⁶⁶ The State Department’s “fair” rating has remained generally consistent at 49 percent to its highest rating in 2017 at 52 percent. The “open” rating has had slightly more variation from

¹¹⁶¹ State Department, Affected Agency Review to Commission on draft report, Nov. 6, 2019 [on file].

¹¹⁶² Ibid.

¹¹⁶³ Ibid.

¹¹⁶⁴ Office of Personnel Management, Federal Employment Viewpoint Survey, 2018, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2018/2018-governmentwide-management-report.pdf>.

¹¹⁶⁵ Ibid.

¹¹⁶⁶ See Office of Personnel Management, Federal Employee Viewpoint Survey, “New IQ Results by Agency,” <https://www.opm.gov/fevs/reports/data-reports>.

its lowest rating of 61 percent in 2018 and 2016 to its highest of 64 percent in 2017. The “cooperative” rating has a range of 58 percent in 2014 to 63 percent in 2017. The “supportive” rating has remained generally consistent at about 78 percent since 2014, but increased slightly to its highest rating of 80 percent in 2017. The “empowering” rating also has little variation from 2014, remaining basically consistent at 62 percent, until 2018 where it dropped to its lowest of 60 percent.¹¹⁶⁷

Processing Times

State reports that the time to complete harassment investigations can range from 60 to 180 days depending on various components of the case, such as the number of victims, witnesses, and alleged harassers, the time frame of the allegations, the location(s) where the alleged harassment took place, the current location of all the witnesses.¹¹⁶⁸ The agency noted that S/OCR aims to complete inquiries within 120 days, and that most can be completed in less than 90 days. While an investigation is underway, State reports that it may take actions such as “temporary reassignment, altering the reporting structure/chain of command, and curtailment (removal) from an oversea post.”¹¹⁶⁹

State Department agency data shows that during fiscal year 2017, it was not able to provide timely EEO counseling (i.e., within 30 days of the initial request or within the agreed upon extension in writing, which is up to 60 days) to complainants who are alleging incident(s) of harassment or discrimination.¹¹⁷⁰ EEOC also found that State had been lagging in its processing of harassment complaints: “EEOC found the timely processing of EEO counseling has consistently fallen below the FY 2015 government wide average (93.82 percent). From FY 2013 to FY 2016, the percentage of [State’s] timely completed EEO counseling decreased from 71 percent to 67 percent.”¹¹⁷¹

The Office of Civil Rights at the State Department explains that the decrease in the number of EEO counselings in fiscal year 2017 was due to the agency doing a complete “overhaul of the nomination process for new collateral-duty EEO counselors. [And] [a]s a part of this process, new EEO Counselors certif[ied] that they will be required to meet strict regulatory deadlines and that failure to do so will result in their removal from the agency’s EEO Counselor Program.”¹¹⁷² State

¹¹⁶⁷ Ibid.

¹¹⁶⁸ See Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 28-29.

¹¹⁶⁹ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 30.

¹¹⁷⁰ U.S. Department of State, Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report, Fiscal Year 2017, at 27.

¹¹⁷¹ MD 715 report of FY 17 at p. 42.

¹¹⁷² Ibid., 44.

also stated that it created a new agency policy to remove EEO counselors from their positions for infractions such as inferior work product and tardiness. As such, according to an EEOC annual status report, the Office of Civil Rights made progress in FY 2018 and achieved an 80 percent timely notice of right to file issuance rate.¹¹⁷³

As of October 2019, the Office of Civil Rights also explained that it had 9 sexual harassment complaints pending and the average time for pending cases at the agency is 135 days, compared to pending cases at the EEOC (i.e., after the internal investigation is complete and sent over to EEOC for action) was 664 days.¹¹⁷⁴ In terms of resolving sexual harassment complaints, the Office stated that it had an average of 54 days in the informal process, compared to an average of 338 days in the formal process, and an overall average time to resolution of 97 days.¹¹⁷⁵ Comparatively, No FEAR Act data (while it does not break out the processing times for specific claims such as sexual harassment) show that in 2018, State had its longest processing time in this study's timeframe.¹¹⁷⁶ The agency's overall complaints processing times had decreased to 187.82 average days in 2016 compared to 200.97 average days in 2015. But these averages further increased to 207.17 days in 2017, and 231.30 days in 2018. Moreover, as of March 31, 2019, State already had an average processing time for complaints of 249.94 days;¹¹⁷⁷ however the agency finished FY 2019 with an average of 216.45 days for processing investigations, which is a decrease from FY 2018.¹¹⁷⁸ The agency noted that its overall timeliness for FY 2019 was 92 percent, which is a higher than the federal government-wide average of 83.75 percent.¹¹⁷⁹

According to the Department's fiscal year 2017 MD 715 report, one reason it has struggled with its complaints processing (which includes EEO counseling, investigations, and FADs) is due to a lack of sufficient personnel resources allocated to the EEO program, which they state was due to the federal hiring freeze in January 2017;¹¹⁸⁰ and continued to be a concern in its FY18 EEOC report.¹¹⁸¹ In terms of resolutions, the agency stated in fiscal year 2017, that when a complainant

¹¹⁷³ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 104.

¹¹⁷⁴ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 58.

¹¹⁷⁵ *Ibid.*, 57.

¹¹⁷⁶ U.S. Department of State, "Equal Employment Opportunity Data Posted Pursuant to the No Fear Act," March 31, 2019, <https://www.state.gov/wp-content/uploads/2019/04/NO-FEAR-2nd-Qtr-2019.pdf>.

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ State Department, Affected Agency Review to Commission on draft report, Nov. 6, 2019 [on file].

¹¹⁷⁹ *Ibid.*

¹¹⁸⁰ U.S. Department of State, *Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report*, Fiscal Year 2017, at 20, <https://www.state.gov/wp-content/uploads/2019/01/Management-Directive-715-Report.pdf>.

¹¹⁸¹ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 83.

requests a final agency decision (FAD), it has not been able to issue all decisions within the regulatory 60-day window.¹¹⁸² In FY 2017, the agency reported that 86 percent of FADs were completed on time,¹¹⁸³ which is a higher than NASA's and the government-wide average (17 percent and 60.83 percent, respectively).¹¹⁸⁴

Outcomes of Investigations

In fiscal year 2018, State reported to EEOC that it conducted 441 counseling sessions during the informal pre-complaint process, and of these 160 were counseled within 30 days.¹¹⁸⁵ Of the total completed counselings, 227 were counseled within 31 to 90 days, of which 37 were untimely. And a further 54 counselings were completed beyond the 90 days. There were 310 individuals who were offered ADR, 77 of these accepted the ADR process.¹¹⁸⁶ Of those who went into Alternative Dispute Resolution, mediation was the most common technique utilized in counseling. In total, State closed all 77 Alternative Dispute Resolution cases with an average of 47.03 days, with 10 individuals agreeing to settlements (both monetary and non-monetary), and 16 choosing not to file a formal complaint. Of those who chose to file a formal complaint, 9 individuals had no resolution and 39 did not attempt Alternative Dispute Resolution. In the remaining 3 cases, those individuals had not yet decided if they were going to file a complaint at the end of the reporting period (September 30, 2018).¹¹⁸⁷

State reported to the Commission that through its internal anti-harassment program, the Human Resources office issued a total of 15 decisions in disciplinary cases regarding conduct that involved discrimination, harassment, or retaliation in fiscal year 2018, which was a decrease from 18 employees in 2017 and 21 employees in 2016.¹¹⁸⁸ Ten of these 15 disciplinary cases in 2018, one of which included an individual resigning with a disciplinary action pending, specifically pertained to harassment of a sexual nature or harassment related to gender and/or gender and sexual orientation. These cases involved inappropriate conduct such as comments that were sexual in

¹¹⁸² U.S. Department of State, Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report, Fiscal Year 2017, at 27.

¹¹⁸³ *Ibid.*, 40.

¹¹⁸⁴ See NASA, *Equal Employment Opportunity Strategic Plan: FY 2017-19*, at 14, https://www.nasa.gov/sites/default/files/atoms/files/fy_2018_nasa_md-715_report_508.pdf; See State Department Affected Agency Responses to Draft Report to Commission, Nov. 6, 2019 [on file].

¹¹⁸⁵ U.S. Department of State, Equal Employment Opportunity Commission Management Directive 715 EEO Program Status Report, Fiscal Year 2017, at 133.

¹¹⁸⁶ *Ibid.*, 150.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 63-64.

nature, unwelcome physical contact, and failure of a supervisor or State official to report harassment, among others.¹¹⁸⁹ In all of these cases, disciplinary action was taken, which varied from letters of admonishment, letters of reprimand, and 1- to 3-day suspensions. State notes that in the case where the employee left the agency with the pending decision, the proposed action was a 10-day suspension.¹¹⁹⁰ Comparatively, of the 18 cases in 2017, 15 of the cases specifically were in response to sexual harassment or harassment related to gender and/or gender or sexual orientation; and 16 of the 21 cases in 2016 pertained to sexual harassment or harassment related to gender and/or gender or sexual orientation.¹¹⁹¹

Regarding resolutions of complaints, since 2016, no sexual harassment complaints were resolved through Alternative Dispute Resolution in the informal process, but two were settled through Alternative Dispute Resolution in the formal EEO complaint stage.¹¹⁹² Further, the agency reports that it has paid monetary benefits in one settled complaint alleging sexual harassment since 2016; and has also negotiated other settlement agreements that included other non-monetary relief such as: expunging personnel records, a letter of eligibility, leave restoration, training, scheduled meetings with the complainant's leadership, and assistance in finding an onward assignment.¹¹⁹³

In terms of formal EEOC resolutions, as of June 30, 2019, two cases in 2018 and one case in 2019 had findings of discrimination on the basis of harassment (non-sexual). According to the No FEAR Act report data, however, no disciplinary action was taken.¹¹⁹⁴ No FEAR Act data also showed that the number of complaints dismissed by State increased from 2015 to 2016 (from 10 to 17, respectively) and increased to 29 cases in 2017 and 2018.¹¹⁹⁵ The number of dismissed cases further increased in 2019, and as of June 30, 2019, the State Department has dismissed 32 cases.¹¹⁹⁶ Further, the No FEAR Act report shows that from fiscal years 2016 to 2018, there have been 16 withdrawn complaints across the two years, and 14 withdrawn as of June 30, 2019.¹¹⁹⁷

¹¹⁸⁹ Ibid., 63. The other 7 cases included harassment related to national origin, race, and religion.

¹¹⁹⁰ Ibid., 64.

¹¹⁹¹ Ibid., 64.

¹¹⁹² Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 71-72.

¹¹⁹³ Ibid.

¹¹⁹⁴ U.S. Department of State, *Equal Employment Opportunity Data Posted Pursuant to the No Fear Act*, June 30, 2019, <https://www.state.gov/wp-content/uploads/2019/08/nofear-3rd-Quarter-Ending-June-30-2019.pdf>.

¹¹⁹⁵ Ibid., 4.

¹¹⁹⁶ Ibid.

¹¹⁹⁷ Ibid.

State reported that when it comes to a decision on whether a case should be accepted or dismissed, it is S/OCR's practice to decide in the complainant's favor.¹¹⁹⁸ The agency argues that this is reflected in its dismissal rate which is below the federal average and its remand rate is even lower.¹¹⁹⁹ For example, in FY 2018, State processed 216 formal complaints and 31 dismissals (14.35 percent); comparatively EEOC data show that there were 16,565 formal complaints and 2,536 dismissals government wide.¹²⁰⁰ These data represent a decrease from FY 2017, where the dismissal rate was 17.71 percent, but an increase from 2016 that was 9.44 percent. Of the 31 dismissed cases in FY 2018, two were remanded by the EEOC,¹²⁰¹ which remains below the average dismissal remand rate of about 30 percent.¹²⁰²

In fiscal year 2018, the Office of the Legal Adviser at the State Department reported that 10 complaints were filed in federal court alleging discrimination, harassment, and/or retaliation.¹²⁰³

As of October 2019, State reported that there are six cases alleging sexual harassment that are pending a hearing at EEOC.¹²⁰⁴

In fiscal year 2018, in the formal complaint process, there were a total of 159 closures (with an average of 430.98 days), and the majority of these cases were closed through final agency decisions (123) that took an average of 470.60 days.¹²⁰⁵ Of these Final Agency Decisions, 95 were closed without an EEOC Administrative Judge (with an average of 306.80 days) and 28 were closed with an Administrative Judge (with an average of 1,026.36 days).¹²⁰⁶ The fact that these cases, on average, take over a year and may take almost three years to come to a resolution, demonstrates the difficulty of this process and further illustrates why some victims may choose not to report.¹²⁰⁷ Jenna Ben-Yehuda testified to this point clearly: "when a number of these cases are taking 18

¹¹⁹⁸ State Department, Affected Agency Review to Commission on draft report, Nov. 6, 2019 [on file]; *see also* EEOC, *Table B-1 FY 2018 Total Work Force, Counselings, and Complaints*.

¹¹⁹⁹ State Department, Affected Agency Review to Commission on draft report, Nov. 6, 2019 [on file].

¹²⁰⁰ *Ibid*; *see also* EEOC Table B-13 FY 2018 Complaints Closed with Dismissals; EEOC, *Table B-1 FY 2018 Total Work Force, Counselings, and Complaints*.

¹²⁰¹ State Department, Affected Agency Review to Commission on draft report, Nov. 6, 2019 [on file].

¹²⁰² EEOC, *New EEOC Report Identifies Common Errors by Federal Agencies in Dismissing Discrimination Complaints on Procedural Grounds*, Sept. 15, 2014, <https://www.eeoc.gov/eeoc/newsroom/release/9-15-14.cfm>.

¹²⁰³ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 157.

¹²⁰⁴ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Oct. 17, 2019, at 68.

¹²⁰⁵ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 147.

¹²⁰⁶ *Ibid*.

¹²⁰⁷ *See e.g.*, Jenna Ben-Yehuda Testimony, *Washington Briefing*, p. 81; Debra Katz Testimony, *Washington Briefing*, p. 129.

months, two years to adjudicate, that silences people from coming forward, and it also can carry [] the rumor mill for many years to come because it's not adjudicated in a timely fashion."¹²⁰⁸ Similarly, Debra Katz also asserted: "the fact of the matter is, some of these cases drag on for many, many, many years, and it creates a huge disincentive when combined with a fear of retaliation, for anybody to come forward."¹²⁰⁹

In the formal complaint process in FY 2018, there were a total of 23 complaints closed and 11 were with monetary benefits that amounted to \$168,775.62 as lump payments for compensatory damages.¹²¹⁰ There were 21 complaints that were settled with non-monetary benefits and these ranged from expungements, reassignments, rescinding removals, to training and having leave restored or a performance evaluation modified.¹²¹¹

In her publication in the American Foreign Service Association journal, Leslie Bassett wrote that while awareness of women's rights improved greatly since a class-action lawsuit filed in 1986 was finally settled in 2010; however:

During the last several years cases pursued and disciplinary action taken through the administrative inquiry process have increased significantly. In the last five years the Foreign Service Grievance Board (the last forum for appeal of department administrative sanctions by members of the Foreign Service) has denied appeals filed by employees facing discipline for inappropriate comments, inappropriate behavior and poor judgment. Such cases have involved, for instance, an officer who "made sexually inappropriate remarks and engaged in offensive touching behaviors"; an officer whose unwanted attentions drove a locally employed (LE) staff member to seek resignation; an engineer who harassed a contractor; and a management officer who harassed LE staff, local contract staff and household staff. Generally the grievants in these cases outranked their victim(s).¹²¹²

Jenna Ben-Yehuda testified that "sexual harassment and assault claims are not adjudicated as part of the background for Senate-confirmed positions at the Department of State."¹²¹³ This means that if a candidate is being vetted to be chief of mission or an ambassador, a record of harassment and

¹²⁰⁸ Jenna Ben-Yehuda Testimony, *Washington Briefing*, p. 81.

¹²⁰⁹ Debra Katz Testimony, *Washington Briefing*, p. 129.

¹²¹⁰ Department of State Interrog. Resp. to U.S. Comm'n Civil Rights, Addenda, Oct. 17, 2019, at 148. Note, EEOC does not break complaint closures down by issue.

¹²¹¹ *Ibid.*

¹²¹² Leslie Bassett, "#StateToo: Ending Harassment at the State Department," *The Foreign Service Journal*, Mar. 2018, <https://www.afsa.org/statetoo-ending-harassment-state-department>.

¹²¹³ Ben-Yehuda, Testimony, *Washington Briefing*, p. 80.

misconduct is not a requirement for Senate confirmation. According to Ben-Yehuda, this practice is currently being investigated by Congresswoman Speier in her upcoming legislation regarding sexual harassment and the State Department.

Further, Ben-Yehuda also testified that it is possible that employees receive beneficial career moves that are not a promotion, and if they have a record of misconduct, that information is not shared.¹²¹⁴ Lack of accountability or, more pointedly, career progress in the face of established records of misconduct can signal that harassing conduct is condoned and costless. She stated that in an already stretched workforce, being moved into a different office and taking on additional responsibilities is seen as a positive transition and “it ends up benefitting the accused because they get additional opportunities, whereas it’s very difficult to come by otherwise [and] the same goes for additional training. . . [H]ighly sought-after trainings are often a great place to park people when they are a problem.”¹²¹⁵

At the Commission’s briefing, Stacey Young, senior litigator at the Justice Department, testified that a similar practice occurs at the Justice Department. Instead of adequately addressing issues of harassment, officials engage in a practice Young called “pass the trash, whereby serious offenders are moved from one office to another.”¹²¹⁶ Not only does this practice not effectively end the misconduct but “transferring predators around an agency telegraphs a permissive attitude toward harmful behavior and subjects new offices to future incidents.”¹²¹⁷ In late 2017, the Justice Department reportedly implemented a new policy in light of serious harassment and assault allegations, focusing on trying to hold harassers accountable. One strategy it implemented was that it does not allow an alleged harasser who has a substantiated claim against them to be eligible for an award or promotion while they are under an investigation.¹²¹⁸

By contrast, the State Department has not implemented such a policy and information about alleged harassment or retaliation are not required to be included in performance reviews or promotions for supervisors.¹²¹⁹ At the Commission’s briefing, the State Department’s representative testified that if there is a concern when an individual in the Foreign Service is “under

¹²¹⁴ Ibid.

¹²¹⁵ Ibid.

¹²¹⁶ Young Testimony, *Washington Briefing*, p. 155.

¹²¹⁷ Ibid.

¹²¹⁸ Sari Horwitz, “Inspector general says mishandling of sexual harassment complaints at Justice Department is a ‘systemic’ problem,” *Washington Post*, Dec. 26, 2017, https://www.washingtonpost.com/world/national-security/inspector-general-says-mishandling-of-sexual-harassment-complaints-at-justice-department-is-a-systemic-problem/2017/12/26/ed51abf6-dc35-11e7-b1a8-62589434a581_story.html.

¹²¹⁹ Emily Tamkin and Robbie Gramer, “Will State Miss Its #MeToo Moment?” *Foreign Policy*, March 5, 2018, <https://foreignpolicy.com/2018/03/05/for-us-diplomats-metoo-faces-hurdles-state-department-sexual-harassment/>.

consideration for tenure to remain in the Foreign Service, for promotion, for appointment to senior level positions,” the Office of Civil Rights will flag a personnel file and alert the Human Resources office.¹²²⁰

According to State’s responses to the Commission, a discriminatory finding is not included in an employee’s personnel file, but the case is referred to the Conduct, Suitability, and Discipline Division in the Bureau of Human Resources’ Office of Employee Relations for discipline and, if found appropriate, the resulting disciplinary action could result in the finding being documented in the employee’s personnel record.¹²²¹ Further, State reports that a disciplinary action is documented in an employee’s file for varying lengths of time, depending upon the method. For instance, if a letter of admonishment is issued in lieu of disciplinary action, it is not placed in an employee’s Official Performance Folder (OPF) but is retained for a year and then destroyed; letters of reprimand remain in a Foreign Service employee’s OPF for one year or until it is reviewed by a promotion or commissioning and tenure board; and a decision letter imposing a suspension for five or fewer days remains in the OPF for two years or until reviewed by two tenure boards.¹²²²

In the EEOC’s Select Task Force report, EEOC Commissioners Feldblum and Lipnic argue that an agency needs to take a “swift, effective, and proportionate” response to dealing with harassment.¹²²³ This includes addressing behaviors that may not necessarily rise to the level of being “severe or pervasive,” but yet still contribute to hostile workplace environment.¹²²⁴ The report suggests that managers should focus on enhancing workplace civility and intervene if they are witness to the misbehavior, or if bystanders or victims report inappropriate conduct.¹²²⁵ Further, some advocates suggest that it is beneficial for management to be more transparent about the disciplinary or corrective actions that they are taking with the accused party. This practice thereby informs the victim and other employees, about what steps are being taken to correct the

¹²²⁰ Smith Testimony, *Washington Briefing*, p. 79.

¹²²¹ Department of State Interrog. Resp. to U.S. Comm’n Civil Rights, Oct. 17, 2019, at 58.

¹²²² *Ibid.*, 59-60.

¹²²³ Chai Feldblum and Victoria Lipnic. *EEOC Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, June 2016, at 32.

¹²²⁴ See e.g., Karen Brummond, Robyn Dupont, Maria Kaplan, Joseph Popiden, Navarro Pulley, Alex Romero, and Laurence Thompson, “Assessing Workplace Harassment Methods Through Comparisons with Similar Crime Prevention Strategies,” *Digest of EEO Law*, https://www.eeoc.gov/federal/digest/vol_2_fy18.cfm; see also, Equal Employment Opportunity Commission, “Promising Practices for Preventing Harassment,” <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

¹²²⁵ Chai Feldblum and Victoria Lipnic. *EEOC Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, June 2016.

misconduct.¹²²⁶ The data and testimony received by the Commission suggest that managers and senior leadership officials at State should continue focusing their attention on how to prohibit these behaviors to ensure a workplace that is free from harassment for all employees.

Finally, the Commission received an anonymous comment from a current employee with concerns that Nondisclosure Agreements (NDAs) signed by State employees cause hesitation to discuss sexual harassment.¹²²⁷ The commenter stated that, “Presently, State employees are told that if they talk to their Congressperson or USCCR about the events that resulted in an NDA, then they could lose any financial remedies and be fired.”¹²²⁸ The Commission is not in a position to verify whether these allegations are true, as this does not fall under its jurisdiction, and in fact State internally requires mandatory reporting of sexual harassment.¹²²⁹ However, the Commission emphasizes that, for legal and policy reasons, in the realm of EEOC complaints, EEOC generally prohibits settlements requiring that the victim keep the information confidential.¹²³⁰

The allegations could be connected to an overall environment in which women at State have felt pressure not to report sensitive information because they work in national security positions.¹²³¹ But it is clear that while strict confidentiality agreements may be required in national security positions, they should not operate to prohibit the reporting of sexual harassment or other civil rights violations.¹²³²

¹²²⁶ Sunu Chandy Testimony, *Washington Briefing*, p. 31; Jenna Ben-Yehuda Testimony, *Washington Briefing*, p. 52; Tamara Chrisler Testimony, *Washington Briefing*, p. 90.

¹²²⁷ Anonymous Public Comment to USCCR (May 28, 2019), Individual 6, at p. 3, https://securisync.intermedia.net/us2/s/folder?public_share=Cw5d2N47Zoq3vCkv3tuRjg0011ef58&id=L1B1YmXPYyBDb21tZW50cw%3D%3D.

¹²²⁸ *Ibid.*

¹²²⁹ *See supra* note 991.

¹²³⁰ *See supra* notes 700-704.

¹²³¹ *See e.g., supra* notes 946-47; 1110-28.

¹²³² *See e.g.*, 12 Foreign Affairs Manual § 713.2-5e (State Department NDAs “are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or EO (Executive Order) relating to: (1) Classified information; (2) Communications to Congress; (3) The reporting to an Inspector General of a violation of any law, rule or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety; or (4) Any other whistleblower protection.”), https://fam.state.gov/searchapps/viewer?format=html&query=classified%20information%20nondisclosure%20agreement&links=CLASSIFI,INFORM,NONDISCLOSUR,AGREEMENT&url=/FAM/12FAM/12FAM0710.html#M713_2_5; 5 U.S.C. § (b)(8)(prohibition against retaliation for employee reporting any information which they believe to be a violation of any law, rule or regulation); Exec. Order 13,526, Classified National Security Information (Dec. 29, 2009), § 1.7(a) (“In no case shall information be classified, continue to be maintained a classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error ... or (4) present or delay the release of information that does not require protection in the interest of the national security.”). In 2013,

Congress extended these protections to cover even federal contractors. 41 U.S.C. § 4712(a) (employee of federal contractor may not be “discharged, demoted or otherwise discriminated against as a reprisal for disclosing to a person or body . . . information that the employee reasonably believes is evidence of . . . “a violation of law, rule or regulation related to the contract”); *see also* U.S. Dept. of State, Office of Inspector General, *Review of the Use of Confidentiality Agreements by Department of State Contractors*, (Mar. 2015), <https://www.stateoig.gov/system/files/esp-15-03.pdf> at 6 (some contractors have policies that may inhibit reporting of fraud, waste, and abuse).

CHAPTER 5: FINDINGS AND RECOMMENDATIONS

FINDINGS

Background and Rule

1. Despite the passage of over thirty years since the landmark ruling establishing that sexual harassment claims may be pursued under Title VII of the Civil Rights Act, sexual harassment continues to be a significant problem, including in federal workplaces.
2. Sexual harassment in the federal government imposes harms on individuals and infects federal workplace cultures.
3. There is a dearth of publicly available data regarding sexual harassment among federal employees. The challenge of fully understanding the scope of the issue in federal workplaces is compounded by the fact that sexual harassment often goes unreported.
4. In the 1986 decision in *Meritor Savings Bank v. Vinson*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace as a form of sex-based discrimination.
5. The judicial test for actionable sexual harassment which requires that it rise to the level of being “severe or pervasive,” has drawn criticism because the test invites inconsistent results.
6. Sexual harassment under Title VII and federal regulations includes unwelcome sexual advances, requests for sexual favors, and other verbal and/or physical harassment that is of a sexual nature. Harassment, however, need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.
7. Sexual harassment claims are generally of two types: quid pro quo harassment and hostile work environment. Incidents of quid pro quo harassment involve a supervisor demanding sexual favors or acquiescence to unwanted sexual attention as a condition of employment or advancement. Hostile work environments, on the other hand, are those that courts recognize as uncomfortable, intimidating, or offensive due to certain behaviors, comments, or actions.
8. Sexual coercion (i.e., “sleep with me or you’re fired”) is the least common scenario of sexual harassment that occurs in the workplace; some studies show that “ambient” harassing behaviors, reflecting disparaging attitudes and or environment based on gender constitute the most common form of sexual harassment.

9. Sexual harassment may consist of verbal and non-verbal behaviors that convey hostility, objectification, exclusion, or second-class status based on a person's gender. Harassment is not solely based on gender or sex, and for workers who are part of more than one marginalized social group, it may have a cascading effect.
10. While harassment may sometimes be part of inappropriate workplace manifestations of sexual attraction, it is ultimately a demonstration of power, control, and dominance. As such, any person can be a victim of sexual harassment, regardless of the victim's or the harasser's sex or sexual orientation.

The Federal Workforce

11. The federal government is the largest employer in the nation.
12. According to a 2018 Merit Systems Protection Board (MSPB) survey, an estimated 1 in 7 federal employees experienced sexually harassing behaviors at work between 2016-2018.
13. Structural risk factors for sexual harassment often intersect and are exacerbated by other discriminatory biases based on race, ethnicity, national origin, religion, age, gender identity, sexual orientation, and disability.
14. Within the federal workforce, people of color are overrepresented at lower levels of pay and underrepresented at higher levels of pay. There is also a gender pay gap among federal workers; OPM estimated in 2012 that women earned about 87 to 89 cents to the dollar compared to men. These wage disparities represent a significant issue because harassment thrives in workplaces with power imbalances on the bases of race/ethnicity, gender, sexual orientation, and gender identity.
15. Though contractors are particularly vulnerable to issues of sexual harassment, Equal Employment Opportunity (EEO) complaint processes and most other legal protections extend only to employees. Many harassment complaints are dismissed because the complainant was found to be a contractor rather than a federal employee, and thus, the complainant lacks legal standing to file an EEO complaint against a federal agency.
16. In some cases, government agencies have misclassified workers as contractors even when they should be classified as employees for the purposes of a sexual harassment complaint to avoid exposure to a claim.
17. Interns are especially vulnerable to sexual harassment due in part to their dependence on recommendations and networking opportunities from supervisors. Yet, unpaid interns do not have the same protections as employees. Courts and the EEOC maintain that compensation (or other meaningful remuneration) is essential for the existence of an employer-employee relationship and that unpaid interns do not meet this requirement.

18. Research shows that retaliation, or fear of retaliation, is one of the main reasons why employees choose not to report harassment.

The Complaint Process

19. The federal EEO complaint process is unduly complex for victims and the steps associated with filing a complaint are not widely known. Though agencies offer several informal mechanisms for addressing sexual harassment in addition to the formal EEO process, including alternative dispute resolution (ADR), mediation, and internal Human Resources (HR) processes, the parallel informal and formal structures are difficult to navigate. For example, victims may pursue a resolution through an informal process but not realize that the clock on their formal EEO complaint deadline continues to run.
20. The federal sector EEO process is longstanding and has never been restructured, and many of the procedures, once introduced, have remained.
21. Under federal regulations, government employees must first contact an EEO counselor at their agency within 45 days of an alleged sexual harassment incident prior to filing a formal EEO complaint. After EEO counseling, federal workers have only 15 days to file a formal complaint or else they lose their claims completely. By contrast, employees in the private sector are typically allowed a much greater time period – between 180 and 300 days – to file charges with the EEOC.
22. The federal complaint process imposes financial caps on damages that have not been adjusted since they were first enacted in 1991: given that the federal government is a large employer, the maximum compensatory damages available in employment discrimination lawsuits is \$300,000. Combined with the complexity, uncertainty, and delays inherent in the complaint process, these limitations on damages provide an economic disincentive to attorneys who could take these cases, often leaving victims without an advocate.
23. Resources within a federal agency such as the Office of General Counsel or Human Resources office will typically be devoted to advocating on behalf of the agency in sexual harassment cases, creating an unfair advantage for the employer agency and inherent conflict of interest regarding employee complainants.
24. EEOC decisions have ordered training and held agencies in contempt for egregious sexual harassment situations where there was evidence of contempt or disrespect for the EEO process.

Data and Trends

25. An estimated one in every two women encounter some form of harassing behavior during their work life, and people of color experience the highest levels of harassment and discrimination in the workplace overall.
26. Organizational factors have strong correlations in predicting harassment. Harassment against both women and men is more likely to occur in male-dominated work environments than in gender-balanced or female-dominated work environments.
27. Harassment flourishes in a climate of tolerance for it and a culture of silence in the face of it.
28. Overall, the total number of sexual harassment claims – and the number of claims per employee – has been steadily increasing in recent years.
29. Women face the highest risk of sexual harassment in federal workforces. The EEOC does not report intersectional data on sexual harassment; however, studies have shown that black women are at the highest risk of being victims of sexual harassment across all sectors. Within the federal workforce, black workers are substantially more likely to be the victims of sexual harassment than members of any other race.
30. Uncertainty and inconsistency in defining “sexual harassment” can impact the accuracy of data on its prevalence, as often individuals do not label certain behaviors that are unwelcome, problematic, or offensive as sexual harassment.
31. Between 2010 and 2018, federal employees filed 62,465 sexual harassment claims with the EEOC. These data are likely to be under-inclusive since studies consistently indicate that there is very substantial under reporting of individuals who claim to have experienced sexual harassment and do not take formal action against the harasser. Rather than report the incident(s), the majority (61%) of people who claim to have experienced sexual harassment merely avoid the harasser(s). Research by the Center for Employment Equity in 2018 found that women working in government, compared with other industries, were among the least likely to file sexual harassment charges.
32. The EEOC estimates that three out of four individuals who experience sexual harassment in the workplace never tell a supervisor, manager, or union representative about the incident.
33. Fear of retaliation and lack of trust in the reporting processes play a major role in the persistence of sexual harassment.
34. A 2018 study of U.S. Forest Service employees showed that despite the agency’s “zero tolerance” harassment policy, most employees who alleged harassment did not report the

incident(s) because they did not trust the reporting process. Many of the women at the U.S. Forest Service who did report sexual harassment suffered retaliatory actions such as verbal threats, bullying, negative performance reviews, and demotions. Another 2018 study found that, of federal employees who claim to have experienced sexual harassment at work, only 8% believed their agency took corrective action against the harasser(s).

35. Sexual harassment can have a serious impact on victims' daily functioning. There is a significant correlation between experiences with harassment and mental health issues.
36. Sexual harassment contributes substantially to the enduring gender pay gap by causing reductions in productivity, increased use of sick and annual leave, and attrition of women.
37. One study found that women who were the targets of sexual harassment were 6.5 times as likely to leave their jobs compared to non-targeted women.
38. The negative effects of sexual harassment are not isolated to just the target(s) of the harassment. Coworkers who observe or are aware of their colleague's experiences with sexual harassment can suffer from similar psychological health and job satisfaction problems.
39. The effects of sexual harassment are also felt by employers and society at large: by forcing women out of their jobs, employers have to cover replacement costs while also missing out on the contributions of gifted workers and innovators. Workplace sexual harassment also results in decreased productivity, increased turnover, absenteeism, decreased job satisfaction, and reputational harm to employees and employers.
40. The Department of Labor does not collect data regarding the prevalence and cost of sexual harassment in the federal workforce and has refused to begin doing so despite requests from members of Congress.
41. According to a 1994 MSPB study, sexual harassment in the federal workplace cost the government an estimated total of \$574 million over the course of two years (when adjusted for inflation). This figure likely underestimates the true financial cost of sexual harassment, due to the lack of available data.

Organizational Factors

42. Workplaces where employers do not take harassing behaviors and misconduct seriously tend not only to have a higher frequency of sexual harassment, but also worse outcomes for victims.
43. Studies have found that sexual harassment decreases linearly as structural gender imbalances approach parity.

44. Workplaces structured around a “masculine job gender context,” such as occupations in which managerial roles are more likely to be filled by men, tend to have greater issues with sexual harassment.
45. Women who hold positions of authority may be more likely to experience sexual harassment, possibly due to the perceived threat of female authority figures to the gender hierarchy presented in predominantly male-dominated industries. According to a 2012 study, women supervisors were 138% more likely to experience harassing behavior, report harassment at a rate of 73% greater than non-supervisors, and experience more varied and sustained forms of harassment than in the more common scenario of a male boss and female subordinate.
46. The federal government continues to struggle with gender parity: in 2016, 56.8% of positions – and 64.7% of the most senior-level non-political appointee management positions – were held by men.
47. Women of color are more likely to experience harassment in compounded ways on the basis of their gender and race or ethnicity. Intersectional harassment decreases the likelihood of victims coming forward and reporting or filing complaints. Data reflect that black women are most likely to experience retaliation, and women of color with economic resources who rely on their jobs to support their families may be especially fearful of losing their jobs and therefore reluctant to speak up.
48. Sexual harassment is especially pervasive in Science, Technology, Engineering, and Mathematics (STEM) fields within the federal government. In one study, every STEM professional surveyed reported having at least one experience of sexual or other identity-based harassment.
49. Workplaces with well-known “rainmakers” (particularly esteemed employees whose status may lead them to believe they are not subject to the organization’s rules) also tend to have increased likelihood of sexual harassment, due to the rainmaker’s prominent status.
50. Some victims wait decades before coming forward, only doing so when they have enough seniority to protect themselves from the potential ramifications of reputational harm.

EEOC Policies and Investigations

51. The No FEAR Act of 2002 requires federal agencies to track summary statistical data regarding complaints of employment discrimination and submit the data to Congress, the Department of Justice, Office of Management and Budget, and EEOC. These data are intended to assist Congress, federal agencies, and the public to assess if agencies are living up to their EEO responsibilities.

52. Among federal employees, EEOC reported 7,733 non-sexual harassment complaints and 685 sexual harassment complaints in 2018 – an increase over 2017 for both types.
53. Few EEOC hearings end in a finding of discrimination: only .41 percent of sexual harassment hearings resulted in findings of discrimination in 2018.
54. Between 2014 and 2016, EEOC reviewed anti-harassment programs at each federal agency under its jurisdiction, finding that a vast majority of federal agencies had ineffective anti-harassment programs.
55. EEOC may recommend disciplinary action against federal employees but does not have the authority to order discipline of individual employees, and instead must refer its recommendations to the Office of Special Counsel for enforcement action.
56. Agencies have the obligation of disciplining an employee found to have engaged in sexual harassment.
57. If an agency labels a charge misconduct (i.e., “sexual harassment”) when it imposes disciplinary action on an employee, the disciplinary action can be appealed and will be upheld in a Merit Systems Protection Board only if the agency proves the elements of that charge. The elements may be defined in agency or EEOC policy or in a relevant statute. If an agency instead disciplines an employee based on a generic charge (i.e. “inappropriate conduct”), there are no specific elements that must be proven.
58. MSPB’s jurisdiction depends on the severity of the disciplinary action. For example, MSPB has jurisdiction over termination and disciplinary actions that result in suspensions of longer than 14 days. Conversely, MSPB does not have jurisdiction when an agency reassigns an employee without changing their salary and grade. This can lead agencies to reassign harassers instead of disciplining them.
59. Though the EEOC offers training programs that are a positive tool to address harassment for private companies and federal agencies, the registration fees and travel costs can be cost-prohibitive for some smaller agencies.
60. EEOC’s Select Task Force on the Study of Harassment in the Workplace found five fundamental principles that have been effective in preventing and addressing workplace harassment:
 - a. Committed and engaged leadership
 - b. Consistent and demonstrated accountability
 - c. Strong and comprehensive harassment policies
 - d. Trusted and accessible complaint procedures

- e. Regular, interactive training tailored to the audience and the organization
61. Employees often feel uncomfortable with discrimination and sexual harassment in the workplace but don't know how to report it and fear retaliation for getting involved. The utilization of bystander training to encourage people to step forward is supported by numerous studies and has been successful in the violence prevention industry.
 62. Effectively combatting sexual harassment often requires changing workplace culture, and bystander training can achieve cultural change from within by demonstrating that complaints are welcomed and everyone is working collectively towards a safe and effective workplace. Bystander training, however, is generally only effective when it is voluntary and may not be useful in workplaces with pre-existing harassment problems.
 63. In 2019, twenty-nine states have introduced legislation directed at preventing and redressing sexual harassment of state government employees, often requiring updates to internal sexual harassment policies and mandatory sexual harassment training.
 64. Although judges, legislators, and the EEOC have noted the chilling effects that nondisclosure agreements can have on investigating and remedying discrimination claims, the federal government is still free to utilize them in employee settlement agreements.

Investigation of State Department and NASA

NASA

65. NASA has the lowest rate of formal EEOC complaints in the federal government among the ten largest agencies. Between 2016 and 2018, NASA reported zero formal incidents of sexual harassment to EEOC; however, the number of harassment claims through its internal anti-harassment program has increased.
66. NASA's workforce is generally under-representative of racial and gender minorities compared to the total U.S. population. NASA's 17,515 employees are predominantly white (12,553) and men (11,520). Within NASA's workforce, there are disparities in the number of women and members of racial minorities in leadership position. Though women represent 34 percent of NASA's total workforce, women account for only 16 percent of employees in Senior Scientific and Professional (ST) and Senior Level (SL) positions, 23 percent of those in Science and Engineering (S&E) positions, and 28 percent of those in GS-14, 15, and Senior Executive Service (SES) positions.
67. NASA's anti-harassment policy defines harassment more broadly than the legal definition. NASA states that this is in order to achieve a goal of addressing harassment before it

reaches the legal standard of discrimination and prevent harassment at the earliest possible opportunity.

68. Under NASA's policy, management officials who fail to take corrective action to address harassment allegations can themselves be subject to disciplinary action.
69. NASA's anti-harassment policies do not offer the same protections to contractors or employees of grant-receiving institutions as they do for employees.
70. Gender bias and a lack of accountability in the STEM fields continues to deter women from entering the aerospace community and works to preserve gender disparities.
71. NASA provides initial and annual EEO training for both supervisory and non-supervisory employees; however, NASA imposes no repercussions on employees who fail to complete the training. Additionally, only online (as opposed to in-person) training is available for contractors and vendors.
72. Responding to independent reports and substantiated allegations of sexual misconduct within the scientific community, the House Committee on Science, Space, and Technology in 2018 proposed several recommendations to government science agencies and their grantees to increase protections against sexual harassment.
73. The Federal Employment Viewpoint Survey (FEVS) allows employees to rate the level of inclusion at their federal agencies through questions in the categories of fairness, openness, cooperative, supporting, and empowering. Compared with the federal government as a whole and other large agencies specifically, NASA scored higher in all five categories in 2018. The FEVS, however, does not fully capture the viewpoints of all federal employees, as it excludes political appointees from participating.
74. As a result of NASA's Anti-Harassment Program, launched in 2018 to address the issues raised by the #MeToo movement, there has been a spike of harassment claims.
75. NASA completes its sexual harassment investigations in a timely manner at a higher rate (94% in 2018) than the government-wide average (73% in 2018).
76. At NASA, complaints of bullying were as prevalent as sexual harassment complaints in 2018, possibly reflecting overlapping behaviors and indicating larger underlying issues affecting NASA's workforce. Low-level harassing behaviors such as bullying which may not meet the legal standard for discrimination may nevertheless set the tone for what is considered acceptable behavior and can serve as a predictor of future harassment. Anti-harassment policies like NASA's, which extend to these behaviors, can help address workplace conflict at the earliest opportunity and ensure that the behavior does not adversely affect the workplace.

77. A comparison of outcomes between NASA's EEO and internal complaint processes show that many employees want to settle workplace issues as quickly and efficiently as possible, oftentimes deciding not to go through the complex and timely formal EEO process that rarely results in findings of discrimination.
78. In 2017, NASA began requiring alternative dispute resolution (ADR) to be offered in all harassment cases and established an ADR Management Team at each Center to facilitate the process. That year, the ADR participation rate in both the informal and formal processes at NASA exceeded the government averages.
79. Though NASA's time to complete EEO investigations is faster than the federal government average, the process still takes ten times longer than the informal anti-harassment program process.
80. NASA has enacted a number of procedures to protect complainants during pending complaints. Complainants receive advice and counsel about their rights and NASA's sexual harassment policy, while supervisors are informed of their obligations and regulations against retaliation. While a complaint is underway, NASA states that it does not reassign complainants or managers unless it is deemed necessary.
81. While NASA has increased its representation of women in its workforce, women are still underrepresented at NASA. Consequently, the planetary science community is under-benefiting from the expertise of qualified women scientists.
82. In 2019, the delay of the first-ever all-female spacewalk in March highlighted the lack of female representation at NASA: the spacewalk was delayed because NASA did not have two spacesuits available for the women astronauts.

Department of State

83. Geographic isolation has been shown to increase the risk of workplace sexual harassment. Because State Department employees are stationed in embassies and consulates in 200 countries around the world, preventing and addressing sexual harassment within the agency poses particular challenges.
84. Women enter the State Department as Foreign Service Officers at the same rate as men, but they are under-represented in senior positions. According to a 2017 public letter by 223 former Ambassadors and high-ranking national security officials, the national security field generally suffers from a culture of hostility toward women. These factors may contribute to an increased risk of sexual harassment at the State Department.
85. Sexual harassment complaints at the State Department have increased in recent years.

86. The demographic breakdown of the State Department workforce shows striking disparities in senior positions: people of color, women, and people with disabilities are generally vastly underrepresented.
87. The State Department's sexual harassment policy, issued in January 2019, includes both the quid pro quo and hostile work environment forms of sexual harassment; however, unlike NASA, the policy does not extend beyond the reach of the EEO definition. Additionally, the policy does not explicitly state that it covers harassment based on gender identity.
88. The efficacy of the State Department's sexual harassment policy is hindered by multiple factors:
 - a. Although the Office of Civil Rights is responsible for conducting internal investigations into allegations of sexual harassment, it has no authority to determine whether or to what extent staff should be disciplined if the allegations are confirmed.
 - b. Though the policy requires supervisors to report sexual harassment, some managers simply ignore the policy.
 - c. The EEO process can involve substantial delays: one State Department employee reported that her sexual harassment complaint waited for 16 months before being assigned to an Administrative Judge at the EEOC.
 - d. Procedures may vary from post to post, and personnel are sometimes moved around while claims are pending, complicating the investigations.
89. Foreign nationals, or locally employed staff, are especially vulnerable to sexual harassment in State Department workplaces abroad, because incidents that occur in overseas posts are handled locally and are often not addressed adequately. The State Department has established a Locally-Employed Staff Liaison program to ensure protections against retaliation and facilitate communication between foreign nationals and the Office of Civil Rights. Locally employed staff can also seek informal EEO counseling and are protected by local labor laws. They do not, however, have the ability to participate in the formal EEO process.
90. The State Department disciplinary system is complex and disjointed, requiring the involvement of several department offices and non-department agencies for each complaint. As a result, the agency suffers from inconsistency between disciplinary decisions and resolution times that are long and vary widely. According to a report by the Office of Inspector General, the average time from case receipt to decision letter between 2010 and 2014 was 114 days – much higher than the target of 30 days.

91. The grievance process for State Department employees who belong to labor unions and fall within the terms of a negotiated grievance procedure is also complicated and difficult to navigate. Employees may only file a grievance for sexual harassment if expressly permitted by the governing collective bargaining agreement, and employees must choose between filing an EEO complaint or a grievance – but may not pursue both avenues.
92. According to an Investigator General report, the State Department does not require the recusal of personnel involved in disciplinary decisions who had existing relationship with the accused, which can jeopardize the independence of a disciplinary decision and cause conflicts of interest.
93. A combination of complex processes, inadequate accountability at senior levels, and a lack of training and other issues at the State Department allow repeat offenders to continue to abuse.
94. Many women at the State Department fear that they will suffer retaliation if they come forward to report harassment.
95. Though the State Department mandates harassment training for all domestic and foreign employees, these trainings may not be sufficient to address the issues within the agency: attendance in trainings specifically addressing misconduct tends to be lower than for those addressing other topics.
96. The importance of “corridor reputation,” peer and supervisor perceptions, at the State Department and in the national security industry generally imposes a heavy cost on victims of sexual harassment who choose to come forward. “Corridor reputation” in the State Department is a major factor for promotions and selection for assignments. Bringing complaints of harassment can cause victims to be labeled as “unpatriotic” and can have a negative impact on corridor reputation.
97. The frequency of rotation at the State Department contributes to the problem of sexual harassment because supervisors sometimes forego pursuing an investigation or discipline based on the knowledge that the alleged harasser will eventually move on to another post.

RECOMMENDATIONS

The Administration

The federal government, as the largest employer in the nation, must be a model employer and it, through its Office of Personnel Management and following guidance from EEOC, should continually disseminate sexual harassment policies and practices consistent with the conduct of a model employer and a leader of protecting the rights of all workers. The existing criteria for

categorizing workers as either contractors or employees must be properly enforced, ensuring that Title VII protections reach all eligible workers.

1. The Government Accountability Office and/or Bureau of Labor Statistics should begin collecting data and reporting on the economic effects of workplace sexual harassment on the nation's workforce.
2. Government agencies should employ the use of climate surveys to evaluate employee perceptions of harassment in their workplaces. These surveys should capture the viewpoints of all federal employees, including political appointees. Climate surveys have been shown to increase trust between employers and employees and create an atmosphere where employees feel that sexual harassment will be taken seriously.
3. To protect and assist victims of workplace sexual harassment, federal agencies should implement:
 - a. Mandatory reporting requirements for managers and supervisors
 - b. Increased transparency regarding the EEO process and its outcomes
 - c. Institutional support for victims of harassment
 - d. Resources such as counseling sessions, monetary stipends for wellness programs, and onsite professionals to help employees recover from the trauma of sexual harassment.
4. Federal agencies should take steps to prevent the incidence of workplace sexual harassment, including:
 - a. Implementing department-wide, uniform penalties to be used in disciplinary actions
 - b. Banning serious perpetrators from receiving promotions and performance awards
 - c. Ending the practice of reassigning perpetrators to other divisions
 - d. Embracing and training employees regarding bystander intervention
5. Federal agencies need to implement mandatory anti-harassment training programs that are specific, clear, and accessible and target every level of employee.
6. Transferring known harassers to another agency or department should not be used as a response to sexual harassment, because it merely relocates the harms to a new workplace.
7. Federal agencies should strengthen protections against retaliation for those who report sexual harassment.

8. Federal agencies should scrutinize policies that permit the use of nondisclosure clauses in settlements of harassment and other discrimination claims.
9. Office of Management and Budget (OMB) has not released the updated harassment guidance approved by a bipartisan vote of the EEOC. The EEOC's current guidance is decades old and does not reflect many developments in the law. OMB should release the updated sexual harassment guidance immediately.

Congress

10. Congress should explicitly classify harassment based on sexual orientation, gender identity, and sex/gender stereotyping as prohibited under Title VII.
11. Congress should enact legislation replacing the "severe or pervasive" standard applicable to sexual harassment claims with a clearer and more workable standard that promotes greater uniformity.
12. Congress should enact explicit statutory protections from sexual harassment for federal government contractors and interns, whether paid or unpaid.
13. Congress should establish a federal ombudsperson, empowered to investigate alleged sexual harassment claims of complainants who may not have adequate recourse through available channels where existing agency structures may be compromised by conflicts.
14. Congress should enact legislation to extend the time limits for filing EEO complaints and change EEO procedure so that formal complaint time limits are tolled while a complainant is pursuing informal processes such as ADR or mediation.
15. The limits on damages for federal discrimination claims, including sexual harassment claims, should be increased or removed to give victims a more realistic opportunity to retain outside counsel to represent them through the complaint process.
16. Congress should amend the No FEAR Act to automatically refer every finding of discrimination to the Office of Special Counsel to facilitate compliance with EEOC orders. The staff of the Office of Special Counsel should be appropriately increased to enable it to respond.
17. Congress should allocate additional funds to enable EEOC to help agencies proactively identify and prevent sexual harassment. EEOC should provide technology tools to assist agencies in tracking trends in real time, and to launch more "Inspector General" type in-depth investigations based on data trends that emerge or complaints.

The EEOC

18. The EEOC should begin collecting and reporting intersectional data on sexual harassment in federal workplaces, so that more effective and targeted measures can be taken to combat harassment against the people most affected by it.
19. The EEOC should implement metrics to track the outcomes at workplaces that receive their new “Leading for Respect” and “Respectful Workplaces” to assess efficacy, and expand the use of these trainings if they yield results.
20. The EEOC should direct agencies to prioritize EEO complaints to mitigate any circumstances that exhibit the risk of an ongoing harm, which may include sexual harassment complaints.
21. EEOC should continue working with behavioral scientists to develop evidence-based responses/methods to harassment prevention that are applicable to the federal workforce.
22. EEOC should consider whether the CIA’s report on its response to individual harassment complaints is a replicable model for other agencies and consider piloting the idea at other agencies.
23. EEOC should eliminate fee-based federal agency training and replace it all with free training. This would be more efficient and won’t cost the government more money overall.

NASA

24. Stricter enforcement of the anti-discrimination and anti-harassment laws that protect individuals in federally funded institutions under Title IX is needed to address the culture of sexual harassment and misogyny in grant-receiving research institutions.
25. NASA should amend its anti-harassment program and policies to include the addition of “low-level” offenses that may not necessarily rise to the level of harassment, such as bullying.
26. NASA should investigate and address the potential causes for the increased reports of harassment at its Goddard Space Flight Center.
27. NASA should develop criteria by which it will provide immediate and effective corrective action before for individuals with credible claims of sexual harassment at the time of reporting the harassment.

Department of State

28. In light of testimony that the USCCR received, and the often isolated geographic conditions in which diplomatic functions must be discharged, it is important that State Department

leadership, including the Secretary, direct and ensure that the culture of State workplaces globally is to have zero tolerance for sexual harassment, meaningful access to fair processes where claims are asserted, and no tolerance for retaliation.

29. The Human Resources Department at State should conduct discipline actions for all employees found to have engaged in sexual harassment. In disciplining employees who have engaged in sexual harassment, State should take into account the nature and seriousness of the offense, the employee's job level, past disciplinary record, past work record, effect on the employee's ability to perform the job, consistency of the penalty, notoriety of the offense, warning about the conduct, potential for rehabilitation, and any mitigating circumstances. The State Department should ensure that the sexual harassment policy is publicly posted at overseas posts and that the policy is fully and equally enforced in every remote location where employees are stationed.
30. Supervisors with a conflict of interest should be required to recuse themselves from assault or harassment investigations.
31. Alternative dispute resolution (ADR) training should be required for all managers and supervisors and the use of ADR at the pre-complaint stage should be encouraged.
32. The sexual harassment policy must clearly identify the offices and people to whom employees should report cases of sexual harassment.
33. The State Department should reduce its complaint processing times.
34. The State Department should implement mandatory exit interviews for all employees leaving the workforce to provide a channel for feedback on the workplace culture.
35. Records of misconduct should be taken into consideration for employee promotions and transfers.

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COMMISSIONERS' STATEMENTS, DISSENTS, AND REBUTTALS

Statement of Commissioner Debo P. Adegbile

Sexual harassment shares some common characteristics with many other forms of discrimination. It imposes painful, sometimes lifelong harms on its victims. It thrives in environments where power is abused. It is disproportionately borne by women, though men are not immune. It demeans human dignity, and its costs fall both on victims, their families, colleagues, and on society at large.

Like other movements, #MeToo has amplified the voices of people who, too often, have felt voiceless, assures victims that they are not standing and suffering alone, and shines a bright national spotlight on an intolerable injustice. Most importantly, sexual harassment calls for a response. As the #MeToo movement has illuminated, sexual harassment claims do not exist in a vacuum. At times race and sexual harassment discrimination intersect, and retaliation is a well-placed concern for those who come forward. With this report the U.S. Commission on Civil Rights examines the federal role in responding to sexual harassment.

Workplace sexual harassment is a problem across all sectors and industries, and the federal government is no exception. But because of its dual role as the largest employer in the United States and as the principal enforcer of federal civil rights protections, a special threat exists when sexual harassment is faced in the agencies and workplaces of the United States government. Our federal government must be a model employer when it comes to addressing and eradicating sexual harassment and other sex discrimination in the workplace. It is therefore imperative that the federal government understands the causes and costs of workplace sexual harassment and that it exemplifies the protections and best practices necessary to stop it in order to ensure that it is a safe and inclusive workplace for all.

Sexual harassment is often driven more by misuses of power than by sexual attraction. For that reason, sexual harassment thrives in workplaces where power dynamics and organizational factors embrace gendered statuses and enforce antiquated norms. Additionally, organizational conditions, and climate are strong determinants whether there are higher risks of sexual harassment. Workplaces where women are underrepresented in positions of leadership have higher incidences of sexual harassment. Other workers who have a systemic disadvantage in the official hierarchy, including interns and independent contractors are especially vulnerable to sexual harassment too often without any adequate remedy. Sexual harassment flourishes in places where it is tolerated: in other words, where reporting mechanisms are ineffective or where victims do not report out of fear that their personal or professional lives will be negatively impacted by retaliatory actions. This may further be compounded in workplaces where employees are not empowered to help victims, or where victims are isolated from their colleagues.

Several of these factors are prevalent across federal government workplaces. The agencies we studied suffer from gender disparities in leadership, gender-based stereotypes, and remote or isolated work environments. Our investigation showed that the federal equal employment opportunity (EEO) complaint process lacks the necessary means for protecting victims from retaliation and providing adequate remedies.

Throughout this study and the Commission's briefing, we were reminded that existence of sexual harassment in the federal workplace is not an abstract issue. The personal accounts, with bravery and painful resolve recounted to us by some of those who has faced sexual harassment underscored the urgency of this problem and the consequences of inaction.

Personal Testimony

One of the witnesses that testified at our briefing explained: "...I'm a senior litigator at the Justice Department. My supervisor stalked me for over a year and it was a terrifying and life altering experience. He admitted to it, but my office responded largely with indifference. They didn't fire, demote, or suspend him, involve outside law enforcement, or even mention the episode in his permanent file. Instead, they merely transferred him to a different office and I feared for the women there. When I later learned about other instances of egregious sexual harassment in my office that were similarly mishandled, I filed a complaint with DOJ's Inspector General's Office. This sparked a multiyear investigation into sexual harassment at the Department's Civil Division."¹²³³

Another witness's account was also vivid and difficult to countenance. "I'm a Foreign Service Officer with the Department of State. An American non-DOS member of my mission overseas assaulted me after attending the Marine Ball many years ago. It took me about a year to recognize that incident for what it was, date rape, and at that point, the guy had left the country. Within hours of the assault, I convinced myself I was entirely to blame for the incident. I was terrified to speak about my experience to anyone in my vicinity given the paramount importance myself and my colleagues place on our corridor reputations. This was my first assignment in the Foreign Service. I know my rank as a junior officer meant I had to keep my head down, handle all tasks thrown my way, and never, ever complain, especially to HR, yet after a year of panic attacks and nightmares, I knew I couldn't function as a professional without additional support that wasn't available to me overseas. I ultimately felt somewhat comfortable admitting to a med in HR at post that I had been assaulted when I read Secretary Clinton's directive to state employees which explicitly stated that those who sought mental health treatment would not automatically face loss of or a downgrade in their security or medical clearances to continue to serve. It was impossible for me to step away from post, quite a large one, without notice, as I was one of two staffers to our male ambassador. I remain profoundly grateful to those at post who did grant me the leave I requested to treat

¹²³³ USCCR Briefing Transcript Federal Me Too: Examining Sexual Harassment in Government Workplaces, May 9, 2019, at 54, <https://www.usccr.gov/calendar/2019/06-12-Transcript-Briefing-Federal-Me-Too.pdf>.

subsequently diagnosed anxiety, depression, and PTSD. ...To my knowledge, my supervisors never reported this incident to the Office of Civil Rights as was likely mandated at that time, and certainly is now per the Foreign Affairs Manual. I had to advance sick leave over three months with a reduction in pay, loss of differential, while purchasing my own plane ticket and accommodations in the U.S. to remain away from my work overseas to treat my PTSD domestically. I'm extremely proud of myself for returning to complete that assignment."¹²³⁴

This report makes clear that this problem is not without solutions. The federal government has the tools which, if employed, can make a difference.

- Mandatory training programs can mitigate potential harassment and create a culture where bystanders know how and when to intervene.
- The widely used practice of transferring harassers to other workplaces must be discarded in favor of real corrective actions that curtail the possibility of future harassment.
- Protections against retaliation are necessary in order to ensure that victims feel comfortable coming forward to report when harassment occurs to them or to their colleagues.
- Likewise, nondisclosure clauses in settlements and other discrimination claims must also be scrutinized.
- When victims do speak up, their call for help must be met with a complaint process that is navigable, unbiased, and offers a realistic chance of remedying the underlying problem.
- Existing EEO procedures should be revised and agencies must ensure that victims have an advocate throughout the process.

In sum, what we learned throughout our investigation is that that sexual harassment is driven principally by power dynamics. We learned that sexual harassment is dramatically underreported. That the current existing data illuminates that retaliation, or fear of retaliation, is one of the main reasons why employees choose not to report harassment. We learned that structural risk factors for sexual harassment often intersect and/or are exacerbated by other discriminatory biases based on race, ethnicity, national origin, religion, age, gender identity, sexual orientation, and disability. We learned that sexual harassment flourishes in a climate of organizational tolerance to harassment. We learned that independent contractors and interns are especially vulnerable to sexual harassment because they do not enjoy the full protections afforded to federal government employees under Title VII. We learned that the federal EEO complaint process for sexual harassment is unduly complex for victims and the steps associated with filing a complaint are not

¹²³⁴ USCCR Briefing Transcript Federal Me Too: Examining Sexual Harassment in Government Workplaces, May 9, 2019, at 56, <https://www.usccr.gov/calendar/2019/06-12-Transcript-Briefing-Federal-Me-Too.pdf>.

widely known. Finally, we learned that sexual harassment has both individual, familial and workplace-wide impacts. It has individual impacts on the victims their professional aspirations and experiences, and it has economic impacts which also have larger societal consequence for agencies employers have to cover replacement costs while missing out on the contributions of workers and innovators. Workplace sexual harassment results in decreased productivity, increased turnover, absenteeism, decreased job satisfaction, and reputational harm to employees and employers. Sexual harassment is common in both federal and non-federal workplaces, however, the federal government as the largest employer in the nation, must be a model employer and demonstrate leadership in addressing sexual harassment, protecting the rights of all workers and ensure that these matters are handled effectively and efficiently.