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INTRODUCTION: #METOO IN THE WORKPLACE

BY JEFFREY M. HIRSCH*

This symposium issue examines various impacts of the #MeToo movement in the workplace. “Me Too” was first coined in 1997 by Tarana Burke, who used the phrase as part of her work to help women like her, especially those of color, who had survived sexual violence.¹ “Me Too” later became “#MeToo,” particularly after several famous actresses accused high-powered Hollywood producer Harvey Weinstein of sexual assault.² The actions of Weinstein, as well as many of the numerous powerful men who subsequently faced similar accusations, involved sexual harassment and assault in a specific context: work. These high-ranking executives used their power over victims’ careers—either as an enticement to “consent” or a threat for a refusal to do so—to advance their sexual misconduct.

The use of workplace power to harass or coerce subordinates, particularly women, is not a new phenomenon. Moreover, since the Supreme Court’s 1986 unanimous decision in *Meritor Savings Bank v. Vinson*,³ sexual harassment has been formally recognized as unlawful under Title VII of the Civil Rights Act.⁴ But recognizing the sexual harassment claim and making genuine headway in addressing the problem are two different things. As the result of judicial decisions narrowly interpreting Title VII’s prohibition against sexual harassment, and the likely related cultural resistance to discussing this problem, sexual harassment has remained a significant dilemma in the workplace.

The #MeToo movement has the potential to upend this situation. By giving victims of sexual harassment support and encouragement to tell their stories, #MeToo has begun to lower some of the apprehension victims feel about bringing their experiences to light. This, in turn, has helped to

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1. Abby Ohlheiser, *The Woman Behind “Me Too” Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST, Oct. 19 2017.

2. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtags*, N.Y. TIMES, Oct. 20, 2017.

3. 477 U.S. 57, 61-67 (1986).

4. The Court found sexual harassment to be unlawful discrimination “because of . . . sex” under Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1).

highlight the seriousness and breadth of the problem. The question remains, however, whether this increased attention will translate into actual improvements in the workplace. There are some hopeful signs. Sexual harassment complaints to the Equal Employment Opportunity Commission (EEOC) initially spiked in the wake of #MeToo.⁵ There also appears to be the beginning of an extralegal cultural shift in the types of behavior that are deemed acceptable. But, as the articles in this symposium discuss, there remain significant hurdles to genuine and long-lasting change.

One impediment to addressing workplace sexual harassment is the difficulty in pursuing these claims through the legal system. Professor Charlotte Alexander's article, *#MeToo and the Litigation Funnel*, empirically examines a common perception among most employment discrimination experts, which is that it is very difficult to obtain a remedy for sexual harassment claims.⁶ Her conclusion? The perception is correct: it is very difficult to win sexual harassment claims, as well as other claims under Title VII.

Alexander starts by describing what is apparent to most Title VII scholars and practitioners, which is the difficulty in pursuing sexual harassment claims, particularly all the way through trial.⁷ This perception runs counter to the views of many non-experts, who are often under the impression that sexual harassment law is overly favorable to plaintiffs.⁸ As Alexander explains, the hope among many is that the #MeToo movement may help change the law in ways more favorable to harassment claims.⁹ It is too early to know whether that will happen, but it appears that #MeToo has prompted an increase in sexual harassment claims to the EEOC, at least for the time being.¹⁰ But what happens to those claims after they are filed is

5. The EEOC's released data isn't recent enough to capture much of whatever effects that #MeToo has had on sexual harassment charges, although there was a 13.6% increase in FY2018, which saw 7,609 sexual harassment charges compared to 6,696 the prior year. U.S. Equal Employment Opportunity Commission, *Charges Alleging Sexual Harassment, FY 2010 - FY 2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

Moreover, the percentage of sexual harassment charges filed by women increased to 84.1% in FY 2018 from 83.5% the prior year. *Id.* But only time will tell if these increases are the start of a meaningful shift.

6. Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. ___ (2019).

7. *Id.* at ___.

8. See Alexia Fernández Campbell, *How the Legal System Fails Victims of Sexual Harassment*, Vox, Dec. 11, 2017 (discussing cases and research including SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017)), <https://www.vox.com/policy-and-politics/2017/12/11/16685778/sexual-harassment-federal-courts>.

9. Alexander, *supra* note 6, at ___.

10. *Id.* at ___ (citing preliminary data from the U.S. Equal Employment Opportunity Comm'n, Press Release: EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), <https://www1.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>, which indicated an increase in over 12%);

the focus of Alexander's study.

The study concentrates on what Alexander describes as the "litigation funnel."¹¹ That is, after harassments occurs, how are claims resolved at various stages, from a formal charge filed with the EEOC, to a lawsuit, and finally to a potential settlement or judicial remedy?¹² To find the answer to these questions, Alexander and her team analyzed a database of sexual harassment lawsuits in the United States District Court for the Northern District of Georgia from 2010 to 2017.¹³ As she notes, the data is not recent enough to capture the main effects of #MeToo, but serves as an update to earlier research and a valuable foundation for later developments.¹⁴

In her article, after describing the EEOC complaint resolution process,¹⁵ Alexander reviews relevant EEOC data and prior studies before detailing her own study.¹⁶ Notable, if unsurprising, is a recent jump in sexual harassment claims filed with the EEOC in the 2017-2018 period from the previous year.¹⁷ But previous studies have found that such claims typically do not provide a remedy. For instance, once plaintiffs file Title VII cases in court, they are far less successful in all aspects of litigation than plaintiffs in other types of cases.¹⁸ Moreover, even when Title VII plaintiffs are able to obtain some form of relief, such as a settlement, they typically receive relatively low monetary awards.¹⁹ Although the data is more limited, one previous study also suggested that sexual harassment claims face a similar success rate to Title VII plaintiffs overall.²⁰

In the study that Alexander directed, she and her team examined 2010-

see also supra note 5.

11. Alexander, *supra* note 6, at ___.

12. *Id.* at ___.

13. *Id.* at ___. Alexander describes the study's methodology in more detail in Charlotte S. Alexander, *Using Text Analytics to Predict Litigation Outcomes*, in *LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS* (Michael Livermore & Daniel Rockmore, eds. forthcoming 2019).

14. Alexander, *supra* note 6, at ___.

15. *Id.* at ___ - ___.

16. *Id.* at ___ - ___.

17. *See supra* note 10.

18. Alexander, *supra* note 6, at ___. (citing Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 *HARV. L. & POL'Y REV.* 103 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 *J. EMPIRICAL LEGAL STUD.* 429 (2004)).

19. *Id.* at __ (citing ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* 266 (2017); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 *J. EMPIRICAL LEGAL STUDIES* 175 (2010)).

20. *Id.* at __ (citing Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 *CORNELL L. REV.* 548, 550, 556 (2001)).

2017 employment law cases from the federal district court that encompasses Atlanta and its suburbs. She compared the outcomes in sexual harassment cases to other employment claims, including other discrimination cases as well as Fair Labor Standards Act and Family and Medical Leave Act claims.²¹ Among her findings were that sexual harassment cases on average survived longer through the litigation process, although like other employment cases a majority of claims were resolved through settlement.²² The team then ran regressions to analyze the impact of various characteristics of sexual harassment claims on their outcomes. For instance, among the characteristics found to have a statistically significant impact were plaintiffs' pro se status (which substantially reduced the likelihood of a settlement or getting past the dismissal and summary judgment stages), the number of claims in a lawsuit (a higher number of claims reduced the likelihood of settlement and increased the chances of dismissal or summary judgment); and the type of claim (FLSA and FMLA claims fared much better than discrimination claims).²³

Isolating the presence of sexual harassment claims among all employment cases was not found to have a statistically significant impact on plaintiffs' chance of success,²⁴ but when examining sexual harassment claims among only Title VII claims, things were much different. Looking solely at Title VII cases, a sexual harassment claim had a statistically significant association with dismissal or summary judgment and a negative association with settlement.²⁵ However, the impact for sexual harassment claims was actually better than all other Title VII claims examined, which had an even stronger negative impact for a plaintiff-favorable outcome.²⁶ This result suggests that sexual harassment claims do not appear to be disadvantaged compared to other Title VII claims.²⁷ But discrimination claims generally are hard to win and may benefit from being combined with FLSA or FMLA claims.²⁸ This is far from a rosy picture, but does suggest that, even before the full impact of #MeToo has been felt, sexual harassment plaintiffs don't face headwinds any more than other discrimination plaintiffs. Yet, as Alexander summarizes, not doing worse than other discrimination plaintiffs isn't much of a victory, as the chances

21. *Id.* at __.

22. *Id.* at __.

23. *Id.* at __.

24. *Id.* at __.

25. *Id.* at __.

26. *Id.* at __ (examining claims alleging race, sex, national origin, color, and religious discrimination).

27. *Id.* at __.

28. *Id.* at __.

of obtaining relief for these claims are quite low.²⁹ And that's just for those who pursue a claim. Studies indicate that only between six to thirteen percent of employees who were victims of sexual misconduct filed with the EEOC.³⁰ What remains to be seen is whether #MeToo will encourage more victims to pursue claims; whether the movement will lead to more success for those claims; and, perhaps most importantly, whether increased attention to the problem of sexual harassment will decrease the frequency that it occurs.

One of the significant factors contributing to sexual harassment and violence are the gender-based social constructions that often drive individuals' behavior at work and elsewhere. Professor Ann McGinley delves into this issue by exploring a particularly high-profile merger of the #MeToo Movement and judicial politics. In *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, McGinley uses Christine Blasey Ford's sexual assault allegation against now-Justice Brett Kavanaugh to explore the masculinities issues that often drive sexual harassment and violence.³¹

McGinley begins by describing the testimony of Blasey Ford and Kavanaugh before the Senate Judiciary Committee.³² On the surface, this testimony simply involved Blasey Ford's allegation that Kavanaugh sexually assaulted her while they were teenagers, and Kavanaugh's denial.³³ But, as McGinley details, such a simple description fails to adequately describe what was going on. Instead, the manner in which Blasey Ford and Kavanaugh testified, and the way in which those testimonies were interpreted, speaks volumes about how society views men, women, and sexual misconduct.

McGinley begins by framing masculinities theory, which argues that gender is a social construction that forces individuals into specific roles and inflicts negative consequences on those who don't act accordingly.³⁴ For instance, men are expected to hide their emotions, show no fear, and eschew child-rearing responsibilities; failure to meet these expectations can result in ridicule or harassment.³⁵ As a result, individuals will "perform"

29. *Id.* at __.

30. *Id.* at __ (citing CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL OPPORTUNITY EMPLOYMENT COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE(2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftn65).

31. Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMP. RTS. & EMP. POL'Y J. __ (2019).

32. *Id.* at __.

33. *Id.* at __.

34. *Id.* at __.

35. *Id.* at __.

expected identity characteristics to gain acceptance, albeit often at a cost to the individual. But, as McGinley notes, masculinities are complex, requiring considerations of race, gender, sexual orientation, and gender identity, among other things.³⁶ Masculinities also plays out differently in various contexts, but its presence in the workplace is particularly strong because of the strong tie between work and individuals' identities.³⁷ As a result, many workplaces act like a microcosm of male-dominated masculinities, complete with anti-female sentiments that often culminate in sexual harassing behavior.³⁸

These masculinities were on display throughout the Kavanaugh hearings. Blasey Ford's testimony was direct; gracious; polite; emotional; competent; forceful; compelling; and, by virtually all accounts, credible.³⁹ According to McGinley, this testimony was able to hit the narrow middle ground allowed for women to be considered both competent and acceptable.⁴⁰ Kavanaugh also tracked his gender expectations, with the sharp contrast in their testimonies illustrating the equally sharp differences in societal expectations for males and females. Kavanaugh didn't merely deny that the attack occurred, he did so in a particularly aggressive and partisan manner. His testimony was often angry, evasive, and belligerent as he argued that he was a supporter of women, never blacked out due to drinking, and was a victim of Democratic political maneuvering.⁴¹ Although Blasey Ford's testimony was widely hailed, public perceptions of Kavanaugh's testimony fell along partisan lines.⁴²

McGinley fits the Kavanaugh allegation firmly in the masculinities theory. For instance, group sexual harassment like the sort alleged by Blasey Ford is a way for teens and young men to demonstrate masculine behavior in front of friends.⁴³ On the other hand, Blasey Ford's silence fits the opposite culture, in which victims and witnesses stay silent out of fear of additional victimization.⁴⁴ While noting that not all boys engage in this behavior, McGinley stresses that Kavanaugh benefitted from the view by some that, even if the event occurred, he should not be punished for decades-old "boys will be boys" behavior.⁴⁵ She also noted that

36. *Id.* at ___.

37. *Id.* at ___.

38. *Id.* at ___.

39. *Id.* at ___.

40. As opposed to being incompetent, or competent but "bitchy." *Id.* at ___.

41. *Id.* at ___.

42. *Id.* at ___.

43. *Id.* at ___.

44. *Id.* at ___.

45. *Id.* at ___.

Kavanaugh's aggressive and emotional testimony seemed to indicate a privileged man who felt that he was entitled to be a Supreme Court Justice.⁴⁶ It also appeared to fit the view that the more forceful the denial, the stronger the defense; that is, never admit to being wrong or weak.⁴⁷

McGinley analyzes the testimony of Blasey Ford and Kavanaugh by imagining how they would have been received if they switched performances. For instance, if Blasey Ford testified with the same emotion and combativeness as Kavanaugh, McGinley stresses that she would have been considered hysterical, irrational, and untrustworthy.⁴⁸ Although Kavanaugh did receive criticism for his performance, McGinley argues that it would have been altogether unacceptable from a woman. In turn, had Kavanaugh testified in the same manner as Blasey Ford—which, McGinley states, he essentially did in an earlier television interview—he likely would have been criticized for not being aggressive enough in denying the charges.⁴⁹ Indeed, the President was displeased with Kavanaugh's initial reserve during the interview, as opposed to his great pleasure in Kavanaugh's aggressive Senate testimony.⁵⁰ And McGinley notes that both Blasey Ford and Kavanaugh may have benefited from their race and class.⁵¹ A black man would not have been able to display the level of anger as Kavanaugh without facing serious backlash, while Blasey Ford's race likely helped give her the benefit of the doubt.⁵²

McGinley concludes that masculinities theory could predict the outcome of the Kavanaugh hearings.⁵³ Kavanaugh's aggressive testimony rewrote the narrative in a way that similar denials would not have done if made by a woman. The ability of men to effectively employ sharp denials threatens the #MeToo movement, which depends on a genuine search for the truth of allegations of sexual harassment and assault. This search is particularly difficult when a single individual alleges sexual harassment and faces a substantial risk of retaliation. Thus, it is not a coincidence that

46. *Id.* at __.

47. *Id.* at __.

48. *Id.* at __.

49. *Id.* at __.

50. *Id.* at __ (citing Kevin Liptak, et al., *Frustrated Trump Turns Optimistic on Kavanaugh*, CNN, Sept. 27, 2018, <https://www.cnn.com/2018/09/27/politics/donald-trump-kavanaugh-reaction/index.html>). At the time, there was a possibility that Kavanaugh's nomination would be withdrawn by the President. See Lawrence Hurley & Jeff Mason, *Trump Waivers on Supreme Court Nominee Kavanaugh*, REUTERS, Sept. 26, 2018.

51. McGinley, *supra* note 31, at __.

52. As McGinley describes, the hearings involving Professor Anita Hill and then-Judge Clarence Thomas, over 25 years earlier, provide a contrast, in which Hill testified in a similar manner to Blasey Ford, but was accused of lying by members of the Senate committee. *Id.* at __.

53. *Id.* at __.

most of the high-profile #MeToo scandals involved multiple victims corroborating each other.⁵⁴

Although masculinities issues play out in all types of workplaces, some industries are particularly problematic. Professor Joseph Seiner addresses one such industry in his article, *Harassment, Technology and the Modern Worker*, which explores sexual harassment in the technology industry, which has faced a series of high-profile harassment scandals in recent years.⁵⁵ In his article, Seiner describes the reasons why the technology sector has seen a higher prevalence of sexual harassment issues, and proposes ways to address the problem in the industry, as well as the economy at large.

After describing a sample of the many disturbing examples of sexual harassment occurring in the technology sector,⁵⁶ Seiner discusses several factors that appear to make this problem worse than in most other industries. One factor is rooted in our educational system. As he describes, the science-based educational foundation of most technology jobs still largely remains the bastion of men.⁵⁷ This, in turn, leads to Seiner's second factor, which is the technology industry's male-dominated workforce. The disproportionate number of men in this industry not only reinforces the stereotype that women are not welcome, but leads to what some have described as a "Brotopia" that encourages or tolerates harassment and discrimination.⁵⁸ It is little wonder that even when women enter that industry, companies have a difficult time retaining them.

Seiner also discusses the role that investors may play in fostering harassment in the technology industry.⁵⁹ Much like the technology workforce, investors tend to be white males who, whether intentionally or not, foster the "boys club" environment that can lead to harassment.⁶⁰ The technology industry also operates in a culture of anonymity and temporary relationships. Using the platform economy as a prime example, Seiner notes that workers often may interact with customers or co-workers on a limited basis. This can lead to a reluctance by workers to bring harassment to light, as they may not realize that other workers are facing similar problems and may not have to interact again with any one harasser (even

54. *Id.* at __.

55. Joseph A. Seiner, *Harassment, Technology and the Modern Worker*, 23 EMP. RTS. & EMP. POL'Y J. __ (2019).

56. *Id.* at __ (discussing sexual harassment allegations at Uber and Tinder).

57. *Id.* at __.

58. *Id.* at __.

59. *Id.* at __.

60. *Id.* at __.

though another may soon take his place).⁶¹ Seiner connects this transparency while at work to the transparency that accompanies the widespread use of mandatory arbitration agreements in the technology sector. As is the case in other industries, the secrecy that is the hallmark of arbitration decisions can allow harassment to fester in a workplace or industry because other workers are unaware of the extent to which it is occurring.⁶²

Finally, Seiner notes that the relative lack of regulation of the technology sector can contribute to harassment. This includes the widespread classification of workers as independent contractors, as well as the ever-changing nature of the industry that makes all kinds of regulation difficult to impose.⁶³ To fill this regulatory gap, Seiner recommends several ways to potentially reduce the level of harassment in the technology industry. One recommendation is to attempt to break down the education stereotypes that exclude many women from the technology sector. Seiner notes that this is a difficult task, but advocates more attention and resources—from both educational institutions and technology companies—to encouraging and supporting a more diverse set of students in technology related fields.⁶⁴

Seiner also advocates that technology companies focus more on the recruitment and retention of workers with diverse backgrounds. Such efforts might include enhanced mentoring, more use of internships, and other means to increase the applicant pool; and, once hired, companies should ensure that employees don't face inequities in their work environment, pay, and other terms and conditions of work.⁶⁵ Similarly, he recommends that technology companies make more efforts to inform workers about possible bias and offer training to help decrease the likelihood of its occurring.⁶⁶ Moreover, when misconduct does occur, Seiner advocates for better reporting and responses from technology companies. For instance, claims of sexual harassment should be sent up the chain of command to the C-suite or even the Board of Directors, rather than just within a unit or the company HR department. Workers should also be given the option to make anonymous complaints to reduce the risk of retaliation. In addition, once a complaint is made, companies should investigate them seriously—possibly by internal or external experts—and,

61. *Id.* at __.

62. *Id.* at __.

63. *Id.* at __.

64. *Id.* at __.

65. *Id.* at __.

66. *Id.* at __.

if meritorious, should result in genuine corrective measures.⁶⁷

Seiner concludes by recommending that technology companies seek out a more diverse set of investors and offer them bias training. He also looks to our regulation of the workplace, advocating for an employee classification rule that excludes fewer workers, as well as encouraging the adoption of “decency pledges” as a way for companies to publicly show their support for non-hostile working environments.⁶⁸

While Seiner’s article focuses on a specific industry, in *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, Professor Michael Green addresses a specific subset of sexual harassment issues: how and whether a subordinate can validly consent to a romantic relationship with an executive at the same workplace.⁶⁹ This issue lies at the heart of the #MeToo movement, as many of the high-profile cases involved accusations against highly placed executives who often defended themselves by arguing that the accusers had consented to whatever conduct occurred.

Green begins by describing the accusations against several executives, including Matt Lauer, Les Moonves, Tavis Smiley, Harvey Weinstein, and Steve Wynn.⁷⁰ He describes the inherent tension in a subordinate consenting to a romantic relationship with an official who has control over the subordinate’s career.⁷¹ This power dynamic is particularly pernicious because of the headwinds facing those who complain about sexual harassment or file claims.⁷² Such actions are already extremely risky and doing so against a high-placed official is even more so.

Green then confronts some of the backlash that has arisen in the wake of the #MeToo movement, particularly concerns that about the rush to judgment, the impact of unproven accusations, and exaggerated claims.⁷³ Green agrees that accused executives deserve a fair process, but points out that there hasn’t been much evidence that these problems are actually occurring in a meaningful way, particularly in the corporate setting.⁷⁴ To the contrary, the much bigger problem has been the silencing of harassment victims. Whether through retaliation or perverse timing incentives in sexual

67. *Id.* at __.

68. *Id.* at __.

69. Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL’Y J. __ (2019).

70. *Id.* at __.

71. *Id.* at __.

72. *Id.* at __.

73. *Id.* at __.

74. *Id.* at __.

harassment law, all too often, victims say nothing.⁷⁵ One promise of #MeToo is that it could prompt extralegal measures that may decrease the incidence of sexual harassment from occurring in the first place.

Green also tackles concerns that #MeToo will disrupt positive workplace relationships. For instance, some have argued that it is unfair to prohibit executives from ever having romantic relationships in the workplace, as many met their future spouses at work. Yet, as Green notes, there's a fundamental power differential between a superior and a subordinate in a relationship and co-workers in a relationship.⁷⁶ He also recognizes the concern that #MeToo could result in executives' avoiding the innocuous and friendly interactions that are often an important part of a successful employment relationship.⁷⁷ Green advocates positive mentorship, but argues that the extreme power differential between executives and subordinates requires blanket rules against any romantic behavior. According to Green, subordinates can never be safe in saying "no" to an executive's romantic overtures.⁷⁸

Green stresses that executive-subordinate romance imposes widespread costs in the organization. The subordinate's career successes will be tainted by the view that the relationship, rather than merit, was responsible.⁷⁹ Moreover, subordinates in the organization will view their path to success as requiring romantic relationships, rather than good work.⁸⁰ As a result, when executives and other supervisors are found to have engaged in sexual harassment, Green argues that employers should take meaningful remedial actions, particularly termination.⁸¹ Companies should also include anti-sexual harassment provisions in executive agreements; clauses with remedies that include significant financial penalties. And resolution of such claims should not occur in secret arbitration proceedings that prevent employees from being aware of harassment issues at work. Similarly, Green argues that neither corporate policies nor the law should permit executives to use consent from a subordinate as a defense to a sexual harassment claim or as a means to challenge an asserted just-cause termination. Such a prohibition, which

75. *Id.* at __ (citing Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, *Vox*, Oct. 15, 2017, <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>).

76. *Id.* at __.

77. *Id.* at __. Elizabeth Tippet's contribution to this symposium describes this problem in detail. Tippet, *infra* note 84.

78. Green, *supra* note 69, at __.

79. *Id.* at __.

80. *Id.* at __.

81. *Id.* at __.

Green compares to consent under statutory rape laws, recognizes the significant power imbalance involved in these relationships, places the risk of romantic encounters on the executive, and will often prevent executives from receiving a golden parachute after leaving under the cloud of sexual harassment.⁸² Like statutory rape, this proposal is also intended to prevent subordinates from engaging in relationships typically deemed harmful and to deter executives from engaging in such conduct. According to Green, whatever costs are involved with hindering romantic relationships at work are overwhelmed by the positive impact of rooting out harassment and unwanted romantic overtures by superiors.⁸³

Finally, in *Opportunity Discrimination: A Hidden Liability Employers Can Fix*, Elizabeth Tippett explores a superficially subtle, but important, form of employment discrimination.⁸⁴ Unlike “big” employment discrimination, such as promotions and raises, Tippett focuses on “small” opportunities. These employment opportunities may not qualify as a challengeable employment action under Title VII,⁸⁵ but they often play an important part in career development. Unfortunately, access to these small opportunities is often based on gender or other protected classes, and can be used as part of a pattern of workplace harassment.

The heavy focus on big opportunities is understandable, but may unintentionally overshadow the significance of other aspects of work. Tippett describes these other, small opportunities as things such as work assignments, access to clients, opportunities to observe and take leadership roles, assistance, feedback and guidance, being given the benefit of the doubt, and the ability to make mistakes.⁸⁶ These opportunities, while easy to overlook, can have a profound impact on employees’ skills and accomplishments over time.⁸⁷ Thus, when employees are deprived of these small opportunities—through what Tippett refers to as “opportunity discrimination”—the cumulative effect can have substantial negative career effects.⁸⁸ This opportunity discrimination has long been felt by many employees, particularly women as the #MeToo movement has helped to highlight.⁸⁹ However, Tippett notes that #MeToo has created a double-

82. *Id.* at __.

83. *Id.* at __.

84. Elizabeth C. Tippett, *Opportunity Discrimination: A Hidden Liability Employers Can Fix*, 23 EMP. RTS. & EMP. POL’Y J. POL’Y J. __ (2019).

85. *Id.* at __.

86. *Id.* at __.

87. *Id.* at __.

88. *Id.* at __.

89. *Id.* at __.

edged sword when it comes to small opportunities. Although opportunity discrimination is a serious problem, some have expressed concern that #MeToo will prompt senior officials to reduce their interactions with female employees, including beneficial mentoring and other work-related issues, out of a fear of sexual harassment allegations.⁹⁰

One major problem in addressing opportunity discrimination is the narrow interpretation of Title VII's "adverse employment action" requirement. In addition to decisions like hiring, firing, and compensation, Title VII includes "terms, conditions, or privileges of employment" as actionable discriminatory conduct.⁹¹ Yet the Supreme Court has typically interpreted this provision as encompassing only "tangible" employment actions—that is, significant changes in status, responsibilities, or benefits.⁹² In hostile work environment cases, "adverse employment action" can also encompass non-tangible actions, but as Tippet notes, this appears limited to the harassment context.⁹³ Thus, most lower courts have interpreted adverse employment action narrowly, thereby excluding many instances of opportunity discrimination.⁹⁴ The answer to this problem, according to Tippet, includes convincing courts that "small decisions matter" and reducing some of the broad discretion given to employers' day-to-day business judgments.⁹⁵

Tippet next describes in detail how small opportunities are not only important to employees' careers, but can and should help plaintiffs establish causation in Title VII cases. Indeed, the Supreme Court has permitted small missed opportunities to act as evidence of an employer's motive in distributing a bigger opportunity.⁹⁶ According to Tippet, this use of small opportunities is significant as it illustrates their relevance even under the current Title VII jurisprudence, particularly a set of recent Supreme Court decisions. In those cases, the Court's application of the *McDonnell Douglas* framework imputed an employer's discriminatory

90. *Id.* at __. This is part of the backlash cited by Michael Green in his contribution to this symposium. Green, *supra* note 69, at __.

91. 42 U.S.C. § 2000e-2(a)(1) (2012).

92. Tippet, *supra* note 84, at __ (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

93. *Id.* at __ n.28 (citing circuit cases). Tippet, however, does note that other Supreme Court cases could be used to argue for a broader interpretation of "adverse employment action." citing *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 69 (2006).

94. *Id.* at __ (citing cases).

95. *Id.* at __.

96. *Id.* at __ (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (more intense scrutiny and unequal discipline led to female employee's termination for a fight at work, while male employee she fought with kept his job)).

intent based on its knowledge that its policies and practices resulted in discriminatory outcomes.⁹⁷ Thus, she argues that under these cases employers are presumed to know when their distribution of small opportunities leads to disparate outcomes for employees.⁹⁸ This line of reasoning can apply to small opportunities as well. For instance, using a set of opportunity discrimination decisions can provide a concrete chain of causation that is easier to prove than showing bias for a subsequent big decision in isolation.⁹⁹ This is particularly true for pattern or practice, and other group, Title VII claims.¹⁰⁰

The goal of Tippet's work is to prompt employers to better allocate its small opportunities. One means to achieve that goal is legislation, such as Washington State's new Equal Opportunity Act.¹⁰¹ Tippet examines the statute and concludes that, although its primary focus is gender-based pay inequity, it is broad enough to prohibit some forms of opportunity discrimination.¹⁰² The key provision in the law is its prohibition against gender-based limits or deprivation of employees' "career advancement opportunities."¹⁰³ Although the statute does not define "career advancement opportunities," Tippet argues that the text suggests that it encompasses many small opportunities that are precursors to more substantial employment decisions.¹⁰⁴ As a result, the statute will likely push employers to identify and analyze its distribution of opportunities that lead to employees' career advancement.¹⁰⁵

Although statutes like Washington's Equal Opportunity Act are welcome steps, Tippet emphasizes that there still exist barriers to addressing opportunity discrimination at the firm level. For instance, HR departments are typically structured to handle big opportunity issues, rather

97. *Id.* at __ (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2031 (2015); *Young v. UPS Inc.*, 135 S.Ct.1338, 1355 (2015); *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009)).

98. *Id.* at __.

99. *Id.* at __ (arguing that employees in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 538 (2011), may have had easier time relying on small opportunities like disaggregated metrics used for promotions (if they were available) rather than trying to use an implicit bias theory, which the Court ultimately rejected).

100. *Id.* at __.

101. Wa. HB 1506 (2017-2018).

102. Tippet, *supra* note 84, at __.

103. Wa. HB 1506, § 4 (2017-2018) (providing exception for "bona-fide job related" factors that are "consistent with business necessity," not based on gender-based differentials, and are responsible for the entire differential).

104. Tippet also notes that the statute appears limited to challenges to an employers' policies or practices, rather than one-off decisions that affect only individual employees. Tippet, *supra* note 84, at __.

105. *Id.* at __.

than analyzing how small opportunities impact workers.¹⁰⁶ Tippet recommends that, instead, employers focus on reverse engineering their decisionmaking to identify the small opportunities that lead to big ones.¹⁰⁷ Moreover, she advocates having a committee or staff member specifically responsible for such issues, which has been found to be particularly effective.¹⁰⁸ Finally, she discusses steps that employers can take to eliminate opportunity discrimination, including more clearly identifying performance indicators, monitoring opportunity decisionmaking, educating employees about the existence of small opportunities, changing the way certain decisions are made, and giving HR departments a broader mandate.¹⁰⁹

The contributions to this symposium have explored a variety of ways in which #MeToo has already impacted the workplace and may continue to do so in the future. They also help provide a baseline to measure progress from this still-recent movement. Whatever #MeToo's ultimate impact, it is unquestionable that the movement has helped to highlight the many of the problems with workplace sexual harassment that, up to this point, had largely been discussed only among practioners and experts in the field. The public's new appreciation of the issue is welcomed and vitally important, but in the end, it will still largely be up to those who are immersed in the field to push for policies and judicial decisions that fulfill some of the promise of #MeToo. This symposium is part of that effort.

106. *Id.* at __.

107. She analogizes to a study of racially and gender-based disparate referrals of students to their principals for infractions such as defying a teacher. *Id.* at __ (citing Kent McIntosh, et al., *Education not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. OF APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 10 (2014)).

108. *Id.* at __ (citing Alexandra Kalev, Erin Kelly & Frank Dobbin, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AMER. SOCIOLOGICAL REV. 589, 589 (2006)).

109. *Id.* at __.