

Written Submission to the U.S. Commission on Civil Rights
Public Briefing on
Federal Me Too: Examining Sexual Harassment in Government Workplaces
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1. Workplace Culture that Fuels Sexual Harassment

Over the past two years, the viral explosion of the #MeToo Movement has revealed the prevalence of sexual harassment across private and public industries. While no industry is immune, there are common patterns among the industries exposed: many of the publicized cases involved workplaces with disparities in the representation of women, particularly in the higher echelons, a hierarchical structure, large power imbalances, and a culture of secrecy or isolation. These conditions can make industries more susceptible to pervasive harassment and underscore how difficult it is to effectively transform industries. In the archetypal example of the renewed² #MeToo Movement, the New York Times revealed in 2017 that Hollywood producer and power broker Harvey Weinstein had for years used his position of power to prey on women eager to get a foothold in the industry.³ In Hollywood, the key positions of power, like Mr. Weinstein's role, are overwhelmingly occupied by men.⁴ This defining characteristic of Hollywood remains common across many industries. The federal workforce is not immune.

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² We use this term in to highlight Tarana Burke's origination of the Me Too Movement many years ago to center the experiences of women and girls of color, especially, in contending with sexual violence of all kinds. See Sandra E. Garcia, "The Woman Who Created #MeToo Long Before Hashtags," *N.Y. Times*, Oct. 20, 2017, available at <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

³ Jodi Kantor & Megan Twombly, "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades," *N.Y. Times*, Oct. 5, 2017, available at <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Ronan Farrow, "From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell their Stories," *The New Yorker*, Oct. 10, 2017, available at <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

⁴ Of the 250 top domestic grossing films in 2018, women made up only 21% of executive producers, 26% of producers, and 8% of directors. Martha M. Lauzen, *The Celluloid Ceiling: Behind-*

In the Federal Judiciary, at the end of 2017, 15 women made public complaints of sexual harassment and other misconduct against Second Circuit Judge Alex Kozinski.⁵ The extreme power imbalance between federal judges and law clerks, coupled with ethical rules and a culture of confidentiality within judges' chambers, cultivated an environment that discouraged people from speaking out.⁶ Recently, the Judicial Conference approved a package of workplace conduct reforms; changes to various codes of conduct for federal judges and judicial employees respond to and implement recommendations contained in the report of the Federal Judiciary Workplace Conduct Working Group dated June 1, 2018.⁷ Whether these reforms are enough to transform practices in the judiciary remains to be seen. Certainly, concerns regarding immunity from scrutiny remain, particularly for chief circuit court judges and Supreme Court Justices.⁸

The U.S. Congress was also exposed by the #MeToo movement. The New York Times published a story in 2017 accusing the House and Senate of being “among the worst” for harassment and detailing lurid accounts culled from more than 50 interviews with former staffers, lobbyists, and lawyers.⁹ Partly due to the obstacles incorporated into the Congressional Accountability Act as it existed at the time, allegations of sexual harassment in Congress rarely

the-Scenes Employment of Women on the Top 100, 250, and 500 Films of 2018, Center for the Study of Women in Television and Film, San Diego State University (2019).

⁵ Stacy Cammarano, “#MeToo in the federal court system is doomed to fail,” *Wash. Post*, May 8, 2018, available at 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?utm_term=.6043cef04452 (citing Matt Zapotoski, “Judiciary closes investigation of sexual misconduct allegations against retired Judge Alex Kozinski,” *Wash. Post*, Feb. 5, 2018, available at 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).

⁶ See Cammarano, *supra* note 5; see also Dahlia Lithwick, “He Made Us All Victims and Accomplices,” *Slate*, Dec. 13, 2017, available at <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> (“And the relationships between law clerks and their judges are mostly built on worshipful silence.”).

⁷ “Judicial Conference Approves Package of Workplace Conduct Reforms” (Mar. 12, 2019), available at <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms>; Kimberly Strawbridge Robinson, “Sexual Harassment Policies Adopted for Federal Judiciary (1),” *Bloomberg Law*, Mar. 12, 2019, available at <https://news.bloomberglaw.com/us-law-week/sexual-harassment-policies-adopted-for-federal-judiciary-1>.

⁸ See, e.g., Joan Biskupic, “Complaints Against Brett Kavanaugh Dismissed by Federal Judicial Council,” *CNN* (Dec. 18, 2018), available at <https://www.cnn.com/2018/12/18/politics/kavanaugh-complaints-dismissed/index.html>.

⁹ Yamiche Alcindor & Katie Rogers, “House and Senate Are ‘Among the Worst’ for Harassment, Representative Says,” *N.Y. Times*, Nov. 13, 2017, available at <https://www.nytimes.com/2017/11/13/us/politics/sexual-harassment-congress-capitol-hill.html>.

became public.¹⁰ The list of industries impacted by the #MeToo Movement is lengthy, but the common thread among the industries described above is that each has a culture that fuels sexual harassment, insulates perpetrators, and visits ongoing shame and employment consequences on those brave enough to come forward.

In *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U.S. Military*, Buchanan et al. identify broad organizational predictors of sexual harassment: (1) organizational climate, which refers to “how individuals perceive their workplace, including its policies, practices, and procedures.,” (2) the proportion of men and women in a workplace, and (3) organizational tolerance of sexual harassment.¹¹ The Equal Employment Opportunity Commission Select Task Force on the Study of Harassment in the Workplace reported a more detailed (yet non-exhaustive) list of individual risk factors:

- 1) homogenous workforces,
- 2) workplaces where some workers do not conform to workplace norms,
- 3) cultural and language differences in the workplace,
- 4) coarsened social discourse outside the workplace
- 5) workforces with many young workers
- 6) workplaces with “high value” employees,
- 7) workplaces with significant power disparities
- 8) workplaces that rely on customer service or client satisfaction,
- 9) workplaces where work is monotonous or consists of low-intensity tasks,
- 10) isolated workspaces,
- 11) cultures that tolerate or encourage alcohol consumption, and
- 12) decentralized workplaces.¹²

These risk factors are not limited to sexual harassment but apply to many forms of harassment in the workplace. While the presence of the above risk factors does not automatically mean that sexual harassment will occur, the presence of these factors may heighten risks. Accordingly, the Task Force recommended that employers pay closer attention to situations that involve one or

¹⁰ Congress has since passed legislation addressing some of the Act’s problems. Emily Cochrane, “Negotiators Strike Deal to Tighten Sexual Harassment Rules on Capitol Hill,” *N.Y. Times*, Dec. 12, 2018, available at <https://www.nytimes.com/2018/12/12/us/politics/sexual-harassment-capitol-hill.html>. Advocacy was spearheaded by a group of current and former Congressional staff, who founded Congress Too. Megan Keller, “Former Staffers Push Congress for Action on Sexual Harassment Measure,” *The Hill*, Nov. 13, 2018, available at <https://thehill.com/homenews/senate/416483-former-staffers-push-congress-for-action-on-sexual-harassment-measure>.

¹¹ NiCole Buchanan et al., “A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military,” *Journal of Social Issues* 70:4, 688–89 (2014).

¹² For more detail about each category, *see* Select Task Force on the Study of Harassment in the Workplace, “Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic” (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686305 (“EEOC Task Force”).

more risk factors.¹³ Several of the risk factors identified in the Task Force report are apparent in the above examples of sexual harassment brought to light in the #MeToo Movement. Hollywood, the Federal Judiciary, and Congress all suffer from a lack of diversity, employ young workers (many of the individuals targeted for harassment were younger actors, law clerks, and congressional aides), and have “high value” employees (producers, judges, congressmembers) with large power disparities between the targeted workers and their superiors.

The #MeToo Movement has encouraged people affected by sexual harassment to come forward and, in many cases, pursue legal claims against the harassers. In addition to accountability and redress for harm done, including monetary compensation, advocates rightly push for changes to organizational policies and practices. Yet, to effectively address harassment and prevent it from happening in the future, organizations must root out both its practical and cultural causes. An organization must establish robust workplace practices (such as effective training workshops, complaint procedures, and human resources responses), and fix its organizational culture. It is not sufficient to merely establish mechanisms for enforcing an anti-harassment policy without addressing the culture of the organization. According to some studies, organizational climate¹⁴ is the strongest predictor of whether sexual harassment will occur.¹⁵ This submission provides concrete recommendations to change workplace culture to recover from and prevent sexual harassment. We first examine a recent example of an ongoing problem of sexual harassment in a federal workplace, the U.S. Forest Service. We then offer recommendations for cultural and procedural reforms to reduce sexual harassment across federal government workplaces.

2. Case Study: The U.S. Forest Service

The U.S. Forest Service provides a lens to understand the type of workplace culture that cultivates harassment and shields harassers. In 1973, Gene Bernardi and several other women filed a class action lawsuit against the Forest Service alleging sex discrimination in hiring and

¹³ *Id.*

¹⁴ Organizational climate and organizational culture are interrelated aspects of employees’ perceptions of an organization. While organizational climate may be summarized as the employees’ perceptions of the organization, organizational culture focuses on the employees’ perceptions of the company’s values and expectations, which are often unspoken or assumed by the employees. Tim Kuppler, “Workplace Culture vs. Climate – why most focus on climate and may suffer for it,” *Human Synergistics International*, available at <https://www.humansynergistics.com/blog/culture-university/details/culture-university/2015/05/13/workplace-culture-vs.-climate-why-most-focus-on-climate-and-may-suffer-for-it>. A range of resources on organizational culture and climate are cited in EEOC Task Force, *supra* note 12, at fn. 154. Like the Task Force, we note that there is an exhaustive body of research on this topic which we will not describe in depth in this submission.

¹⁵ Buchanan et al., *supra* note 11 at 688 (citing Chelsea Willness, Piers Steel, & Kibeom Lee, “A meta-analysis of the antecedents and consequences of workplace sexual harassment,” *Personnel Psychology*, 60, 127–162 (2007)).

promotions for certain positions in the Pacific Southwest Region.¹⁶ The lawsuit was eventually resolved with a consent decree requiring the Region to increase women’s representation in line with their composition in the community’s workforce.¹⁷ These remedies were met with resentment by some men in the Forest Service, who actively opposed their enforcement.¹⁸

In the intervening decades, the Forest Service, including but not limited to the Pacific Southwest Region, has been plagued by reports of sexual harassment and ongoing allegations of discrimination.¹⁹ The problem is so persistent that workers have described the Forest Service as having a culture of gender discrimination and sexual harassment.²⁰ In May 2015, the Special Counsel Carolyn Lerner sent a letter to President Obama describing serious mismanagement of the office that handles civil rights complaints in the U.S. Department of Agriculture (the Forest Service is an agency within the Department of Agriculture) and stating that the USDA’s civil rights office “has an unusually high number of complaints filed against its own leadership.”²¹ Three years later, a 2018 investigation by PBS Newshour described a series of allegations by women in the U.S. Forest Service who first faced discrimination and harassment at work followed by retaliation after they reported the original mistreatment.²² For example, after her temporary employment ended, Oregon firefighter Michaela Myers reported to the USDA that her

¹⁶ *Bernardi v. Yeutter*, Civ. Action No. 73–1110 SC (N.D. Cal.); *see also* James G. Lewis, “New Faces, Same Old Values,” *Forest History Today* (Fall 2017), at 43–44, available at https://foresthistor.org/wp-content/uploads/2018/07/5-Lewis_New_Faces.pdf.

¹⁷ *Id.*

¹⁸ *See Levitoff v. Espy*, 74 F.3d 1246 (9th Cir. 1996); *see also* Lewis, *supra* note 16 at 44; “They reported sexual harassment. Then the retaliation began,” *PBS NewsHour*, Mar. 1, 2018, available at <https://www.pbs.org/newshour/nation/they-reported-sexual-harassment-then-the-retaliation-began>.

¹⁹ *Donnelly v. Glickman*, 159 F.3d 405, 407 (9th Cir. 1998); Ron Nixon, “Women Allege Harassment and Abuse on Forest Service Firefighting Crews,” *N.Y. Times*, Sep. 19, 2014, available at <https://www.nytimes.com/2014/09/20/us/Women-Allege-Harassment-and-Abuse-on-Forest-Service-Firefighting-Crews.html?ref=todayspaper>; *PBS NewsHour*, *supra* note 18.

²⁰ *See* Catherine Boudreau, “Whistle-blower alleges ongoing sexual misconduct at U.S. Forest Service,” *Politico*, Nov. 15, 2018, available at <https://www.politico.com/story/2018/11/15/sexual-misconduct-forest-service-976699>.

²¹ Letter from Carolyn Lerner, U.S. Office of Special Counsel, to President Barack Obama (May 18, 2015), available at <https://osc.gov/PublicFiles/FY2015/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001/15-24%20DI-14-2556,%20DI-14-4627,%20and%20DI-15-0001%20Letter%20to%20the%20President.pdf>; Representative Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform, Opening Statement, Hearing on “Examining Sexual Harassment and Gender Discrimination at the U.S. Department of Agriculture,” (Dec. 1, 2016), available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/EEC_7.pdf.

²² *PBS NewsHour*, *supra* note 18.

supervisor had repeatedly groped her and made lewd sexual comments to her.²³ The investigation was quickly closed without a finding of wrongdoing, and Ms. Myers was not rehired when she applied to work in Oregon the next season.²⁴ A Colorado firefighter, Abby Bolt, was raped while on assignment with the Forest Service in 2012.²⁵ Initially she was discouraged from reporting the rape to the Forest Service, and when she eventually filed a discrimination complaint, she received anonymous disparaging notes in her mailbox, including one that said, “women don’t belong in fire.”²⁶ It is important to note that the culture of demeaning women went all the way to the top of the agency, when in March of 2018, then-U.S. Forest Service Chief Tony Tooke resigned after an employee, Shannon Reed, reported that Mr. Tooke groped her at an employee orientation and that two Forest Service employees had confided that Mr. Tooke had improper sexual relationships with them.²⁷

Several organizational predictors of sexual harassment emerge from these accounts of the workplace culture at the Forest Service. First, there remain large disparities in the number of women in the Forest Service. In the 2017 summer season, only 34% of the Forest Service workforce was female, and women made up less than 15% of employees in the firefighting division.²⁸ Second, despite the agency’s official “zero tolerance” policy, the agency’s practices in reality appear to tolerate sexual harassment. In a survey of 1,907 Forest Service employees in the Pacific Southwest Region, most respondents who experienced harassment had not reported it.²⁹ In other regions, individuals’ complaints were not investigated or were closed after cursory investigations.³⁰ Ms. Reed, who reported misconduct by the Forest Service Chief at the time, “said her representative from the USDA Coalition of Minority Employees sent dozens of emails to Agriculture Secretary Sonny Perdue, Forest Service leadership and its staff but never received a response.”³¹ Third, and most importantly, these features combine with other aspects of the workforce to create a negative organizational culture. This third point is essential as it is not unusual in organizations where sexual harassment has been a persistent problem to find that,

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Boudreau, *supra* note 20.

²⁸ *PBS NewsHour*, *supra* note 18.

²⁹ Robert Velasco, Acting Deputy Chief Business Operations, “Sexual harassment survey results identify areas for improvement,” *U.S. Forest Service Leadership Corner* (Jan. 26, 2018), available at <https://www.fs.fed.us/features/sexual-harassment-survey-results-identify-areas-improvement>.

³⁰ *PBS NewsHour*, *supra* note 18; Boudreau, *supra* note 20.

³¹ Boudreau, *supra* note 20.

although written or official policies prohibit harassment, a culture of tolerance of the behavior persists.

Relying on interviews with Forest Service employees, union representatives, lawyers, and congressional investigators, the PBS NewsHour investigative report described the culture of the Forest Service as a “boys’ club,” explaining that “women are often assigned to remote forests, where they may work in close quarters with male-dominated crews in high-risk scenarios. Socializing after work can involve heavy drinking.”³² Several of the risk factors identified by the EEOC Task Force are apparent in this description: employees often work in isolated locations and the workplace culture encourages alcohol consumption.³³ In addition, the workforce is relatively homogenous, particularly among the firefighters, and women in the workforce may challenge gender norms just by working in a traditionally male environment.³⁴ The lack of effective enforcement over many years has further contributed to a cultural perception of impunity. One female firefighter reported that a male colleague admitted that he made sexual comments about another colleague.³⁵ The male colleague described emerging from the EEO process unscathed, saying “the only thing that EEO taught us is that we can get away with anything.”³⁶ After a hearing by the House Oversight and Government Reform Committee “Examining Misconduct and Retaliation at the U.S. Forest Service” in November 2018, U.S. Forest Service Chief Victoria Christiansen acknowledged some of the cultural problems within the agency, explaining that employees lacked confidence in the agency’s processes and transparency.³⁷

While the Forest Service has undertaken several steps to address sexual harassment and discrimination over the years, the problem persists on an endemic level. Our view is that harassment is ongoing because the culture has not changed: past efforts to address sexual harassment have focused on increasing representation of women and providing reporting mechanisms, without addressing the cultural norms that fuel harassment within the Forest Service. In response to recent reporting and scrutiny, the Forest Service has committed to amending its anti-harassment policy and has established an independent call line for workers to

³² *PBS NewsHour*, *supra* note 18.

³³ *See* EEOC Task Force, *supra* note 12.

³⁴ *See id.* (describing these additional risk factors).

³⁵ *PBS NewsHour*, *supra* note 18.

³⁶ *Id.*

³⁷ Boudreau, *supra* note 20; *see also* Statement of Victoria Christiansen, Chief, USDA Forest Service Before the House Committee on Oversight and Government Reform Concerning “Examining Misconduct and Retaliation at the U.S. Forest Service” (Nov. 15, 2018), available at <https://republicans-oversight.house.gov/wp-content/uploads/2018/11/Christiansen-FS-Statement-FS-Misconduct-11-15.pdf>.

report harassment.³⁸ Forest Service Chief Christiansen explained in November 2018, that the agency has engaged its 25,000 permanent employees in “Listen and Learn” sessions, in which the employees could voice concerns to senior management, a “Stand Up for Each Other” training (which presumably trains employees on bystander intervention), and has established an “Employee Advisory Group” in which select employees have access to senior management (however few details about this program are publicly available).³⁹ While these appear to be positive steps necessary to root out a culture that fuels sexual harassment, we wish to offer a couple of observations about the way forward. First, implementation is as important as the plan itself. Measures to eradicate sexual harassment must be pursued earnestly and transparently and persistently. It is worth noting that members of the House Oversight and Government Reform Committee have raised doubts about the Forest Service’s transparency⁴⁰ and expressed concerns about failures identified in a February 2019 audit report on sexual harassment in the Pacific Southwest Region.⁴¹ Second, the measures identified by Chief Christiansen are not enough—they are necessary but not sufficient. The Coalition of Immokalee Workers’ Fair Food Program⁴² provides a powerful model of the kind of multi-faceted approach, implemented persistently over time, that is required to transform workplace culture, to root out sexual harassment and create a safer and more equitable workplace.⁴³

3. Recommendations to Change Workplace Culture

We therefore propose the following elements of a comprehensive strategy to change workplace culture and trigger a virtuous cycle of accountability to root out and prevent sexual harassment. These recommendations are derived from our firm’s experience in negotiating

³⁸ Christiansen, “Examining Misconduct and Retaliation at the U.S. Forest Service,” *supra* note 37.

³⁹ *Id.*; Victoria Christiansen, Interim Chief USDA Forest Service “Are you ready to Stand Up for Each Other?” *U.S. Forest Service Leadership Corner* (May 18, 2018), available at <https://www.fs.fed.us/features/are-you-ready-stand-each-other>; Victoria Christiansen, Interim Chief USDA Forest Service “Chartering an Employee Advisory Group,” *U.S. Forest Service Leadership Corner* (April 13, 2018), available at <https://www.fs.fed.us/features/chartering-employee-advisory-group>.

⁴⁰ Boudreau, *supra* note 20.

⁴¹ House Committee on Oversight and Government Reform, “Cummings, Grijalva, and Speier Express Concern with Forest Service’s Failure to Address Sexual Harassment” (Feb. 14, 2019), available at <https://oversight.house.gov/news/press-releases/cummings-grijalva-and-speier-express-concern-with-forest-service-s-failure-to>.

⁴² See <https://fairfoodprogram.org>; see also “Rape in the Fields, *Frontline* (June 25, 2013), available at <https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields/>

⁴³ See Alieza Durana & Haley Swenson, “Using the Power of Supply Chains to End Sexual Harassment,” *Harv. Bus. Rev.*, Oct. 23, 2018, available at <https://hbr.org/2018/10/using-the-power-of-supply-chains-to-end-sexual-harassment> (describing the use of easy-to-use reporting, training, climate surveys, and education of stakeholders, in addition to clear written policies).

workplace disputes in cases of pervasive harassment and breakdowns in organizational governance, as well as from the growing social science literature. The recommendations can be applied to the U.S. Forest Service case study described above but are equally applicable to other government and private workplaces.

a. Importance of Accountability

First, public accountability is vital to begin changing an organization's culture. This is important on an individual and organizational level. First, the harasser should face consequences proportional to the harm inflicted.⁴⁴ In many cases, the appropriate consequences will be termination. In any event, it is important that the reasons for discipline are disclosed to the appropriate entities and made public consistent with the complainants' wishes.⁴⁵ There have been numerous instances in which "high value" rainmakers move laterally after their sexual harassment is exposed at one organization while their history remains hidden from the new organization,⁴⁶ or where individual harassers are terminated but the corporate boards that shielded misconduct remain intact,⁴⁷ or, as occurred in the Forest Service's Pacific Southwest

⁴⁴ A weak response may signal that the organization does not take the allegations seriously, thereby further entrenching the culture of harassment. On the other hand, a disproportionately severe response may discourage reporting. See EEOC Task Force, *supra* note 12 (cautioning against "zero tolerance" policies on harassment).

⁴⁵ There are many instances in which the details of the harassment could be embarrassing or damaging to the complainant. The organization must weigh these concerns against the risk of future harassment and if the complainant wishes to be anonymous, only disclose details necessary to accountability such as the identity of the perpetrator and, broadly, the nature of the harassment. These tricky circumstances are one example of why organizations must do the work to rebuild the trust of their employees—people who have harassment to report must believe that the organizational leadership and human resources will prioritize protecting them from disclosure or retaliation, even as they work to address the harassment. Without rebuilding trust, the organization will go on as before, with victims feeling they cannot report harassment and perpetrators immune from consequences.

⁴⁶ Sara Randazzo & Nicole Hong, "At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs With Ease," *Wall St. J.*, July 30, 2018, available at <https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-1532965126>; Andrew Strickler, "#MeToo's Reach Falling Short Of BigLaw Rainmakers," *Law 360* (May 30, 2019), available at https://www.law360.com/employment/articles/1164518/-metoo-s-reach-falling-short-of-biglaw-rainmakers?nl_pk=a0773df6-9868-4b8d-b1c5-4aed1652335a&utm_source=newsletter&utm_medium=email&utm_campaign=employment.

⁴⁷ See, e.g., *City of Monroe Employees' Retirement System v. Murdoch et al.*, C.A. No. 2017-0833-AGB, Del. Ch. Ct. (Nov. 20, 2017) (alleging that the board of directors of Twenty-First Century Fox neglected oversight responsibilities and facilitated sexual harassment); Keach Hagey, "Fox Creates Advisory Committee in Settlement of Shareholder Complaint Over Sexual Harassment," *Wall St. J.*, Nov. 20, 2017, available at <https://www.wsj.com/articles/fox-creates-advisory-committee-in-settlement-of-shareholder-complaint-over-sexual-harassment-1511223028?>; see also Karen Wickre, "Corporate Boards

Region, employees who have been disciplined for harassment receive promotions or transfers without disclosing their records.⁴⁸ Accountability must take place at an organizational level too: it is also important that the organization acknowledge how it has let down its employees and other stakeholders (donors, shareholders, voters). Some scholars and advocates have promoted the application of a restorative justice model, often applied in the criminal justice reform context, to addressing sexual harassment.⁴⁹ A key component of that model requires that the transgressor acknowledge the harm inflicted and accept responsibility for it.⁵⁰ An organization's demonstration of its commitment to a harassment-free environment, correlates strongly with harassment prevention.⁵¹ Acknowledgment of the harm and inclusion of employees over time rebuilds the employees confidence that the organization is earnestly engaging in change.⁵²

b. Resources for Individual and Organizational Healing

To address deep-rooted cultural problems, it is also helpful for the organization to provide resources for employees to recover from the trauma that a history of sexual harassment will have imposed on the workforce. Organizations should make available resources for individual healing, counseling, therapy, and wellness. These resources may include counseling sessions, monetary stipends for wellness programs, and onsite professionals as necessary. The

are Complicit in Sexual Harassment,” *Wired*, Dec. 6, 2017, available at <https://www.wired.com/story/corporate-boards-are-complicit-in-sexual-harassment/>.

⁴⁸ “Forest Service Initiatives to Address Workplace Misconduct: Audit Report 08601-0008-41,” at 5–6, U.S. Department of Agriculture Office of Inspector General (Feb. 2019), available at <https://www.usda.gov/oig/webdocs/08601-0008-41.pdf>

⁴⁹ Lesley Wexler, Jennifer K. Robbennolt, & Colleen Murphy, “#MeToo Time’s Up, and Theories of Justice,” 45 *U. Ill. L. Rev.* 2019 at 69. Lindsey Jones-Renaud, “What does a Survivor-Centered Approach to Workplace Harassment Look Like?” *Medium* (Nov. 29, 2018), available at https://medium.com/@lindsey_61294/what-does-a-survivor-centered-approach-to-workplace-harassment-look-like-2fbb3212fad. In an analogous context, David Karp et. al offer a detailed analysis of how restorative justice can help college campuses respond to sexual misconduct. “CAMPUS PRISM: A Report on Promoting Restorative Initiatives for Sexual Misconduct on College Campuses,” Skidmore College Project on Restorative Justice (April 2016).

⁵⁰ Wexler et al, *supra* note 49, at 71. Other important features of restorative justice include “direct participation of offenders and victims in the process along with representatives of the relevant community; narration of the wrongful behavior and its effects; acknowledgement of the offense and acceptance of responsibility for it by the offender; joint efforts to find appropriate ways to repair the harm done; and reintegration of the offender into the broader community.” *Id.* These aspects of the restorative justice model appear throughout our recommendations, though we have placed particular emphasis on community and survivor participation.

⁵¹ Buchanan et al., *supra* note 11 at 698.

⁵² *See supra* note 46.

programs available and any professionals leading the healing and transformation must be selected with meaningful staff input.

c. Transparency, Staff-Led Transformation, and Opportunities for Listening

Organizations must include their employees throughout the transformation to make any meaningful change to the organizational culture. There are recent examples of boards of private corporations being cleared and reconstituted according to a new, more transparent, more independent process in the wake of sexual harassment scandals in which the board was implicated. A similarly transparent process can be implemented in federal workplaces to address management-level complicity in sexual harassment. Inclusion in the process of accountability will build trust among employees and repair some of the damage caused by the problematic organizational culture. This inclusion requires the organization to seek input from employees about what resources to allocate where, and what reforms to undertake. It requires the organization to actively seek input from employees. In these active listening sessions, leadership should show up, sit quietly, and listen, and they may need to take place regularly for some time. After the listening sessions, organizational leaders should demonstrate that they are listening by responding to and implementing employee ideas. It is possible that in the case study above, the U.S. Forest Service has undertaken this sort of listening session.⁵³ However, few details are publicly available about the content of the sessions. To be effective, an organization should be transparent about its processes, making information readily accessible about how employees can participate, what feedback and criticisms employees provided, and what measures the organization plans to implement.

d. Organizational Reforms

To change organizational culture, including employee perceptions of the organizations' policies, workplaces must undertake organizational policy reforms to prohibit harassment, and effectively enforce the anti-harassment policies. Many of these reforms are discussed in depth the EEOC Task Force Report's recommendations on sexual harassment prevention.⁵⁴ To summarize, organizations should develop clear and simple anti-harassment policies that clearly describe the prohibited conduct, the complaint process that includes multiple accessible avenues to report harassment, assurances that the employer promptly and thoroughly investigate, will protect the confidentiality of the complaints to the extent possible, and will take appropriate corrective action.⁵⁵ Organizations should include social media in their policies and should have proportional, rather than "zero tolerance," responses to harassment.⁵⁶ Organizations should

⁵³ See Christiansen, "Examining Misconduct and Retaliation at the U.S. Forest Service," *supra* note 37 (describing "Listen and Learn" sessions).

⁵⁴ See generally EEOC Task Force, *supra* note 12.

⁵⁵ *Id.*

⁵⁶ *Id.*

develop robust and multifaceted reporting mechanisms that allow employees to choose the procedures and choose among several options of people to handle the complaint. To undertake these changes in a manner consistent with changing the organizational culture, organizations should include employees in the process and make information about any changes accessible. The organization should also ensure that the changes are enforced promptly and effectively, investigations are opened quickly, and employees are informed throughout the process.⁵⁷ To this end, the EEOC Task Force recommends that organizations periodically test the reporting mechanisms.⁵⁸

e. Interactive Small Group Training

To prevent sexual harassment before it begins, organizations must also effectively train their employees on discrimination and bystander intervention. Not all trainings are effective.⁵⁹ In fact, trainings have often received criticism as a formulaic method for employers to dispel liability without engaging their employees in actual prevention. Studies have shown that interactive, small group workshops are most effective (compared to other types of trainings) in combatting sexual harassment.⁶⁰ These sessions are particularly effective if the participants are able to engage in experiential learning, which include discussions and hands on exercises.⁶¹ Such cooperative trainings have the added benefit of including employees in the conversation and building a sense of ownership among the employees for their prevention of sexual harassment.

f. Iterative Process

We believe a combination of these recommendations can transform the culture of an organization and build employee-driven accountability in a way that positive steps fuel one another in a virtuous cycle. However, this process takes time and repetition. Organizations should not expect to be successful in their very first round of reforms. Rather, organizations should engage their employees in ongoing conversations, repeat the processes and engage in collaborative learning throughout. Only through persistence and ongoing demonstrations of their

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Joanna Grossman & Vicki J. Magley, “Do Sexual Harassment Trainings Really Work?,” *Scientific American*, Nov. 10, 2017, available at <https://blogs.scientificamerican.com/observations/do-sexual-harassment-prevention-trainings-really-work/>.

⁶⁰ Buchanan et al., *supra* note 11 at 692; Jessica Cundiff et al., “Using Experiential Learning to Increase the Recognition of Everyday Sexism as Harmful: The WAGES Intervention,” <http://gap.hks.harvard.edu/using-experiential-learning-increase-recognition-everyday-sexism-harmful-wages-intervention>.

⁶¹ Cundiff et al., *supra* note 60.

commitment can organizations effectively change a culture that has historically fueled sexual harassment.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. Kotagal'.

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