
WAL Writing Contest Runner-Up Article

#MeToo and #TimesUp: Social Media and the Law Converge

By Tara Bush

In October 2017, I was deeply immersed in my first semester of law school when the #MeToo movement went viral. I, like all women, marveled that something so ubiquitous could only finally be unmasked by social media. Then, on January 1, 2018, #TimesUp, a sister movement fighting against sexual harassment, assault, and discrimination in the workplace, was born. As a student returning to law school later in my career, I had experienced sexual harassment on the job in various forms over the years. I thought, “It’s about time.”

Now, just over two years later as I finish my final semester of law school, what impact have #MeToo and #TimesUp had on the laws both nationally and in my lifelong home state of Texas? Has the promise of these nascent social media movements effected any change to the seemingly immutable status quo?

Shining a spotlight on the harm

While the story of Harvey Weinstein was certainly a catalyst for #MeToo and #TimesUp, the vast majority of women across the country with their own #MeToo stories work in fields considerably less glamorous and high-profile than Hollywood. Sexual harassment cuts across every industry, from agriculture to tech, banking to the service industry, and healthcare to law. Essentially about the power dynamic at its core, sexual harassment has thrived in fields historically dominated by men. In fact, the problem is often most rampant where women work in low-income jobs and are most vulnerable.⁴⁸

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in the workplace, which includes sexual harassment.⁴⁹ Sexual harassment is unwelcome behavior a worker experiences because of his or her sex and does not have to involve physical contact or be motivated by sexual desire.⁵⁰ Words alone can be enough to implicate sexual

⁴⁸ See WORKPLACE JUSTICE: SEXUAL HARASSMENT IN THE WORKPLACE at 1 (Nat’l Women’s Law Ctr. ed., 2016).

⁴⁹ See *id.*

⁵⁰ See *id.*

harassment.⁵¹ Hostile or derogatory remarks about women in general or non-conformance to gender stereotypes, unwelcome sexual advances, and requests for sexual favors all represent various forms sexual harassment takes in the workplace.⁵²

The widespread incidence of workplace sexual harassment transcends age and whether a woman works in a white-collar or blue-collar role, both of which have no relation to the likelihood she has been harassed.⁵³ The effects for women can be devastating. While 63% of all women report having been harassed, only 20% of women who were harassed actually reported the incident.⁵⁴ Fears of retaliation, hurting their careers, being labeled a troublemaker, or embarrassment prevent the majority of women from making a complaint.⁵⁵ Many women simply quit their jobs, resulting in lost wages.

Beyond the serious toll sexual harassment can take on a victim's physical and emotional health, employers are also discovering the significant financial harm resulting from loss of worker productivity caused by increased use of employee sick leave and job turnover.⁵⁶ Employers can also be liable for sexual harassment against their employees under certain circumstances and held responsible for the victim's back-pay and damages, as well as potential costs of litigating claims.⁵⁷

The national impact of #MeToo—where we started and how far we have come

Pre-#MeToo in March 2017, during his first 100 days in office, President Trump signed an executive order revoking the Fair Pay and Safe Workplaces order put in place in 2014 by President Obama.⁵⁸ The move represented a significant step backward for women in the workplace by repealing regulations that mandated paycheck transparency and banned

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See* Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV.: GENDER (Sept.–Oct. 2019), <https://hbr.org/2019/09/the-metoo-backlash>.

⁵⁴ *See id.*

⁵⁵ *See* Nat'l Women's Law Ctr., *supra* note 1, at 1–2.

⁵⁶ *See id.* at 2.

⁵⁷ *See id.*

⁵⁸ *See* Andrea Johnson, *Trump Just Signed a Law Ditching Fair Pay and Safe Workplaces*, NAT'L WOMEN'S LAW CTR. BLOG (Mar. 28, 2017), <https://nwlc.org/blog/trump-just-signed-a-law-ditching-fair-pay-and-safe-workplaces/>.

forced arbitration clauses for sexual harassment, sexual assault, and discrimination claims.⁵⁹ Secret mandatory arbitration proceedings for sex discrimination claims silence victims and allow companies to hide abuses by bypassing the public court system. The repeal of the Fair Pay order pursuant to the Congressional Review Act prevented any future president or the Department of Labor from reissuing substantially similar regulations.⁶⁰

Fast forward to December 2017, two months after #MeToo, and President Trump's signing of the Tax Cuts and Jobs Act. A small but noteworthy provision in the Act prohibits businesses from deducting any settlement payments and attorney's fees related to claims for sexual harassment or abuse that were subject to a nondisclosure agreement.⁶¹ Commonly referred to as the "Weinstein tax," this section of the federal tax code became one of the first post-#MeToo laws to shine a spotlight on and disincentivize the use of NDAs.⁶²

The two years following the emergence of #MeToo and #TimesUp have proved uneven in progress made on the national front. Aggregating the changes made in individual state laws shows that real advances have been made across the country. The National Women's Law Center (NWLC) created the #20Statesby2020 initiative to compel state legislators to enact policy reforms.⁶³ The NWLC reported that as of December 2019, state legislators had introduced 200 bills to strengthen workplace protections, and fifteen states plus New York City had enacted new anti-harassment laws, many with bipartisan support.⁶⁴

Notwithstanding this progress in state legislatures, a May 2018 ruling by the U.S. Supreme Court that upheld an employer's right to include mandatory arbitration clauses in employment contracts could have a potentially chilling effect on employees' abilities to pursue sexual harassment claims. In a 5-4 decision in *Epic Systems Corp. v. Lewis*, Justice

⁵⁹ See Janet Burns, *Trump Order Drops Pesky Regulations on Equal Pay, Sexual Harassment*, FORBES (Apr. 4, 2017, 2:59 p.m.), <https://www.forbes.com/sites/janetwburns/2017/04/04/trump-order-drops-pesky-regulations-on-equal-pay-sexual-harassment/#2ec24515c100>.

⁶⁰ See Johnson, *supra* note 11.

⁶¹ See Robert W. Wood, *IRS Gives Tax Break to Sexual Harassment Victims*, FORBES (Mar. 4, 2019, 8:45 a.m.), <https://www.forbes.com/sites/robertwood/2019/03/04/irs-gives-tax-break-to-sexual-harassment-victims/#d9652e629b71>.

⁶² See *id.*

⁶³ See Andrea Johnson, Kathryn Menefee, and Ramya Sekaran, PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020 at 2 (Nat'l Women's Law Ctr. ed., 2019).

⁶⁴ See *id.*

Neil Gorsuch wrote for the majority, “the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written.”⁶⁵ Writing for the dissent, Justice Ruth Bader Ginsburg countered that the decision was “egregiously wrong” because for employees it would mean “[e]xpenses entailed in mounting individual claims will often far outweigh potential recoveries.”⁶⁶ Allowing employers to force employees into arbitration rather than joining with other employees in filing class action lawsuits for sexual harassment claims eliminates a critical tool for women to hold employers to public account.

In what could be viewed as a response to the Supreme Court’s decision in *Epic Systems*, in April 2019, Congress acted with the most comprehensive federal legislation proposed so far with the introduction of the BE HEARD in the Workplace Act sponsored by Senator Patty Murray and co-sponsored by 19 Senate and four House Democrats.⁶⁷ This bill tackles head-on several of the most systemic practices that have allowed sexual harassment to pervade the workplace in the past. Key proposed reforms include the following:

- extending Title VII protections against employment discrimination to employees of all companies not just those with more than 15 employees;
- expanding the definition of “employee” to include independent contractors, interns, and volunteers;
- prohibiting employers from requiring that workers sign employment contracts with mandatory arbitration agreements for work disputes and blanket non-disclosure agreements;
- extending the statute of limitations period for filing a charge or making a complaint; and
- providing grants for legal assistance to low-income workers with needs related to employment discrimination.⁶⁸

⁶⁵ *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

⁶⁶ *Id.* at 1633, 1647; see Jena McGregor, “A Nail in the Coffin”: What the Supreme Court’s Decision This Week Means for Workers, WASH. POST (May 24, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/05/24/a-nail-in-the-coffin-what-the-supreme-courts-decision-this-week-means-for-workers>.

⁶⁷ See Ramya Sekaran, *Congress Finally Introduces Groundbreaking Workplace Harassment Legislation for the Rest of Us*, NAT’L WOMEN’S LAW CTR. BLOG (Apr. 9, 2019), <https://nwlc.org/blog/congress-finally-introduces-groundbreaking-workplace-harassment-legislation-for-the-rest-of-us>.

⁶⁸ See S. 1082, 116th Congress, 1st Session (2019); Marisa Endicott, *Democrats Just Introduced Sweeping #MeToo Legislation. It Would Have a Huge Impact on the Service Industry.*, MOTHER JONES (Apr. 9, 2019), <https://www.motherjones.com/politics/2019/04/democrats-just-introduced-sweeping-metoo-legislation-it-would-have-a->

Passage of the BE HEARD in the Workplace Act by Congress would signify real reform for women nationwide.

Texas's measured response to #MeToo

Because the Texas legislature only meets every two years, Texas's response to #MeToo was necessarily delayed. The 86th legislative session opened on January 8, 2019, over a year after #MeToo and #TimesUp went viral. The Texas House moved decisively in a unanimous vote just two days into the legislative session to pass reforms to the chamber's internal sexual harassment policies.⁶⁹ This action boded well for an impactful session of workplace reforms in which legislators filed almost 100 bills relating to sexual assault and harassment.⁷⁰

However, while almost as many bills filed aimed to help victims of sexual harassment as survivors of sexual assault, fewer harassment bills passed.⁷¹ Representative Victoria Neave, D-Dallas, passed several major sexual assault bills with bipartisan support that represent major steps forward for Texas women.⁷² The most important bill, House Bill 8, extends the statute of limitations for testing sexual assault evidence, sets timelines for more prompt testing of rape kits, and requires a new audit of backlogged rape kits in Texas.⁷³ By contrast, none of the eight sexual harassment bills Rep. Neave filed passed due to less bipartisan support for sexual harassment issues and pushback from the business lobby.⁷⁴ Senate Bill 46, the session's most significant sexual harassment bill with more than 50 co-sponsors and the most bipartisan support, passed the Senate but failed in the House after House leadership failed to prioritize it.⁷⁵ The bill would have enabled employees at companies with less than 15 employees to file sexual harassment claims with the Texas Workforce Commission.⁷⁶

huge- impact-on-the-service-industry.

⁶⁹ See Alex Ura & Jolie McCullough, *Texas House Votes to Strengthen Sexual Harassment Investigations*, TEX. TRIB. (Jan. 9, 2019, 11:00 AM), <https://www.texastribune.org/2019/01/09/texas-house-sexual-harassment-investigations>.

⁷⁰ See Andrea Zelinski, *#MeToo Bills Gain Momentum in Texas Legislature*, HOUS. CHRON. (Apr. 22, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/MeToo-bills-gain-momentum-in-Texas-Legislature-13781641.php>.

⁷¹ See Kate Groetzinger, *Texas Lawmakers Took on Sexual Assault this Session, but Largely Ignored Sexual Harassment*, TEX. OBSERVER (May 30, 2019, 6:00 AM), <https://www.texasobserver.org/texas-legislature-addresses-sexual-assault-ignores-harassment>.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

One bright spot of the 2019 session was the passage of Senate Bill 212 relating to sexual harassment at Texas universities.⁷⁷ The law makes it a misdemeanor and a fireable offense for employees to fail to report incidents of sexual harassment, assault, stalking, or dating violence on college campuses.⁷⁸ Texas is breaking new ground in the arena of higher education, as it is currently the only state to go beyond institutional accountability to impose individual criminal responsibility for failure to follow mandatory reporting requirements.⁷⁹ This law will be watched closely, but clearly, Texas still has a way to go in enacting meaningful legislation to address sexual harassment in the broader workplace.

Novel solutions catalyzed by #MeToo and #TimesUp

Going forward, the power of grassroots movements like #20Statesby2020 cannot be underestimated. The strength in such movements lies in their ability to mobilize individual states to fill in the gaps in existing federal laws and policies and to promote accountability. To this end, #20Statesby2020 advises workplace policy solutions that are comprehensive and multi-pronged rather than simply focusing on one issue, such as eliminating non-disclosure agreements.⁸⁰

Mandatory prevention training programs for all employees, including management, that are tailored to the specific type of workplace have the greatest impact on reducing workplace sexual harassment.⁸¹ Specifically, training centered around the relationship between sexism and character has been found more effective than traditional workplace sexual harassment training programs that simply instruct how to identify sexual harassment behaviors.⁸² Employer policies must also offer employees multiple reporting options to encourage more women to report incidents of harassment.

Progress has also been made through laws developed by conducting a close examination of workers' needs for protection based on industry type. For example, hotel workers, who are particularly vulnerable to sexual harassment and assault because of the isolated nature of their work, have pushed many cities to pass ordinances requiring hotels to

⁷⁷ See Maria Mendez, *Under New Texas Law, College Employees Could Be Fired and Charged for Not Reporting Sexual Misconduct*, DALL. MORN. NEWS (Dec. 30, 2019, 6:15 AM), <https://www.dallasnews.com/news/politics/2019/12/30/under-new-texas-law-college-employees-could-be-fired-and-charged-for-not-reporting-sexual-misconduct>.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Johnson, et al., *supra* note 16, at 3–4.

⁸¹ See *id.* at 12.

⁸² See Bower, *supra* note 6, at 4.

install panic buttons workers can use to call for help if sexually harassed or assaulted.⁸³ This approach has inspired similar laws on the state level that apply to the retail, security guard, property services, and casino industries.⁸⁴ More unique solutions tailored to specific industries would benefit all women in the workplace.

Finally, only time will tell whether proposed federal policies and regulations such as the BE HEARD in the Workplace Act will receive the bipartisan support required to become law. Enacting legislation on a national level banning forced arbitration agreements for sexual harassment claims, mandating stricter employer reporting requirements, prohibiting the practice of NDAs in settling claims, and eliminating statutes of limitations for making claims would significantly expand women's rights to workplace safety and equality. The untapped potential of the federal government to make truly groundbreaking changes for women by finally addressing workplace sexual harassment remains to be seen.

Conclusion

The progress #MeToo and #TimesUp have reaped so far in a very short period of time is truly compelling. Perhaps the most monumental result of these movements is at the same time, the most obvious: increased awareness of an issue that is so essential for working women. Workplace sexual harassment and NDAs have been frequent topics of the Democratic presidential debates this campaign season and have now become part of the national vernacular. With the convergence of social media and the election of a record number of women to Congress in 2018, the time has never been more ripe for enduring change.

⁸³ See Johnson, et al., *supra* note 16, at 14.

⁸⁴ See *id.*