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Costs vs. Compensation: Legal and Policy Recommendations for Addressing Workplace Sexual Harassment

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**COSTS VS. COMPENSATION: LEGAL AND POLICY
RECOMMENDATIONS FOR ADDRESSING WORKPLACE SEXUAL
HARASSMENT**

HEATHER McLAUGHLIN* AND CHRISTINE THOMAS**

ABSTRACT

The recent #MeToo Movement has unequivocally shown that workplace sexual harassment is a widespread issue. Since December 2017, workers around the globe have shared personal stories of sexual harassment, as well as the tolls it caused on their health and careers. In this Article, we review extant interdisciplinary research on the negative consequences of sexual harassment for workers' physical, psychological, and behavioral health; their career and earnings trajectories; and for broader organizational culture. Understanding these costs sheds light on how best to reduce and respond to workplace sexual harassment. We offer three suggestions for law and policy: (1) expand legal protection against sexual harassment to all workers, (2) increase award damages, and (3) update internal sexual harassment policies and procedures to reflect best practices. We conclude by arguing that sexual harassment is an urgent workplace issue that must be addressed in contemporary workplaces.

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I. INTRODUCTION

Beginning in 2017, the global #MeToo movement sparked an unprecedented conversation about the prevalence of sexual harassment and assault.¹ Widespread accounts of workplace sexual harassment across a wide range of jobs—including the film and entertainment industry, government, and higher education—forced many workplaces and other institutions to grapple with sexism and gender discrimination within their organizations.² For example, federal grant agencies such as the National Science Foundation and National Institutes of Health implemented new policies and conditions to ensure that awardees foster a harassment-free work and learning environment.³ Similarly, the Congressional Accountability Act was amended in December 2018 to increase transparency and accountability when lawmakers are accused of sexual misconduct.⁴ Since 2003, taxpayers have paid roughly \$300,000 to settle thirteen claims of sexual harassment and other forms of sex discrimination by members of Congress, and the Amendment forces lawmakers to reimburse the Treasury Department for the cost of future lawsuits and settlements.⁵

As the public #MeToo accounts have shown, workplace sexual harassment has considerable costs. Researchers have found a strong link between sexual harassment and psychological health, and an increasing body of research shows damaging effects for a range of physical and behavioral health outcomes as

1. See Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 2016), www.eeoc.gov/select-task-force-study-harassment-workplace [hereinafter *Study on Harassment*] (reporting that twenty-five percent to eighty-five percent of women have experienced workplace sexual harassment). Estimates vary depending on the question wording (e.g., experiencing harassing behaviors vs. subjectively defining an experience as sexual harassment), the time frame being considered (e.g., the past year vs. lifetime sexual harassment), and sampling methodology (e.g., probability vs. non-probability sampling); although men also experience non-trivial rates of sexual harassment, research consistently shows that it is more common among women. For a review of sexual harassment among men, see Jennifer L. Berdahl et al., *The Sexual Harassment of Men? Exploring the Concept with Theory and Data*, 20 PSYCH. WOMEN Q. 527, 528 (1996).

2. See, e.g., Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (film and TV industry); David A. Lieb, *Over 100 State Lawmakers Accused of Misconduct in 3 Years*, USA TODAY (Jan. 23, 2020, 5:28 PM), www.usatoday.com/story/news/nation/2020/01/23/lawmaker-misconduct-over-100-state-lawmakers-accused-3-years/4557566002/ (politics); NAT’L. ACADS. SCI. ENG’G MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 1, 93 (2018) (academia).

3. NAT’L. ACAD. SCI. ENG’G MED., *supra* note 2, at 113.

4. 2 U.S.C. § 1415(d)(1).

5. Juliet Linderman, *\$300 in Taxpayer Funds Has Been Spent Settling Sexual Harassment Claims Against Congress, Report Says*, PBS NEWSHOUR (Jan. 12, 2018, 6:42 PM) www.pbs.org/newshour/politics/300k-in-taxpayer-funds-has-been-spent-settling-sexual-harassment-claims-against-congress-report-says.

well.⁶ Additionally, sexual harassment has harmful economic and career effects⁷ and far-reaching consequences for coworkers, bystanders, and organizational culture.⁸ In this Article, we argue that a more comprehensive understanding of these costs can shed light on how to best reduce and respond to workplace sexual harassment.

We begin Part II by summarizing existing federal law that governs workplace sexual harassment and highlighting ambiguity or shortcomings in its ability to protect *all* workers. Next, in Part III, we synthesize interdisciplinary research on the costs of workplace sexual harassment for targets' health and well-being, targets' careers, and broader organizational culture. In light of these significant costs, we offer three recommendations for law and policy in Part IV: (1) expand legal protection against sexual harassment to all workers, (2) increase award damages, and (3) update internal sexual harassment policies and procedures to reflect best practices. We conclude by arguing that sexual harassment is an urgent workplace issue that must be addressed in contemporary workplaces.

II. BACKGROUND: EXISTING SEXUAL HARASSMENT LAW

A. *Workplace Sexual Harassment as Illegal Sex Discrimination*

Federal courts have interpreted “sex discrimination” under Title VII of the Civil Rights Act of 1964⁹ to include sexual harassment; however, it remains a widespread problem in United States (U.S.) workplaces.¹⁰ Title VII prohibits sex-based employment discrimination, and revisions implemented in 1991 allow plaintiffs to recover compensatory and punitive damages.¹¹ In the 1976 case of *Williams v. Saxbe*, a federal judge explicitly labeled sexual harassment a form of sex discrimination.¹² In addition to Title VII, nearly all states—and many

6. Darius K-S Chan et al., *Examining the Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCH. WOMEN Q. 362, 372 (2008); Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCH. 578, 578 (1997) [hereinafter *Antecedents and Consequences*].

7. NAT'L. ACAD. SCI. ENG'G MED., *supra* note 2, at 3. Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 352–53 (2017).

8. Kathi Miner-Rubino & Lilia M. Cortina, *Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work*, 92 J. APPLIED PSYCH. 1254, 1255 (2007).

9. 42 U.S.C. § 2000e-2(a).

10. Feldblum & Lipnic, *supra* note 1.

11. 42 U.S.C. § 1981a(a)(1).

12. *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (Diane Williams was fired from her job at the U.S. Department of Justice after refusing her supervisor's sexual advances. The district court ruling marked “the first occasion on which a federal judge held that sexual advances coupled with retaliation for their refusal constituted actionable sex discrimination.”). CATHARINE

cities and counties—have enacted laws to protect workers from discrimination, often supplementing federal law in important ways.¹³

Legally, sexual harassment is defined as:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.¹⁴

This definition includes two forms of sexual harassment: *hostile work environment* and *quid pro quo*.¹⁵ To establish that sexual harassment “interferes” with work or is considered to be “intimidating, hostile, or offensive,” plaintiffs often point to significant health and economic effects. For example, in *Katt v. City of New York*, a former civilian employee of the New York City Police Department was awarded \$400,000 in compensatory damages after several officers made lewd gestures and comments, touched her in an unwelcome and sexually suggestive manner, and shared sexually inappropriate materials.¹⁶ These experiences had severe physical and psychological health effects—including headaches, stomach ailments, nightmares, and debilitating anxiety in subsequent encounters with police officers—and a licensed clinical psychologist testified that the plaintiff, Alli Katt, exhibited “hallmark” post-traumatic stress disorder (PTSD) symptoms that required professional counseling.¹⁷

Similarly, in the case of *EEOC v. EmCare, Inc.*, multiple sexual harassment complaints had been lodged against the Chief Executive Officer of EmCare's AnesthesiaCare division, Jim McKinney.¹⁸ Joined by two coworkers, plaintiff Yvonne Shaw filed an additional complaint against McKinney after he made inappropriate comments about her fifteen-year-old daughter at the company's

A. MACKINNON, A SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 63 (1979).

13. Khadija Murad, *Sexual Harassment in the Workplace*, NAT'L CONF. STATE LEGISLATURES (Feb. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx>.

14. *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment> (June 27, 2002) [hereinafter *Facts About Sexual Harassment*].

15. See *Williams*, 413 F. Supp. at 655 for an example of *quid pro quo* sexual harassment, which occurs when sexual favors are expected in exchange for either positive (e.g., a promotion) or the avoidance of negative (e.g., termination) employment outcomes. Hostile work environment sexual harassment occurs when sexual behaviors create an “intimidating, hostile, or offensive work environment.” See *Facts About Sexual Harassment*, *supra* note 14. In 1986, a whole decade after *Williams v. Saxbe*, the U.S. Supreme Court first recognized hostile work environment sexual harassment as a violation of Title VII in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 59 (1986).

16. *Katt v. City of New York*, 151 F. Supp. 2d 313, 317, 320 (S.D.N.Y. 2001).

17. *Id.* at 323–24.

18. *EEOC v. EmCare, Inc.*, 857 F.3d 678, 681 (5th Cir. 2017).

“Bring Your Child to Work” day.¹⁹ Six weeks later, all three employees were fired after an alleged human resources audit; however, a jury later determined that their dismissal was retaliation for filing a complaint and awarded them back pay.²⁰ Although most victims are able to attempt legal remedies, the existing anti-discrimination laws contain notable gaps that limit protection for many groups of workers.²¹

B. Gaps in Title VII Coverage

Although federal law proclaims that employees are entitled to a harassment-free workplace, legal protection is contingent upon organizational size. Title VII defines an “employer” as a person who employs fifteen or more employees for at least twenty weeks during the current or previous calendar year.²² Thus, individuals who are self-employed, independent contractors, or employed in small companies have no legal recourse under federal law.²³ The rationale for this exemption is to eliminate “stifling government regulation” for “corner” stores, entrepreneurs working out of their garage, family-owned retail and service operations, and other independent business people struggling to provide work for themselves as well as jobs for others.²⁴ Although this reasoning may be well-intended, we argue that all employers should be required to provide safe working conditions and that there should be legal recourse for the twenty million employees who work in small firms if their employer fails to provide adequate sexual harassment protections.²⁵

19. *Id.* at 681–82.

20. *Id.* Although employees in this case were terminated as retaliation, workers can also seek damages when sexual harassment causes them to quit their job, reduce their hours, drop clients, or make other employment decisions that diminish past or future earnings.

21. In addition to the issues we discuss in the following section, bureaucratic hurdles and confusing policies may deter some harassed workers from mobilizing the law. For example, in order to file a federal lawsuit, victims must first contact the EEOC within 180 days of the harassment—or 45 days if they are federal employees—and wait for the EEOC to issue a Notice of Right to Sue after completing their investigation. If the investigation takes longer than 180 days, victims can request this notice from the EEOC, effectively ending the investigation. They then have 90 days to file a lawsuit in court. *See* Laura M. Hyer, *Is Cooperation With the EEOC an Implied Requirement for Exhaustion of Administrative Remedies?*, 98 IOWA L. REV. 1351, 1357–58 (2012) (discussing ambiguity as to whether harassed workers are required to cooperate with EEOC investigations).

22. *See* 42 U.S.C. § 2000e(b).

23. *See* Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN’S L. REV. 1197, 1197 (2006) (providing a historical analysis of the small firm exception).

24. *Id.* at 1199.

25. *See* 2015 SUSB Annual Data Tables by Establishment Industry, U.S. CENSUS BUREAU (Jan. 2018), <https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html>. According to the Annual Statistics of US Businesses (SUSB) data, 20.8 million Americans were employed at firms with less than 20 workers in 2015, amounting to 16.7% of workers in

This omission is especially glaring given the boom in the contingent workforce over the last several decades.²⁶ Using Internal Revenue Service data, Lim et al. found that the number of independent contractors increased from 10.2 million in 2001 to over 13.8 million in 2016 (an increase from 6.6% to 8.0% of tax filers).²⁷ Other estimates suggest this number may be even higher.²⁸ Among this category of workers are rideshare drivers for tech companies like Lyft and Uber, whose status as independent contractors has garnered much attention from legal scholars.²⁹ Valued at over fifty billion dollars in 2015,³⁰ and possibly double that today, Uber Technologies, Inc. is far from the mom-and-pop shop that lawmakers envisioned when allowing exemptions from Title VII.³¹

In contrast to its drivers, employees of the tech giant *are* covered by Title VII.³² In 2017, after ex-employee Susan Fowler, published her harrowing account of sexism and harassment in a viral blogpost,³³ Uber reached a \$4.4 million settlement with the EEOC for permitting a culture of harassment and retaliation.³⁴

employment establishments surveyed. Unfortunately, the data cannot be disaggregated to examine businesses with less than 15 employees that are exempt from Title VII. A total of 12.5 million employees worked in establishments smaller than 10 (excluding those who are self-employed), and another 8.3 million worked in establishments with 10 to 19 employees; however, the total number of workers may exceed 20 million, as some smaller establishments are missed due to the sampling methodology used in the SUSB. *See also* U.S. CENSUS BUREAU, *METHODOLOGY: UNIVERSE FOR STATISTICS OF U.S. BUSINESSES 3* (2020).

26. Arne Kalleberg, *Nonstandard Employment Relations: Part-Time, Temporary and Contract Work*, 26 ANN. REV. SOCIO. 341, 356 (2000); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements*, 72 ILR REV. 382, 389–90 (2019); David S. Pedulla, *The Hidden Costs of Contingency: Employers' Use of Contingent Workers and Standard Employees' Outcomes*, 92 SOC. FORCES 691, 693 (2013).

27. KATHERINE LIM ET AL., INTERNAL REVENUE SERV., *INDEPENDENT CONTRACTORS IN THE U.S.: NEW TRENDS FROM 15 YEARS OF ADMINISTRATIVE TAX DATA* 14 (2019).

28. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, *CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNING, AND BENEFITS* 3 (2015).

29. Andre Andoyan, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy,"* 47 GOLDEN GATE U. L. REV. 153, 156 (2017); Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 463 (2017); Jillian Kaltner, *Employment Status of Uber and Lyft Drivers: Unsettlingly Settled*, 29 HASTINGS WOMEN'S L.J. 29, 30 (2018).

30. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684–85 (2016).

31. Carlson, *supra* note 23, at 1199.

32. Press Release, Equal Emp. Opportunity Comm'n, *Uber to Pay \$4.4 Million to Resolve EEOC Sexual Harassment and Retaliation Charge* (Dec. 18, 2019), www.eeoc.gov/newsroom/uber-pay-44-million-resolve-eeoc-sexual-harassment-and-retaliation-charge.

33. Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

34. Press Release, Equal Emp. Opportunity Comm'n, *supra* note 32.

Unlike in-house employees, drivers are not protected under federal law, allowing Uber to turn a blind eye when drivers are harassed by passengers and vice versa. Regrettably, there is strong evidence that sexual harassment and assault are not uncommon. Roughly three thousand incidences of non-consensual kissing, touching, or penetration were reported to Uber annually in both 2017 and 2018.³⁵ Although passengers were more likely to be victimized, drivers were also targets of non-consensual sexual behaviors.³⁶ Consistent with these data, journalists have documented stories from women Uber and Lyft drivers whose complaints of unwanted touching, lewd comments, and sexual assault went unanswered by the tech companies.³⁷ After advertising a promotion that promised to pair riders with “incredibly hot chick” drivers, it is perhaps not surprising that Uber failed to take seriously issues of sexual harassment and assault.³⁸

In addition to rideshare drivers, many janitors are also classified as independent contractors.³⁹ A growing number of companies outsource janitorial services to companies that then subcontract the work to small firms and independent contractors.⁴⁰ Although some of these workers have successfully fought to be reclassified as “employees” to receive unpaid wages and other employment benefits, the layers of subcontracting often make it difficult to determine legal culpability.⁴¹ As Fitzgerald explains, “[T]his system of contracting and subcontracting loosens and blurs lines of employer responsibility” for workers who are already at heightened risk of sexual harassment due to “isolated, late-night work conditions, low wages and (mainly)

35. UBER, 2017-2018 US SAFETY REPORT 59 (2019).

36. *Id.* at 61.

37. Graham Rapier, *Females Drives for Uber and Lyft Say Sexual Harassment Is the Norm – and Getting Help from the Companies Isn’t Easy*, BUS. INSIDER (Jun. 19, 2019), www.businessinsider.com/female-uber-lyft-drivers-say-sexual-harassment-is-rampant-2019-6. See also Ellen Huet, *Why Aren’t There More Female Uber and Lyft Drivers?*, FORBES (Apr. 9, 2015), www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyftdrivers/#7bfec6db10a2 (relating the experience of one driver from Atlanta who reported that her passenger “asked if she wanted to ‘make some extra money’ and ‘dance for him’... reached over and rubbed her thighs and breasts while she was driving and asked if she had ever had sex in a car. Once they stopped driving, he allegedly grabbed her face and tried to kiss her before getting out.” Despite reporting the incident, the passenger was not banned from the platform and Uber did not acknowledge her complaint except to send a generic email more than a week later after they were contacted by local media.).

38. Charlie Warzel, *Sexist French Uber Promotion Pairs Riders with “Hot Chick” Drivers*, BUZZFEED NEWS (Oct. 21, 2014), www.buzzfeednews.com/article/charliwarzel/french-uber-bird-hunting-promotion-pairs-lyon-riders-with-a.

39. RATNA SINROJA ET AL., U.C. BERKELEY CTR. FOR LAB. RES. AND EDUC., MISCLASSIFICATIONS IN CALIFORNIA: A SNAPSHOT OF THE JANITORIAL SERVICES, CONSTRUCTION, AND TRUCKING INDUSTRIES 6–7 (2019).

40. *Id.* at 6.

41. *Id.*

immigrant status.”⁴² When the outsourced work goes to independent contractors or small businesses with less than fifteen employees, the workers no longer have legal standing to seek compensation for much-needed health resources and services and are less likely to receive health insurance.⁴³ This is especially dire given Chen et al.’s report that as many as seventy-five percent of janitors have experienced workplace sexual harassment.⁴⁴ Luckily, some independent contractors are covered by more inclusive state and local laws, thereby closing some of the legal loopholes precluding a considerable portion of the workforce from the civil rights protections guaranteed under the law.⁴⁵

These gaps in coverage are consequential because, as Part III shows, sexual harassment exacts a terrible toll. Dr. Peggy Crull, former Executive Director of the Working Women’s Institute, found a pattern of mental and physical stress, diminished self-confidence, reduced productivity, and economic insecurity among women who experience sexual harassment.⁴⁶ Next, we turn to the extant interdisciplinary literature on the costs of sexual harassment on workers’ mental and physical health, and careers; organizations; and society.

III. THE COSTS OF SEXUAL HARASSMENT

A. *Health Effects*

Violence and harassment in the workplace are well-established precursors to poor health. Experiences of workplace incivility alone are sufficient to prompt occupational, psychological, and physical health symptoms,⁴⁷ and sexual harassment has been linked to a wide array of health outcomes, including hypertension, sleep disturbances and fatigue, pain symptoms, persistent fear, cognitive difficulties, post-traumatic stress symptoms, depression, disordered eating, and alcohol and drug abuse. In addition to triggering new symptoms,

42. Louise Fitzgerald, *Unseen: The Sexual Harassment of Low-Income Women in America*, 39 EQUAL DIVERSITY & INCLUSION 5, 9 (2019).

43. Arne L. Kalleberg et al., *Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States*, 65 AM. SOCIO. REV. 256, 257, 261 (2000).

44. Helen Chen et al., *The Perfect Storm: How Supervisors Get Away with Sexually Harassing Workers Who Work Alone at Night*, U.C. BERKELEY LAB. OCCUPATIONAL HEALTH PROGRAM. 1, 4 (2016), <https://lohp.berkeley.edu/wp-content/uploads/2016/05/The-Perfect-Storm.pdf>.

45. The state of Washington, for example, offers independent contractors the same protections as employees. See, e.g., *Currier v. Northland Servs., Inc.*, 332 P.3d 1006, 1012 (Wash. Ct. App. 2014). Washington also bans non-disclosure agreements in cases of sexual harassment and assault, as well as employment agreements that eliminate the right to report harassment. See S.B. 5996, 65th Leg., Title XLIX § 49.44.210 (Wash. 2018).

46. Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539, 541 (1982).

47. Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCH. 483, 493 (2005).

sexual harassment can also worsen existing symptoms and exacerbate conditions that had been previously resolved.⁴⁸ As van der Kolk's popular book suggests, traumatic experiences such as sexual harassment prompt stress reactions in the oldest parts of our brains that beget physiological reactions even when conscious, rational capacities have yet to fully materialize.⁴⁹ Considering the pervasiveness of workplace sexual harassment, it is important to recognize the short- and long-term impacts on workers' health and well-being.

1. Psychological Health

Following the work of Fitzgerald et al., many researchers have adopted an integrated model of antecedents and outcomes of sexual harassment in the workplace, accounting for the influence of work environment, gender, and sexual harassment on health and job-related outcomes.⁵⁰ As opposed to looking narrowly at the direct link between sexual harassment and the resulting psychological distress, situating this relationship within the context of past experiences, existing life stressors, and the work environment is more representative of actual neurological and physiological stress processes.⁵¹ Prolonged exposure to stress has numerous adverse health effects,⁵² including negative effects on brain systems associated with mental agility,⁵³ decision-making,⁵⁴ and motivation.⁵⁵ Furthermore, long-term overexposure to the stress hormone cortisol is associated with depression, impaired memory, sleep problems, heart disease, and other rippling health effects.⁵⁶ Although severe or chronic sexual harassment is especially likely to cause psychological and other

48. Kathleen M. Rospenda, *Workplace Harassment, Services Utilization, and Drinking Outcomes*, 7 J. OCCUPATIONAL HEALTH PSYCH. 141, 142–43 (2002).

49. BESSEL A. VAN DER KOLK, *THE BODY KEEPS THE SCORE* 54 (2014) (describing the effects of psychological trauma, and how individuals' minds and bodies are affected by traumatic stress).

50. *Antecedents and Consequences*, *supra* note 6, at 586–87.

51. Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 91 (2011).

52. Jens C. Pruessner et al., *Burnout, Perceived Stress, and Cortisol Responses to Awakening*, 61 PSYCHOSOMATIC MED. 197, 201 (1999).

53. Ingibjörg H. Jonsdottir et al., *Cognitive Impairment in Patients with Stress-Related Exhaustion*, 16 STRESS 181, 182 (2013).

54. Eduardo Dias-Ferreira et al., *Chronic Stress Causes Frontostriatal Reorganization and Affects Decision-Making*, 325 SCIENCE 621, 625 (2009); *Antecedents and Consequences*, *supra* note 6, at 586–87.

55. Cheryl Conrad, *A Critical Review of Chronic Stress Effects on Spatial Learning and Memory*, 34 PROG. NEURO-PSYCHOPHARMACOL. & BIO. PSYCH. 742, 743 (2010).

56. Kara E. Hannibal & Mark D. Bishop, *Chronic Stress, Cortisol Dysfunction, and Pain: A Psychoneuroendocrine Rationale for Stress Management in Pain Rehabilitation*, 94 PHYSICAL THERAPY 1816, 1823 (2014); Bruce McEwen, *Central Effects of Stress Hormones in Health and Disease: Understanding the Protective and Damaging Effects of Stress and Stress Mediators*, 583 EUR. J. PHARMACOL. 174, 177 (2008).

health symptoms,⁵⁷ even frequent but relatively low exposure to sexual harassment has negative implications for workers.⁵⁸

In particular, workplace sexual harassment has been linked to stress and anxiety, depression, and other negative measures of psychological well-being.⁵⁹ In one of the earliest studies of these relationships, Crull reported that sexual harassment causes debilitating stress with adverse consequences for general tension, nervousness, anger, and fear.⁶⁰ These findings are consistent with one study of home health care professionals that found sexual harassment increased anxiety and anger due to fears that the harassment would continue in the future.⁶¹ These symptoms can also lead to depression. The link between chronic stress and depression is well-established,⁶² and researchers have found a robust relationship between sexual harassment and depressive symptoms across a wide array of jobs ranging from flight attendants,⁶³ to college faculty and staff,⁶⁴ to active-duty military personnel.⁶⁵ Moreover, these effects are long-lasting. Using longitudinal survey data, Houle et al. found that early career sexual harassment was associated with long-term depressive symptoms—even after controlling for prior levels of depression—for both men and women.⁶⁶ Qualitative data also

57. LOUISE FITZGERALD & LILIA M. CORTINA, APA HANDBOOK OF THE PSYCHOLOGY OF WOMEN: PERSPECTIVES ON WOMEN'S PRIVATE AND PUBLIC LIVES 215, 221–22 (Cheryl B. Travis et al. eds., 2018).

58. Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCH. 401, 412 (1997) [hereinafter *Job-Related and Psychological Effects*].

59. See Chan et al., *supra* note 6. See also Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127, 133 (2007) (for meta-analyses of existing research).

60. Crull, *supra* note 46.

61. Julian Barling et al., *Behind Closed Doors: In-Home Workers' Experience of Sexual Harassment and Workplace Violence*, 6 J. OCCUPATIONAL HEALTH PSYCH. 255, 257 (2001).

62. Constance Hammen, *Stress and Depression*, 1 ANN. REV. CLINICAL PSYCH. 293, 293 (2005) (as a recurrent condition, individuals who have experienced depression are at greater risk for experiencing future depressive episodes, particularly under stress, which may increase vulnerability to other psychological risk factors). See, e.g., Stephanie L. Burcusa & William G. Iacono, *Risk for Recurrence in Depression*, 27 CLINICAL PSYCH. REV. 959, 960 (2007).

63. Sara Gale et al., *The Impact of Workplace Harassment on Health in a Working Cohort*, 10 FRONTIERS PSYCH. 1181, 1186 (2019).

64. Jaimee Marsh et al., *Prevalence of Workplace Abuse and Sexual Harassment among Female Faculty and Staff*, 51 J. OCCUPATIONAL HEALTH 314, 320 (2009); Judith A. Richman et al., *Sexual Harassment and Generalized Workplace Abuse among University Employees: Prevalence and Mental Health Correlates*, 89 AM. J. PUBLIC HEALTH 358, 361 (1999).

65. Amy L. Culbertson & Paul Rosenfeld, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCH. 69, 73 (1994). See also Amy E. Street et al., *Gender Differences in Experiences of Sexual Harassment: Data from a Male-Dominated Environment*, 75 J. CONSULT. CLINICAL PSYCH. 464, 468 (2007) (finding especially adverse outcomes among men who are harassed).

66. See Houle et al., *supra* note 6.

showed that harassed workers experienced self-blame and self-doubt, and they expressed annoyance, anger, and conflicted emotions stemming from their harassment.⁶⁷

The psychological distress caused by sexual harassment has far-reaching consequences for other measures of well-being. For example, Harned and Fitzgerald found a relationship between sexual harassment and eating disorder symptoms that was triggered by psychological distress, low self-esteem, and self-blame.⁶⁸ In its most severe forms, sexual harassment can be classified as a traumatic event⁶⁹ that causes post-traumatic stress (PTS) symptoms and PTSD,⁷⁰ even after controlling for prior victimization.⁷¹ Notably, in both cross-sectional and longitudinal studies, PTS symptoms were not attributed to negative affective disposition.⁷² Moreover, PTS symptoms resulting from sexual harassment are associated with depression and other negative mental health outcomes,⁷³ and could potentially lead to suicide.⁷⁴

2. Physical Health

Chronic stress, such as that resulting from repeated exposure to sexual harassment, can lead to psychological distress that manifests as physical symptoms. Physical health does not simply refer to the absence of disease but includes the overall well-being of a person's physical form.⁷⁵ Genetic, lifestyle, behavioral, and psychological factors all play a role in determining the quality of a person's physical health. Maintaining good physical health not only

67. *Id.*

68. Melanie S. Harned & Louise F. Fitzgerald, *Understanding a Link Between Sexual Harassment and Eating Disorder Symptoms: A Mediation Analysis*, 70 J. CONSULT. CLINICAL PSYCH. 1170, 1177 (2002).

69. Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69, 72 (2002).

70. *Id.* at 71. See also Willness et al., *supra* note 59, at 138.

71. Margaret E. Reed et al., *The Psychological Impact of Previous Victimization: Examining the "Abuse Defense" in a Sample of Harassment Litigants*, 9 PSYCH. INJURY & L. 230, 239 (2016); Margaret S. Stockdale et al., *Sexual Harassment and Posttraumatic Stress Disorder: Damages Beyond Prior Abuse*, 33 L. & HUM. BEHAV. 405, 414 (2009).

72. *Job-Related and Psychological Effects*, *supra* note 58, at 401, 413; Liberty J. Munson et al., *Longitudinal Analysis of Dispositional Influences and Sexual Harassment: Effects on Job and Psychological Outcomes*, 53 PERS. PSYCH. 21, 41 (2000).

73. Ivy K. Ho et al., *Sexual Harassment and Posttraumatic Stress Symptoms Among Asian and White Women*, 21 J. AGGRESSION, MALTREATMENT & TRAUMA 95, 102 (2012).

74. Claire Mayhew & Duncan Chappell, *Workplace Violence: An Overview of Patterns of Risk and the Emotional/Stress Consequences on Targets*, 30 INT. J.L. & PSYCHIATRY 327, 337 (2007).

75. Norman Sartorius, *The Meanings of Health and its Promotion*, 47 CROAT. MED. J. 662, 662 (2006).

improves mental health⁷⁶ but reduces the risk of developing chronic diseases, such as high blood pressure,⁷⁷ diabetes,⁷⁸ and cancer.⁷⁹

Compared to research on psychological health outcomes, the connection between sexual harassment and physical health is understudied. Still, sexual harassment has been linked to overall poor physical health and well-being,⁸⁰ and to long-lasting physical health problems.⁸¹ Pointing to the need for more research on these relationships, empirical studies suggest that harassed women often report declines in overall health satisfaction,⁸² sleep disturbances and fatigue,⁸³ headaches and nausea,⁸⁴ hypertension,⁸⁵ and joint pain and musculoskeletal conditions.⁸⁶ They are also at an increased risk for occupational injuries.⁸⁷

The relationship between sexual harassment and hypertension (high blood pressure) is especially concerning. Hypertension is commonly referred to as the “silent killer” because symptoms are often absent or go unnoticed.⁸⁸ Over time, high blood pressure can cause damage to the arteries, heart, brain, kidneys, and

76. Julius Ohrnberger et al., *The Relationship Between Physical and Mental Health: A Mediation Analysis*, 195 SOC. SCI. & MED. 42, 42, 48 (2017).

77. Paul K. Whelton et al., *Primary Prevention of Hypertension: Clinical and Public Health Advisory from the National High Blood Pressure Education Program*, 288 JAMA 1882, 1885 (2002).

78. Susan P. Helmrich et al., *Physical Activity and Reduced Occurrence of Non-Insulin-Dependent Diabetes Mellitus*, 325 NEW ENG. J. MED. 147, 147 (1991).

79. Lawrence H. Kushi et al., *American Cancer Society Guidelines on Nutrition and Physical Activity for Cancer Prevention: Reducing the Risk of Cancer with Healthy Food Choices and Physical Activity*, 56 CA: CANCER J. FOR CLINICIANS 254, 255 (2006).

80. Willness et al., *supra* note 59, at 155.

81. Stans de Haas et al., *Sexual Harassment and Health Among Male and Female Police Officers*, 14 J. OCCUPATIONAL HEALTH PSYCH. 390, 395 (2009). *See also* Kimberly T. Schneider et al., *Women’s Cognitive, Affective, and Physiological Reactions to a Male Coworker’s Sexist Behavior*, 31 J. APPLIED SOC. PSYCH. 1995, 2013 (2001) [hereinafter *Women’s Reactions*].

82. Mindy E. Bergman & Fritz Drasgow, *Race as a Moderator in a Model of Sexual Harassment: An Empirical Test*, 8 J. OCCUPATIONAL HEALTH PSYCH. 131, 131 (2003); Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCH. 174, 186 (2002); Lim & Cortina, *supra* note 47, at 493.

83. Gale et al., *supra* note 63, at 9.

84. Crull, *supra* note 46, at 541.

85. Nancy Krieger et al., *The Inverse Hazard Law: Blood Pressure, Sexual Harassment, Racial Discrimination, Workplace Abuse and Occupational Exposures in US Low-Income Black, White and Latino Workers*, 67 SOC. SCI. & MED. 1970, 1978 (2008).

86. Gale et al., *supra* note 63.

87. Lezah P. Brown et al., *Evaluating the Association of Workplace Psychosocial Stressors With Occupational Injury, Illness, and Assault*, 8 J. OCCUPATIONAL & ENV’T HYGIENE 31, 35 (2011); Gale et al., *supra* note 63.

88. Jonathan P. Kalehoff & Suzanne Oparil, *The Story of the Silent Killer*, 22 CURRENT HYPERTENSION REPS. 71, 71 (2020).

eyes.⁸⁹ Even in the short term, high blood pressure can cause physical symptoms, such as headache, chest pain, irritability, and progressive loss of consciousness.⁹⁰ In the most serious cases, it can lead to a stroke or heart attack.⁹¹ Although it is believed that primary hypertension develops gradually, secondary hypertension typically has a sudden onset and is triggered by chronic conditions such as stress or excessive alcohol consumption.⁹² In a Pennsylvania study of women between the ages of forty and sixty, Thurston et al. found that women with a history of sexual harassment had significantly higher odds of hypertension.⁹³ Krieger et al. found similar effects in their study of racially and ethnically diverse, low-income women in Massachusetts.⁹⁴ Although sexual harassment was less common than racial discrimination or other forms of workplace abuse, it was the only “social hazard” that was associated with elevated blood pressure.⁹⁵

3. Behavioral Health

Behavioral health describes the behavioral dimensions of mental and physical health, as well as the reciprocal interplay among these domains of health.⁹⁶ Although it is difficult to disentangle the nature of these relationships and the direction of causation, viewing behavioral health as an embodiment of other health domains provides practical avenues for appropriate and timely treatment and prevention.⁹⁷ Research on the effects of sexual harassment on behavioral health has focused mostly on subsequent alcohol and drug use. For example, Richman et al. found a positive relationship between sexual harassment and problem drinking among a sample of first-year medical students.⁹⁸

89. *High Blood Pressure Symptoms and Causes*, CTRS. FOR DISEASE CONTROL & PREVENTION, (May 19, 2020), <https://www.cdc.gov/bloodpressure/about.htm>.

90. Sheldon G. Sheps, *Hypertensive Crisis: What Are the Symptoms?*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/high-blood-pressure/expert-answers/hypertensive-crisis/faq-20058491>; *High Blood Pressure Dangers: Hypertension's Effects on Your Body*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/high-blood-pressure/in-depth/high-blood-pressure/art-20045868> [hereinafter *High Blood Pressure Dangers*].

91. *High Blood Pressure Dangers*, *supra* note 90.

92. Edward Onusko, *Diagnosing Secondary Hypertension*, 67 AM. FAM. PHYSICIAN 67, 70, 71 (2003).

93. Rebecca C. Thurston et al., *Association of Sexual Harassment and Sexual Assault with Midlife Women's Mental and Physical Health*, 179 JAMA INTERNAL MED. 48, 52 (2019).

94. Krieger et al., *supra* note 85.

95. *Id.*

96. Steven Ross Johnson & Harris Meyer, *Behavioral Health: Fixing a System in Crisis*, MOD. HEALTHCARE, <https://www.modernhealthcare.com/reports/behavioral-health/#/>.

97. *Id.*

98. Judith A. Richman et al., *Perceived Workplace Harassment Experiences and Problem Drinking Among Physicians: Broadening the Stress/Alienation Paradigm*, 91 ADDICTION 391, 401 (1996).

Insomuch as these results attest to the importance of analyzing the relationships between different types of work stressors and drinking-related outcomes, they are also a testament to the benefit of accounting for sex or gender. Men and women report different patterns of alcohol misuse and abuse, so it is perhaps not surprising that some studies have found sex-specific effects on alcohol consumption.⁹⁹ In one nationally representative sample, sexual harassment was associated with alcohol use and problem drinking for both men and women, independent of the effects of job and life stress, but the effects were more prolonged among men.¹⁰⁰ Similarly, a study of university employees found that sexual harassment related to frequency of drinking, escapist drinking motives, and prescription drug use for women only, and heavy episodic drinking for men only.¹⁰¹

Given the range of psychological, physical, and behavioral health outcomes, harassed workers may require extensive resources to cope. In one study, university employees who experienced sexual harassment were more likely to utilize health services related to work stress, suggesting that “harassment can be a costly problem to employers who provide health and mental health benefits to employees.”¹⁰² Yet many workers quit their jobs in response to sexual harassment, losing access to employer-provided healthcare benefits in the process.¹⁰³ The need for costly services at the same time that harassed workers feel increasingly alienated from their work leaves targets in particularly precarious positions. Next, we turn to the costly consequences of sexual harassment for workers’ professional lives.

B. *Economic and Career Effects*

1. Consequences for Targets

Sexual harassment is a persistent barrier to career success and satisfaction.¹⁰⁴ In some cases, the health effects discussed above have direct consequences on workers’ productivity and job performance. In one study, the resulting fear, anger, and anxiety caused by sexual harassment led to poorer interpersonal job performance, greater neglect, and cognitive difficulties.¹⁰⁵ Even in the absence of detrimental health effects, sexual harassment can still

99. Almila Erol & Victor M. Karpyak, *Sex and Gender-Related Differences in Alcohol Use and Its Consequences: Contemporary Knowledge and Future Research Considerations*, 156 DRUG & ALCOHOL DEPENDENCE 1, 7 (2015).

100. Kathleen Rospenda et al., *Workplace Harassment, Stress, and Drinking Behavior Over Time: Gender Differences in a National Sample*, 33 ADDICTIVE BEHAVS. 964, 966 (2008).

101. Richman et al., *supra* note 64.

102. Rospenda, *supra* note 48, at 148.

103. McLaughlin et al., *supra* note 7, at 334.

104. See Willness et al., *supra* note 59, at 127.

105. Barling et al., *supra* note 61, at 266.

derail workers' careers, as many targets often choose to quit their jobs rather than continue working in a harassing environment.¹⁰⁶

When examining the effect of sexual harassment on workers' professional lives, one of the strongest and most robust findings relates to decreased job satisfaction.¹⁰⁷ Although samples often focus on predominantly white women in the U.S. labor market—many of whom work in legal professions¹⁰⁸ or higher education¹⁰⁹—the relationship between sexual harassment and job satisfaction was also demonstrated among racially and ethnically diverse samples of women,¹¹⁰ as well as among men and women around the globe, including Canada,¹¹¹ Hong Kong,¹¹² and Italy.¹¹³

Reduced job satisfaction has consequences for both work and job withdrawal. Work withdrawal is measured through behaviors such as increased absenteeism or tardiness, while job withdrawal is defined as complete separation from an employer (e.g., quitting or termination).¹¹⁴ Workplace sexual harassment is associated with several measures of work withdrawal, including increased absenteeism,¹¹⁵ diminished productivity and job performance,¹¹⁶ and

106. McLaughlin et al., *supra* note 7, at 351.

107. *Antecedents and Consequences*, *supra* note 6, at 584.

108. Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 L. & SOC. INQUIRY 235, 236 (2002); David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. RELS. REV. 594, 595 (1998).

109. Theresa M. Glomb et al., *Structural Equation Models of Sexual Harassment: Longitudinal Explorations and Cross-Sectional Generalizations*, 84 J. APPLIED PSYCH. 14, 19 (1999) [hereinafter *Structural Equation Models*]; Munson et al., *supra* note 72, at 25–26; *Job-Related and Psychological Effects*, *supra* note 58, at 404.

110. Bergman & Drasgow, *supra* note 82, at 134; Lilia M. Cortina et al., *Contextualizing Latina Experiences of Sexual Harassment: Preliminary Tests of a Structural Model*, 24 BASIC & APPLIED SOC. PSYCH. 295, 306 (2002).

111. Barling et al., *supra* note 61, at 259; Colleen E. O'Connell & Karen Korabik, *Sexual Harassment: The Relationship of Personal Vulnerability, Work Context, Perpetrator Status, and Type of Harassment to Outcomes*, 56 J. VOCATIONAL BEHAV. 299, 305 (2000).

112. Darius K-S Chan et al., *Sexual Harassment: A Preliminary Analysis of Its Effects on Hong Kong Chinese Women in the Workplace and Academia*, 23 PSYCH. WOMEN Q. 661, 663–64 (1999).

113. Donatella Di Marco et al., *Approaching the Discriminatory Work Environment as Stressor: The Protective Role of Job Satisfaction on Health*, 7 FRONTIERS PSYCH. 1, 7 (2016).

114. Rebecca S. Merkin, *The Impact of Sexual Harassment on Turnover Intentions, Absenteeism, and Job Satisfaction: Findings from Argentina, Brazil and Chile*, 10 J. INT'L WOMEN'S STUD. 73, 76 (2008).

115. *Id.*; Rebecca S. Merkin & Muhammad Kamal Shah, *The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings From Pakistan Compared to the United States*, SPRINGERPLUS, May 1, 2014, at 10; *Women's Reactions*, *supra* note 81, at 1997.

116. Barling et al., *supra* note 61, at 257. *See also* Hamed et al., *supra* note 82, at 176; Cortina et al., *supra* note 108, at 257; U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 40–41 (1988); Julie A. Woodzicka & Marianne LaFrance, *The Effects*

decreased organizational commitment.¹¹⁷ Crull, for example, found that seventy-five percent of the women who sought assistance to cope with sexual harassment reported lower job performance, often because they found it difficult to concentrate or complete work in the presence of their harasser.¹¹⁸ Furthermore, sexual harassment also affects both intentions to quit and actual job withdrawal.¹¹⁹ Although job turnover was generally high in their prospective cohort study of women in their early thirties, McLaughlin et al. found that eighty percent of harassed women versus fifty-four percent of other working women changed jobs within two years.¹²⁰

Targets often quit because the harassment becomes intolerable, as demonstrated by the severe health effects discussed above. Additionally, some harassed workers leave due to the inadequacy of their employer's response or because "it wouldn't be worth me trying to spend all my energy to change" a toxic workplace culture.¹²¹ This perceived uphill battle is consistent with research showing that an organization's perceived tolerance of sexual harassment is negatively associated with employee well-being.¹²² Moreover, a career interruption can lead to greater financial stress and diminished long-term earnings,¹²³ particularly if workers are unable to secure strong references due to

of Subtle Sexual Harassment on Women's Performance in a Job Interview, 53 *SEX ROLES* 67, 76 (2005).

117. Barling et al., *supra* note 61, at 257. See also Bergman & Drasgow, *supra* note 82, at 136; Paula C. Morrow et al., *Sexual Harassment Behaviors and Work Related Perceptions and Attitudes*, 45 *J. VOCATIONAL BEHAV.* 295, 303 (1994); *Job-Related and Psychological Effects*, *supra* note 58, at 402.

118. Crull, *supra* note 46, at 541.

119. Shiu-Yik Au et al., *Me Too: Does Workplace Sexual Harassment Hurt Firm Value?*, *SOC. SCI. RSCH. NETWORK* (Aug. 19, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437444. See also Julian Barling et al., *Prediction and Replication of the Organizational and Personal Consequences of Workplace Sexual Harassment*, *J. MANAGERIAL PSYCH.*, 1996, at 4, 16; Barling et al., *supra* note 61, at 266; Angela M. Dionisi et al., *Revisiting the Comparative Outcomes of Workplace Aggression and Sexual Harassment*, 17 *J. OCCUPATIONAL HEALTH PSYCH.* 398, 405 (2012); *Structural Equation Models*, *supra* note 109, at 25; Lim & Cortina, *supra* note 47, at 485; McLaughlin et al., *supra* note 7, at 335; *Beyond Targets*, *supra* note 8, at 1264.

120. McLaughlin et al., *supra* note 7, at 342.

121. *Id.* at 348–49.

122. *Beyond Targets*, *supra* note 8, at 1260.

123. McLaughlin et al., *supra* note 7, at 352.

deteriorating work relationships¹²⁴ or if they experience gaps in employment that are concerning to prospective employers.¹²⁵

Yet workers may find themselves in a catch twenty-two, as reporting sexual harassment can lead to retaliation and/or stigmatization.¹²⁶ Although reporting was uncommon, Lonsway et al. found that half of the female police officers who filed sexual harassment complaints experienced some form of reprisal.¹²⁷ Equally discouraging, a series of survey experiments showed that participants were less likely to recommend promotion for a fictitious woman who self-reported sexual harassment as compared to an identical, non-harassed employee.¹²⁸ These untenable options reinforce the urgency of providing legal recourse to targets and to fostering workplace cultures where sexism, misogyny, and sexual harassment are less likely to occur.

2. Consequences for Bystanders, Coworkers, and Employers

The noxious effects of sexual harassment are not limited to targets but cause “collective and diffuse harms” that extend to bystanders, work groups, and entire organizations.¹²⁹ In one of the earliest studies of “ambient” sexual harassment, Glomb et al. found that working in a harassing environment, even after controlling for employees’ direct experiences of sexual harassment, reduced job satisfaction and caused psychological distress.¹³⁰ In other words, watching, hearing, or knowing about the sexual harassment of a colleague has negative consequences. “Employees look to the treatment of their coworkers for cues and

124. James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATION 271, 276 (1982). See also Pamela Hewitt Loy & Lea P. Stewart, *The Extent and Effects of the Sexual Harassment of Working Women*, 17 SOCIO. FOCUS 31, 42 (1984); Jana L. Raver & Michele J. Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. MGMT. J. 387, 395 (2005).

125. Roy Maurer, *How to Evaluate Resume Employment Gaps*, SHRM (July 29, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/how-to-evaluate-resume-employment-gaps.aspx>.

126. Louise F. Fitzgerald et al., *Why Didn't She Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 134 (1995); Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177 (2000).

127. Kimberly A. Lonsway et al., *Sexual Harassment in Law Enforcement: Incidence, Impact, and Perception*, 16 POLICE Q. 177, 188 (2013).

128. Chloe Grace Hart, *The Penalties for Self-Reporting Sexual Harassment*, 33 GENDER & SOC'Y 534, 549 (2019).

129. Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 247, 257–58 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2004).

130. Theresa M. Glomb et al., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 309, 313, 321–22 (1997).

information about organizational norms regarding fairness and justice,”¹³¹ and when workplaces are viewed as accepting of sexual harassment, men and women alike report declines in work and health satisfaction.¹³²

In many instances, a culture of harassment can cause major problems for employers.¹³³ A positive work environment benefits the business as a whole by encouraging high morale, organizational commitment, productivity, and overall job satisfaction.¹³⁴ Yet issues such as high rates of employee turnover are of major concern for organizations of all structures and sizes, as the costs associated with hiring, training, and overall reduced productivity are not trivial. Between 1985 and 1987, sexual harassment cost the federal government in excess of \$267 million, of which more than \$200 million was attributed to lost productivity.¹³⁵ In a separate study, the estimated cost of sexual harassment to the U.S. Army in 1988 surpassed \$250 million, including \$39 million in reduced productivity, \$9 million due to absenteeism, and over \$165 million for recruitment and training.¹³⁶ For private companies, the costs of a tarnished reputation can amass even more quickly. When the *New York Post* published a story detailing allegations of sexism and sexual harassment at CTPartners, the executive search firm’s stock price immediately fell nearly twenty-five percent.¹³⁷ On the verge of bankruptcy, the firm was acquired by a rival company, DHR International, roughly six months later.¹³⁸ Additional companies have suffered damage to their organizational image as a result of the wave of allegations brought on by the #MeToo movement,¹³⁹ but it remains to be seen whether and how they will recover as the social movement continues to lose media traction.

Employers have a demonstrated financial incentive to take sexual harassment seriously; however, it is common for employers to merely adopt

131. Kathi Miner-Rubino & Lilia M. Cortina, *Working in a Context of Hostility Toward Women: Implications for Employees’ Well-Being*, 9 J. OCCUPATIONAL HEALTH PSYCH. 107, 108 (2004).

132. Di Marco et al., *supra* note 113, at 7; *Antecedents and Consequences*, *supra* note 6, at 584–85.

133. Au et al., *supra* note 119.

134. *How Employee Satisfaction Affects Organizational Performance*, HR DAILY ADVISOR (June 16, 2017), <https://hrdailyadvisor.blr.com/2017/06/16/employee-satisfaction-affects-organizational-performance/>.

135. See U.S. MERIT SYS. PROT. BD., *supra* note 116.

136. Robert H. Faley et al., *Estimating the Organizational Costs of Sexual Harassment: The Case of the U.S. Army*, 13 J. BUS. & PSYCH. 461, 476 tbl.1 (1999).

137. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1619 (2018).

138. *Id.*; *DHR International Agrees to Terms of Acquisition of CTPartners*, DHR INT’L (June 22, 2015), <https://www.dhrinternational.com/about/news-media/dhr-international-agrees-terms-acquisition-ctpartners/>.

139. Hemel & Lund, *supra* note 137, at 1612.

sexual harassment policies as a “window dressing” to protect themselves from legal liability.¹⁴⁰ Taken together, these findings suggest a need to rethink organizational responses to sexual harassment by developing policies and practices that demonstrate a clear commitment to employees’ safety and well-being. If left unchecked, even isolated incidences of sexual harassment can foster an organizational culture where sexism and misogyny are normalized and expected. Understanding the steep costs to health, careers, productivity, and company image provides clarity on how best to respond to workplace sexual harassment.

IV. RECOMMENDATIONS FOR LAW AND POLICY

Bearing in mind the substantial costs of sexual harassment for taxpayers, targets, bystanders, and employers alike, we offer three recommendations for law and policy. First, federal law should be expanded so that *all* workers receive protection against sexual harassment. Second, to ensure that victims are adequately compensated for the health, economic, and other costs associated with sexual harassment, maximum award amounts for compensatory and punitive damages should be increased in sexual harassment lawsuits. Third, employers should develop or update internal sexual harassment policies and procedures to not only shield themselves from legal liability, but to also truly foster a positive workplace culture.

A. *Expand Coverage*

All workers have the right to a harassment-free work environment, and it is essential that anyone who is sexually harassed be able to pursue legal recourse if they so choose. For this reason, we recommend that Title VII coverage be extended to “non-employees” who work for companies that employ fewer than fifteen people and those who are classified as independent contractors. Over the last twenty years, the workplace has changed considerably, and federal law has not kept pace. Seven percent of workers in the United States are independent contractors, many of whom work in the gig economy for companies like Lyft, Airbnb, TaskRabbit, and Grubhub.¹⁴¹ Years before Uber’s fall from grace during the #MeToo movement, women drivers recognized that company policies put them at risk. For example, drivers were not able to block specific passengers and were penalized for low ratings.¹⁴² Especially given their reliance on tips to earn a livable wage, these policies greatly restrained drivers’ responses to sexual

140. See Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 373–74 (2020).

141. BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS SUMMARY — MAY 2017 1 (2018).

142. Huet, *supra* note 37 (noting that, unlike drivers, riders with low ratings were not removed from the system).

harassment. Although Uber has recently adopted promising safety measures, these changes did not begin to occur until after the company faced widespread public scrutiny.¹⁴³

Beyond the gig economy, other workers who are excluded from Title VII protection face unique vulnerabilities due to the nature of their work. For example, subcontracted janitors often work alone, late at night, in nearly abandoned office buildings. Similarly, one California survey found that eighty percent of women farmworkers experienced some form of sexual harassment on the job,¹⁴⁴ but because of the small-firm exemption, twenty-two percent of H-2A farmworkers in the United States are not covered by Title VII.¹⁴⁵ If the workers who are most likely to be harassed have no legal recourse, then anti-discrimination laws have failed in their responsibility to protect the most vulnerable workers. Lawmakers must critically evaluate whether coverage under anti-discrimination law reflects contemporary workplaces or whether extending coverage is the “fairest and most workable option.”¹⁴⁶ As an increasing number of states are re-evaluating protections for independent contractors,¹⁴⁷ federal lawmakers have ample basis to make these changes.

Even after expanding the definition of “employee,” policymakers must remain vigilant to ensure that access to justice is not limited along additional axes of inequality. Access to legal resources and the ability to mobilize law is already patterned by social class, race, and gender,¹⁴⁸ so it is imperative that marginalized workers are not systematically locked out of civil justice institutions. Although Title VII protects “employees” from sex discrimination, it has remained a point of contention whether it is illegal to discriminate on the

143. Jessica Guynn, *Uber Safety Review Reports More Than 3,000 Allegations of Sexual Assault Last Year*, USA TODAY (Dec. 6, 2019), <https://www.usatoday.com/story/tech/2019/12/05/uber-safety-report-nearly-6-000-sexual-assaults-2017-and-2018/2624893001/>.

144. Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010).

145. Anna B. Roberson, *The Migrant Farmworkers’ Case for Eliminating Small-Firm Exemptions in Antidiscrimination Law*, 98 TEX. L.R. 185, 205 (2019) (noting in southern states, this estimate increases to nearly one-third of H-2A farmworkers).

146. Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 242 (1997). See also Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 366 (2001).

147. Aaron Colby, *Did an Employee or Independent Contractor Just Deliver Dinner?*, FORBES (July 21, 2020, 12:12 PM), <https://www.forbes.com/sites/aaroncolby/2020/07/21/did-an-employee-or-independent-contractor-just-deliver-dinner/#6130e1d05344>; Roy Maurer, *Gig-Worker Model Upends Employee Classification Debate*, SHRM (May 23, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/gig-worker-model-upends-employee-classification-debate.aspx>.

148. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 352 (2008).

basis of gender identity.¹⁴⁹ Earlier this year, the Supreme Court ruling in *Bostock v. Clayton County* clarified that discrimination against gay or transgender workers is indeed a violation of Title VII,¹⁵⁰ but policy advocates must continue to assess whether Title VII is adequately enforced for LGBT workers and whether the law falls short in other ways.¹⁵¹

B. Increase Award Damages

Expanding protection allows for more legal mobilization to occur, but it will not prevent the deeply scarring effects of sexual harassment. If monetary awards do not cover the costs of counseling or lost wages, let alone legal fees, then harassed workers have little incentive to file a complaint. The legal process is long and arduous, and plaintiffs in these types of cases may be re-victimized during discovery and trial.¹⁵² For example, in *Katt*, it took roughly six years for the plaintiff to receive compensatory damages after the defense challenged nearly every aspect of her account.¹⁵³ Although a jury also awarded one million dollars in punitive damages, the defense successfully argued in a post-trial motion that New York municipalities are immune from punitive damages.¹⁵⁴

Thus, we argue that maximum award amounts must be re-examined to ensure that (1) harassed workers receive appropriate compensation, and (2) applicable laws function as sufficient deterrents. In particular, Title VII caps damages at certain amounts depending on the size of the employer. For companies with 15 to 100 employees, the maximum combined compensatory and punitive damages allowable is \$50,000.¹⁵⁵ For companies with 500 or more

149. András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOCIO. 586, 586–87 (2011).

150. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

151. For example, despite research showing that sexually harassing experiences are both gendered and racialized, U.S. anti-discrimination laws do not effectively address multiple and intersecting forms of discrimination. NiCole T. Buchanan & Alayne J. Ormerod, *Racialized Sexual Harassment in the Lives of African American Women*, 25 WOMEN & THERAPY 107, 114 (2002). Compare Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107, 108 (2017) (noting the often overlooked nature of intersectional discrimination in U.S. antidiscrimination law), with Johanna Kantola & Kevät Nousiainen, *Institutionalizing Intersectionality in Europe*, 11 INT'L FEMINIST J. POL. 459, 466 (2009) (describing recent intersectional discrimination policy reforms in Europe).

152. See, e.g., Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping With Preconceptions Through Discretion*, 51 EMORY L.J. 559, 566, 576 (2002); Jacqueline M. Wheatcroft et al., *Revictimizing the Victim? How Rape Victims Experience the UK Legal System*, 4 VICTIMS & OFFENDERS 265, 276 (2009).

153. *Katt v. City of New York*, 151 F. Supp. 2d 313, 318, 371 (S.D.N.Y. 2001).

154. *Id.* at 345.

155. 42 U.S.C. § 1981a(b)(3).

employees, the cap is set at \$300,000.¹⁵⁶ If we are to take sexual harassment seriously as a workplace issue, then damage amounts must be increased to reflect the very real costs documented in Part III above. Building on the wage premium or “compensating differential” used to draw workers to dangerous jobs, Hersch uses EEOC complaint data to calculate the value of the “risk” of sexual harassment.¹⁵⁷ For efficient deterrence, Hersch argues that statutory caps should be increased to at least \$7.6 million per claim.¹⁵⁸

C. Update Workplace Policies and Practices

Broadening the scope of Title VII and increasing award damages can increase the law’s effectiveness as a regulatory tool, but it is no panacea. Anti-discrimination laws can compensate workers who are harassed and create financial incentives for employers to take it seriously, but employers must do the work to ensure that sexual harassment is a rare occurrence and to respond swiftly when it does occur. It is unacceptable for complaints of sexual harassment to continue to fall on deaf ears.¹⁵⁹ The #MeToo movement should serve as a wakeup call to employers and human resource professionals that decades-old, anti-harassment policies are not enough, and judges should no longer accept this window dressing as evidence of compliance. Not only is sexual harassment widespread, but it is also costly to workers and employers alike. Pretending otherwise is not only illogical, but it is bad for business.

Even when covered by anti-discrimination law, few employees turn to the law in response to sexual harassment.¹⁶⁰ Although it is plausible that higher award damages could inspire more workers to do so, this requires a level of legal consciousness and capital that the average worker is unlikely to possess.¹⁶¹ Contrary to popular belief, harassed workers are rarely looking for a windfall but instead “don’t want anything except for it to stop and for no retaliation to be made.”¹⁶² Thus, our third recommendation is aimed at employers, who we advise to develop or review internal sexual harassment policies and procedures

156. Joni Hersch, *Efficient Deterrence of Workplace Sexual Harassment*, 2019 U. CHI. LEGAL F. 147, 157–58 (2019).

157. *Id.* at 163–64.

158. *Id.* at 148.

159. See Ellen Peirce et al., *Why Sexual Harassment Complaints Fall on Deaf Ears*, 12 ACAD. MGMT. EXEC. 41, 52 (1998) (discussing organizations’ inadequate or complacent responses to sexual harassment complaints and proposing better ways to address the complaints).

160. See Feldblum & Lipnic, *supra* note 1. See also Amy Blackstone et al., *Legal Consciousness and Responses to Sexual Harassment*, 43 L. & SOC’Y REV. 631, 665 (2009) (finding that those who are harassed appear to be selected, at least in part, because they are less likely to mobilize the law).

161. See Feldblum & Lipnic, *supra* note 1 (discussing how low-status employees may be less likely to understand the complaint process and more likely to fear ramifications).

162. See e.g. Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 82 (2000).

to ensure they reflect “best practices” advanced during the #MeToo movement. This includes more effective ways to educate workers about inappropriate workplace conduct,¹⁶³ mechanisms for reporting that prevent retaliation, and transparent complaint resolution processes that take into consideration the needs and concerns of harassed workers.¹⁶⁴

Employers can improve existing policies, but this may merely be lip service without an organizational climate that supports policies in practice.¹⁶⁵ Human resource departments should adopt metrics to ensure policies and procedures are effective at preventing sexual harassment.¹⁶⁶ Furthermore, industry stakeholders can collaborate to find creative ways to increase compliance. For example, farmworkers in Immokalee, Florida were able to foster remarkable support for the Campaign for Fair Food Program (FFP).¹⁶⁷ Participating corporations (including Whole Foods, Subway, Walmart, and McDonald’s) agreed to restrict produce purchases to farms that meet FFP standards, which includes, among other things, a strict anti-harassment policy.¹⁶⁸ Since the inception of the program, rape, attempted rape, and sexual harassment by supervisors have been virtually eliminated on FFP farms.¹⁶⁹ Given that public interest in sexual harassment has already begun to wane, it is more important than ever to establish new norms that promote a harassment-free workplace culture.

V. CONCLUSION

The overwhelming focus on assessing liability often leads employers to ignore the toll on employees. Yet, as interdisciplinary research makes clear, sexual harassment affects all aspects of health and well-being. Furthermore, the #MeToo reckoning underscores that policies alone do not prevent workplace sexual harassment. In the face of a toxic workplace climate, it can be incredibly difficult for employees to affect change. Some find ways to “bargain with patriarchy,”¹⁷⁰ but many targets of harassment feel powerless to transform

163. See Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1, 21 (2012) (finding that sexual harassment law challenges both men’s and women’s beliefs, status, and norms, so more research is needed into how policies can reduce this sense of threat).

164. See Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html> (discussing opposition to non-disclosure agreements).

165. Edelman & Cabrera, *supra* note 140, at 1543, 1568; NAT’L ACADS. SCI. ENG’G MED., *supra* note 2, at 180.

166. Linda Hamilton Krieger et al., *When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843, 867 (2015).

167. Fitzgerald, *supra* note 42, at 12.

168. FAIR FOODS STANDARDS COUNCIL, FAIR FOOD 2017 ANNUAL REPORT 12–13 (2018).

169. *Id.* at 20.

170. Deniz Kandiyoti, *Bargaining With Patriarchy*, 2 GENDER & SOC’Y 274, 285 (1988).

existing workplace cultures. As media interest in the topic continues to fade, it is more important than ever to enforce laws and policies that address workplace sexual harassment. Increasing award damages and ensuring that all workers are protected will incentivize organizations to address sexual harassment, but it remains to be seen whether the #MeToo movement has sparked a norm cascade that will produce lasting change.