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**BREAKING THE CULTURAL CYCLE OF SEXUAL HARASSMENT
IN THE PROFESSIONAL SPORTS INDUSTRY: TIME TO STEP UP
PREVENTION & PUNISHMENT**

ABSTRACT

The National Football League's Washington Football Team, now known as the Washington Commanders, faces an abundant amount of franchise issues, but its toxic workplace environment full of sexual harassment towers above the rest. This is just the most recent example of a professional sports team mistreating its women employees. Year after year, sexual harassment allegations resurface, revealing a contemplation of whether the current "solutions" for curbing sexual harassment in the professional sports industry are effective.

Current remedies, both in a legal and societal context, have inhibited efforts by women for equal treatment from the teams who employ them. When allegations arise, an internal investigation follows, ultimately leading to sanctions by the organization's league. Lawsuits commonly follow, often resulting in settlements. Soon after, another scandal within the industry hits the media—and so, the process begins again. By exploring potential modifications to current remedies and proposing initiatives for the Washington Football Team, this Note provides hope that the organization launches an effort to strip itself of its toxic and pervasive culture and leads in the next step of decreasing sexual harassment throughout the entire professional sports industry.

INTRODUCTION

“I have never been in a more hostile, manipulative, passive-aggressive environment . . . and I worked in politics.”¹ This quote represents one of the many disturbing comments made by women who have worked in the professional sports industry, particularly, Julia Payne, the former Vice President of Communications for the Washington Football Team.² While it is true that the participation of women *playing* sports has significantly improved since the passage of Title IX in 1972,³ has there really been any meaningful improvement in female involvement on the business side of the professional sports industry? Based on the recent allegations made by forty-two former female employees of the Washington Football Team,⁴ the answer appears to be no.⁵ In the summer of 2020, the Washington Post published two investigative reports outlining allegations made by female employees regarding encounters with male colleagues or superiors, revealing a workplace cultivated with inequality and intimidation.⁶ These reports unveiled the need for a cultural change in the Washington Football Team organization, and likely many other organizations within the professional sports industry.

The professional sports industry in the United States is male-dominated.⁷ Principally comprised of the National Football League (“NFL”), Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the

1. Will Hobson & Liz Clarke, *From Dream Job to Nightmare*, WASH. POST (July 16, 2020), <https://www.washingtonpost.com/sports/2020/07/16/redskins-sexual-harassment-larry-michael-alex-santos/?arc404=true>.

2. *Id.*

3. Keyleigh N. Wallick, *Underrepresentation of Women in Sports Leadership: Stereotypes, Discrimination, and Race*, CUPOLA (2018), https://cupola.gettysburg.edu/cgi/viewcontent.cgi?article=1764&context=student_scholarship.

4. Matthew Paras, *Director for Dan Snyder's Former Foundation Accused of Sexual Harassment: Report*, WASH. TIMES (Nov. 18, 2020), <https://www.washingtontimes.com/news/2020/nov/18/director-dan-snyders-former-foundation-accused-sex/>.

5. In July 2020, the previously known “Washington Redskins” football team changed their brand name to the “Washington Football Team,” pending an adoption of a new name. *Washington Announces Franchise Will Be Called ‘Washington Football Team’ Pending Adoption Of New Name*, WASH. FOOTBALL TEAM, <https://www.washingtonfootball.com/news/redskins-announce-franchise-will-be-called-washington-football-team-pending-adop> (last visited Jan. 21, 2020). After eighteen months, the team announced its new name to be the “Washington Commanders.” *Washington Announces New Team Name: Washington Commanders*, NAT’L FOOTBALL LEAGUE (Feb. 2, 2022), <https://www.nfl.com/news/washington-commanders-new-team-name>. Nevertheless, this Note will refer to the team as the “Washington Football Team” because that was the name at the time the sexual harassment allegations described throughout this Note arose.

6. Paras, *supra* note 4.

7. See Surina Khurana, *The Sports Industry Is Sexist and It’s Time We Fix It*, DAILY CALIFORNIAN (Mar. 29, 2019), <https://www.dailycal.org/2019/03/29/the-sports-industry-is-sexist-and-its-time-we-fix-it/>.

National Hockey League (“NHL”), together known as the “Big Four,”⁸ the professional sports industry in the United States operates with a gender imbalance that is impossible to hide.⁹ The stereotype is that professional sports are strictly to be played, viewed, and controlled by men; but when women account for thirty-seven to forty-five percent of professional sports leagues’ fan-bases, that stance loses its soundness.¹⁰ Women should be playing a more significant role in the business of professional sports, a multi-billion dollar enterprise.

In truth, there are quite a few women who possess positions in the offices of professional sports teams.¹¹ However, women are treated differently than men in these positions.¹² As an industry deeply rooted with hyper-masculine characteristics, it is no surprise that sexual harassment occurs frequently in professional sports. Countless allegations arise from men in powerful positions using their professional advantage in an attempt to manipulate women through the use of sexual advances and unprofessional comments.¹³ When women preliminarily inform their employer of an unwelcomed sexual harassment situation, employers do not always handle the complaint appropriately.¹⁴ So when necessary, women can file claims with the Equal Employment Opportunity Commission (“EEOC”) for sexual harassment.¹⁵ Yet, even with potential claims against them, teams within the “Big Four” do not appear to be making any meaningful changes to their harmful employment practices.

8. Pete Grathoff, *Cool Graphic Shows All the Big Four Sports League Champions of the 2010s*, KAN. CITY STAR (Oct. 31, 2019), <https://www.kansascity.com/sports/spt-columns-blogs/for-petes-sake/article236860263.html>.

9. See Khurana, *supra* note 7.

10. Bri Newland & Ted Hayduk, *Female Sport Fandom: Insights from the Growing Female Market*, PRESTON ROBERT TISCH INST. FOR GLOBAL SPORT, https://www.sps.nyu.edu/content/dam/sps/academics/departments/tisch-institute-for-global-sport/pdfs/Female_Sport_Fandom_White_Paper.pdf (last visited Feb. 14, 2021).

11. *E.g.*, *Influential Women in Football*, NAT’L FOOTBALL LEAGUE, <https://www.nfl.com/photos/influential-women-in-football-0ap3000000812590> (last visited Feb. 14, 2021). Some influential women working throughout the NFL include: Amy Trask, the first female CEO of an NFL team; Martha Firestone Ford, the controlling owner of the Detroit Lions organization since 2014; Amy Adams-Strunk, the controlling owner of the Tennessee Titans organization; Kathryn Smith, the first female to obtain a full-time coaching position in the NFL; Katie Blackburn, the executive vice president of the Cincinnati Bengals; and Sarah Thomas, the first female NFL official. *Id.*

12. See Trisha Mannie, *Chapter 951: A Step Towards Ending Sexual Harassment*, 50 U. PAC. L. REV. 201, 203 (2019).

13. *Id.* at 202–03.

14. See Carly McCann et al., *Employer’s Responses to Sexual Harassment*, UNIV. MASS. AMHERST CTR. FOR EMP. EQUITY, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> (last visited Feb. 14, 2021).

15. FILING A CHARGE OF DISCRIMINATION, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-charge-discrimination> (last visited Dec. 21, 2020).

The ongoing pattern of toxicity toward women employees within the professional sports industry presents complex legal issues for women seeking redress. This Note will explore the systematic culture of sexism occurring throughout the “Big Four” sports in the United States and assess whether current reparation tactics of internal investigations and monetary settlements are effective in improving the status of women on the business side of the industry.

In Part I, this Note will provide an overview of the current problem occurring in the Washington Football Team organization and the previous problem, which occurred in the Dallas Mavericks organization, as examples to show how sexual harassment is a continuing issue in professional sports. Part II discusses what legal opportunities these women have and where these claims come from historically. Then, in Part III, this Note will examine the weaknesses of internal investigations and EEOC settlements when used to solve sexual harassment issues within the industry. Finally, in Part IV, this Note will explore the redress opportunities for women who experience sexual harassment in their workplace and what legal changes need to be made in order for the professional sports industry to become a more inclusive place to work.

I. THE PROBLEM: REPORTS FROM THE WASHINGTON POST & SPORTS ILLUSTRATED

In July and August of 2021, the Washington Post (the “Post”) published two detailed reports uncovering the miserable work environment for women cultivated by the Washington Football Team organization. Unfortunately for the organization, these reports were released in the midst of other unsettling public issues for the team—a longstanding losing streak, a name change from its traditional and controversial “Redskins” brand name, and a strong desire for a change in ownership.¹⁶ The Post first released a report in July revealing allegations against the team by seventeen former women employees, but just a month later, the Post published a second report, which added twenty-five more women with allegations against male employees in the organization—presenting a total of forty-two accusers.

A. *The July Report*¹⁷

The Post began its report by categorizing allegations against the Washington Football Team as either (1) “unwelcome overtures or comments of a sexual nature” or (2) “exhortations to wear revealing clothing and flirt with clients to close sales deals.”¹⁸ Before the report was published, but after the Post presented

16. Vinnie Iyer, *Daniel Snyder and the Washington Football Team: A Timeline of His Dysfunctional, Now Full Ownership*, SPORTING NEWS (Mar. 24, 2021), <https://www.sportingnews.com/us/nfl/news/daniel-snyder-redskins-timeline/>.

17. Hobson & Clarke, *supra* note 1.

18. *Id.*

its findings to the organization, three of the accused employees departed from the organization: (1) Larry Michael, the former Senior Vice President of Content, accused of frequently “discuss[ing] the physical appearance of female colleagues in sexual and disparaging overtones;” (2) Alex Santos, the former Director of Pro Personnel, accused of making “inappropriate remarks about [former employees’ and reporters’] bodies and asking them whether they were romantically interested in him,” as well as pinching another woman employee and “[telling] her she had ‘an ass like a wagon;” and (3) Richard Mann II, Assistant Director of Pro Personnel, accused of texting a woman colleague “to expect an ‘inappropriate hug . . . And don’t worry that will be a stapler in [his] pocket, nothing else.”¹⁹ These allegations, unfortunately, were reinforced by many more accusations made by other women employees of the organization.²⁰ For example, Emily Applegate, former Marketing Coordinator for the organization, described her time at the organization as “the most miserable experience of [her] life.”²¹ She expressed how working under Mitch Gershman, the Chief Marketing Officer, was encompassed with a mixture of comments on her body and insults about her performance.²² Gershman often suggested that Applegate wear form-fitting dresses and only wear heels.²³ Additionally, Applegate stated that Gershman would yell at her about “how f—ing incompetent [she] was.”²⁴

The report continues by diving into the Washington Football Team’s employee handbook, which states that the “level of media and public scrutiny of the Washington [Football Team] magnifies any inappropriate or unprofessional behavior, so a high level of professionalism is required from all employees.”²⁵ However, while there is a section regarding sexual harassment, many former employees reveal that it is not discussed during the onboarding process.²⁶ The accusers told the Post that within their first weeks at the organization, women employees are given a private “orientation” from veteran women colleagues who advise them of certain people and places they should try to avoid while at work.²⁷ Dan Snyder, the Washington Football Team’s owner, was not personally accused by these women, but was criticized for understaffing the human resource department and creating a “sophomoric culture of verbal abuse among top executives.”²⁸ These criticisms are rooted in the fact the Washington

19. *Id.*

20. *Id.*

21. *Id.*

22. Hobson & Clarke, *supra* note 1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Hobson & Clarke, *supra* note 1.

28. *Id.*

Football Team's human resource department consists of merely one employee and lacks any formal reporting procedure.²⁹

Overall, the Post's July report primarily revealed conduct of male employees that created an unhealthy work environment at the Washington Football Team's office for its women employees.³⁰

*B. The August Report*³¹

About a month later, the Post released yet another report, this time recounting twenty-five additional women's experiences of sexual harassment while working for the Washington Football Team.³² These allegations stemmed from "male bosses, colleagues and players commenting on their bodies and clothing, incorporating sexual innuendos into workplace conversation and making unwanted advances in person or via emails, text messages and social media."³³ This time, Dan Snyder, was not absent from allegations.³⁴ Tiffany Bacon Scourby, a former cheerleader, described Snyder inviting her to "join his close friend in a hotel room so they 'could get to know each other better'" after a charity event in 2004.³⁵ The report also included numerous additional accusations against Alex Santos, who had already been accused in the July Report mentioned above. For example, one former intern attempted to file a complaint with the human resource department against Santos but instead was told by Chief Financial Officer, Stephen Choi, that because "the team ha[s] a 'male-dominated culture' [that] she would have to avoid Santos or quit."³⁶ She chose to quit.³⁷

The allegations did not stop there. For instance, one female told the Post that the team has a policy that restricts the "movement of women in the building to minimize their interactions with players."³⁸ Another stated that Dan Snyder treats his women employees like "servants" and described a protocol that female assistants of Dan Snyder must "wear heels but [not] let [their] heels clack loudly."³⁹ Most shockingly, evidence surfaced regarding an unofficial video put together at the request of Larry Michael, the team's former radio voice.⁴⁰ This

29. *Id.*

30. *Id.*

31. Will Hobson et al., *Lewd Cheerleader Videos, Sexist Rules: Ex-Employees Decry Washington's NFL Team Workplace*, WASH. POST (Aug. 26, 2020), <https://www.washingtonpost.com/sports/2020/08/26/redskins-cheerleaders-video-daniel-snyder-washington/?arc404=true>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Hobson et al., *supra* note 31.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

video, created without the consent of the team's cheerleaders, consisted of spliced together footage of topless cheerleaders and other salacious moments that were blurred out in the official video.⁴¹ This video was titled "For Executive Meeting."⁴²

To outline every one of the numerous allegations the Post uncovered in its July and August Reports would prolong this Note, but to put into perspective the quantity and seriousness of these allegations, it should be noted that some former employees have even formed a support group to help with their lingering emotional damage developed during their time working for the Washington Football Team.⁴³

C. *The Next Step*

As a result of these reports, Snyder hired Beth Wilkinson, a Washington D.C. attorney, to conduct an "unbiased" internal investigation regarding these allegations.⁴⁴ Not much later, the NFL intervened and assumed oversight over Wilkinson's investigation.⁴⁵ Dan Snyder stated that the NFL's intervention was at his suggestion for the purpose to secure that the "results are thorough, complete and trusted by the fans, the players, our employees and the public."⁴⁶ The NFL's involvement was also in response to a demand by Lisa J. Banks and Debra S. Katz, the attorneys that represent more than twelve of the accusers, calling for the NFL to launch its own investigation and later suspend Dan Snyder as owner if the outcome of the investigation substantiates the claims from the Post's reports.⁴⁷

As of now, no lawsuit or claims with the EEOC have been filed, as the investigation is still in progress. However, it is likely that this internal investigation is the end of it and will likely result in mere sanctions or policy changes within the team's own control. This assumption arises from precedent—a similar investigation in the Dallas Mavericks organization.

41. Hobson et al., *supra* note 31.

42. *Id.*

43. *Id.*

44. *Washington's NFL Team Hires Attorney to Review Protocols*, ESPN (July 16, 2020), https://www.espn.com/nfl/story/_/id/29474652/sources-washington-team-hires-attorney-review-protocols.

45. Liz Clarke et al., *NFL Assumes Oversight of Investigation into Washington Football Team Workplace*, WASH. POST (Aug. 31, 2020), <https://www.washingtonpost.com/sports/2020/08/31/nfl-assumes-oversight-investigation-into-washington-football-team-workplace/>.

46. Stephen Whyno, *NFL Takes Over Investigation of Washington Football Team*, AP NEWS (Aug. 31, 2020), <https://apnews.com/article/1378e0c662183592dd40b5b0b08fde8b>.

47. Liz Clarke & Beth Reinhard, *Attorneys for Former Washington NFL Employees Demand League Investigate on Its Own*, WASH. POST (Aug. 27, 2020), <https://www.washingtonpost.com/sports/2020/08/27/attorneys-former-washington-nfl-employees-demand-league-investigate-its-own/>.

D. Similar Investigation: The Dallas Mavericks

Of course, the Washington Football Team is not the only professional sports organization that has faced allegations involving female mistreatment. For example, in 2018, Sports Illustrated published a similar report on the Dallas Mavericks, an NBA team. In the report, more than a dozen current and ex-employees characterized the organization as a hostile work environment, comprised of sexual harassment and domestic violence.⁴⁸ After the Sports Illustrated report was released, the Mavericks commissioned an internal investigation, which was overseen by the NBA.⁴⁹ The final report “substantiated numerous instances of sexual harassment and other improper workplace conduct within the Mavericks organization over a period spanning almost twenty years.”⁵⁰ Aside from legal punishment, Mark Cuban, the owner of the Mavericks, donated ten million dollars to organizations that “promote women in leadership roles and [that develop policies] to combat domestic violence,” as a form of sanction from the NBA.⁵¹ Moreover, the NBA required:

[T]he team to provide the league office with quarterly reports regarding the recommendations set forth in the report and their implementation; immediately report to the league office any instances or allegations of significant misconduct by any employee; continually enhance and update annual “Respect in the Workplace” training for all staff, including ownership; and implement a program to train all staff, including ownership, on issues related to domestic violence, sexual assault, and sexual harassment.⁵²

48. Jon Wertheim & Jessica Luther, *Exclusive: Inside the Corrosive Workplace Culture of the Dallas Mavericks*, SPORTS ILLUSTRATED (Feb. 20, 2018), <https://www.si.com/nba/2018/02/21/dallas-mavericks-sexual-misconduct-investigation-mark-cuban-response> (outlining allegations against Terdema Ussery, the former President and CEO, Buddy Pittman, the former Senior Vice President of Human Resources, Earl Sneed, a writer for the Mavericks, Paul Monroe, former Vice President of Marketing, and an unnamed former senior ticket sales employee).

49. Michael McCann, *Assessing the Mavericks’ Workplace Investigation and Placing the Penalties in Context*, SPORTS ILLUSTRATED (Sept. 19, 2018), <https://www.si.com/nba/2018/09/19/mavericks-mark-cuban-terdema-ussery-earl-sneed-nba-investigation>.

50. KRUTOY LAW, P.C. & LOWENSTEIN SANDLER, THE REPORT OF THE INDEPENDENT INVESTIGATION OF DALLAS BASKETBALL LIMITED (Sept. 19, 2018), https://f1f64ea4c4b583b18306-3f73a7ab3eff14b4728a55d6928da99b.ssl.cf5.rackcdn.com/The-Report-of-the-Independent-Investigation-of-Dallas-Basketball-Limited_9-19-2018.pdf. This full report was released to the public and outlines the allegations, investigative condemning findings, and recommendations. *Id.*

51. Khadrice Rollins, *Mark Cuban to Donate \$10 Million in Lieu of Fine After NBA’s Investigation into Workplace Misconduct*, SPORTS ILLUSTRATED (Sept. 19, 2018), <https://www.si.com/nba/2018/09/19/dallas-mavericks-workplace-sexual-misconduct-investigation-findings-punishment-mark-cuban>.

52. *Id.*

However, even with a condemning report of the Mavericks organization and a vow to clean up the problem, change did not appear to follow.⁵³ Just a little over a year after the scandal, another Maverick's executive, Tony Ronzone, was accused of sexual assault in a hotel room.⁵⁴ After the unnamed victim informed the team of the incident, an internal investigation followed.⁵⁵ Cynthia Wales, who was hired after the 2018 scandal as the Mavericks' Chief Ethics and Compliance Officer, conducted the investigation.⁵⁶ Six months later, the Mavericks closed the investigation as a result of a lack of credible evidence.⁵⁷ The NBA reported that the Mavericks did inform them of the alleged incident, as required to do so as a part of the compliance orders administered after the 2018 investigation, and that they remain "in communication with team about the matter."⁵⁸ However, the victim and her attorneys strongly believed that the investigation was inadequately conducted and the Mavericks did not attempt to obtain potentially critical evidence.⁵⁹ For example, when Ronzone denied that the victim was ever in his hotel room, the team allegedly did not request hotel video footage or allow the victim to take a polygraph test as part of the investigation.⁶⁰ Additionally, even after the victim's attorneys offered opposing counsel access to the statements of the people who the victim spoke to soon after the incident, the Mavericks' attorneys did not respond.⁶¹ However, the victim was not interested in filing a lawsuit because of the risk of having to sign a non-disclosure agreement and losing the ability to speak out about her experiences.⁶² Thus, the victim chose to release her story through *Sports Illustrated*, which then prompted the Mavericks' human resource department to enter into settlement negotiations with her.⁶³ After much back and forth, the victim and Mavericks ended at an impasse.⁶⁴ This situation is only one example of the obstacles

53. See Jessica Luther & Jon Wertheim, *A New Mavericks #MeToo Accusations—and Questions About the Team's Investigations*, *SPORTS ILLUSTRATED* (July 29, 2020), <https://www.si.com/nba/2020/07/29/mavericks-sexual-assault-allegation> (detailing the victim's experience with Tony Ronzone forcing himself on her in a Las Vegas hotel room including trying to kiss her, sticking his tongue down her throat, throwing her on the bed, straddling her, and pinning her body down before she was able to "escape").

54. *Id.*

55. *Id.*

56. *Id.*

57. Tim MacMahon, *Mavericks: Reports on Sexual Assault Investigation 'One-sided'*, *ESPN* (July 29, 2020), https://www.espn.com/nba/story/_/id/29559729/mavericks-report-sexual-assault-investigation-one-sided.

58. See Luther & Wertheim, *supra* note 53.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See Luther & Wertheim, *supra* note 53.

64. *Id.*

women face when seeking remedies for wrongs done against them, especially in sexual harassment situations being “he-said” versus “she-said.”⁶⁵ If the previous sanctions and compliance orders placed on the Mavericks in 2018 by the NBA were effectual, this new victim should have been able to find a remedy, or at a minimum been provided with a more thorough investigation by the team or the NBA. In short, sexual harassment issues have not been fully eradicated by sanctions or compliance orders placed by the NBA.⁶⁶

II. BASIS OF CLAIMS

A. *Society Demands Basis for Claims: The #MeToo Movement*

Gender-equality issues throughout society have circulated for the past few decades, but recently rose to prominence when the #MeToo hash-tag went viral in 2017,⁶⁷ opening many eyes to mistreatment of women and forcing society to dive deeper into the issues that had been hidden behind closed doors for so long. While Tarana Burke coined the “#MeToo” phrase in 2006, it gained popularity in 2017 after several Hollywood actresses spoke up about their sexual harassment experiences with film-producer Harvey Weinstein, opening the door for other women to speak up about their similar experiences through social media.⁶⁸ The immense public attention created by these Hollywood actresses generated outrage among society.⁶⁹

It is no secret that women have been victim of sexual harassment for longer than anyone cares to admit; however, it was not until 1986 that sexual harassment was classified legally as a form of discrimination.⁷⁰ Decades later, the #MeToo movement began to circulate, appearing to be a direct result of victims reaching their boiling point and deciding to no longer normalize nor tolerate harassment and misconduct in the workplace.

B. *#MeToo’s Achievements: Positive Changes in the Workplace for Women*

As a result of the #MeToo movement, the way people view and understand sexual harassment has changed.⁷¹ For example, less than thirty powerful people

65. *See id.*

66. *Id.*

67. *History and Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> (last visited Feb. 8, 2021).

68. *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE UNIV. BLOG, <https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/> (last visited Feb. 8, 2021).

69. Deborah L. Rhode, *MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 380 (2019).

70. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986).

71. Sarah Pennington, Note, “*Do You Think Sexual Assault and Harassment are a Big Problem in Society?*”: *How #MeToo May Impact Juror Decision-Making in Sexual Assault and Harassment Cases*, 59 U. LOUISVILLE L. REV. 89, 89 (2020).

either resigned or were terminated after facing sexual misconduct allegations in the year before #MeToo circulated.⁷² Consequently, the year after, over 200 people in similar powerful positions resigned or were terminated based on the same type of sexual misconduct allegations.⁷³ Today, the hash-tag represents how sexual harassment is a widespread issue⁷⁴ and mistreatment of women cannot and will not be ignored any longer.

#MeToo has an allied hashtag: #TimesUp.⁷⁵ The Time's Up Initiative states that "enough is enough," and a workplace should be a "safe, fair, and dignified" place for all women.⁷⁶ Time's Up has created programs to pursue their initiatives, including a legal defense fund to support individuals who have experienced workplace sexual harassment⁷⁷ and a lab to conduct research and create innovative solutions.⁷⁸

#TimesUp, along with #MeToo, exemplifies societal desire to give sexual harassment victims opportunities for redress and to reduce misconduct occurring in the workplace. There are many steps employers should take to respond to this societal desire and to eradicate any sexual harassment occurring within their organization. Such steps include, but are not limited to: addressing any potential of harassment by ensuring policies are fair, inclusive, and transparent; generating training programs and bystander prevention under a zero-tolerance standard; taking intentional action in response to incidents; and building a workplace based on mutual respect.⁷⁹

Training in particular proves to be an "obvious vehicle for raising the subject of harassment, expressing disapproval, informing employees of their rights, and

72. Laurie S. Kohn, *#MeToo, Wrongs Against Women, and Restorative Justice*, 28 KAN. J. L. & PUB. POL'Y 561, 568 (2019).

73. *Id.*

74. Pennington, *supra* note 71, at 105.

75. See Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements—And How They're Alike*, TIME (Mar. 22, 2018), <https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/>.

76. *Our Story*, TIME'S UP, <https://timesupnow.org/about/our-story/> (last visited Jan. 5, 2021).

77. *The TIME'S UP Legal Defense Fund*, TIME'S UP, <https://timesupfoundation.org/work/#legal-defense> (last visited Feb. 17, 2021). The Legal Defense Fund helps by connecting victims to attorneys, assisting to pay legal fees and costs, and connecting and paying for victims needing public relations assistance. *Id.*

78. *The TIME'S UP Impact Lab*, TIME'S UP, <https://timesupfoundation.org/work/#impact> (last visited Feb. 17, 2021). The Impact Lab works to create innovative solutions to shift sexual harassment culture, transform the private work sector, improve public policy, and study problems. *Id.*

79. See generally Lauren P. Daley et al., *Sexual Harassment in the Workplace: How Companies Can Prepare, Prevent, Respond, and Transform Their Culture*, CATALYST, https://www.catalyst.org/wp-content/uploads/2019/01/sexual_harassment_in_the_workplace_report.pdf (last visited Feb. 17, 2021).

sensitizing the workforce.”⁸⁰ Notably, New York, Maine, Delaware, and a few other states have created legislation that requires employers to provide sexual harassment training to their employees.⁸¹ These training programs help educate employees to understand the consequences of sexual harassment, make it easier for victims to bring claims, and make it more expensive for employers to litigate claims,⁸² which all work to encourage employers to cultivate well-founded policies and programs as a form of prevention. However, there is currently no federal provision on required training related to sexual harassment in the workplace.⁸³ A lack of federal guidance could be due to the EEOC’s stance that a lot of the training implemented over the last thirty years has focused too heavily on avoiding legal liability rather than prevention,⁸⁴ proving that training alone is an insufficient tool to rid the sports industry of sexual harassment.

Regrettably, few employers have actually implemented the practices that they verbally expressed would be a priority in making their workplace a sexual harassment-free zone.⁸⁵ As a result, while some professional sports teams have made some sort of advancements, many of these self-policing strategies have failed in creating any real progress.⁸⁶ In order to pursue a remedy for a wrong done against them in the workplace, women must also rely on legal claims.

C. *Legal Basis of Claims*

Of course, while society can push for women to obtain a remedy for their mistreatment, there must be a claim under the law. Sexual harassment is a type of discrimination that will violate Title VII.⁸⁷ Sexual harassment can include

80. Susan Bison-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 65–66 (2018).

81. *E.g.*, N.Y. LAB. L. § 209-G (2019); ME. REV. STAT. ANN. tit. 26, § 807(3) (2017); DEL. CODE ANN. tit. 19, § 711A(g). *See generally* Khadija Murad, *Sexual Harassment in the Workplace*, NAT’L CONF. STATE LEGIS., <https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx> (last visited Feb. 17, 2021) (listing state-by-state laws regarding workplace sexual harassment and sexual harassment training).

82. Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS’N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/>.

83. Murad, *supra* note 81.

84. Elizabeth C. Potter, *When Women’s Silence is Reasonable: Reforming the Faragher/Ellerth Defense in the #MeToo Era*, 85 BROOK. L. REV. 603, 621 (2020).

85. Mary Beth Ferrante, *#MeToo Started, Reported Finds Companies Are Not Taking Enough Action*, FORBES (Nov. 13, 2019), <https://www.forbes.com/sites/marybethferrante/2019/11/13/two-years-after-metoo-started-report-finds-companies-are-not-taking-enough-action/?sh=164777145981>.

86. *See id.*

87. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Under Title VII of the Civil Rights Act of 1964, it is considered an unlawful employment practice “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to

“unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁸⁸ Title VII also created the EEOC, which serves as an enforcement body with the duty to eliminate unlawful employment discrimination.⁸⁹ Because of Title VII and the EEOC’s authority, it is clear that the type of sexual harassment experienced by the women employees of the Washington Football Team can be litigated through the EEOC.

Over 14,000 workplace discrimination cases are settled through the EEOC or private settlements each year before the conciliation process even occurs.⁹⁰ Specifically, 692 of the EEOC’s cases involving sexual harassment resulted in settlements in 2019,⁹¹ which are constructed in the form of consent decrees.⁹² Consent decrees contain “quotas that benefit not only actual victims of discrimination, but also members of groups that have been historically discriminated against and might be in the future if current practices are not changed.”⁹³ For example, a settlement can require that “information necessary for ongoing monitoring of defendant’s compliance should be submitted to the Commission on a period basis” or that the defendant must permit the Commission “to inspect or require production of relevant documents and to interview employees, including managers, who may possess relevant

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” *Id.* FACTS ABOUT SEXUAL HARASSMENT, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment> (last visited Feb. 18, 2021). Actions become issues when they explicitly or implicitly affect an “individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.” *Id.*

88. FACTS ABOUT SEXUAL HARASSMENT, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment> (last visited Feb. 18, 2021).

89. 42 U.S.C. § 2000e-4.

90. WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation> (last visited Feb. 18, 2021).

91. CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGED FILED WITH THE EEOC) FY 2010–2019, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> (last visited Feb. 18, 2021). Because 2019 statistics were not available at the time, the year 2018 statistics can highlight the result of the EEOC’s resolutions, which totaled 7,986. *Id.* Of these resolutions, 698 resulted in settlements, 691 were withdrawn with benefits given to the charging party, 1,666 were closed for administrative reasons without a determination based on the merits, and 4,501 were found to not have reasonable cause and therefore do not meet the statutory requirements. *Id.* Thus, 430 charges were found to have reasonable cause, but only 140 were successfully conciliated. *Id.* Out of the 290 charges left as unsuccessful conciliations, the EEOC only filed 41 lawsuits included allegations of sexual harassment. *Id.*

92. SETTLEMENT STANDARDS AND PROCEDURES, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/settlement-standards-and-procedures#section2> (last visited Feb. 18, 2021).

93. 2 Fair Empl. Prac. § 15:177.

information.”⁹⁴ However, criticisms of EEOC consent decrees exist, including a lack of individualization and rarely requiring specific actions that integrate with the employer’s core operations.⁹⁵ Regardless, consent decrees embody a great deal of potential as an injunctive remedy to hold professional sports teams accountable in their regulation of sexual harassment within their organization.

With well-established restoratives—societal movements (#MeToo and #TimesUp) and a legal remedy (sexual harassment claim actionable under Title VII)—it *should* be safe to assume sexual harassment in the workplace has been curbed. However, statistics prove that is not the case. The number of EEOC’s receipts involving sexual harassment claims increased from 2015 to 2019 by over ten percent.⁹⁶ One survey discovered that while reports of being sexually coerced or receiving unwanted sexual attention had slightly decreased between the years before and after the beginning of the #MeToo movement, reports of gender harassment had increased by over fifteen percent.⁹⁷ This survey revealed the theory of a “backlash effect” from #MeToo—although blatant sexual harassment might be less predominant, overall hostility towards women in the workplace has increased.⁹⁸ In other words, sexual harassment is still occurring; it just may not be as obvious since the perpetrators realize the negative repercussions that may follow (a harmed reputation, ruined career, lawsuits, etc.). While it can be argued that the #MeToo movement plays a role in the increase of claims made with the EEOC by encouraging victims to join in and share their stories, it cannot be ignored that, despite efforts of the EEOC each year and the popularity of the #MeToo movement, the number of unlawful sexual harassment incidents occurring in the workplace is not diminishing.

III. CURRENT EFFORTS BY THE TEAMS THEMSELVES & THE EEOC

A. *Internal Solutions by the Teams*

1. Internal Investigations

There are criticisms for the use of internal investigations after allegations arise. For example, one lawyer, speaking about the Mavericks’ internal

94. SETTLEMENT STANDARDS AND PROCEDURES, *supra* note 92.

95. Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U.L. REV. 1519, 1526 (2014).

96. DATA VISUALIZATION: SEXUAL HARASSMENT CHARGE DATA, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/data-visualizations-sexual-harassment-charge-data> (last visited Feb. 14, 2021).

97. Stefanie K. Johnson et al., *Has Sexual Harassment At Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> (defining “gender harassment” as “negative treatment of women that is not necessarily sexual, but may include things like a supervisor or coworker making sexist remarks, telling inappropriate stories, or displaying sexist material”).

98. *Id.*

investigation, expressed that “as a matter of best practices, it was clearly a lapse in judgment to let HR conduct the investigation of these allegations.”⁹⁹ There is an inherent conflict of interest when an organization hires a law firm to investigate, even when the league oversees it.¹⁰⁰ The Mavericks’ attorneys could not be neutral when the same team that compensates them is the one they may need to depict as “engaging in unlawful conduct relating to female employees.”¹⁰¹ The Washington Football Team attempted to reduce bias by allowing the NFL to take over the investigation.¹⁰² However, there is a question of whether the NFL is an unbiased party as well. Lisa Friel is a special counsel for investigations for the NFL and met with the lawyers who represent some of the victims.¹⁰³ Friel’s job, as an employee of the NFL, is to investigate alleged violations of the league’s personal conduct code, which includes domestic violence, sexual assault, extortion, disorderly conduct, and more.¹⁰⁴ Friel’s position was created after the league was criticized for mishandling a domestic violence situation, resulting in the NFL’s declaration to “conduct professional internal investigations that are not designed to please the head office, yet dispel the impression that its biggest stars seem above reproach.”¹⁰⁵ Although it appears that Friel’s position eliminates bias, it is important to note that the NFL does not exist without the teams that comprise it; so when the NFL gets involved in investigations regarding teams in their league, inherent bias must be present. When a team creates a “public relations disaster” that damages the overall reputation of the NFL, an employee of the NFL, like Friel, would be acting in her best interest to protect said reputation.¹⁰⁶ Therefore, because internal investigations inevitably attract bias, there can be no conclusion as to whether such an investigation portrays an accurate report of allegations.

Internal investigations also face structural limitations. Attorneys in private practice lack subpoena power and thus cannot legally compel employees to

99. Luther & Wertheim, *supra* note 53.

100. McCann, *supra* note 49.

101. *Id.*

102. Clarke et al., *supra* note 45.

103. Ken Belson, *N.F.L. Takes Over Sexual Harassment Investigation of Washington Football Team*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/09/01/sports/football/nfl-washington-sexual-harassment-snyder.html>.

104. Dan Berry, *Ex-Prosecutor’s Job: Flag N.F.L. Players*, N.Y. TIMES (Feb. 4, 2016), <https://www.nytimes.com/2016/02/05/sports/football/lisa-friel-ex-prosecutor-finds-plenty-to-do-as-the-nfls-top-investigator.html>.

105. *Id.* The “mishandling” referenced is the NFL’s treatment of Ray Rice, a Baltimore Ravens player at the time, who was caught on tape dragging his unconscious fiancée out of an elevator. The NFL commissioner suspended him for only two games. After more footage was released, he was suspended indefinitely, but the criticism of his two-game “light” suspension had already created outcry from the public.

106. *See also id.*

provide useful evidence like emails, text messages, etc.¹⁰⁷ Likewise, private attorneys cannot require people they speak to during their investigation to be under oath.¹⁰⁸ This proves that the Mavericks 2018 investigation may not have revealed the whole truth.¹⁰⁹ In turn, the Washington Football Team should be wary that an internal investigation might not suffice in creating a valid and accurate report.

In early February 2021, approximately half a year after the Post released its reports, NFL Commissioner Roger Goodell announced that the investigation into the Washington Football Team was nearing completion.¹¹⁰ In response, the American Civil Liberties Union, Futures Without Violence, National Women's Law Center, and the Time's Up Foundation wrote a letter demanding that the NFL release the report to the public in the hopes of full "transparency and accountability."¹¹¹ The letter states: "If the NFL fails to do so, the public and NFL workers will never believe that the League cares about the women who work within their franchises or will actually hold teams and their owners accountable."¹¹² The letter expresses the standpoint that without transparency, the "pervasive and abhorrent" culture of the Washington Football Team will continue to exist unchecked.¹¹³ Another important reason for the report to be published is that it can be a strong litigation tool for victims to sue the Washington Football Team through the EEOC.¹¹⁴ Comparatively, the NBA's report on the Mavericks explicitly substantiates the allegations that executives committed sexual harassment on women employees, allowing for claims against the team to more likely succeed.¹¹⁵

In all, although NFL intervention can be helpful, it is not a lone viable solution for the Washington Football Team to rid itself of its systematic culture of sexual harassment.

2. Sanctions

After a league conducts an internal investigation and releases a condemning report, sanctions follow, either enacted by the league or self-imposed. The goal

107. McCann, *supra* note 49.

108. *Id.*

109. *Id.*

110. Mark Maske, *Beth Wilkinson Close to Completing Washington Football Team Investigation Roger Goodell Says*, WASH. POST (Feb. 4, 2021), https://www.washingtonpost.com/sports/2021/02/04/beth-wilkinson-washington-football-investigation/?itid=sf_sports.

111. *Advocates Call on the NFL Commissioner to Release Final Washington Football Team Investigation Report*, NAT'L WOMEN'S L. CTR. (Feb. 5, 2021), <https://nwlc.org/press-releases/advocates-call-on-nfl-commissioner-to-release-final-washington-football-team-investigation-report/>.

112. *Id.*

113. *Id.*

114. McCann, *supra* note 49.

115. *Id.*

of sanctions is clear: to punish and deter.¹¹⁶ However, these goals are not achieved in the “Big Four.” Time and time again, leagues hand out sanctions against its teams for numerous prohibited actions,¹¹⁷ proving threat of punishment is not effective in deterrence.

Another issue is the quality of the sanctions given. When New Orleans Saints Head Coach Sean Payton was found to be involved in a “bounty program” in 2012, the NFL suspended him for one year without pay.¹¹⁸ In 2012, Sean Payton’s salary was around \$7.5 million.¹¹⁹ While that sanction seems sizable to a normal person, it is a small financial hit to a person with such an incredibly high net worth.¹²⁰ Powerful individuals in the NFL continue to commit prohibited actions because paying a fine does not have a drastic impact their careers or finances. Another example derives from Jerry Richardson, the soon-to-be owner of the Carolina Panthers at the time, who was fined \$2.75 million by the NFL after an investigation led to substantial evidence of workplace misconduct, including sexual harassment.¹²¹ Jerry Richardson’s net worth is \$2 billion.¹²² Additionally, as previously mentioned, the Mavericks donated \$10 million to programs regarding women leadership and domestic violence as a form of sanction from the NBA. Because of the good nature behind a donation, it is difficult to classify one as a sanction. The Mavericks did not lose anything with that “punishment,” but rather gained positive publicity by donating to a worthy cause.

If the NFL finds the investigation to corroborate the sexual harassment allegations against the Washington Football Team and decides sanctions are appropriate, it is unlikely these sanctions will ameliorate the toxic work environment that has been tolerated for years. If the sanctions placed by the

116. Laura Peterson, *Collective Sanctions: Learning From the NFL’s Justifiable Use of Group Punishment*, 14 TEX. REV. ENT. & SPORTS 165, 166 (2013).

117. E.g., Adam Rank, *Biggest Football Punishments*, NAT’L FOOTBALL LEAGUE, <https://www.nfl.com/photos/biggest-football-punishments-09000d5d827a273e> (last visited Feb. 17, 2021).

118. *Id.* A “bounty program” in professional football is a system in which players are paid bonuses for deliberately injuring opposing players during a game. *Saints Bounty Scandal*, ESPN (Feb. 26, 2013), http://www.espn.com/nfl/topics/_/page/new-orleans-saints-bounty-scandal.

119. *Sean Payton*, SPOTRAC, <https://www.spotrac.com/nfl/new-orleans-saints/sean-payton-11361/> (last visited Feb. 18, 2021).

120. *See id.* Sean Payton’s net worth is \$24 million. *Sean Payton Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-athletes/richest-coaches/sean-payton-net-worth/> (last visited Feb. 18, 2021).

121. Austin Knoblauch, *NFL Fines Jerry Richardson \$2.7M After Investigation*, NAT’L FOOTBALL LEAGUE, <https://www.nfl.com/news/nfl-fines-jerry-richardson-2-75m-after-investigation-0ap3000000938897> (last visited on Feb. 18, 2021).

122. *Jerry Richardson Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-businessmen/jerry-richardson-net-worth/#:~:text=Jerry%20Richardson> (last visited on Feb. 18, 2021).

leagues described in the previous examples were effective in deterrence of prohibited conduct, prohibited conduct would not still be occurring or, at the least, would be less frequent. The Washington Football Team is one of the most valuable sports franchises in the world, with an estimated value of \$3.4 billion,¹²³ while Dan Snyder, the owner, has a net worth of \$2.6 billion on his own.¹²⁴ If the NFL chooses to sanction the Washington Football Team or Dan Snyder personally, it is unlikely any monetary amount similar to the ones imposed on Sean Payton, Jerry Richardson, or the Dallas Mavericks would help deter the team or any other professional sports team from engaging in misconduct in the future. In all, while the goal of deterrence of sanctions remains attractive, sanctions do not alone produce constructive results.

B. Settlements

While leagues can enact sanctions on their teams, that does not protect the team or its individuals from legal liability. Women may choose to file a claim with the EEOC when they feel they have been wronged, although many of these claims do not reach court but rather result in settlements.¹²⁵ As previously mentioned, these settlements often include consent decrees to help foster compliance in the future. For the Washington Football Team particularly, settlements have failed to make a positive impact on the team's workplace culture. For example, it was revealed that Dan Snyder was accused of sexual misconduct in 2009, and the Washington Football Team paid the former woman employee \$1.6 million as part of a confidential settlement.¹²⁶ Yet, over the next ten years, numerous more women employees have come forward with similar allegations against the team, proving the ineffectiveness of the prior settlement in deterrence. Since the 2009 settlement involving Dan Snyder was confidential,¹²⁷ it is unclear whether that settlement included a consent decree. However, considering the multitude of accusations that followed, either there were no compliance provisions or enforcement was lax. If the Washington Football Team settles any of the claims likely to arise from the current situation,

123. Jeff Clabaugh, *Washington Football Team's Value Climbs By \$300M in Annual Rankings*, WTOP NEWS (Aug. 3, 2020), <https://wtop.com/business-finance/2020/08/the-washington-football-team-value-climbs-by-300m>.

124. #327 *Dan Snyder*, FORBES (Feb. 18, 2021), <https://www.forbes.com/profile/dan-snyder/?sh=579094c6b193>.

125. See WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION, *supra* note 90.

126. Will Hobson et al., *Washington Football Team Settled Sexual Misconduct Claim Against Daniel Snyder for \$1.6 Million*, WASH. POST (Dec. 22, 2020), https://www.washingtonpost.com/sports/daniel-snyder-sexual-misconduct-settlement/2020/12/22/f81131d8-4339-11eb-a277-49a6d1f9dff1_story.html.

127. Will Hobson, *NFL Probe of Harassment at Washington Football Team Should Be Made Public; Activists Say*, WASH. POST (Feb. 5, 2021), <https://www.washingtonpost.com/sports/2021/02/05/nfl-washington-football-investigation-public/>.

these settlements will not play any purposeful role in bettering the toxic culture of mistreating women within the organization, especially with an absence of an intricate consent decree.

C. *Additional Initiatives to be Considered by Professional Sports Teams*

1. Preventative Measures: The *Faragher-Ellerth* Affirmative Defense

One potential solution is preventative in nature—enacting well-drafted anti-harassment policies and complaint procedures. This concept is highlighted in the *Faragher-Ellerth* framework, which operates as an affirmative defense for an employer involved in a sexual harassment case.¹²⁸ The employer may assert the defense that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹²⁹ But this is not a “get-out-of-jail-free card” for employers facing claims; it simply acts as a safeguard for employers who took the reasonable steps to remedy sexual harassment but were not notified of the harassment with enough time to do anything about it.¹³⁰ The *Faragher-Ellerth* defense serves as a tool to encourage Title VII’s intention of forethought by employers in order to prevent sexual harassment from occurring in the first place.¹³¹

Courts vary on their analysis of the first prong of the defense—that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.¹³² The Eleventh Circuit has held that an employer must show that its “sexual harassment policy was effectively published, that it contained reasonable complaint procedures, and that it contained no other fatal defect.”¹³³ The Eighth Circuit has determined that when there are multiple individuals whom harassment could be reported to and the policy is disseminated to all employees, the first prong is met, even when no training or counseling is supplied by the employer in regard to sexual harassment.¹³⁴ The Seventh Circuit has held that a policy that did not provide a specific reporting avenue but instead permitted employees to report how they feel most

128. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C.L. REV. 859, 879 (2008); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

129. See sources cited *supra* note 128.

130. See *id.*

131. See *Ellerth*, 524 U.S. at 764.

132. See Matthew D. Venuti, *Modernizing the Workplace: The Third Circuit Puts the Faragher-Ellerth Affirmative Defense in Context*, 64 VILL. L. REV. 535, 546–50 (2019).

133. *Frederick v. Sprint/United Mgmt.*, 246 F.3d 1305, 1314 (11th Cir. 2001).

134. *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007).

comfortable was sufficient to satisfy the first prong as well.¹³⁵ In summary, courts often conclude that an employer acted reasonably when it has distributed a written sexual harassment policy to employees but differ on what makes such a policy adequate, with some standards much lower than others.¹³⁶

The second prong of the defense is that the employee victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. There is a trend of courts refusing to consider context when making determinations about a victim's reasonableness in delay of reporting.¹³⁷ In the case *Walton v. Johnson & Johnson*, the Eleventh Circuit did not consider the victim's fear in context as a reason for her three-month delay in complaining because there was not a "credible threat of retaliation," thus disregarding the victim's allegations of forcible rape and gun-brandishing as a source of her fear.¹³⁸ A non-contextual approach to evaluating fear makes a failure to complain automatically "unreasonable,"¹³⁹ therefore blaming the victim for not speaking up. Fortunately, the Third Circuit has adopted an approach that expands the reasonableness inquiry, making it less time-stringent and more consistent with the policy underlying Title VII.¹⁴⁰ This approach takes into account "the employee's fear of retaliation, confidentiality, harm, impairment of career prospects, blame for the supervisor's conduct, and even the financial distress that may result from the employee losing their job."¹⁴¹ This more contextual and flexible standard prevents women who have delayed their reporting, for whatever reason applicable to their situation, from being automatically blocked from relief based on any arbitrary time constraint.

135. *Hardy v. Univ. of Ill. at Chi.*, 328 F.3d 361, 365 (7th Cir. 2003).

136. *See Venuti, supra* note 132, at 546–47.

137. *Brake & Grossman, supra* note 128, at 883. *See also Reed v. MBNA Mktg. Sys., Inc.*, 231 F. Supp. 2d 363, 367, 375 (D. Me. 2002) (holding that the plaintiffs failure to complain was unreasonable even though her harassing supervisor told her not to tell anyone and threatened that his father was "good friends with the owner" of the company they worked for); *Dennis v. Nevada*, 282 F. Supp. 2d 1177, 1180, 1185 (D. Nev. 2003) (holding plaintiff was unreasonable for failing to complain even though she expressed that she "did not want to jeopardize completing the probationary period successfully"); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000) (expressing expectation that the plaintiff should complain even before realizing the misconduct would recur and escalate).

138. *Walton v. Johnson & Johnson Serv.*, 347 F.3d 1272, 1290–91 (11th Cir. 2003) (refusing to allow a three-month delay to be considered reasonable because the harasser never told the plaintiff "her job was in jeopardy" nor "threaten her with physical harm").

139. *Brake & Grossman, supra* note 128, at 883.

140. *See Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 314 (3rd Cir. 2018).

141. *Venuti, supra* note 132, at 566.

The NFL has a policy that strictly prohibits employment discrimination based on sex.¹⁴² In its personal conduct policy, the NFL prohibits unlawful discrimination based on an individual's race, color, religion, sex, national origin, age, disability, or sexual orientation.¹⁴³ While the NFL may have policies in place, policies are needed at the team-level to be useful in litigation since the teams are independently owned, reflecting the NFL's lack of control over the teams in its league.¹⁴⁴ The Washington Football Team's code of conduct forbids "unwelcome or unsolicited sexual advances" and conduct that "creates an intimidating, hostile or offensive working environment."¹⁴⁵ Nevertheless, it can be safely concluded from the numerous allegations against the Washington Football Team that these policies are aimless and not strictly enforced. A court should dive deep into the details and compliance procedures of a team's policies and not allow the mere existence of a policy to suffice. A sexual harassment policy that "exist[s] only on paper" should not be enough.¹⁴⁶ Therefore, the Washington Football Team should not be afforded the *Faragher-Ellerth* defense if it faces claims in court in the future.

That is not to say the *Faragher-Ellerth* defense should never be available to professional sports teams; instead, it should only be available to teams who have created effective preventative policies that work to cleanse the organization of any traces of a toxic culture. After the release of the Mavericks' condemning report in 2018, the team initiated a more formal reporting process, regular anonymous employee surveys, expansion of the human resource department, workplace training programs, and a confidential hotline for employees to share concerns.¹⁴⁷ These are in addition to the NBA's compliance requirements mentioned above. It is likely that these initiatives increase the Mavericks' chance to successfully utilize the *Faragher-Ellerth* affirmative defense in case of future infractions. For the Washington Football Team, on the other hand, Snyder has been quoted to vow that after completion of the investigation, the team "will institute new policies and procedures and strengthen [the] human resources infrastructure to not only avoid these issues in the future but most importantly

142. Francine Eichhorn, *How the NFL "Protects" Cheerleaders with Discriminatory Policies*, 34 ABA J. LAB. & EMP. L. 289, 292 (2020).

143. Ken Belson, *How an Instagram Post Led to an N.F.L. Cheerleader's Discrimination Case*, N.Y. TIMES (Mar. 25, 2018), <https://www.nytimes.com/2018/03/25/sports/saints-cheerleader.html#:~:text=Davis>.

144. *See id.*

145. Hobson et al., *supra* note 31.

146. *Id.*

147. Molly Evans, *Investigations Into Dallas Mavericks Reveals Sexual Misconduct Over 20 Years*, NAT'L PUB. RADIO (Sept. 19, 2018), <https://www.npr.org/2018/09/19/649615551/investigation-into-dallas-mavericks-reveals-sexual-misconduct-over-20-years>.

creat[e] a team culture that is respectful and inclusive of all.”¹⁴⁸ It is likely the NFL will demand compliance to certain requirements as the NBA did for the Mavericks, in addition to self-imposed implementations by the team itself; that is, if Snyder was being sincere with his motives for change. While these new potential initiatives cannot shield the Washington Football Team from liability from past instances, the team may be able to take advantage of the defense in the future. Still, it is important to keep in mind that the intention of the *Faragher-Ellerth* defense is to protect victims by encouraging employers to improve their policies, not to save the employers after the fact.

2. Human Resource Departments

Human Resource (“HR”) departments also have potential to play a powerful role. For example, former Mavericks employees stated that the “team’s HR office [was] part of the problem.”¹⁴⁹ They explained that the HR office was one that created “a chilling effect on the willingness to approach [them] with sensitive workplace issues.”¹⁵⁰ An HR department is only effective if it is run rightfully—a task even a huge organization like the Dallas Mavericks could not do. The Washington Football Team struggles with an effective HR department as well, which was presented as one of the many issues that cultivated the sexual harassment allegations. At one point, the Washington Football Team’s HR department consisted of merely one employee in charge of handling 220 other employees.¹⁵¹ This lone HR staffer reported directly to the team’s Chief Financial Officer at the time, Stephen Choi, who has been known to disregard sexual harassment claims he was advised of.¹⁵² In response to the sexual harassment reports by the Post, the team hired a new Chief People Officer to oversee the human resource department, created a “whistleblower hotline for employees,” and implemented a transparency policy regarding communication with employees.¹⁵³ It is yet to be determined if these new initiatives will make a difference in the team’s hostile culture.

On the other hand, there has been a trend of companies forgoing HR departments in their entirety, revealing that having such a department may be

148. *Washington NFL Dan Snyder Vows Culture Change Amid Allegations*, ESPN (July 17, 2020), https://www.espn.com/nfl/story/_/id/29481774/washington-nfl-owner-dan-snyder-vows-culture-change-amid-allegations.

149. Wertheim & Luther, *supra* note 48.

150. *Id.*

151. John Keim, *Washington Football Team Hires Chief People Officer for HR Department*, ESPN (Nov. 9, 2020), https://www.espn.com/nfl/story/_/id/30284764/washington-football-team-hires-chief-people-officer-hr-department.

152. Hobson et al., *supra* note 31.

153. Keim, *supra* note 151.

more arbitrary than effective in some cases.¹⁵⁴ Therefore, the Washington Football Team may need to start from scratch by ridding itself of its current ineffective HR department and re-building the organization with non-hierarchical principles to foster autonomy.¹⁵⁵ This way, high-ranked employees cannot just fall back on HR to manage any issue complained about them, but instead must avoid engaging in wrongful conduct in the first place.¹⁵⁶ Naturally, with no HR department, there is more of a chance for liability, so the Washington Football Team must weigh these risks against one another: re-build the organization to foster equality but risk harassment inevitably occurring with no protections in place or continue with the current HR department, while making some improvements, and hope courts find they have placed effective enough policies to be afforded the *Faragher-Ellerth* defense and avoid liability.

IV. SOLUTIONS

The concern is clear: once the Washington Football Team is sanctioned by the NFL, settles any claims with the EEOC, and declares the wrongs are “remedied” in a hope of any public relations nightmare to disappear, the underlying issue of sexual harassment occurring in the Team’s office will not vanish but inevitably continue to occur. The current solutions, internal investigations followed by sanctions from the league and EEOC settlements with mediocre consent decrees, do not create any change, but rather create a vicious circle—an act of sexual harassment, sanction by the league, EEOC settlement, and repeat. In order to terminate the cycle, changes must be made from a legal standpoint, both preventive and punitive in nature.

First, the *Faragher-Ellerth* defense standard should be raised. Courts should require a more extensive showing that an employer exercised reasonable care to prevent and promptly correct any sexual harassment behavior. The fact that an employer merely possesses an anti-sexual harassment policy should not suffice; rather, implementation, enforcement, and education of such policy should be more relevant in a court’s analysis. Additionally, courts should be more lenient towards the time constraint of when an employee chooses to report, similar to the Third Circuit’s approach. By looking at victims’ fears in context, women are more likely to be seen as acting reasonably in their delay. Courts should be able to rely on both a broader array of factors and the context of the victim’s situation

154. Lauren Weber & Rachel Feintzeig, *Companies Say No to Having an HR Department*, WALL ST. J. (Apr. 9, 2014), <https://www.wsj.com/articles/SB10001424052702304819004579489603299910562>. Some top executives believe a traditional human resource department “stifles innovation and bogs down businesses with inefficient policies and processes.” *Id.* Craig Ruppert, the CEO of Ruppert Landscape Inc., a company with 900 employees and no HR department, believes that a “decentralized structure fosters autonomy and accountability among leaders across the company.” *Id.*

155. *See id.*

156. *See id.*

when analyzing whether the employer is afforded the *Faragher-Ellerth* defense and thus stripping the victim of potential relief.¹⁵⁷ These standards would better align with the underlying policy of Title VII by forcing professional sports teams to improve their current sexual harassment policies before the defense can be available. With higher quality drafted and implemented anti-harassment policies and complaint procedures, the frequency of sexual harassment occurrences should decrease by cleansing these teams of toxic cultures. Not only should teams improve their policies, but they should also improve their HR departments to ensure compliance with the updated policies. It is important that teams take preventative measures against sexual harassment and not strictly rely on internal investigations and sanctions after the fact.

Second, punishments for sexual harassment within the workplace of a professional sports team should be heightened. Sanctions by the league are not enough to deter future misconduct or encourage a team to strengthen its sexual harassment policy. Although there are certain limitations to the control of leagues over their teams, the leagues need to regulate their teams more actively by not only enacting monetary sanctions but also enacting suspensions to participation and compliance orders. Additionally, the EEOC should heighten the requirements of its consent decrees as part of settlements. These consent decrees need to include more than merely requiring an anti-harassment training program, which have been argued to be simply “‘symbolic gestures’ whose efficacy has little empirical support,”¹⁵⁸ and require more specific and individually tailored solutions to the team and its culture. Treating women equally and respectfully in the workplace should not be a compliance task, but rather a cultural attitude in the company. By requiring compliance through consent decrees for a longer period of time and more stringently, there is a higher chance for a team to blend that compliance into its company culture long-term.

CONCLUSION

The Washington Football Team’s toxic and pervasive culture is a prime example of the need for more invasiveness from a legal standpoint into the workplace of the professional sports industry. After the hopeful public release

157. Potter, *supra* note 84, at 627. (listing factors like the existence of an anti-harassment policy detailing a multifaceted complaint procedure, and the dissemination of this policy such that employees have actual notice of their rights, the existence of sexual harassment training or other educational efforts, the extent of employer’s leadership and management to actively promote a respectful, harassment-free workplace; the occurrence of other incidents of harassment both in that particular workplace and across the employer’s locations; and the employer’s response to past complaints of harassment).

158. Schlanger & Kim, *supra* note 95, at 1586 (citing Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 6, 29 (2001)).

of the report following the Washington Football Team's investigation, many steps should be taken: (1) specific and detailed sanctions on the team placed by the NFL, including monetary sanctions, suspensions, and compliance orders; (2) re-drafting of anti-harassment policies and complaint procedures, including training and enforcement standards for such policies by the team; (3) re-evaluation of the human resource department; and (4) if claims are brought to the EEOC, individualized and involved consent decrees implemented and enforced by the EEOC. The Washington Football Team needs to implement each of these initiatives to launch the restructuring of its toxic and pervasive culture.

Male domination is no longer an excuse for mistreatment of women in the workplace of professional sports teams. Women play a vital role in the success of each sports organization and deserve to be treated the same as men in those same positions. There is no flip we can switch to end sexual harassment overnight, but there are strides to be taken to make professional sports teams, specifically the Washington Football Team, a workplace cultivated *not* with inequality and intimidation, but instead with respect and accountability for all employees.

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