#METOO AND THE COURTS: AN ANALYSIS OF THE MOVEMENT'S EFFECT ON WORKPLACE SEXUAL HARASSMENT LAW

Natalie Pedersen and Christine Cross

ABSTRACT

In late 2017, the #MeToo Movement transformed the way we talk about sexual harassment and assault in the United States. In its wake, state legislatures have enacted laws to better protect victims, including those who have suffered workplace sexual harassment. While scholars have examined these legislative changes, this is the first article to look at the effect of the Movement on the judiciary. Specifically, we find that while a few courts have referenced the Movement by name in their decisions, only one, the Third Circuit in *Minarsky v. Susquehanna City*, actually acknowledged the fact that the realities of what was learned through the Movement should affect how judges approach sexual harassment cases. This Article examines the #MeToo Movement, both legislative and judicial changes flowing from it, and the path forward from here.

I. INTRODUCTION

The #MeToo Movement has garnered significant media attention, helping to transform the way both men and women talk about sexual assault and harassment. The Movement has also sparked changes in the law surrounding these topics. While some scholars have reviewed and discussed the legislative changes brought about by the #MeToo Movement,[1] few have looked at the impact the Movement has had on United States courts. This paper does precisely that. First, we review the origins of the Movement, then examine its effects on the law, particularly (though not exclusively) of workplace sexual harassment. The paper discusses both state and federal legislative changes that have been made; however, the primary focus of this article is on the courts. Specifically, we examine how the Movement has shaped the way courts think about and rule on workplace harassment issues pertaining to victim reasonableness in delayed reporting. Finally, the paper offers some projections and suggestions for the ways in which the Movement should continue to shape the law in years to come.

1. *See generally* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement,* 103 MINN. L. REV. 229 (2018). *See also* L. Camille L. Hebert, *Is Me Too Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 324 (2018) (discussing, in part, potential changes the movement could have on courts).

II. THE #METOO MOVEMENT BACKGROUND

A. *#MeToo 2006 and 2017*

There are two key moments in the #MeToo Movement that sparked the revolution that we know today: the Movement's creation and when it became universally known. In 2006, Tarana Burke,[2] a civil rights activist from the Bronx, New York, started the #MeToo Movement.[3] She created the Movement with "young Black women and girls in low wealth communities," beginning the discussion on sexual violence.[4] Though sexual violence unfortunately affects many, it was a topic that was rarely, if ever, discussed prior to this Movement. The core of the #MeToo Movement was empowerment, focusing on a healing process for the victims, creating advocates from survivors, and working on solutions to sexual violence in order to ensure fewer victims in the future.[5] There are many reasons why the Movement began to spread, including discussions on Black Twitter[6] and in Ebony Magazine,[7] but this Movement did not become universally known until Alyssa Milano, an American actress, singer, producer, author, and activist, tweeted about it in 2017.[8]

During the well-publicized investigation of Hollywood producer Harvey Weinstein,[9] Milano felt there was far too much focus on the man who committed the crime and not enough attention on the survivors.[10] Milano tweeted, "If you've been sexually harassed or assaulted, write '#metoo' as a reply to this tweet."[11] The

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2. *See* Meredith Worthen, *Tarana Burke,* BIOGRAPHY, https://www.biography.com/activist/tarana-burke (last updated Jan. 26, 2021).

3. *Id.*

4. *How We Do the Work: Supporting Survivor Healing and Community-Based Action to Interrupt Sexual Violence*, ME TOO, https://metoomvmt.org/get-to-know-us/vision-theory-of-change/ (last visited Feb. 19, 2021).

5. *Id.*

6. Black Twitter is a group of predominantly Black Twitter users from around the world that focus on issues prevalent to the Black community. See Donovan X. Ramsay, *The Truth About Black Twitter*, ATLANTIC (Apr. 10, 2015) https://www.theatlantic.com/technology/archive/2015/04/the-truth-about-black-twitter/390120/, for a discussion on Black Twitter.

7. *See A Black Woman Created the "Me Too' Campaign Against Sexual Assault 10 Years* Ago, EBONY MAG. (Oct. 18, 2017), https://www.ebony.com/news/black-woman-me-too-movement-tarana-burke-alyssa-milano; *accord* Abby Ohlheiser, *The Woman Behind "Me Too" Knew the Power of the Phrase When She Created it – 10 Years Ago*, WASH. POST (OCT. 19, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/?utm_term=.e357fdf087bf.

8. Nadja Sayej, *Alyssa Milano on the #MeToo Movement: 'We're Not Going to Stand for it Any More,'* GUARDIAN (Dec. 01, 2017, 7:00 AM), https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse.

9. As of March 2020, Weinstein was convicted and sentenced to 23 years in prison for rape and sexual assault. Many believe that the length of his sentence is a representation of how successful the #MeToo movement has been. For example, see Nisha Varia, *Weinstein Rape Sentence in US Boosts #MeToo Movement*, HUM. RTS. WATCH (Mar. 12, 2020, 12:09 PM), https://www.hrw.org/news/2020/03/12/weinstein-rape-sentence-us-boosts-metoo-movement.

10. Sayej*, supra* note 8.

11. *Id.*

response was overwhelming, and the shock waves are still inspiring change in society today. Milano had accumulated over 55,000 replies while the hashtag started trending on Twitter, and since then, #MeToo has had an impact both nationally and globally.[12] In the forty-five days following Milano's initial tweet, the hashtag was active in eighty-five countries on Twitter and posted over eighty-five million times on Facebook, with many famous women posting about their experiences within their industry.[13] Some notable women who have publicly disclosed and discussed their experiences of sexual harassment or assault since Milano's 2017 Twitter post include, "Uma Thurman, Björk, Sheryl Crow, Lady Gaga, Molly Ringwald and Ilana Glazer."[14]

After this initial wave of support for the #MeToo Movement, more men and women came forward accusing others of sexual harassment. The increased reporting underscored just how common sexual harassment is and how victims' previous silence was cultivated by society. The broken silence was deafening.

Though some industries were exposed more than others, the #MeToo Movement encouraged women and men from all industries, backgrounds, nationalities, and socioeconomic statuses to share their story. Waking up and seeing a news story about #MeToo became commonplace. Logging into any sort of social media without seeing the hashtag became nearly impossible. In fact, #MeToo was used in social media posts roughly, "42 billion times and was mentioned 4 million times in 2019 across social media and news sites."[15] There was also a surge in #MeToo social media posts in correlation with news events.[16]

B. *Time's Up*

#MeToo inspired changes across industries as companies became increasingly aware not only of the prevalence of sexual misconduct, but also the damage such allegations could do to their reputations. The entertainment industry had a particularly high percentage of #MeToo allegations and, in response, many women in Hollywood began working together to create Time's Up.[17] Time's Up is a Movement fueled by the outrage of all the women and men sharing #MeToo stories.[18] It was started in January 2018 by three hundred prominent actresses and female agents, writers, directors, producers and entertainment executives with one overarching goal: to stop systemic sexual harassment not only in Hollywood, but also in blue-collar workplaces nationwide.[19] Some of these women include:

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12. *Id.*

13. *Id.*

14. *Id.*

15. Tom Hals, *Weinstein Trial Revives #MeToo, a Hashtag with Movement's Longevity*, REUTERS (Feb. 3, 2020, 6:05 AM), https://www.reuters.com/article/us-people-harvey-weinstein-metoo/weinstein-trial-revives-metoo-a-hashtag-with-movements-longevity-idUSKBN1ZX1CG.

16. *Id.*

17. *See* Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html.

18. *Id.*

19. *Id.*

> Ashley Judd, Eva Longoria, America Ferrera, Natalie Portman, Rashida Jones, Emma Stone, Kerry Washington and Reese Witherspoon; the showrunner Jill Soloway; Donna Langley, chairwoman of Universal Pictures; the lawyers Nina L. Shaw and Tina Tchen, who served as Michelle Obama's chief of staff; and Maria Eitel, an expert in corporate responsibility who is co-chairwoman of the Nike Foundation.[20]

There were several main initiatives behind this Movement, including:

(1) A legal defense fund, backed by $13 million in donations, to help less privileged women (like janitors, nurses and workers at farms, factories, restaurants and hotels) protect themselves from sexual misconduct and the fallout from reporting it;
(2) Legislation to penalize companies that tolerate persistent harassment, and to discourage the use of nondisclosure agreements to silence victims; and
(3) A drive to reach gender parity at studios and talent agencies.[21]

Time's Up was also created to help address one of the main criticisms of the #MeToo Movement – that it only focused on famous women and men while overlooking the average working-class person.[22] According to its mission statement, the goal of Time's Up is to work toward "safe, fair, and dignified work for women of all kinds."[23] The focus is on "women from the factory floor to the Stock Exchange, from child care centers to [corporate offices], from farm fields to tech fields, to be united by a shared sense of safety, fairness and dignity as they work and as we all shift the paradigm of workplace culture."[24]

Time's Up also works to bring awareness to the varied demographics of women who reach out to the organization for support, putting faces to stories of sexual harassment and assault and drawing more attention to important issues.[25] For example, the age range for those who have contacted the organization is as follows: 40% are ages 18-39, 56% are ages 40-64, and 3% are ages 65 and up.[26] For Race and National Origin: 6.4% are Asian or Pacific Islander, 17.7% are Black, 8.7% are Latinx, 3.5% are Native American, and 59.2% are White.[27] This variety of demographics is a powerful reminder of the breadth and reach of sexual harassment. Further, giving more credence to Tarana Burke's original inspiration, 67% of the men and women that contact the Time's Up organization identified as

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20. *Id*.
21. *Id.*
22. *Id.*
23. *About*, TIME'S UP, https://timesupnow.org/about/ (last visited Oct. 1, 2021).
24. *TIME'S UP™ Announces Lisa Borders as First-Ever President and CEO*, PR NEWSWIRE (Oct. 02, 2018, 10:03 PM), https://www.prnewswire.com/news-releases/times-up-announces-lisa-borders-as-first-ever-president-and-ceo-300722749.html.
25. *See Together, We're Changing Tomorrow: 19 Annual Report*, TIME'S UP, https://timesupfoundation.org/wp-content/uploads/2020/04/2019-TULDF-Annual-Report-Final.pdf (last visited Feb. 20, 2021).
26. *Id.* at 7.
27. *Id.* at 6.

low-income individuals.[28] Time's Up also looks at what industries are being affected by the Movement the most.[29] By far, the industry with the most employees reporting harassment to the Time's Up organization is Arts and Entertainment.[30] Workers in the food services industry and the health care industry are also frequent reporters.[31]

C. *Critiques of the #MeToo Movement*

While many view the #MeToo Movement as giving a voice to those who have been traditionally silenced, the Movement is not without its critics. In particular, two main critiques have been made: the Movement harms innocent men who have been falsely accused, and the Movement overlooks more blue-collar women and focuses on only celebrities.[32] It is also possible to criticize the Movement for disproportionately focusing on the accused at the expense of those who have been harassed.

An article written during the hearings for Supreme Court Justice (then nominee) Brett Kavanaugh in September of 2018[33] noted that there are many who claimed that the #MeToo Movement is "anti-men" and "(t)here is no due process" because an innocent man accused publicly will never be able to remove the stain from his reputation.[34] Essentially, some believe that the harm done to the wrongfully accused is irreversible. Others argue that this Movement is so important that the possibility of a few innocent men being injured does not outweigh those men who never would have been rightfully accused without the momentum of this Movement.[35]

The criticism that the #MeToo Movement is only for the famous women who have a platform is an understandable perception. Fear of retaliation complicates the realities of everyday women in the workforce joining the #MeToo Movement, given their dependence on their jobs.

While there may be some credence to the argument that #MeToo Movement focuses too much on the accused, this seems to be confusing the attention that those accused receive with positive publicity. This is not the case. For example, although Harvey Weinstein has been mentioned in over 15,000 articles, he has suffered immeasurable reputational harm and will live in infamy.

No matter one's perspective on the #MeToo Movement, it is indisputable that this Movement changed the perception of sexual assault and harassment in our society. The Movement has affected everything from business practices to how

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28. *Id.* at 7.

29. *Id.* at 6.

30. *Id*.

31. *Id.*

32. Lisa Boothe, *Judge Kavanaugh and the Weaponization of #MeToo*, THE HILL (Sept. 25, 2018), https://thehill.com/opinion/judiciary/408302-judge-kavanaugh-and-the-weaponization-of-me too.

33. This hearing took place before Brett Kavanaugh became a Supreme Court Justice, when he was accused of sexually harassing Christine Blasey Ford, Deborah Ramirez, and Julie Swetnick.

34. Boothe, *supra* note 33.

35. *Id.*

some courts review workplace sexual harassment cases. For example, Former Equal Employment Opportunity Commissioner and current Chair, Charlotte Burrows, claims that the #MeToo Movement has made some judges more willing to understand why some sexual harassment victims do not immediately come forward, which is a notable deviation from how courts traditionally view these cases.[36] This development will be discussed in more detail in Section IV. Next, we will discuss the status of sexual harassment law in the United States in order to give an understanding of what legal changes the #MeToo Movement has encouraged and what still needs to be done.

III. WORKPLACE SEXUAL HARASSMENT LAW

A. *Overview*

The most comprehensive federal protection against discrimination in the workplace was created by Title VII of the Civil Rights Act of 1964.[37] Section 703(a)(1) of the Civil Rights Act of 1964 states:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;[38]

Though the Civil Rights Act of 1964 was primarily a response to racial tensions in the United States, Congress included sex in the act as a last-ditch effort by Congressman Howard Smith to defeat the bill.[39] This did not work and the bill was passed with sex included as a protected characteristic, paving the way towards a more equal workforce for women.[40]

Originally, even though sex was included as a protected characteristic, sexual harassment was not considered to be illegal under Title VII. In *Meritor v. Vinson*,[41] the Supreme Court made clear that harassment was included within the workplace evils Congress intended to eradicate with the passage of the Civil Rights Act of 1964.[42] Specifically, the Court noted that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire

36. Chris Opfer, *Judges Shifting View on Victim Silence in #MeToo Cases*, BLOOMBERG LAW (Nov. 28, 2018, 2:56 PM), https://news.bloomberglaw.com/daily-labor-report/judges-shifting-view-on-victim-silence-in-metoo-cases.

37. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000(e)(2) (1964). It is important to note that, although this section of this article will be focused on federal law, employees could have greater protections at either the state or local level.

38. *Id.*

39. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

40. *Id.*

41. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-69 (1986).

42. *Id.* at 65.

spectrum of disparate treatment of men and women' in employment," including harassment that is so severe and pervasive it essentially changes the conditions of work for an employee.[43]

B. *Hostile Work Environment and Quid Pro Quo Claims*

In recognizing so-called hostile work environment claims, the court in *Meritor* also distinguished these claims from another type of sexual harassment – *quid pro quo*.[44] A *quid pro quo* (or tangible employment action) claim arises when an employee or a prospective employee is forced to choose between an employment detriment or submitting to sexual demands.[45] For a plaintiff to be successful under a *quid pro quo* claim, the plaintiff must show:

(1) She is a member of a protected class[46]
(2) She was the subject of unwanted sexual advances or a request for sexual favors
(3) The unwelcome harassment and/or advances were based on sex
(4) That submission to the unwelcome advance was an express or implied condition for receiving job benefits or that the refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and
(5) That the employer was responsible for the supervisor's conduct.[47]

If there is a proven *quid pro quo* claim against an employer, there is no way for an employer to shield themselves from liability.[48]

The more common claim under Title VII is the hostile work environment claim. To be successful under a hostile work environment claim, a plaintiff must first show a *prima facie* case:

(1) that she belongs to a protected group;
(2) that she was the subject of unwelcome sexual harassment;
(3) that the harassment was based on sex;
(4) the harassment was sufficiently persuasive to affect a term, condition or privilege of employment; and
(5) that employer knew, or should have known about the harassment and failed to take prompt, corrective action.[49]

Originally, courts interpreted both of these claims to be available only to members of the opposite sex; however, the Supreme Court extended sexual harassment

43. *Id.* at 64.
44. *Id.* at 65.
45. For an example of *quid pro quo* sexual harassment, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749 (1998), which will be discussed in more detail later.
46. For the purpose of laying out the law, this article will use "she," however, it is certainly possible for a man to be subjected to sexual harassment as well.
47. 29 C.F.R. § 1604.11(a)(1)-(2) (2002); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296 (3d. Cir. 1997).
48. *See Meritor Sav. Bank*, 477 U.S. at 70-71.
49. 29 C.F.R. § 1604.11(a)(3).

claims to same-sex sexual harassment in the case *Oncale v. Sundowner Offshore Services, Inc.*[50]

Though the Supreme Court held there would be no defense for an employer in a *quid pro quo* sexual harassment case, the Court did make an affirmative defense available to employers facing a hostile work environment claim. This defense, well-known as the Faragher/Ellerth Defense, originated from two cases, *Faragher v. City of Boca Raton*[51] and *Burlington Indus., Inc. v. Ellerth.*[52] The defense requires that when a supervisor creates a sexually hostile work environment and there is no tangible employment action, the employer can avoid liability by:

> (1) Showing it took reasonable care to prevent and correct promptly any sexually harassing behavior; and
> (2) The plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[53]

This defense provides employers with a large safety net to avoid liability because courts have traditionally permitted employers to satisfy the first prong of the defense by merely maintaining an anti-sexual harassment policy.[54] This makes the test so favorable for employers that it weakens a plaintiff's ability to recover from a hostile work environment if one of the two prongs of the test are met (despite the fact that the test is formulated as an "and" and not an "or"). Additionally, under the second prong, it has become a nearly impossible hurdle to overcome if the plaintiff failed or waited too long to report the incident of sexual harassment to the employer.

IV. METOO MOVEMENT'S EFFECT ON THE CASELAW

These hurdles have been significantly reduced in at least one circuit thanks, in no small part, to the #MeToo Movement. In a 2018 opinion, *Minarsky v. Susquehanna City*,[55] the Third Circuit drew on the lessons learned from the #MeToo Movement to refine the *Faragher*/*Ellerth* analysis. *Minarsky* involved a claim of hostile work environment by the long-term secretary of the Director of Susquehanna County's Department of Veteran Affairs, Thomas Yadlosky.[56] Minarksy worked in a building where he was often alone with Yadlosky. Minarsky alleged that soon after she started working at the Department of Veteran Affairs,

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50. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79-82 (1998).
51. Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).
52. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
53. *Faragher,* 524 U.S. at 807.
54. Tippett, *supra* note 1, at 240-41*; see also* Ann M. Henry, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 CHI. U. LEGAL F. 553, 556; Deborah L. Rhode, *#MeToo: Why Now What Next?*, 69 DUKE L .J. 377, 386 (2019).
55. Minarsky v. Susquehanna City, 895 F.3d 303, 303 (3d. Cir. 2018).
56. *Id*. at 306.

Yadlosky began to harass her.[57] The harassment included physically pulling her into him and massaging her shoulders.[58] As time passed, the harassment intensified and even though she jokingly told Yadlosky to stop, he did not.[59] Minarsky was aware that Yadlosky had been reprimanded at least once for sexual harassment of another employee, but that he never faced any consequences for it.[60] Minarsky was harassed frequently by Yadlosky over a course of four years and never reported it, even though the company's anti-harassment policy specified reporting mechanisms for harassment.[61] She eventually confided in a co-worker about the harassment and that co-worker's supervisor reported the harassment to Sylvia Beamer, the Chief County Clerk.[62] Yadlosky was then fired.[63]

Minarsky eventually sued the County for sexual harassment and her hostile work environment claim was dismissed on summary judgment.[64] She appealed to the United States Court of Appeals for the Third Circuit, arguing the District Court erred in finding the County had met both elements of the *Faragher/Ellerth* defense.[65]

In its opinion granting summary judgment on her hostile work environment claim, the District Court specifically focused on Minarsky's failure to report the harassment under the terms of the County's anti-harassment policy.[66] The District Court specifically found that "[T]he County's reasonable policies and responses are set in stark contrast to plaintiff's refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of county officials."[67] The District Court cited case law holding that a long failure to report misconduct, when a policy exists to report such misconduct, is unreasonable as a matter of law.[68] The District Court also noted that sometimes fear of retaliation may justify failure to report harassing conduct, but did not find that to be the case here and deemed any concerns Minarksy had about retaliation to be unfounded.[69]

The Third Circuit took issue with this holding. The Court acknowledged that Third Circuit precedent had "routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable," but held that a jury could find that Minarsky did not act unreasonably under the circumstances.[70] In footnote twelve of the opinion, the Court specifically discusses the #MeToo Movement (although not by name):

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57. *Id.*
58. *Id.*
59. *Id.* at 307.
60. *Id.*
61. *Id.* at 308.
62. *Id.* at 308-09.
63. *Id.* at 309.
64. *Id.*
65. *Id.*
66. Minarsky v. Susquehanna City, 895 F.3d 303, 311 (3d. Cir. 2018).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 313.

> This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time the conduct occurs. While the policy underlying *Faragher/Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it that way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report harassment.[71]

The Court went on to clarify that a mere failure to report harassing conduct is no longer *per se* unreasonable and that the passage of time is just one factor to be considered when analyzing the reasonableness of a plaintiff's response.[72] "If plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law."[73] The significance of this change in approach to the second element of the *Faragher-Ellerth* defense cannot be overstated, for it now allowed plaintiffs, at least in the Third Circuit, the ability to move forward with hostile work environment claims even after a prolonged period of non-reporting without being foreclosed by silence that was based on fear of retaliation.

The #MeToo Movement directly caused this shift. The Court in *Minarsky* could not be clearer in its reasoning that the years of silent suffering uncovered by the Movement influenced the Court to reevaluate its precedent on failure to report as *per se* unreasonableness and gave context to plaintiffs' fears of coming forward in a way that makes them seem all too reasonable and understandable.

Minarsky has already influenced other courts outside of the *Faragher/Ellerth* defense context. In *Williams v. United Launch Alliance, L.L.C.*,[74] the United States District Court for the Northern District of Alabama cited *Minarsky* (and specifically footnote twelve) in granting Plaintiff's Motion to Strike Defendant's Bill of Costs.[75] The case involved a hostile work environment claim by a female employee, Deborah Williams, against Launch Alliance.[76] In granting Defendant's

71. *Id.* at 313 n.12.

72. *Id.* at 314.

73. *Id.*

74. Williams v. United Launch All., LLC., No. 5:16-cv-00335-HNJ, 2018 U.S. Dist. LEXIS 235684, at *1 (N.D. Ala. Sep. 14, 2018).

75. *Id.* at *7.

76. *Id*. at *11.

Motion for Summary Judgment, the court found that Ms. Williams was sexually harassed at work, the court also ruled that the harassment did not rise to the level of a hostile work environment and, even if it did, the employer could prevail on the *Faragher/Ellerth* defense.[77] The court, however, refused to force Ms. Williams to pay Defendant's costs.[78] In doing so, the court noted "the possibility that [an] award of costs in a given case could deter future plaintiffs from bringing similar claims in good faith."[79] Specifically, the court found this to be a potentially troubling consequence "given the tenor of the times."[80] In making this point, the court cited footnote twelve of *Minarsky* for the proposition of how widespread the failure to report harassment at work really is and the victims' fears that lead to this failure to report. Interestingly, the *Williams* court used the reasoning of *Minarsky*, and specifically its reliance on the #MeToo Movement in the context of sexual harassment, to deny costs in a harassment case.[81] This is certainly an expansion of *Minarsky* that broadens its reach and, consequently, the reach of the #MeToo Movement in workplace harassment cases.[82]

However, not all courts have taken this approach. In fact, in surveying federal sexual harassment cases brought since the inception of the #MeToo Movement, we have only found the above two that explicitly seem to recognize the influence of the Movement on the interpretation of plaintiff's reasonableness in these cases.[83] Other cases continue to apply the second prong of the *Faragher/Ellerth* defense without regard to the lessons learned from the #MeToo Movement.

In a particularly startling disregard for the hesitancy a harassment victim might feel about making a complaint to an employer, the United States District Court for the Northern District of Texas accepted the recommendations of the Magistrate Judge to grant summary judgment to the employer on a hostile work environment claim involving repeated physical contact.[84] The case involved a woman, Bellanca Wilson, who was employed by the school district as a teacher and alleged she was harassed by an Assistant Principal, Geronimo Santos, at work.[85] Specifically, Ms. Wilson claimed that Mr. Santos touched and patted her in various places on her body, including her chest, made sexual innuendos and

77. *Id.* at *11.

78. *Id.* at *7.

79. *Id.*

80. *Id.*

81. *Id.* at *7-9.

82. Other courts have also started to realize the failure to report workplace sexual harassment is not *per se* unreasonable. For example, in Martinez v. Bd. of Educ., No. PJM 19-0169, 2020 U.S. Dist. LEXIS 152383, at *1-2, 6-7, 9-10 (D. Md. Aug. 21, 2020), the District Court held that an employee who had been raped, emotionally abused, and threatened by her supervisor was not automatically unreasonable in her failure to report his conduct for several years. The Court specifically noted that her extreme fear could be a very real and reasonable explanation for her delay in reporting. The case, however, did not specifically reference the #MeToo Movement.

83. Minarsky v. Susquehanna Cty., 895 F.3d 303, 311, 313-15, 317 (3d. Cir. 2018); *Williams*, 2018 U.S. Dist. LEXIS 235684, at *1.

84. Wilson v. Dallas Indep. Sch. Dist., No. 3:18-cv-34-G-BN, 2020, at *9 (N.D. Tex. Jan. 17, 2020).

85. *Id.* at *11.

invitations to her and showed her his underwear.[86] However, she only reported the patting to the school district.[87] Because of this, the District Court held that the employer must prevail on the *Faragher/Ellerth* affirmative defense because:

> [N]one of Ms. Wilson's allegations are sufficiently severe alone, and she only establishes that the harassment complained of altered the terms of her employment, if at all, due to the number of incidents Ms. Wilson reported during her deposition. But that she (at most) only reported three of those incidents using [the school district's] established reporting policies while employed with [the school district] undercuts the pervasiveness of the conduct, providing undisputed evidence showing the [the school district] has proven the second prong of the *Ellerth/Faragher* affirmative defense.[88]

When compared with *Minarsky's* painstaking detail of the latitude that should be afforded to women in light of the revelations made during the #MeToo Movement, the court's quick dismissal of the plaintiff's claim in *Wilson* illustrates the variance with which courts approach these issues. In *Wilson*, the court had before it a plaintiff who was courageous enough to file complaints with the school district.[89] It is entirely possible that after her first two complaints, she felt that nothing was being done and became fearful for her job if she continued to complain. However, nowhere in the court's opinion is this possibility even addressed.[90] In fact, Wilson also brought a claim for retaliation alleging that after her first two complaints, her contract was not renewed and she was not supported by the district when she was assaulted by students on several occasions.[91] The District Court similarly dismissed this claim despite the close temporal proximity between her complaints to the school district about the sexual harassment and the adverse actions taken against her.[92]

Likewise, in *Anderson v. Surgery Ctr. of Cullman, Inc.*, the Eleventh Circuit affirmed a grant of summary judgment to plaintiffs who had been subjected to a hostile work environment that included being choked, kicked, and their hair pulled by their supervisor. The court held that the employer satisfied its burden under *Faragher/Ellerth* because the employer promptly corrected the harassment and the remedial actions were effective.[93] Additionally, the court noted that the three-month delay between the supervisor's actions and the plaintiffs' reporting was too long to satisfy the second prong of *Faragher/Ellerth*.[94] Even though the plaintiffs explained that their failure to complain stemmed from fear of retaliation and knowledge that previous complaints against the supervisor went unredressed, the court said that such contentions did not mean that future complaints would be

86. *Id*.
87. *Id.* at *13.
88. *Id.* at *18.
89. *Id.* at *2-3.
90. *Id.* at *15.
91. *Id.* at *11.
92. *Id.* at *23-24.
93. Anderson v. Surgery Ctr. of Cullman, Inc, 839 F. F. App'x 364, 371-72 (11th Cir. 2020).
94. *Id.* at 372.

futile.[95] Thus, it held plaintiffs' fear of retaliation and consequent delayed reporting to be unreasonable.[96] It is clear that not all courts are acknowledging the realities laid bare by the #MeToo Movement in deciding cases about workplace sexual harassment, but there certainly has been a detectable shift in a minority of courts in analyzing these issues.

V. LEGISLATIVE CHANGES

Although our focus in this article is on the #MeToo Movement's effect on the courts, the impact of the Movement via legislative action cannot be ignored. In the years since the Movement started, several states, including California, Connecticut, Illinois, New York, Delaware, and Vermont, have made a directed effort to protect employees from experiencing sexual harassment in the workplace.

A. *California*

California took several legislative actions, including creating the Stop Harassment and Reporting Extension ("SHARE") Act as well as enacting Senate Bill-1343 and the Stand Together Against Non-Disclosure ("STAND") Act.[97] The SHARE Act increased the statute of limitations for claims of unlawful workplace harassment, discrimination, or civil rights-related retaliation with the Department of Fair Employment and Housing under the Fair Employment and Housing Act (FEHA) from one year to three years.[98] Senate Bill-1343 requires an employer with five or more employees to provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all non-supervisory employees as of January 1, 2020, and once every two years thereafter.[99] The STAND Act took effect on January 1, 2019, and held that the provisions of any settlement agreement entered into on or after January 1, 2019,

95. *Id.*

96. Additionally, other courts have specifically cited the #MeToo Movement in making decisions outside of the sexual harassment context, ranging from keeping the identity of litigants anonymous, *see* Doe. v. MacFarland, 117117 N.Y.S.3d 476, 497-9898 (Sup. Ct. 2019), to deciding whether more independent investigation was needed by detectives in a Pennsylvania Post-Conviction Relief Act case, *see* Commonwealth v. Williams, No. CP-51-CR-00011614-2007, 2018 WL 1676872, at *11 (Pa. Com. Pl. June 25, 2018). Of particular note, the dissent in Sparkman v. Consol Energy, Inc., 571 S.W.3d 569, 573-74 (Ky. 2019), noted that a company uses wrongful means to interfere with its subsidiary's contracts when it provides income and advancement for a woman (thus, awarding her the contract) simply because she is having a sexual relationship with one of the parent company's powerful employees. Specifically, the dissent noted that "[i]n this age of the #metoo movement, it is difficult to understand how the court could find that financial advancement for a woman and discrimination against a man because the woman is having a sexual affair is anything but a wrongful means or an improper purpose." *Id.* at 574.

97. Assemb. B. 9, 2019-2020 Reg. Sess., ch. 709 (Cal. 2019); S. B. 1343, 2017-2018 Reg. Sess., ch. 956 (Cal. 2018); S. B. 820, 2017-2018 Reg. Sess., ch. 953 (Cal. 2018).

98. Assemb. B. 9, 2019-2020 Reg. Sess., ch. 709 (Cal. 2019).

99. S. B. 1343, 2017-2018 Reg. Sess., ch. 956 (Cal. 2018).

that has a confidentiality agreement violates the STAND Act and are null and void.[100] This law does not affect pre-litigation settlement suits.[101]

B. *Connecticut*

Connecticut enacted the "Time's Up" law which requires additional training for both current and new employees.[102] Further, employers must provide periodic and supplemental training once every ten years.[103] While the training requirement does not seem overly aggressive in comparison to some states, Connecticut also extended the statute of limitations for bringing a claim of sexual harassment from 180 days to 300 days, among other smaller changes to Connecticut's laws.[104]

C. *Delaware*

Delaware passed House Bill 360, which adds new requirements for employers.[105] Specifically, employers that have four or more employees must provide employees with an "information sheet" provided by the Delaware's Department of Labor.[106] This information sheet includes the illegality of sexual harassment, a definition of sexual harassment and examples, the legal remedies and complaint process, directions on whom to contact, and a prohibition on retaliation.[107] Additionally, employers with over fifty employees must provide interactive sexual harassment prevention training to all employees every two years.[108]

D. *Illinois*

Illinois enacted several new measures focused on enhanced training and reporting requirements.[109] Some of these include the Workplace Transparency Act, Sexual Harassment Victim Representation Act and the Hotel and Casino Employee

100. S. B. 820, 2017-2018 Reg. Sess., ch. 953 (Cal. 2018).

101. Anthony Zaller, *Limits on Confidentiality Clauses Involving Harassment Claims*, CAL. EMP. L. REP. (Mar. 1, 2019), https://www.californiaemploymentlawreport.com/2019/03/limits-on-confidentiality-clauses-involving-harassment-claims.

102. Kris Janisch, *New Sexual Harassment Law in Connecticut Goes into Effect Soon*, GOVDOCS (Aug. 29, 2019) https://www.govdocs.com/new-sexual-harassment-law-in-connecticut-goes-into-effect-soon/.

103. *Id.*

104. *Id.*

105. *Sexual Harassment: Delaware's Response to the #MeToo Movement*, OFFIT KURMAN: LEGAL BLOG (July 24, 2018), https://www.offitkurman.com/blog/2018/07/24/sexual-harassment-delawares-response-to-the-metoo-movement/.

106. *Id.*

107. *Id.*

108. *Id.*

109. Kris Janisch, *Illinois Enacts Sweeping New Laws Related to #MeToo Movement*, GOVDOCS: BLOG (Sept. 6, 2019), https://www.govdocs.com/illinois-enacts-sweeping-new-laws-related-to-metoo-movement/.

Safety Act.[110] The Sexual Harassment Victim Representation Act "ensures a victim and accused perpetrator are not represented by the same union representative in proceedings."[111] The Hotel and Casino Employee Safety Act requires hotels and casinos to provide employees who work in isolated spaces with panic buttons, requires hotels and casinos to create and adhere to written anti-sexual harassment policies and protects employees from retaliation when that employee discloses, reports or testifies about sexual harassment or sexual assault.[112]

E. *New Jersey*

In 2019, New Jersey passed Senate Bill 121 which applies to all agreements entered into after March 18, 2019.[113] This Senate Bill holds that non-disclosure agreement and confidentiality agreements are against public policy.[114] This means that any settlement for a New Jersey Law Against Discrimination ("NJLAD"), retaliation, or harassment claim cannot have any language that conceals the nature and details surrounding the discrimination that occurred.[115] This policy allows for victims to share their stories without fear of breaching a settlement contract.

F. *New York*

New York enacted Senate Bill 6577.[116] This Bill took several progressive steps to protect employees from sexual harassment, including:

(1) Prohibiting nondisclosure agreements related to discrimination;
(2) Prohibiting mandatory arbitration clauses related to discrimination;
(3) Requiring employers to provide employees notice of their sexual harassment prevention training program in writing in English and in employees' primary languages;
(4) Extending the definition of "Employer" to Employers of any size (used to be at least four employees);
(5) Extending the statute of limitations for claims resulting from unlawful or discriminatory practices constituting sexual harassment to three years;
(6) Requiring review and update of the model sexual harassment prevention guidance document and sexual harassment prevention policy; and

110. *Gov. Pritzker Signs Comprehensive Legislation Protecting Victims of Sexual Harassment in the Workplace*, ILLINOIS.GOV: PRESS RELEASES (Aug. 9, 2019), https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=20435.

111. *Id.*

112. *Id.*

113. S. 121, 218th Leg., 2018 Sess. (N.J. 2019).

114. Martin W. Aron, Brett M. Anders & John K. Bennett, *New Jersey Prohibits Enforcement of Non-Disclosure Provisions in Settlement Agreements, Other Contracts*, JACKSONLEWIS: PUBL'NS (Mar. 20, 2019), https://www.jacksonlewis.com/publication/new-jersey-prohibits-enforcement-non-disclosure-provisions-settlement-agreements-other-contracts.

115. *Id.*

116. S. 6577, 2019-2020 Reg. Sess. (N.Y. 2019).

(7) Directing the commissioner of labor to conduct a study on strengthening sexual harassment prevention laws.[117]

Senate Bill 6577 also influenced what the New York courts can and cannot consider for a sexual harassment case. The bill removes the requirement that the harassment be considered severe or pervasive in order to be legally cognizable. Instead, the harassment need only be "above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."[118] This lower standard will make it easier for plaintiffs to prove that they were harassed in the workplace without needing to prove the harassment became completely intolerable in order to be recognized as illegal. As of October 1, 2019, Senate Bill 6577 effectively removed the ability of employers to assert the *Faragher*/*Ellerth* affirmative defense.[119] This momentous step means that an employee's failure to complain about sexual harassment is not fatal to the employee's case.

G. *Vermont*

Vermont enacted Act No. 183 (H. 707), which prohibits employment contracts from containing provisions that prevent an employee from disclosing sexual harassment or waiving an employee's rights with respect to remedies of sexual harassment.[120] It also prohibits a settlement agreement for sexual harassment from including a provision that prevents an employee from working for that employer or an affiliate company.[121] Finally, any settlement for a sexual harassment claim cannot prevent the employee from reporting sexual harassment to an appropriate governmental agency, complying with court functions, or exercising his or her right to sue under state or federal labor laws.[122]

VI. EMPLOYER RESPONSES TO THE #METOO MOVEMENT

Along with implementing specific sexual harassment prevention mandated by certain states, at least some employers are voluntarily increasing the preventative measures they take against harassment in the workplace. While many employers have recirculated or, in some way, made their employees more aware of existing sexual harassment policies, a minority of employers have gone further. Among the tactics employers have used to prevent future instances of sexual harassment are increased hours of sexual harassment training and workshops focused on the prevention of sexual harassment. Further, many of the men who

117. *Id.*

118. Ryan M. Bates & Jason Brown, *New York Overhauls Discrimination and Harassment Laws in Second #MeToo Wave*, LEXOLOGY (Aug. 13, 2019), https://www.lexology.com/library/detail.aspx?g=e96cec7e-5a9a-4c7a-b5f2-6aa4675ffdd1.

119. *Id.*

120. H.B. 707, 2017-2018 Leg. Sess. (Vt. 2018).

121. *Id*.

122. *Id.*

were accused of sexual harassment have been replaced by women in their respective jobs.[123]

Perhaps the most important changes have come not in the companies' sexual harassment policies, but rather in their approach to litigation based on sexual harassment. In the wake of the #MeToo Movement, companies such as Google, Facebook, and Airbnb have ended their mandatory arbitration policies when it comes to sexual harassment claims.[124] Allowing employees to take such claims to court not only increases the likelihood of employees' success on the claims, but also increases the likelihood that the proceedings will become public and not culminate in a non-disclosure agreement that so often accompanies arbitration proceedings.[125] Additionally, permitting these claims to go to court allows our judicial system to grapple with the true frequency and impact of harassment in the workplace and adapt case law accordingly.

VII. MOVING FORWARD

Given the already significant effect of the #MeToo Movement on the law, one can only wonder what will happen moving forward. Below we discuss our predictions for what we believe is likely to happen, as well as what we think should happen given the underlying concerns about issues like disclosure and retaliation that have been highlighted by the Movement.

A. *Likely Changes*

States are likely going to continue to create laws that require a certain number of hours for sexual harassment training and notice requirements for employees. Examples of these laws have been appearing in several states already, as discussed *supra* section V. Other states will likely follow. While this is often viewed as progressive and in direct response to the #MeToo Movement, it is a simple measure that really should have already been instituted nationwide. Regardless of the timeliness of these new laws, increased training should help decrease the incidence of workplace sexual harassment.

Stemming directly from the Movement, states are also likely to continue banning non-disparagement/confidentiality clauses. As discussed, several states have already enacted such laws – California, New Jersey, and New York, for instance – and allowed victims of sexual harassment to openly discuss what happened to them without fear of reprisal. Absent such laws, a settlement

123. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES: U.S. NEWS (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

124. Allegra Lawrence-Hardy & Kathy Glennon, *#MeToo Today: The Evolution of the Movement and Practical Tips for Employers*, CORP. COMPLIANCE INSIGHTS (Oct. 10, 2019), https://www.corporatecomplianceinsights.com/metoo-today/.

125. Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo-and Time's Up-Inspired Action Against the Federal Arbitration Act,* 87 FORDHAM L. REV. 2653, 2658-59 (2019).

agreement would typically prohibit a person from talking about the details of the case, leading to the silencing of thousands of men and women, and allowing for the possibility of the perpetrator preying on more victims in the future. The fear of monetary damages owed from breach of contract of a non-disclosure or non-disparagement clause discourages victims from warning others about the dangers of a harasser and directly violates Title VII's goal of eradicating sexual harassment from the workplace. We are hopeful that the time is ripe for the elimination of such clauses nationwide so that silence is no longer a condition of compensation in sexual harassment settlements.

In response to the #MeToo Movement, many employers will likely take some onus on themselves and revisit their sexual harassment policies. After reviewing the policies, they will likely strengthen their policy, including their reporting requirements. This will benefit both the business, because a better policy might afford them more protection under the law, and the employee, because it will provide clarity to any weak policies and establish a clear chain of command for reporting the harassment.

B. *Desired Changes*

In addition to the likely changes we discussed above, we would also like to see some more aggressive changes when it comes to workplace sexual harassment cases. First, arbitration clauses should be waived for sexual harassment claims. This could be accomplished legislatively or by businesses taking initiative as we have seen from some of the bigger tech companies like Google, Facebook, and Airbnb discussed *supra* section VI. The fairness of arbitration in terms of its power asymmetry can be debated, but regardless of the power dynamic, arbitration never involves a jury. Banning mandatory arbitration agreements for sexual harassment cases would allow for survivors to bring their claims in a forum that would allow for their peers to decide liability.

Additionally, allowing all claims to be heard by judges would ensure that our judicial system is accurately understanding the actual number and nature of workplace sexual harassment claims out there. Requiring judges to review all complaints in sexual harassment cases can open their eyes to the frequency with which this happens and the nature of the cases, including victims' fear of retaliation if they report. This is integral to change that may occur through caselaw, as we saw in *Minarsky*.[126] The more often sexual harassment cases make their way before judges, the more likely we are to see caselaw change to reflect the realities of workplace sexual harassment.

While we think it is likely that employers will rework their policies, we also think that they should take this opportunity to re-examine company culture to ensure that they have zero tolerance policies toward any sexual harassment. A written harassment policy is meaningless if the company consistently operates in ways that contradict or undermine the policy. It is not enough to have a sexual harassment prohibition on paper; companies must internalize the belief that all

126. *See generally* Minarsky v. Susquehanna Cty., 895 F.3d 303 (3d Cir. 2018).

workplace harassment is wrong, and all employees must be treated equally and with respect.

Additionally, it is imperative that employers enact meaningful sexual harassment training. After the *Faragher* and *Ellerth* cases were decided, companies were quick to enact policies in order to be able to meet the first prong of the defense. However, it has become painfully obvious to almost anyone who has sat through a sexual harassment training that there are varying levels of impact and meaning depending on the quality of the training. Now is the time for employers to reexamine the training they have in place and ensure that it is actually helpful to employees, rather than just satisfying a mere hour requirement. Courts, too, should be exacting in examining harassment training when evaluating the *Faragher*/*Ellerth* affirmative defense to ensure such training is actually preventative and not merely performative.

Finally, and perhaps most importantly, we would like to see other courts following the example and reasoning of *Minarsky*; unfortunately, we deem this unlikely.[127] It is possible that a judge might feel as if he or she is legislating from the bench if he or she begins to let current events influence how he or she rules on court cases. We believe these concerns are unfounded, because, as the #MeToo Movement has proven, there are psychological and practical reasons for why victims of sexual harassment refuse or delay reporting the harassing conduct. These are just the types of concerns that should go into the reasonableness calculus involved in the second prong of the *Faragher*/*Ellerth* affirmative defense.[128] Far from judicial legislation, recognizing and incorporating such concerns when deciding upon the reasonableness of a victim's actions actually allows a judge to more fully realize his or her duties.

VIII. CONCLUSION

It is obvious that the #MeToo Movement has affected the law in several respects. Legislatures have responded to the Movement, primarily at the state level, by changing training requirements for employers and disallowing non-disclosure agreements in connection with sexual harassment cases. Additionally, some proactive employers have changed their sexual harassment policies and practices in order to allow for longer and, we hope, more meaningful training for employees. Some have even prohibited mandatory arbitration in matters of workplace sexual harassment. While all of these are incredibly important steps, we believe there is one area that can have an incredible impact that is only just beginning to feel that effect of the #MeToo Movement and that area is the judicial system. If more courts follow the lead of the *Minarsky* court and truly allow the understandings uncovered by the #MeToo Movement to resonate throughout the case law, we will have a workplace sexual harassment legal framework that reflects the reality of what harassment victims actually experience and acknowledges a victim's reticence to come forward, rather than punishing the victim for being afraid to lose their livelihood.

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127. *Id.*

128. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).