Tipping the Scales of Justice in Sexual Harassment Law

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Without the realistic threat of legal sanctions, women's voices too often go unheard or unheeded."

Between 1992 and 2000, the number of charges of sexual harassment filed with the EEOC and state fair employment agencies rose from 10,532 to 15,836, an increase of 50% in less than a decade. These figures, however, are simply the tip of the iceberg. Research consistently finds that a very small percentage of women (1-6%) who experience harassing events actually report the harassment. Some might argue that most women do not file charges of
harassment because the behavior causes no harm. The research belies that assumption: “even relatively mild experiences with sexual harassment” carry with them negative work-related, psychological, and health consequences.\(^5\) Thus, contrary to the often unsubstantiated claims of sexual harassment law critics that the law has run amok, catering to the hypersensitive,\(^6\) a growing body of empirical research shows that sexual harassment, both in the workplace and the academy, not only is pervasive but pernicious.\(^7\)

What accounts for the persistence of sexual harassment as a problem? The answer lies with the incentives created by sexual harassment law itself. The law is littered with procedural and substantive hurdles that significantly reduce not only the number of meritorious complaints of harassment that are filed, but also the number of cases in which any meaningful review of the actions of employers or educational institutions is undertaken. While paying lip service to the goal of sexual equality, both on the job and in the academy, the law tips the scales in favor of employers and educational institutions, creating disincentives for women to file legitimate complaints of sexual harassment and ensuring that they receive little relief if they do so.

Part I of this Article discusses the impact of the extremely short statute of limitations for sexual harassment claims. I argue that severely limiting the time frame within which to file a complaint of sexual harassment sharply reduces the number of complaints actually filed, even those that are meritorious. In Part II, I ask why prospective plaintiffs in both Title VII\(^8\) and

\(^5\) Vicki J. Magley et al., Outcomes of Self-Labeling Sexual Harassment, 84 J. APPLIED PSYCHOL. 390, 400 (1999); see Kimberly T. Schneider et al., Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations, 82 J. APPLIED PSYCHOL. 401, 412 (1997).

\(^6\) RHODE, supra note 1, at 97 (citing to commentators who describe supporters of harassment law as “overzealous,” “hypersensitive,” or “neurotics”); cf. Magley et al., supra note 5, at 400-01 (debunking “whiner hypothesis” advocated by certain “backlash” writers); Schneider et al., supra note 5, at 413 (concluding that their “study provide[d] important evidence that the women who experience sexual harassment are not oversensitive to benign compliments or comments”).

\(^7\) See MSPB REPORT III, supra note 4, at viii, 26 (finding that 44% of female and 19% of male employees reported unwanted sexual attention at work and estimating that sexual harassment cost the federal government $327.1 million during the two-year period covered by the survey); MSPB REPORT II, supra note 4, at 11, 40 (finding that 42% of women and 14% of men reported unwanted sexual attention on the job and estimating the cost of harassment at $267.3 million for the two-year period covered by the survey); U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 35 Fig. 3-2 (1981) (finding that 42% of female and 15% of male survey respondents had experienced unwanted sexual attention at work); Lawton, supra note 3, at 78-85 (discussing results of various studies on the incidence of harassment); Hill, supra note 4, at 1445 (noting that sexual harassment “occurs today at an alarming rate” affecting “anywhere from forty-two to ninety percent of women . . . during their working lives”).

\(^8\) Title VII governs employees’ allegations of sexual harassment on the job. See 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting employers from discriminating on the basis of sex “with respect to [an individual’s] compensation, terms, conditions, or privileges of employment”).
Title IX's sexual harassment cases must use grievance procedures designed, created, and implemented by the potential defendant – the employer or educational institution – before filing suit. I argue that the conflict of interest inherent in the private system of internal dispute resolution for sexual harassment claims creates improper incentives for employers and educational institutions and discourages plaintiffs from invoking such procedures. Finally, Part III examines the alarming rate at which courts grant summary judgment to employers in sexual harassment cases. By doing so, they not only deprive plaintiffs of the right to present their case to a jury; they also insulate employers' internal grievance procedures from any meaningful external scrutiny.

Standing alone, a short statute of limitations or an extra layer of procedure serves as a deterrent to the filing of meritorious claims of harassment. The cumulative impact of a short statute of limitations, an additional layer of procedure, and an increased likelihood of losing on summary judgment, however, is formidable. These obstacles to recovery send a powerful message about the law's willingness to listen to women's stories of harassment.

I. STATUTE OF LIMITATIONS

The statute of limitations, for any type of claim, acts as a barrier to entry. The shorter the time period, the more likely it is that claims, both valid and invalid, will not be investigated. Because sexual harassment is a

9. Title IX governs allegations of sexual harassment made by students against school, college, or university personnel. See 20 U.S.C. § 1681(a) (1994) (prohibiting, with certain exceptions, discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance").

10. This trend in the federal courts of granting employer motions for summary judgment in sexual harassment cases is part of a larger pattern seen in other employment discrimination cases. See Anne Lawton, The Meritocracy Myth and the Illusion of Equal Employment Opportunity, 85 MINN. L. REV. 587 (2000) (describing the large number of Title VII race and sex discrimination claims disposed of on employer motions for summary judgment).

11. Eight years ago, Louise Fitzgerald recommended extending the time period for filing claims of sexual harassment, explaining that a longer time period was more consistent with the "[p]sychological research on victim behavior." Louise F. Fitzgerald, Sexual Harassment: Violence Against Women in the Workplace, 48 AM. PSYCHOL. 1070, 1074 (1993).

12. See Daniels v. United States, 121 S.Ct. 1578, 1582-83 (2001) (citation omitted) (explaining that while a criminal defendant has many chances to challenge the constitutionality of his conviction, such opportunities are not without limit because "[p]rocedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim"); see also Louise Weinberg, Choosing Law: The Limitations Debates, 1991 U. ILL. L. REV. 683, 685, 687 (noting legislative efforts to limit the statute of limitations in products liability and medical malpractice claims as a tort reform measure aimed at reducing the number of such claims).
Title VII claim, an employee claiming harassment must file a charge with the Equal Employment Opportunity Commission (EEOC) no later than 180 days from the harassing event. In those states with enforcement agencies for fair employment laws, the plaintiff employee has 300 days from the harassing event to file.

Ten months or 300 days, which is the maximum time period allowed, is significantly shorter than the statute of limitations for many other causes of action. For example, in Ohio, the statute of limitations for breach of sales contracts under the Uniform Commercial Code is four years from the date of breach. For tort actions involving claims of trespass upon real property or for relief based on fraud, the relevant statute of limitations also is four years.

It is important to realize that establishing a statute of limitations is a choice. For example, in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, the Supreme Court held that in private causes of action pursuant to § 10(b) of the Securities Exchange Act of 1934 plaintiffs must initiate litigation within one year of discovering "the facts constituting the violation" and no later than three years after the violation occurred. The Court rejected both the Securities and Exchange Commission's suggested five-year statute of repose, as well as "the traditional rule of applying a state limitations period when the federal statute is silent." Had the Court accepted the state limitations period, as had both the trial court and the Ninth Circuit done, plaintiffs would have had two years from the time that they discovered the fraud to file suit. Moreover, by forcing plaintiffs to file suit no later than three years after the violation occurred, regardless of when plaintiffs discovered the violation, the Court created a rule in "conflict[] with traditional

13. Sexual harassment is considered a form of sex discrimination under Title VII. 29 C.F.R. § 1604.11(a) (1997) (footnote omitted) (stating that "[h]arassment on the basis of sex is a violation of section 703 of title VII").
15. Id.
16. OHIO REV. CODE ANN. § 1302.98 (West 1994).
17. OHIO REV. CODE ANN. § 2305.09(A), (C) (West 1994). For fraud, the cause of action does not accrue until discovery of the fraud. Id.
18. Cf. Weinberg, supra note 12, at 686 (footnote omitted) (noting that statutes of limitation are "demonstrably arbitrary" and that legislatures make choices about the length of time to set for different causes of action).
22. Id. at 361.
23. Id. at 368 (Stevens, J., dissenting).
24. See id. at 353-54.
limitations periods for fraud-based actions [and] frustrate[d] the usefulness of § 10(b) in protecting defrauded investors."

By limiting the period in which plaintiffs could file suit, the Court restricted the availability of relief under § 10(b)'s private cause of action.26

Why is a short statute of limitations for sexual harassment claims such a problem? First, as a matter of policy, recognizing a cause of action but attaching to it a short statute of limitations sends a message about what claims legislatures and courts want parties to pursue vigorously.

Especially short periods of limitation or periods set without regard to the plaintiff's state of knowledge might be seen as undermining the policies supporting the right sued on, undercutting general policies supporting the whole field of law, or negating procedural policies favoring access to courts, trial by jury, rights to notice and hearing, and so forth.27

Second, as a practical matter, a short statute of limitations is at odds with the ways in which many victims of harassment respond.28 Depending on the nature of the harassing events, it may take a woman time to process what has

25. Id. at 374 (Kennedy, J., dissenting).
26. The short statute of limitations that the Supreme Court judicially created in Lampf, reflects, in part, some Justices' discomfort with the implied cause of action under § 10(b). See Lampf, 501 U.S. at 364-66 (Scalia, J., concurring in part and concurring in the judgment) (noting that because Congress did not create the private cause of action under § 10(b), the most "responsible approach" for determining the statute of limitations was to use "a limitations period for an analogous cause of action" from the Securities Exchange Act of 1934).

Chief Justice Rehnquist joined the Court's opinion in Lampf, authored by Justice Blackmun. In an earlier § 10(b) case, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), authored by Justice Rehnquist, the Court held that plaintiffs in a § 10(b) case must be actual purchasers or sellers of securities. Id. at 754-55. The Court noted that the § 10(b) cause of action was a "judicial oak which ha[d] grown from little more than a legislative acorn." Id. at 737. Therefore, policy concerns, such as the "danger of vexatious litigation," suggested caution in expanding the class of plaintiffs able to avail themselves of § 10(b)'s private cause of action. Id. at 739-49. See also FRANKLIN A. GEVURTZ, CORPORATION LAW 577-79 (2000) (commenting that Justice Rehnquist's discussion of vexatious litigation in Blue Chip Stamps revealed a "hostility toward securities lawsuits" that "presaged a shift in the attitude by the Supreme Court toward Rule 10b-5," reflected in later decisions that "seemed to retrench on the reach of the Rule").

28. See Fitzgerald, supra note 11, at 1074 (stating that the short statute of limitations is unreasonable "[g]iven the numerous factors that inhibit women from complaining to anyone, much less filing a formal complaint"); cf. Lisa S. Tsai, Note, Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law, 79 TEx. L. Rev. 531, 554-56 (2000) (discussing research on victims' responses to harassment and noting that "existing continuing violation and sexual harassment jurisprudence... fails to account for the varying responses manifested by victims of sexual harassment"); Joanna L. Grossman, The First Bite is Free: Employer Liability for Sexual Harassment, 61 U. Pitt. L. Rev. 671, 722-29 (2000) (discussing the research on victims' responses to sexual harassment and describing many women's decisions not to use employer grievance procedures as "rational").
happened to her at work.\textsuperscript{29} She may fear retaliation or not know how to proceed, delaying her decision to seek legal redress.\textsuperscript{30} In addition, the impact of harassment is often cumulative; a woman may brush aside early harassing events only to realize later that those events were the beginning of a pattern of harassment that has not abated.

Moreover, the continuing violation doctrine, as applied by the courts, has not served to mitigate the harshness of Title VII's short statute of limitations.\textsuperscript{31} The continuing violation theory allows a court to examine harassing events that occur outside the 300-day limitations period so long as they form part of a pattern of harassing conduct that continues into the 300-day limitations period.\textsuperscript{32} The doctrine, however, is applied unevenly across the circuits and, at times, even within the same circuit.\textsuperscript{33} For example, suppose a female plaintiff files suit alleging ten different harassing events, only four of which fall within the 300-day limitations period. If the plaintiff must demonstrate that the harassing events within the 300-day limitations period, standing alone, are severe or pervasive, the plaintiff is more likely to lose, notwithstanding the severity or pervasiveness of the behavior when viewed in its totality.\textsuperscript{34}

Mitigating doctrines, such as the continuing violation theory, can soften the impact of a short statute of limitations. However, lengthening the statute of limitations for sexual harassment claims serves the same purpose. Furthermore, doing so provides an added benefit: reducing the amount of litigation surrounding mitigating doctrines like the continuing violation theory.\textsuperscript{35}

II. INTERNAL GRIEVANCE PROCEDURES

Institutional grievance procedures are another impediment facing plaintiffs who allege sexual harassment. It certainly makes sense to give employers and educational institutions incentives to prevent and correct harassment. At the same time, however, such internal procedures are fraught

\textsuperscript{29} See Fitzgerald, supra note 11, at 1074 (citation omitted) (concluding that a short statute of limitations is unjustified because it takes victims of harassment "time to sort through their experience and decide on a course of action").

\textsuperscript{30} See id. (noting that a longer statute of limitations for filing complaints is necessary because women often hesitate to come forward with complaints of harassment, in particular because of the negative consequences associated with reporting).

\textsuperscript{31} See Tsai, supra note 28.

\textsuperscript{32} LINDEMANN & KADUE, supra note 14, at 449.

\textsuperscript{33} Tsai, supra note 28, at 539 (noting the "wide variety of inconsistent evaluative and doctrinal standards [that] have developed - many of which are subject to varying interpretations, even within the circuits that created them").

\textsuperscript{34} See id. at 542-46.

\textsuperscript{35} See Tsai, supra note 28, at 559.
with problems. There is no effective oversight of the procedures used by most institutions. Moreover, employers and educational institutions have a built-in conflict of interest in any sexual harassment case: the institution is the potential defendant in any litigation brought by the employee or student alleging harassment. Yet, the Supreme Court’s interpretation of institutional liability under both Title VII and Title IX basically requires plaintiffs alleging sexual harassment to use their institution’s internal grievance procedure or risk losing in court, even at the summary judgment stage.36

A. Liability Standards Under Title VII

In Meritor Savings Bank, FSB v. Vinson,37 the Supreme Court rejected a per se rule of liability for employers in hostile environment cases.38 The Court distinguished between quid pro quo and hostile environment cases, noting that employer liability for hostile environment cases hinged on notice to the employer of the harassing conduct.39 In doing so, the Court crafted a rule of liability at odds with the EEOC Guidelines at the time.40 Moreover, as Justice Marshall noted in his concurring opinion, neither the language of Title VII nor the law of agency commanded the rule of liability crafted by the majority’s decision in Meritor.

A supervisor’s responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in “hostile environment” cases, that sexual harassment does not create employer liability until the

36. See Grossman, supra note 28, at 710 (footnote omitted) (noting that in Title VII sexual harassment cases many trial courts jump right to the employer’s affirmative defense and, if “the affirmative defense is viable [the court], without further analysis, [ ] grant[s] [ ] summary judgment to the employer”).
38. Id. at 72.
39. Id. at 71-72.
40. See id. at 71 (citation omitted) (noting that its liability rule for hostile environment cases was “in some tension with the EEOC Guidelines, which held an employer liable for the acts of its agents without regard to notice”).
employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.\textsuperscript{41}

Thus, Meritor created a requirement unique to sexual harassment cases, reposing with employers what has become an essentially unsupervised “first shot” at resolving complaints of harassment.

In two subsequent decisions, Burlington Industries v. Ellerth\textsuperscript{42} and Faragher v. City of Boca Raton,\textsuperscript{43} the Supreme Court expanded on Meritor’s discussion of employer liability. The Court held that employer liability turns not on the labels quid pro quo or hostile environment, but rather on whether the employee demonstrates that she suffered a tangible employment action.\textsuperscript{44} The Court limited tangible employment actions to “significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”\textsuperscript{45} As a result, it is not clear whether a downgrade on a performance evaluation rises to the level of a tangible employment action, absent a showing that the performance evaluation affected a promotion decision, for example.

If the employee fails to demonstrate a tangible employment decision, then the employer may avail itself of a judicially created affirmative defense. The employer may escape liability for sexual harassment if it can demonstrate that (1) it “exercised reasonable care to prevent and correct promptly 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.”\textsuperscript{46}

The Supreme Court’s decisions in Meritor, Ellerth, and Faragher have tipped the scales in favor of limiting employer liability for hostile environment harassment by supervisory personnel if employees fail to use their employer’s grievance procedure, even though no such requirement exists for any other cause of action brought pursuant to Title VII. Congress did not condition Title VII liability on employees’ use of internal grievance procedures, so it is unclear why such limitations should apply to sexual harassment cases. “When Congress intends that litigants invoke grievance mechanisms before pursuing judicial remedies for violations of civil rights, it states the precondition

\begin{itemize}
\item \textsuperscript{41} Id. at 76-77 (Marshall, J., concurring) (italics in original).
\item \textsuperscript{42} 524 U.S. 742 (1998).
\item \textsuperscript{43} 524 U.S. 775 (1998).
\item \textsuperscript{44} Ellerth, 524 U.S. at 752-54, 761.
\item \textsuperscript{45} Id. at 761 (citations omitted).
\item \textsuperscript{46} Id. at 765.
\end{itemize}
explicitly." By shifting the focus toward internal procedures, the Court gave employers the wrong incentive. If an employer can escape liability by developing and disseminating a sexual harassment policy and complaint procedure, then the employer's focus shifts away from changing the causes of harassment - the organization's culture and a male-dominated workforce - toward developing a policy and procedure that protect it from liability.

B. Liability Standard Under Title IX

The Supreme Court's decision in Gebser v. Lago Vista Independent School District effectively eliminates an educational institution's liability for sexual harassment of students. In Gebser, the Supreme Court did not overrule its earlier precedents in Cannon v. University of Chicago, establishing a private cause of action for Title IX violations, and Franklin v. Gwinnett County Public Schools, recognizing a right to monetary relief for such violations. In effect, the Court nullified the holdings of those two cases. After Gebser, a Title IX plaintiff who establishes that a teacher sexually harassed her cannot recover monetary damages unless she can demonstrate that she reported the harassment to a school official with the authority to


48. Recent research indicates that an organization's tolerance for harassing behavior and a masculine job gender context predict the likelihood of harassment occurring in an organization. See Louise F. Fitzgerald et al., Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model, 82 J. APPLIED PSYCHOL. 578, 586 (1997) (finding that "a male-dominated workplace" in which there are "large numbers of male workers, combined with traditionally male-oriented tasks" is a significant predictor of "high levels of sexual harassment" and that women who perceive their organizations as "tolerant of sexual harassment . . . experience considerably higher levels of harassment"); see also Theresa M. Glomb et al., Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences, 72 ORG. BEHAV. & HUM. DECISION PROC. 309, 321 (1997) (finding that an organization's climate, as measured by the "employees' perceptions that the organization is tolerant of sexual harassment," is "positively related to [the employees'] experiences of harassment as well as to the ambient level of sexual harassment in their work group"); Matthew S. Hesson-Mcinnis & Louise Fitzgerald, Sexual Harassment: A Preliminary Test of an Integrative Model, 27 J. APPLIED PSYCHOL. 877, 887, 890 (1997) (finding that three factors predict the likelihood of sexual harassment: (1) victim vulnerability, for example, being younger or less educated, (2) "a male-dominated job context," and (3) an organization that is "more tolerant of sexual harassment"); cf. id. at 898 (suggesting that "strong affirmative action programs and moving (large numbers of) women into jobs traditionally held by men may prove a reasonable organizational strategy for reducing harassment").


52. See Gebser, 524 U.S. at 282-93.

53. Lawton, supra note 3, at 114.
"institute corrective measures," and the school official was deliberately indifferent to her complaint of sexual harassment.

In *Gebser*, the Title IX plaintiff, who was a high school freshman and sophomore at the time of the harassment, lost at the summary judgment stage because she had failed to complain about a male teacher's sexual comments and advances, even though "it [was] not at all clear" that the school district had either a formal sexual harassment policy or a grievance procedure. Even if Gebser had complained, however, she still may have lost if she had complained to a school official lacking the authority to remedy the harassment. In *Canutillo Independent School District v. Leija*, for example, the school district escaped liability because the parent of a second-grade girl had notified only the student's homeroom teacher that another teacher had sexually molested her daughter.

As Justice Stevens noted in his dissent in *Gebser*, the majority's decision gives academic institutions no incentive to develop effective anti-harassment policies and procedures. Why should a school district or university concern itself with having an effective policy and grievance procedure? "After all, a school may escape liability for sexual harassment of a student even if the school has no sexual harassment policy or procedure, all of a victim's teachers know of the harassing behavior, and the school is grossly negligent in its handling of the sexual harassment complaint." Consequently, while expressing its concern about the incidence of sexual harassment in educational institutions, the Court in *Gebser* effectively eviscerated the ability of students to obtain judicial relief for sexual harassment at school.

C. What's Wrong with Internal Grievance Procedures?

1. Conflict of Interest

Why must a prospective plaintiff use a grievance procedure designed and controlled exclusively by the prospective defendant? The conflict of interest inherent in such an arrangement is apparent. "[I]nternal grievance procedures are obstructed by an inherent conflict within the institution as it tries simultaneously to eliminate sexual harassment from the work and academic

55. See id.
56. Id. at 277-78.
57. Id. at 305 (Stevens, J., dissenting); see also id. at 291-92.
58. 101 F.3d 393 (5th Cir. 1996), cert. denied, 520 U.S. 1265 (1997).
59. Id. at 400-02.
60. *Gebser*, 524 U.S. at 300-01 (Stevens, J., dissenting).
61. Lawton, supra note 3, at 115-16.
environment, and to insulate itself from liability." Because a woman who brings an internal grievance for sexual harassment has a potential legal claim against the party controlling the procedure, the institution's goals are not necessarily consonant with those of the victim. It is little wonder, then, that many victims of harassment choose not to use their institutions' internal grievance procedures, believing that nothing will be done or that they will experience negative consequences, including retaliation.

Nowhere is the conflict of interest between institution and victim more apparent than on college and university campuses. If a tenured professor harasses a student, the university's interest is aligned with that of the tenured professor. Tenure provides the professor with a claim that he cannot be dismissed absent cause. In public universities, the tenured professor can argue that he has a property interest in his tenure. The risk of a lawsuit by the tenured professor is significantly higher than the risk of a lawsuit by a student. The tenured professor, by virtue of his lifetime employment with the institution, has a strong incentive to fight any discipline, censure, or termination. The student, on the other hand, passes through the institution and ultimately graduates.

The record keeping practices of some universities highlight the tension between the institution's desire to protect itself from liability and its long-term commitment to reducing sexual harassment. Educational institutions are not required to report the number, nature, or resolution of sexual harassment complaints. In addition, many universities use both formal and informal systems to address harassment complaints.
procedures for resolving complaints of sexual harassment. Yet, a number of universities fail to maintain records of either informal or formal complaints, which makes it difficult to monitor the number and nature of complaints filed. Without records, how can a college or university determine whether its own internal procedures are operating properly? Furthermore, the university has no incentive to maintain records because records open up the institution to liability, especially in the case of repeat offenders.

Suppose the University employs Professor X, who during his tenure has engaged in repeated incidents of sexual harassment. Each time, the student has used the university's informal grievance procedure. The University does not maintain records of informal complaints of sexual harassment. Moreover, as is typical with informal procedures, the University did not impose sanctions against Professor X because no fact-finding occurred. Professor X has little incentive to stop his behavior, which is relatively cost-free. Suppose, however, that one year a student decides to file suit against the University based on Professor X's harassing behavior. If records do not exist, the university need not provide them to the student's attorney during discovery. As a result, the University is not charged with knowledge of the professor's behavior, unless the student can find out on her own about prior complaints, contact those complainants, and obtain their cooperation to act as witnesses in her case. If she fails to do so and the University took some action on her complaint, e.g., mediating the dispute, the student will lose her Title IX case, most likely at the summary judgment stage.

68. *Id.* at 88.
69. *See id.* at 150-51 Tbl. 1 (noting that University of Maryland at College Park, Miami University, and the State University of New York at Binghamton do not keep records of the numbers of informal complaints filed, while the University of California at Berkeley has no "'statistical breakdown of complaints' based on [the] nature and resolution" of the complaint).
70. *See Lawton, supra* note 3, at 150-51 Tbl. 1 (noting that the University of Maryland at College Park does not keep records of formal complaints while the University of California at Berkeley "'[h]as no way to retrieve or identify'" such records when a public records request is made).
71. *See id.* (noting that the University of Florida at Gainesville does not maintain records in a central location).
72. *See Kihnley, supra* note 62, at 74 (explaining that "central record keeping of the complaints is crucial for maintaining accurate records of the prevalence and outcome of sexual harassment incidents . . . ").
73. *See Louise F. Fitzgerald et al., The Antecedents and Consequences of Sexual Harassment in Organizations: An Integrated Model, in Job Stress in a Changing Workforce: Investigating Gender, Diversity, and Family Issues 55, 69 (Gwendolyn Puryear Keita & Joseph J. Hurrell, Jr. eds., 1994) (noting that "the single most formidable obstacle" to obtaining data about sexual harassment in organizations is the fear of "documenting the existence of a problem carrying legal liability").
74. This example is taken from Lawton, *supra* note 3, at 94-95.
2. A Private System of Law

Internal grievance procedures are private. Neither employers nor educational institutions are required to report the number, nature, or outcome of sexual harassment complaints filed with the institution. Nor are employers or educational institutions required to undertake climate studies to determine the extent to which employees and students know about and trust the internal process. Hence, in the vast majority of cases that never make it to court, there is no oversight of the institution’s internal grievance procedure.

Privatizing the system of harassment resolution creates a system of law over which there is little public scrutiny. Judge Harry Edwards of the D.C. Circuit “recommends that conflicts arising in undefined areas of employment discrimination law ‘should be resolved by judges and other officials charged with lawmaking in the public interest, rather than private dispute resolvers.’” Many might criticize Judge Edwards’s recommendation as impractical, citing the increased number of sexual harassment complaints and the need for some alternative dispute resolution mechanism. However, there are several flaws with this argument.

First, the number of claims filed does not necessitate a private system of resolution, created by the potential defendant over which there is little scrutiny. In Title VII cases, for example, sexual harassment victims already have to exhaust administrative remedies by filing a charge with the EEOC prior to filing suit in federal court. The law does not require other Title VII plaintiffs to use internal grievance procedures or risk losing in court. Why, then, must employees alleging sexual harassment bring their complaints to their employer before going to the EEOC and federal court? Second, there is no empirical evidence to support the courts’ reliance on policies and procedures as effective mechanisms for preventing and correcting sexual harassment on the job or within academic institutions.

In general, the current set of policies, procedures, and training used in organizations has not solved the problem of sexual harassment. Nor is there any evidence that they have or will lead most targets of harassment to come forward and make formal complaints or that they are greatly inhibiting would-be sexual harassers. While they may be having a positive impact and are probably leading more victims to

75. Kihnley, supra note 62, at 72.
76. Id. at 72 (citation omitted).
77. See supra note 2 and accompanying text.
78. LINDEMANN & KADUE, supra note 14, at 508.
79. See supra note 41 and accompanying text.
come forward and are restraining some harassers, such effects have not been documented so far.\textsuperscript{80}

There is a similar absence of empirical data on the efficacy of sexual harassment education and training programs.\textsuperscript{81}

If the primary goal of Title VII, according to the Court in Faragher, is to prevent, rather than provide a remedy for, the harm caused by sexual harassment,\textsuperscript{82} then it is interesting that no empirical data exists to support the assumption that having a sexual harassment policy and complaint procedure actually deters harassment in the workplace. This is not to suggest that harassment policies and procedures do not work; but, if such policies and procedures effectively deprive sexual harassment plaintiffs of the right to a remedy in court, then is there not some obligation to verify that they do, in fact, deter harassing conduct? If no such evidence exists, why do the courts place such heavy reliance on the plaintiffs' failure to invoke such policies and procedures?

Third, the lack of oversight of internal grievance procedures created by employers and educational institutions, whose interests are not necessarily consonant with those of the grievant, is troubling. Suppose at State University each college has its own standing committee for investigating complaints of sexual harassment made by students, other faculty members, or employees.\textsuperscript{83} The University's procedure provides that the committee will review the evidence and make a determination whether the complaint of harassment has

\textsuperscript{80} Barbara A. Gutek, \textit{Sexual Harassment Policy Initiatives, in \textit{Sexual Harassment: Theory, Research, and Treatment}} 185, 196 (William O'Donohue ed., 1997) (emphasis in original); see Elizabeth O'Hare Grundmann et al., \textit{The Prevention of Sexual Harassment, in \textit{Sexual Harassment: Theory, Research, and Treatment}} 175, 176 (William O'Donohue ed., 1997) (noting the absence of published "empirical evaluation of the effectiveness of any company policy or educational program to reduce sexually harassing attitudes or behaviors").

\textsuperscript{81} Robert S. Moyer & Anjan Nath, \textit{Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment}, 28 J. Applied Soc. Psychol. 333, 334 (1998) (noting "the unpleasant empirical truth [ ] that almost nothing is known about the effects of sexual harassment education and training programs"); but see MSPB \textit{REPORT III, supra} note 4, at vii (expressing concern that "very widespread training and information efforts" had not reduced the incidence of sexually harassing behavior in the federal workforce).

\textsuperscript{82} Faragher v. City of Boca Raton, 524 U.S. 885, 805-06 (1998); \textit{contra} Grossman, \textit{supra} note 28, at 720-21 (footnotes omitted) (explaining that the Supreme Court's decisions in \textit{Faragher} and \textit{Ellerth} were revisionist history, "elevat[ing] deterrence to the 'primary' goal [of Title VII] and [leaving] compensation by the wayside," notwithstanding earlier Court decisions that "had repeatedly recognized that Title VII ha[d] two separate, yet equally important goals: compensation and deterrence").

\textsuperscript{83} \textit{See}, e.g., \textit{Ohio State University, Rules of the University Faculty: Faculty, Governance, and Committees § 3335-5-04(B)(1), (E), available at http://www.osu.edu/offices/trustees/rules5/rule5-04.html} (last visited July 11, 2001).
merit. 84 The committee’s determination, however, must be “based on clear and convincing evidence.” 85 State University has created a higher burden of proof for complainants than they would have had had they filed suit in court. The higher burden of proof means that claims that may have legal merit do not give rise to sanctions under State University’s internal grievance procedure.

Of course, a victim of sexual harassment may still sue State University if she is dissatisfied with the results of its internal investigation. But, after losing in an internal investigation, some complainants may believe that their case is not strong enough to merit pursuing it through traditional legal channels. Suppose, however, that the complainant is a student who decides to sue State University at the termination of the University’s internal investigation. Under the standard enunciated in Gebser, she will undoubtedly lose her claim for monetary damages because the University was not “deliberately indifferent” to her complaint. In fact, it instituted an investigation and examined the evidence presented by both parties.

The liability standard established by the Supreme Court in Burlington and Faragher, unlike that in Gebser, promises, as a theoretical matter, greater oversight of employers’ internal grievance procedures. 86 As a practical matter, however, many employers escape liability by merely adopting and disseminating a sexual harassment policy and procedure. 87 The courts assume,
without requiring any evidence from the employer, that every employer’s policy and complaint procedure is equally effective at preventing and correcting harassing conduct. However, there is no empirical evidence to suggest that harassment policies and procedures actually deter harassing conduct in the workplace, let alone evidence suggesting that all harassment policies and complaint procedures are equally effective at doing so. Moreover, the affirmative defense from Burlington and Faragher only applies once the employee has successfully shown that she was sexually harassed. In an alarming number of cases, however, the federal courts award summary judgment to employers because the court concludes that the harassing conduct was not “severe or pervasive.” As a result, the employee’s opportunity to obtain judicial review of the employer’s internal grievance procedure is lost.

III. SUMMARY JUDGMENT

Over the past decade, commentators have discussed the ease with which federal courts grant employer motions for summary judgment in employment discrimination cases. Because employment discrimination cases, e.g., disparate treatment, typically involve questions about the employer’s intent, summary judgment should be used sparingly. Nevertheless, courts are constructing various devices in order to make it easier for employers to prevail on motions for summary judgment in employment discrimination cases.

The summary judgment phenomenon also has had its impact on sexual harassment law. In Meritor, the Supreme Court held that sexual harassment

supervisor’’); Grossman, supra note 28, at 675 (concluding that Ellerth and Faragher “created a virtual safe harbor” from liability for employers).

88. See supra notes 80-81 and accompanying text.


90. See Lawton, supra note 10, at 628 nn.188-89 (citing cases standing for the proposition).

91. See id. at 617-61.

92. See Theresa M. Beiner, The Misuse of Summary Judgment in Hostile Environment Cases, 34 Wake Forest L. Rev. 71 (1999). Professor Beiner’s article was published prior to the Supreme Court’s decision in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). In Reeves, the Supreme Court admonished the lower federal courts not to weigh the evidence on motions for summary judgment or judgment as a matter of law. Id. at 150. If the courts heed this admonition, it will prove more difficult to grant employer motions for summary judgment on the grounds that the alleged harassment was not severe or pervasive. It is not clear, however, what impact Reeves will have on the federal courts’ willingness to
is not actionable unless it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"\textsuperscript{93} Determining whether behavior is severe or pervasive is a fact-intensive inquiry. Therefore, it is surprising that so many courts are granting employer motions for summary judgment in sexual harassment cases on the grounds that the complained-of behavior is not sufficiently severe or pervasive.\textsuperscript{94}

In a study published in 1999, Professor Theresa Beiner determined that between the years 1987 and 1998, federal district courts granted employer motions for summary judgment on the grounds that the plaintiff had failed to establish that the complained-of behavior was severe or pervasive in 175 out of 302 cases—a rate of 58%.\textsuperscript{95} Moreover, appellate courts are not checking the district court's flagrant abuse of summary judgment. During the same time period (1987 through 1998), the appellate courts upheld district court orders granting summary judgment in 76% of the cases heard.\textsuperscript{96}

These statistics are startling for two reasons. First, whether behavior is severe or pervasive is a highly fact-intensive inquiry, so summary judgment should be granted sparingly. Second, Professor Beiner's statistics only include cases in which the court granted summary judgment because the behavior was not severe or pervasive. Employers have other weapons in their arsenal for obtaining summary judgment:\textsuperscript{97} (1) failure to file a timely EEOC claim, and (2) after \textit{Burlington} and \textit{Faragher}, decided in 1998, the affirmative defense based on the employer's internal grievance procedures. Consequently, Professor Beiner's statistics underestimate the number of sexual harassment claims disposed of on employer motions for summary judgment.

In order to grant summary judgment on the grounds that the behavior is not severe or pervasive enough, however, many federal courts are simply ignoring the "totality of the circumstances" standard used by the EEOC\textsuperscript{98} and endorsed by the Supreme Court in \textit{Harris v. Forklift Systems, Inc.}\textsuperscript{99} Instead,
many federal courts carve up the plaintiff's case, examining incidents of harassment in isolation or in "discrete parts" in order to conclude that the plaintiff's allegations fail the "severe or pervasive" requirement.\textsuperscript{100} \textit{Morris v. Oldham County Fiscal Court},\textsuperscript{101} a recent case from the Sixth Circuit, illustrates the problem.

Judy Morris began work as a secretary for the Oldham County Road Department in 1984.\textsuperscript{102} In late 1994, Brent Likins became the new County Road Engineer; the position gave him supervisory authority over Morris.\textsuperscript{103} Morris claimed that Likins often made jokes with sexual overtones, referred to her on one occasion as "Hot Lips," and commented several times on what she was wearing.\textsuperscript{104} In March of 1995, Morris received her second performance evaluation from Likins with an overall rating of "very good."\textsuperscript{105} In her first evaluation, Likins rated Morris's performance as "excellent."\textsuperscript{106} In front of another supervisor, Jim Lentz, Morris asked Likins why her performance rating had dropped from "excellent" to "very good."\textsuperscript{107} Likins told Morris that she "could come into his office and then after [they] were finished he would mark [her] excellents [sic] and then [they] would go from there."\textsuperscript{108} Morris informed Likins that "if that is what it took . . . he could have the job because [she] was not going to tolerate it."\textsuperscript{109} Both Morris and Lentz, the other supervisor, interpreted Likins's statement as suggesting that Morris could obtain a more favorable evaluation by providing Likins with sexual favors.\textsuperscript{110}

Morris complained about Likins's behavior to County Judge John Black.\textsuperscript{111} Judge Black wrote Likins a letter about the alleged behavior, expressing Judge Black's desire to have Likins and Morris "work out [their] problems and differences."\textsuperscript{112} Morris claimed that Likins became increasingly critical of her work after receiving Judge Black's letter. Morris complained again to Judge Black, who then told Likins not to communicate directly with Morris and not to be around Morris without a third party being present.\textsuperscript{113}

\textsuperscript{100} Beiner, \textit{supra} note 92, at 97-98.
\textsuperscript{101} 201 F.3d 784 (6th Cir. 2000).
\textsuperscript{102} \textit{Id.} at 786. Morris performed clerical and secretarial duties.
\textsuperscript{103} \textit{Id.} at 787.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Morris}, 201 F.3d at 787.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Morris}, 201 F.3d at 787.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
According to Morris, however, Likins ignored Judge Black's advice. Morris claimed that Likins called her at least thirty times on the telephone and, on several occasions, sat in the Road Department parking lot, "looking in [her] window and making faces at her."\textsuperscript{114} One day, Likins allegedly followed Morris home from work, pulled alongside her mailbox, and gave her the finger.\textsuperscript{115} Morris also alleged that, on several occasions, Likins threw roofing nails on her driveway at home, and destroyed a television set that Morris had watched at work.\textsuperscript{116}

The trial court granted the County's motion for summary judgment on Morris's sexual harassment claim.\textsuperscript{117} In affirming the lower court's order granting summary judgment, the Sixth Circuit explained that Morris had complained about only four categories of sex-related harassment: (1) the dirty jokes, (2) the sexual proposition, (3) the one-time reference to Morris as "Hot Lips," and (4) the comments about Morris's state of dress.\textsuperscript{118} According to the court, the retaliatory behavior could not form part of Morris's sexual harassment claim because Likins had not engaged in that behavior "because of sex."\textsuperscript{119}

There is no evidence in the record to suggest that any of Likins's alleged offensive post-transfer conduct was committed "because of sex." Rather, it seems to have been motivated entirely by his personal displeasure toward plaintiff and the complaints she made to Black. As we recently observed, "Personal conflict does not equate with discriminatory animus."\textsuperscript{120}

Without the retaliatory conduct, the court concluded that the remaining examples of sex-based conduct did not suffice to satisfy the requirement that harassment be severe or pervasive. While acknowledging that the "sexual advance was truly offensive, it was the only advance that Likins allegedly made."\textsuperscript{121} By labeling the sexual advance as an isolated incident, the court concluded that Morris's allegations "consisted of the kind of simple teasing, offhand comments, and isolated incidents that \textit{Faragher} made clear did not amount to discriminatory changes in the terms and conditions of a plaintiff's employment."\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Morris}, 201 F.3d at 787.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} at 790.
\item \textsuperscript{119} \textit{Id.} at 790-91.
\item \textsuperscript{120} \textit{Id.} at 791 (footnote and citation omitted).
\item \textsuperscript{121} \textit{Morris}, 201 F.3d at 790.
\item \textsuperscript{122} \textit{Id.}
\end{itemize}
The majority's decision in *Morris* is problematic for two reasons. First, the conclusion that the retaliatory conduct was not based on sex flies in the face of the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* In *Oncale*, the Supreme Court held that Title VII covers same-sex harassment. The Court in *Oncale* explained that harassment "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." While the retaliatory conduct in *Morris* was not sexual in nature, it occurred because Morris had complained about Likins's sexual conduct at work. In other words, Likins retaliated because Morris rejected his sexual advance and complained about his sexual behavior at work to Judge Black. Male employees similarly situated to Morris did not face her dilemma: complain about Likins's improper sexual behavior and risk an escalation of the harassing conduct, or suffer in silence. Therefore, it is simply legally erroneous, under *Oncale*, to separate Likins's retaliatory conduct from his sexual conduct.

Second, as Judge Clay noted in his dissent, the majority's decision ignored prevailing Sixth Circuit precedent. In *Williams v. General Motors Corp.*, the Sixth Circuit reversed the trial court's order granting summary judgment on plaintiff Williams's hostile environment claim. The trial court granted summary judgment because Williams failed to demonstrate that the harassment was severe or pervasive. The Sixth Circuit reversed the trial court's order, noting that the court had to examine the "totality of the circumstances" in evaluating the plaintiff's claim of a hostile work environment based on sex. Instead, the trial court had improperly carved up the plaintiff's allegations, making it easier to grant summary judgment.

In this case, however, the district court divided and categorized the reported incidents, divorcing them from their context and depriving them of their full force. The court's analysis is clearly premised on an impermissible disaggregation of the incidents...

Of course, when the complaints are broken into their theoretical component parts, each claim is more easily dismissed.... Thus, the

124. *Id.* at 79-80.
125. *Id.* at 80.
126. *See* *Morris*, 201 F.3d at 797 (Clay, J., concurring in part, dissenting in part) (noting that "the majority's legal conclusion that to consider the other acts would be a 'mistake' is erroneous").
128. *Id.* at 553.
129. *Id.* at 558.
130. *Id.* at 562.
issue is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether—taken together—the reported incidents make out such a case.\(^{131}\)

Without overruling its earlier precedent in *Williams*, however, the Sixth Circuit in *Morris* did exactly what it had previously held as improper. Not only did the court disaggregate the sexually based conduct from the retaliatory conduct, but the court also isolated the sexual advance from Likins's verbal remarks.\(^{132}\) While noting that the sexual advance was "truly offensive," the court nonetheless concluded that it was an isolated incident.\(^{133}\) Although Likins propositioned Morris on only one occasion, he also engaged in other behavior, such as remarking on the state of her dress and calling her "Hot Lips," that formed the context for the sexual advance. By isolating each incident or category of incidents and describing each as insufficient to demonstrate severe or pervasive conduct, the court was able to more easily affirm the trial court's order granting summary judgment.

Unfortunately, the Sixth Circuit's decision in *Morris* is not an anomaly. All too often courts dispose of sexual harassment claims on employer motions for summary judgment.\(^{134}\) By doing so, they send a message to litigants about the availability of relief for harassment on the job, which, in turn, reduces the number of women willing to come forward with complaints of sexual harassment.\(^{135}\)

IV. CONCLUSION

It has been fifteen years since the Supreme Court's decision in *Meritor,* yet the incidence of sexual harassment both on the job and in the classroom has not declined. The reason lies with sexual harassment law itself. The law creates disincentives for women to file complaints of harassment and makes it difficult to hold employers and educational institutions liable for harassing behavior.

Unlike other causes of action, sexual harassment has a very short statute of limitations, which restricts the number of meritorious claims heard by the

\(^{131}\) *Id.* (emphasis in original).

\(^{132}\) For a critique of the tendency of many courts to disaggregate sexual from nonsexual allegations of harassment, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683, 1713-29 (1998).

\(^{133}\) *Morris*, 201 F.3d at 790.

\(^{134}\) *See supra* note 36, and notes 92-96 and accompanying text.

\(^{135}\) *See Samuel Issacharoff & George Lowenstein, Second Thoughts about Summary Judgment*, 100 YALE L. J. 73, 75 (1990) (noting that "liberalized summary judgment inhibits the filing of otherwise meritorious suits . . .").
EEOC and the courts. In addition, sexual harassment victims must use grievance procedures designed by the institution that they seek to hold liable for the harassment, even though there is no empirical data to support the belief that such internal procedures actually deter harassment. Furthermore, because neither employers nor educational institutions must keep records of harassment complaints filed or their resolution, there is little effective oversight of these private systems of law. Finally, even if a woman files a timely claim of harassment, she is likely to lose on a motion for summary judgment.

These obstacles to relief give institutions not only the wrong incentives but also the tools to ensure that sexual harassment victims do not obtain a trial on the merits. The end result is a system that tips the scales sharply in favor of employers and educational institutions at the expense of the victims of harassment.