BETWEEN SCYLLA AND CHARYBDIS: THE PERILS OF REPORTING SEXUAL HARASSMENT

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"Now wailing in fear, we rowed on up those straits, Scylla to starboard, dreaded Charybdis off to port, her horrible whirlpool gulping the sea-surge down, down..."

I. INTRODUCTION

It has been almost ten years since I reported my colleague Alan White, a tenured professor in the finance department at Miami University's School of Business, for sexual harassment. In retrospect, I realize that reporting the harassment to my employer was not the wisest course of action. I "won" my case, but in the long run, it was I who was the loser. The time, energy, and money that I spent in negotiating the pathways of the

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1. HOMER, THE ODYSSEY 12: 253-55 (Robert Fagles trans., Viking 1996). According to Greek mythology, Scylla, a twelve-legged, six-headed monster, lived in a "fog-bound cavern" in an enormous rock along the coast of Italy. See id. at 12: 81-111. The "awesome Charybdis" took the shape of a whirlpool lying beneath another large rock "an arrow-shot apart" from the crag from which Scylla terrorized sailing vessels. See id. at 12:112-19; see also Wikipedia: The Free Encyclopedia, Charybdis, http://en.wikipedia.org/wiki/Charybdis (last visited Mar. 20, 2007). In the Odyssey, Odysseus had to steer a perilous course between the monstrous Scylla and the terrifying Charybdis, both of which threatened to destroy his ship and his crew. Thus, the expression "between Scylla and Charybdis" means "between two perils or evils, neither of which can be evaded without risking the other." WEBSTER'S NEW UNIVERSEAL UNABRIDGED DICTIONARY 1633 (2d ed. 1983).

2. With a few exceptions (my and my attorney's name), I use pseudonyms for the faculty members and administrators mentioned in this Article; I did not change names in case citations. My harasser has passed away, and, with one exception, all of the university officials mentioned in this Article - the various chairmen, deans, and university administrators - either have retired or no longer occupy the positions they held while I was at Miami.

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university's labyrinthine procedure, as well as the retaliation that ultimately drove me to leave my job, made my victory a hollow one, indeed.

Judicial opinions on sexual harassment portray reporting as the only reasonable course of action for the woman who finds herself the target of sexual harassment in the workplace. The hazards of reporting rarely are discussed, because the law assumes that employers are objective, non-discriminating entities that do not tolerate harassment in the workplace and that employers' and victims' interests coincide. Nothing is further from the truth.

Reporting does not solve the harassment problem within an organization, because reporting is a solution to an individual problem. Harassment is not an individual problem; it is an organizational problem. While harassment may occur in any workplace, its occurrence is not, as the courts assume, a merely random, unpredictable event. Harassment is far more likely to occur in male-dominated workplaces in which women are perceived as interlopers onto male work turf and in workplaces in which harassing workplace conduct is tolerated or condoned. It is in precisely these workplaces where reporting harassment is the riskiest for the woman involved.

Thus, the law creates a double bind for the victim of harassment, placing her between Scylla and Charybdis. If she reports the harassment, she is likely to experience retaliation. If the employer's intervention stops


4. See generally Lawton, Bad Apple, supra note 3 (explaining how the current legal framework incorrectly identifies the source of harassment as the individual harasser, rather than recognizing that harassment occurs because particular organizations tolerate or condone its occurrence).

5. Lawton, Bad Apple, supra note 3, at 840-41.


7. See, e.g., Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2409 (2006) (describing retaliation that followed complaint of sexual harassment); see also Joanna Grossman, The First Bite is Free: Employer Liability for Sexual Harassment, 61 U. Pitt. L. Rev. 671, 725 (2000) ("For women in professional careers, such as law, medicine, or academics, silence in the face of harassment may be a calculated measure to avoid losing the
the harassment, all she has accomplished is replacing one problem—harassment—for another—retaliation. But, if a woman does not report the harassment to her employer, for example because she fears retaliation, then she has to figure out some way to deal with the harasser on her own, or find another job. If she finds another job and leaves her current position without reporting, she likely will lose any subsequent lawsuit that she files against her employer for sexual harassment because she did not first notify her employer of the harassing workplace conduct.8 In other words, once harassment occurs, the choices that women face are all bad.

For those few women who have the ability to easily move from job to job without sacrificing salary or prospects, finding other employment may be the best solution. But, for the vast majority of women for whom exit is not a viable strategy, the law boxes them in: there simply is no good way to proceed under the current legal framework.

That was my experience. I naively placed my faith in university officials and university procedures. Reporting Professor White stopped the harassment, but also generated a pattern of conduct, some of which was clearly retaliatory in nature, which made my life as a tenure-track faculty member substantially more difficult than it had been prior to reporting.

Thus, I offer up this story of harassment within the academy as a cautionary tale about the perils of reporting.9 The story reads

8. See Grossman, supra note 7, at 700 (stating that “[r]arely, if ever, will courts excuse a plaintiff from filing an internal complaint due to fear of retaliation or the perception that such complaints are futile”); Lawton, Empirical Vacuum, supra note 3, at 257-60 (describing various ways in which employers retaliate against those who report sexual harassment).

9. I am indebted to those who came before, using stories to enrich the body of legal scholarship. See, e.g., Nancy Cook, In Celia’s Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases into a Feminist Castle Doctrine, 6 VA. J. SOC. POL’Y & L. 197 (1999) (detailing the story of a slave, celia, who murdered her master out of fear of his unsolicited sexual advances and threats); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 MICH. L. REV. 2411 (1988) (discussing the trend of narrative and legal storytelling as a tool for marginalized groups); Peter Margulies, The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education, 88 NW. U. L. REV. 695 (1994) (calling for the increased use of narrative to establish a civic republican model of clinical legal education). This Article differs from some of this earlier narrative work in that it involves my own, rather than another’s, story of sexual harassment. In that sense, it fits more within the body of first-person narrative legal scholarship. See, e.g., Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.
chronologically. In Part II, I describe the harassment, as well as my initial decision to use the university’s informal resolution process. In Part III, I explain how the informal process failed, thereby requiring me to invoke the university’s formal procedures. Part IV discusses the myths of female hypersensitivity and male vulnerability to opportunistic female colleagues that commonly are invoked in sexual harassment cases and that Professor White relied upon to damage my credibility. In Part V, I pick up on a theme begun in Part IV.C of this article—how the university’s procedures, though seemingly neutral, worked to Professor White’s advantage and my disadvantage. Part VI describes the aftermath of reporting and how the repeated struggles I faced after reporting eventually led to my resignation from the university in the spring of 2000.

I realize that many law review articles, while critical of legal rules or judicial opinions, often end on an optimistic note about the possibility for legal change. I am less sanguine about the prospects for change in sexual harassment law. Meaningful change requires federal judges to look behind employers’ paper policies and procedures to determine how harassment policies work in practice. That is unlikely to occur. Therefore, I caution women who fall victim to harassment about the wisdom of relying on their employers to obtain some measure of justice for the harms visited upon them by sexual harassment.

II. “A KISS IS NOT JUST A KISS”12

It was Sunday, December 22, 1996, three days before Christmas, and I was in my office finishing several letters of recommendation for students who were applying to law school. The building was quiet and it appeared that no one, besides me, was around. To my surprise, two other finance


10. Cf. e.g., Richard B. Peterson & David Lewin, Research on Unionized Grievance Procedures: Management Issues and Recommendations, 39 HUMAN RES. MGMT. 395, 403 (2000) (recommending periodic employee surveys of the “perceived fairness of grievance handling processes and grievance decision outcomes” because “perceived fairness of grievance handling . . . shapes [employees’] assessment of the overall effectiveness of grievance procedures”); see also Lynn Perry Wooten and Erika Hayes James, When Firms Fail to Learn: The Perpetuation of Discrimination in the Workplace, 13 J. MGMT. INQUIRY 23, 27 (2004) (noting that “the existence of antidiscrimination policies (e.g., EEO statements) often allows organizations to view discrimination incidents as anomalies . . . [and] create[s] the appearance that discrimination cannot exist in the organization”).

11. See generally Lawton, Empirical Vacuum, supra note 3 (noting the tendency of employers to engage in “file cabinet” compliance and the failure of federal judges to look beyond paper policies and procedures when evaluating employers’ anti-harassment efforts).

department faculty members were in the coffee lounge when I went for coffee before settling down to work. I greeted them both, but left quickly because I wanted to avoid one of them, Alan White, whose conduct during the past two months had made me increasingly uncomfortable.

I was working at my computer when, shortly thereafter, Professor White entered my office. I had closed the door, but apparently it had not caught so the door did not lock. Professor White came up behind me at the computer and began massaging my shoulders. I stood up to get him to stop touching me and tried to distract him by showing him materials from an international bioethics conference I had just attended in Strasbourg, France. That strategy failed. He patted my rear end, at which point, I realized that I had to get him out of my office. I was uncertain whether the other finance department faculty member was around and I had seen no one else in the building. I did not want to be trapped inside the confines of my small office with a man who was touching and groping me. I picked up my coffee cup, left the office, and started walking toward the coffee lounge. Unfortunately, Professor White decided to accompany me. He put his arm around my waist, pulled me toward him, and kissed me on the neck. I realized that the situation was getting out of control, but I did not want to anger him. As the most recently tenured member of the finance department, he voted on both my promotion and tenure. I also had injured my ankle the evening before and wasn’t sure that I could sprint down the hall away from him. But, what was perhaps most distressing, was the fact that until recently, I had considered him a friend and colleague. So, instead of confronting him, I pulled away and asked him why he was being so “affectionate.” It was a bad choice of words, given what was happening, but I was thinking only of finding a safe place and avoiding any confrontation with Professor White in what appeared to be a deserted building.

I got my coffee and started back toward my office, hoping that Professor White had stayed behind in the coffee lounge. To my chagrin, he followed me back to my office. He noticed that I was limping, and offered to massage my ankle, which I refused. By that point, I had reached my office door. I stood at the door waiting for him to pass by, so that I would not be in the position once again of being trapped inside my office with him. As he passed me by, he fired off one last suggestive salvo, informing me that I knew where I could go for some “affection.” I immediately went into my office, made certain that the door was locked, and called my friend and colleague Ella Street, who was a visiting law professor in the finance department, to ask for her advice. We talked for awhile, but I remained undecided on how to proceed when I hung up the phone. Fortunately,
Professor White was not around when I left the office for home.  

I spent the holidays talking with family and friends about what I should do. December 22 was not the first time that Professor White had touched me in intimate and sexually inappropriate ways at work. While sitting next to me at a school-wide faculty meeting, he had patted my stocking leg; he had taken me by the hand on one occasion when I had tried to leave my office because he was making me feel uncomfortable; and he had touched me on the rear end when I passed by him in the main faculty office. Most of these events took place in December of 1996, but the faculty meeting had occurred earlier in the fall term. Apart from Professor Street, however, I had not spoken about or reported these incidents, because I hoped that they were aberrations and that avoiding Professor White would stop the harassment.  

My reluctance to report Professor White stemmed, at least in part, from my fear that he would hold my reporting him for sexual harassment against me during tenure and promotion deliberations. I was an untenured faculty member, just beginning the second year of a six-year tenure track. Professor White, who had obtained tenure only the year before, voted on my tenure and promotion case. He was, in effect, one of my supervisors, and I did not wish to alienate or, worse, antagonize him.  

But, I also worried how the other members of the department would view my report of sexual harassment. I was an “outsider” in the finance department: I was both a woman and a lawyer. Of fifteen tenured or tenure-track faculty members in the department, only two were women, comprising a mere 13% of the finance department faculty, and only three, including myself, were lawyers. Some members of the finance department and of the business school faculty simply did not know how to interact with women as professional colleagues, because there were so few women working as tenured or tenure-track faculty at the business school. There

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13. The preceding description is taken from the formal complaint of sexual harassment that I filed with the Department of Affirmative Action at Miami University. See Formal Complaint of Sexual Harassment, filed April 11, 1997, with Dep’t. of Affirmative Action, Miami Univ., at 5-6 [hereinafter Formal Complaint] (on file with author).

14. Nor was it the only improper or sexist conduct to which I had been exposed during my short tenure at the business school. See infra note 131-33 and accompanying text.

15. See Formal Complaint, supra note 13, at 4-5.

16. While I did not realize it at the time, my response to Professor White’s harassment was neither unique nor unusual. As the Merit Systems Protection Board (“MSPB”) found in its three large-scale studies of sexual harassment in the federal workplace, “[t]he single most common response of employees who are targets of sexually harassing behaviors . . . has been, and continues to be, to ignore the behavior or do nothing.” Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges 29 (1995). For a discussion of the MSPB studies and their findings, see Lawton, Emperor’s New Clothes, supra note 3, at 79-81, 86-7.

17. See infra Part VI.B.1.
was only one tenured woman in the finance department out of a tenured faculty of fourteen (7%), and women comprised approximately 15% of the tenured or tenure-track faculty within the school of business.

Moreover, no necessary connection existed between the disciplines of law and finance. The type of legal scholarship in which Martin Brown, my mentor and another lawyer in the department, and I were engaged did not fit within the dominant quantitative model for research that prevailed in the department. In addition, just before I was hired, another law professor in the department had been denied tenure and had sued the university.\footnote{18. See infra note 63.}

Although I had worked in the department for only a year and a half, I realized that some of my colleagues would necessarily view with skepticism any allegation of sexual harassment against “one of their own.” The problem was that I simply did not fit in: I was neither male nor a finance professor. Unlike Professor White, I was the “new kid on the block,” having been at the business school for a mere year and a half at the time—a woman intruding into a largely male enclave.\footnote{19. See Tristin K. Green, Work Culture and Discrimination, 93 CAL. L. REV. 623, 648 (2003) (stating that “[r]esearch indicates not only that work cultures in workplaces dominated by white males are likely to develop around a white, male norm, but also that outsiders, whether identified by race, sex, or both, must overcome a presumption against fit”) (footnote omitted).}

But, I realized that I needed to report the harassment, because avoiding Professor White was not working. On January 7, 1997, I spoke with Bruce Evans, the Director of the Department of Affirmative Action (“DAA”), about my experiences with Professor White. Mr. Evans provided me with copies of the university’s informal and formal resolution procedures and recommended that I not speak with Professor White alone.\footnote{20. See Formal Complaint, supra note 13, at 6-7.}

I did not decide until the next day to opt for the university’s informal process; I did so as a compromise between my need to report and my desire to minimize the impact of reporting on my reputation within the department.\footnote{21. The university also “encourage[d] informal means of mediation and resolution where practical and appropriate.” MIAMI UNIVERSITY POLICY AND INFORMATION MANUAL §3.2122A [hereinafter MUPIM] (on file with author).}

On January 8, I contacted Mr. Evans and told him I wanted to use the informal resolution process; he scheduled the meeting for Friday, January 10, 1997.

On the morning of January 10, I met with Mr. Evans and Professor White.\footnote{22. The following synopsis about the informal resolution procedure is taken from my formal sexual harassment complaint. See Formal Complaint, supra note 13, at 6-9.} Professor White tried to minimize my complaints, by stating that he was a friendly person and patted his colleagues, both male and female, on the back. I explained to Professor White the nature of my complaints.
and noted that it was not back-patting that was the issue. I recounted to
him the behaviors that I found offensive, in particular, the events of
December 22. Professor White responded by asking me whether he had
been drinking. I was taken aback. He was suggesting, in front of a
university official, that he was so drunk that he had blacked out and could
not remember what had transpired on December 22. To my surprise, Mr.
Evans did not pursue the matter.

Professor White also raised a concern about his participation in any
decisions about my promotion and tenure. He indicated that whether he
voted for or against tenure, his decision would appear suspect based on my
allegation of sexual harassment. But, because the informal process at
Miami involved no fact finding, Mr. Evans could make no formal ruling on
the need for Professor White to recuse himself from deliberations on my
promotion and tenure decision.

Professor White never admitted any wrongdoing during the informal
resolution process. While he apologized to me, he did so after the meeting
outside the earshot of the Director of the DAA. Moreover, while he
raised concerns about the confidentiality of the informal resolution process,
Professor White simultaneously misrepresented to at least one faculty
member in the department what had occurred during the informal process.

Prior to the January 10 meeting, Professor White spoke with Charles Lang,
the chairman of the finance department’s promotion and tenure committee
(“P&T Committee”). Professor White told Professor Lang that he had been
summoned to the DAA, based on a complaint that I had made. But,
Professor White told Professor Lang that because he had been drinking on
December 22, he did not recall what had occurred. Nonetheless, he told
Professor Lang that he believed the visit to the DAA had to do with a
“tasteless joke” and advised Professor Lang to “leave your humor at
home.”

After the informal resolution process, Professor White spoke once
again with Professor Lang, explaining that he “had learned his lesson” and

23. See My personal reply to Ms. Anne Lawton’s formal complaint of sexual
harassment, filed April 21, 1997, with Dep’t. of Affirmative Action, Miami Univ., at I
[hereinafter Personal Reply] (on file with author).

24. The ensuing discussion about the conversation between Professors Lang and White
is taken from both my formal complaint and a contemporaneous journal of events that I
maintained. See Formal Complaint, supra note 13, at 9; Facsimile from author to Sarah
Poston, legal counsel for author, at 8 (March 17, 1997, 16:30 EST) [hereinafter Journal of
Events] (on file with author).

25. Memorandum re: Conversation with Alan White, from Ellen Hope, Assoc. Prof.,
Econ. Dep’t., Miami Univ., to Bruce Evans, Dir., Dep’t. of Affirmative Action, Miami
Univ., April 29, 1997, at 4 (on file with author); see also Statement of Jane Cassidy, May
14, 1997, at ¶¶[hereinafter Cassidy Statement] (on file with author); see Journal of Events,
supra note 24, at 10.
that the problem had been worked out. Professor White did not provide Professor Lang with details of the January 10 meeting or correct the misimpression that my complaint had to do with a "tasteless joke."

III. GOING FORMAL

My informal complaint worked in one respect: it stopped the harassment. In other significant respects, the process was a failure. The absence of formal fact finding meant that, according to the university, Professor White had not engaged in sexual harassment. Thus, the presumption was that Professor White could impartially judge my application for promotion and tenure, and participate in my annual reviews.

While Professor White had not objected to recusing himself from the department's P&T Committee, because he was doing so on a permanent basis, he and I had to negotiate the terms of that recusal. John Green, the chairman of the finance department, also participated in the negotiations. It was during this time period that I realized I needed legal representation. Two problems arose during negotiation of the recusal agreement.

First, I wanted an explanation in the agreement as to why I sought Professor White's recusal from the committee performing my annual reviews and deciding on my promotion and tenure. When I first raised the prospect of asking for Professor White's recusal from the P&T Committee, Professor Green cautioned me against doing so. He felt that such a request might reflect poorly on me with some members of the department. Thus, I was concerned that absent such a clear statement in the recusal agreement, speculation about my reasons would abound and that much of that speculation would redound to my detriment.

Second, I wanted members of the department to know the facts. I knew that Professor White already had misrepresented to Professor Lang the reasons for my complaint to the DAA. I suspected that he was lying to other members of the department, as well, and I thought that a formal statement included as part of the recusal agreement might lay to rest some of the rumors and lies. The members of the department then could evaluate, against the known facts, any derogatory statements that Professor White made about me or my work.

Moreover, a discussion at a spring 1997 faculty meeting about outside letters of review drove home the importance to me of setting the record

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26. I hired the firm of Laufman, Rauh & Gerhardstein, in Cincinnati, Ohio. See Representation Agreement, March 19, 1997. I was friends with Sarah Poston, one of the firm's attorneys. Ms. Poston agreed to represent me at half the firm's hourly fee as a professional courtesy. See id.
27. See Formal Complaint, supra note 13, at 1.
28. Id.
straight. During this faculty meeting, members of the department were discussing a requirement that faculty members in their tenure year obtain outside letters reviewing their scholarship.\(^{29}\) During the discussion, Professor White suggested requiring outside letters for the untenured faculty member's third-year review.\(^{30}\) At that time, I was the only untenured faculty member in the department. It appeared that Professor White, under the guise of implementing some objective procedure, was trying to make the tenure process more arduous for me, by requiring outside letters of review, potentially not only in my tenure year but also three years earlier, for my third-year review. No other member of the department had been required to submit outside letters of review for their third-year review. Without knowing the facts of my complaint, other members of the department would not necessarily question Professor White's motivation in creating another barrier to tenure that no other member of the department had had to overcome.

Accordingly, I wanted a statement in the agreement that I had alleged that Professor White had engaged in unwanted touching of a sexual nature.\(^{31}\) Professor White, of course, strenuously objected to the inclusion of such language. Because I had chosen Miami's informal resolution procedure, which entailed no finding of sexual harassment, I could not insist on my language. Thus, the final agreement merely stated that I had "raised concerns" about Professor White.\(^{32}\)

I made my initial request for recusal to my department chairman on March 3, 1997.\(^{33}\) When I first requested Professor White's recusal from my P&T Committee, I was unaware that the finance department had an "absence equals a no vote" rule. Thus, by agreeing to recuse himself, Professor White guaranteed that I would receive at least one negative vote on my promotion and tenure decision. Not until two and half weeks later, at a meeting held at the DAA on the subject of recusal did I learn of the finance department's unusual rule.\(^{34}\) Had I been apprised of the departmental rule earlier, I would have "sought different terms for the resolution" of my problem with Professor White.\(^{35}\) When I learned of the rule from my department chairman, I insisted that the recusal agreement


\(^{30}\) Id.

\(^{31}\) See Formal Complaint, supra note 13, at app. D ¶2.


\(^{33}\) See Letter from author to John Green, Chairman, Fin. Dep't., Miami Univ., in Formal Complaint, supra note 13, at app. B.

\(^{34}\) See Continuing Journal, supra note 29, at 2 ¶2.

\(^{35}\) See Recusal Agreement, supra note 32, at ¶3.
include language waiving the departmental rule in my case.\textsuperscript{36} On April 2, 1997, Professor White and I, as well as Professor Green, as chairman of the finance department, and Professor Lang, as chairman of the P&T Committee, signed the recusal agreement, which waived the department's "absence equals a no vote" rule.\textsuperscript{37}

Two days later, at a finance department meeting, Professor Green announced that Professor White and his wife would host that year's departmental party at their home. I could have sent my regrets, but socializing with my colleagues was an important way to break down the barriers that existed as a result of my outsider status within the department. Attending the department's annual party was particularly important that year, because it would signal a return to business as usual. So, I complained to both Professor Green and to Rex Knight, the dean of the business school, about having the party at Professor White's home, but to no avail. Once again, the university had made no formal finding of sexual harassment against Professor White, so there was no reason why he could not host the department's party at his home.\textsuperscript{38}

At that point, I realized that I had to invoke the university's formal complaint procedure. A week later, on April 11, 1997, I filed a formal complaint of sexual harassment against Professor White with the University's Department of Affirmative Action.

On April 21, 1997, Professor White filed his personal reply to my formal complaint of sexual harassment:

Ms. Anne M. Lawton, Assistant Professor of Finance, who has a J.D. and teaches business law courses within the department of finance, filed a formal complaint of sexual harassment against me on Friday, April 11, 1997.

Mr. Evans, given your knowledge of this case, you know that I have gone to the highest extremes to negotiate a settlement with Ms. Lawton. I wanted a settlement just to finish it, so we could both get back to work. Yet, Ms. Lawton continues to harass me with her allegations that I engaged in "unwanted" touching of a sexual nature toward her. This is just not true. The touching was not unwanted nor unwelcomed, and its nature was not sexual.

On January 10, 1997, you, Ms. Lawton, and I met in your office. I was told only the day before the meeting that it involved you, Ms. Lawton, and me, and we were to discuss some "workplace issues." Upon hearing the allegations for the first time during that meeting, I strived to maintain my composure,
show sensitivity to the concerns raised by Ms. Lawton, and resolve the matter. At that time, I was not prepared to get into a debate with Ms. Lawton over what actually happened and who initiated or encouraged what. I was only concerned with maintaining a good working relationship with Ms. Lawton. At the conclusion of the meeting, I was under the impression that we all agreed that the meeting was to be considered an "educational exercise," that Ms. Lawton and I would both alter our behavior toward one another in the workplace, and we agreed that the meeting would remain confidential. Also, I suggested at the end of the meeting that she may want me to recuse myself from the evaluation of her promotion and tenure materials. I made it clear that whatever she decided was in her best interest, I would gladly accept. Outside the Affirmative Action Office after the meeting, I told her I was sorry, and she thanked me for coming to the meeting.

On Monday, March 31, 1997, I received Ms. Lawton's original version of the memorandum of agreement (recausal letter) . . . As stated above, during the informal resolution process, I willingly offered to recuse myself from any decisions concerning her job evaluations. I thought it was clear that I would cooperate in removing myself from her promotion and tenure committee, if she wanted me to do so. It was not necessary for her to take the extreme measures she did in order to have me recused, unless there was an underlying motive. I believe that she breached the confidentiality agreement and violated the spirit of the informal resolution process.

In her proposed recusal letter dated March 31, 1997, she wanted the following statement to be read to the members of the promotion and tenure committee:

In January of this year, Anne Lawton made allegations of unwanted touching of a sexual nature against Alan White to the Affirmative Action Office. During an informal process held in the Affirmative Action Office, Alan White was made aware of those allegations, which he never denied. Alan White has agreed to permanently recuse himself from any current or future consideration of Anne Lawton's promotion and tenure materials.

In this memorandum of agreement that I received on March 31, 1997, the phrase "unwanted touching of a sexual nature" was used in connection with this case for the first time. Also, the phrase, "which he never denied," is a false statement. I thought these statements were totally inappropriate. I called you shortly after receiving the memorandum, and told you that I felt the
phrases were inappropriate, and you agreed with me. I, then, rewrote Ms. Lawton's memorandum of agreement. . . . I did omit the phrase, "which he never denied," and changed the phrase "made allegations of unwanted touching of a sexual nature against Alan White," to "raised concerns about Alan." This was not done to trivialize the concerns raised by Ms. Lawton, but to maintain the confidentiality of the January 10, 1997, meeting and to respect the informal resolution process developed by the University Senate." . . . In retrospect, I believe the original memorandum prepared by Ms. Lawton was an attempt to coerce me into signing a document in which I would confess to allegations that were not true.

Ms. Lawton has twisted and eliminated facts in order to serve herself. . . . [I]f this harassment of me by Ms. Lawton and her advisors does not stop quickly, I no longer want to work here. My friends, family, and I now stand ready to address each and every allegation filed by Ms. Lawton and to challenge the process approved by the University Senate which has been used by Ms. Lawton to slanderously attack [ ] me. . . .

I engaged in friendly, socially acceptable, professional behavior toward Ms. Lawton. This is the same kind of behavior that I exhibit toward my students, colleagues, and friends, regardless of gender. However, I do appreciate that the January 10, 1997, meeting was productive in raising my awareness of behaviors that might be considered inappropriate by some.

There were a few times that Ms. Lawton and I flirted with each other in an innocent way. The flirtations were not one-sided and certainly not of a sexual nature on my part and, at the time, I did not take it to be of a sexual nature on the part of Ms. Lawton. . . . During our times together, my behavior and treatment of Ms. Lawton was always consistent with my friendly personality and never changed from the first day we began working together until the January meeting in your office. Not once during that period did Ms. Lawton show any sign whatsoever, either directly or indirectly, that my behavior made her feel uncomfortable or threatened. On the contrary, her actions toward me indicated that she considered me to be her trusted friend and ally. She has used my friendliness to make a case against me. In my opinion, her motive is to be promoted and tenured without evaluation.

This reply is to let you know that I will no longer sit by and allow Ms. Lawton and her advisors to intimidate me [and] my family [ ] in order to obtain her wishes. She has continually manipulated the system and used the university process to serve her purpose at my expense. . . . I am prepared to file charges against Ms. Lawton and anyone else who continues to participate in this harassment and slander.
 Needless to say, my family and I have suffered immensely throughout this whole ordeal with Ms. Lawton. I trust that you and the other officers of Miami University will resolve this issue once and for all within a few days. In the meantime, I pray to God that Ms. Lawton and I can redevelop a productive, professional relationship.  

IV. THE FALLACY OF NEUTRAL RULES

The problem with the current legal framework in sexual harassment cases is that it looks balanced, fair, and objective. In *Faragher v. City of Boca Raton*, one of the Supreme Court’s two affirmative defense cases, the Court framed the issue of employer liability as balancing the interests of the “innocent employer” against those of the “innocent employee” victimized by harassment on the job. By doing so, the Court ignored both the cultural backdrop against which sexual harassment claims are viewed, as well as the role that the employer plays in creating the hostile work environment.

First, allegations of harassment often are met with skepticism. The dominant perception in this culture is that women either lie about harassment to gain some advantage in the workplace or are overly sensitive to normal workplace conduct. Either way, the alleged harasser in any individual case has an automatic advantage: his story resonates with dominant cultural myths about women’s proclivity to lie or their hypersensitivity to common workplace interactions. As a result, women who complain about harassment start out with a credibility deficit that they must overcome.

Second, sexual harassment does not occur randomly: its predictors are largely organizational in nature. Harassment is far more likely to occur in male-dominated workplaces, especially those in which core tasks are defined as male, and in workplaces in which management condones or  

41. *Id.* at 801. The companion case to *Faragher* was Burlington Indus. v. Ellerth, 524 U.S.742 (1998).
42. See, e.g., RHODE, supra note 3, at 97.
43. See generally Deborah Zalesne, *Sexual Harassment Law: Has it Gone Too Far, or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351 (1999) (describing how selective media accounts of exceptional sexual harassment cases create the impression that claims of harassment are overblown and reinforce stereotypes that women lie about harassment in order to obtain advantages at work).
tolerates harassing conduct. Thus, harassment is more likely to occur in
certain workplaces than in others, and it is in precisely these workplaces—
where management tolerates or condones harassing behavior—that
reporting harassment is the most risky.

By ignoring both the cultural myths that disadvantage women in
sexual harassment cases, as well as the structural impediments to reporting
harassment, the Court created powerful, yet invisible, hurdles for victims to
overcome in bringing a sexual harassment case. What is missing from the
legal story about sexual harassment is a recognition and appreciation of the
fact that sexual harassment operates within a power dynamic that privileges
the harasser and disadvantages the victim. As a result, women’s voices are
ignored, ridiculed, and silenced, because women’s stories about harassment
are not woven into the fabric of the cultural and legal narrative about sexual
harassment.

A. Liars . . .

Harassers respond to allegations of sexual harassment using
predictable scripts. An all-too-familiar script is that women lie about
harassment in order to use the threat of a sexual harassment lawsuit to
obtain some undeserved benefit at work. Therefore, it is not surprising that
the dominant theme of Professor White’s personal reply to my harassment
complaint was that I had lied about the harassment in order to obtain an
advantage in the promotion and tenure process. Professor White claimed
that I had “twisted and eliminated facts” and “continually manipulated the
system and used the university process to serve [my] purpose at [his]
expense.” My “motive” in doing so was “to be promoted and tenured
without evaluation.”

Professor White did not have to look far for confirmation of his belief
that women lie about sexual harassment. Both the university’s own policy
and the requirements for bringing a successful sexual harassment lawsuit
support this false perception.

At the time of my complaint, Miami’s sexual harassment policy
included a “false claims” provision, which provided that “[a] complainant
found to have knowingly made false allegations of sexual harassment
[would be] subject to University discipline.” The false claims language

45. See Lawton, Bad Apple, supra note 3, at 838-841 (explaining how employers with
environments ripe for sexual harassment escape liability if they have a harassment policy
and grievance procedures).
46. Personal Reply, supra note 23, at 3, 4.
47. Id. at 3.
48. MUPIM, supra note 21, at §3.2116. The university revised portions of MUPIM
shortly after I had filed my complaint, but retained the false claims provision in the revision.
See Revision to MUPIM §3.6F (1997) [hereinafter REVISED MUPIM] (on file with author).
immediately followed a statement about retaliation, suggesting that retaliation against complainants and false complaints of sexual harassment are equally plausible events. 49

The rules crafted by the federal courts in sexual harassment cases also reinforce this stereotype about women’s proclivity to lie. Rather than focusing on the conduct of the alleged harasser, the federal courts all too frequently inquire why the complainant either failed to report or delayed reporting the harassment to her employer. 50 The prompt complaint requirement, borrowed from rape law, serves as one of the law’s proxies for the victim’s veracity. 51 After all, if the harassment were bad enough, then why didn’t the victim promptly complain—either to the harasser or to her employer? 52

There are two problems with the requirement of prompt complaint. First, the evidence demonstrates it is an extraordinarily poor proxy for credibility. The social science research over the past twenty-five years consistently has shown that women do not report (or delay reporting) harassment because they fear retaliation, they believe no one will believe

49. See MUPIM, supra note 21, at §3.2115 (anti-retaliation provision); id. at §3.2116 (false claims provision); see also REVISED MUPIM, supra note 47, at §3.6E (anti-retaliation provision), id. at §3.6F (false claims provision).

50. See, e.g., Tatt v. Atlanta Gas Light Co., No. 04-14434, 2005 U.S. App. LEXIS 8538, at *7 (11th Cir. 2005) (“And, any belief on her part that she perceived the conduct as ‘severe’ is undermined by the fact that she failed to report it until she received the adverse performance evaluation.”); Gleason v. Mesirow Fin., 118 F.3d 1134, 1145-46 (7th Cir. 1997) (citation omitted) (“Novak’s alleged sexual harassment was not troubling enough to Gleason that she bothered to report it to any of her superiors, even though she was given ample opportunity to do so.”); Petrosino v. Bell Atlantic, No. 99 CV 4072, 2003 U.S. Dist. LEXIS 4616, at *23 (E.D. N.Y. March 20, 2003) (“She did not complain of this incident to the company, though she made other complaints, and she worked with Degenhardt in later years without further incident.”); see also Lawton, Empirical Vacuum, supra note 3, at 253-60 (noting the inconsistency between a legal standard that depicts formal reporting as the only reasonable alternative to harassment and the extensive empirical evidence demonstrating that victims of harassment rarely register formal complaints against their harassers).

51. Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 850-51 (1991). Most states have abandoned the prompt complaint requirement for rape cases. See Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 84 B.U. L. REV. 945, 967 (2004) (explaining that “[m]odern courts rarely require a prompt complaint,” but instead “under a modern ‘fresh complaint’ doctrine” allow the rape victim to “admit evidence that a complaint was promptly reported to bolster [her] credibility”).

52. See, e.g., Hulsey v. Pride Rests., 367 F.3d 1238, 1249 (11th Cir. 2004) (explaining that plaintiff’s failure to complain to her employer did not entitle the employer to summary judgment, but the employer could raise the issue at trial to show that plaintiff did not perceive the conduct as severe or pervasive); see also Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 850-51 (1991) (“[T]he standard of proof for rape is the law’s highest, permitting no reasonable doubt of the defendant’s guilt; the standard for sexual harassment, a preponderance of the evidence, is the law’s lowest.”).
them, or they think that reporting will make the situation at work worse.\textsuperscript{53}

Second, the sole reason for the prompt complaint requirement is the unarticulated assumption that without it women will manufacture complaints of harassment against otherwise "innocent" men. The problem, however, is that there is no evidence that false complaints of harassment are a common or serious problem.\textsuperscript{54} It is true that the perception is that false claims outnumber legitimate complaints of harassment, but there simply is an absence of evidence supporting that erroneous perception.\textsuperscript{55}

The prompt complaint requirement surfaced twice during my case. First, in its findings on my sexual harassment complaint, the DAA concluded that while I had not complained directly to Professor White, I had made a "contemporaneous complaint" of harassment by invoking the university's informal resolution procedure in early January.\textsuperscript{56} As the DAA's discussion about the contemporaneousness of my complaint directly followed an excerpt from the EEOC's policy manual about what constituted unwelcome conduct, it appeared that my prompt complaint suggested that Professor White's behavior was unwelcome.\textsuperscript{57} But, why was my reaction, and not his behavior, better evidence of the unwelcomeness of his conduct?

\textit{[A]s in rape cases, the focus is on the victim, not on the man. She may be less powerful, and economically dependent, but she still is expected to express unwelcomeness. Unless she does, no burden is placed on him to refrain from abusing his position of power. A doctor may be required, by tort law, to secure affirmative and informed assent before he lays his hands on a woman; but a boss may freely touch any woman subordinate, until and unless she expresses, through her conduct, her non-assent.}\textsuperscript{58}

Professor White and I were colleagues, not paramours. Yet, I had to demonstrate that his conduct, some of which constituted sexual imposition, a third-degree misdemeanor in Ohio,\textsuperscript{59} was unwelcome.

\begin{footnotes}
\item[54] See, e.g., Lawton, \textit{Emperor's New Clothes}, supra note 3, at 124.
\item[55] Zalesne, \textit{supra} note 43, at 353 nn. 9-10.
\item[56] See Letter of Findings regarding Anne M. Lawton's formal sexual harassment complaint against Alan White, April 30, 1997, at 3-4 [hereinafter DAA Findings] (on file with author).
\item[57] \textit{Id.} at 3-4.
\item[58] Estrich, \textit{supra} note 51, at 828.
\item[59] See \textit{Ohio Rev. Code Ann.} §§2907.01 (B) (2006) (defining sexual contact as "any touching of an erogenous zone of another, including without limitation the . . . buttock . . . for the purpose of sexually arousing or gratifying either person") \textit{Ohio law defines sexual imposition as "[t]he offender know[ing] that the sexual contact is offensive to the other person . . . or is reckless in that regard."} \textit{Ohio Rev. Code Ann.} §2907.06(A)(1) (2006).
\end{footnotes}
Second, Professor White contended that my decision not to confront him directly meant that I did not consider his behavior offensive. "Ms. Lawton's contemporaneous responses to Mr. White tell us something about the severity. She said nothing. Appreciating that Ms. Lawton is an adult over thirty trained as an advocate, it is difficult to imagine why she would make no response to gestures that she perceived as truly intimidating." Thus, to Professor White, my failure to register a protest directly with him suggested that I really did not find his behavior offensive.

Professor White's interpretation of my behavior, however, took his harassing conduct out of context. Nowhere did he acknowledge that he was my supervisor and had power, in part, over my promotion and tenure decision. Moreover, why was it my responsibility to explain to him what constituted appropriate workplace behavior? Professor White was an adult over forty, yet I had to tell him that touching a female colleague on the rear end and trying to kiss her breached the bounds of acceptable conduct at work.

Thus, the story told by Professor White played upon pervasive myths about women's willingness to lie about sexual harassment in order to obtain advantage. At the same time, it drew upon dominant gender beliefs that men are "generally more competent at most things than are women." The challenges of the tenure process, for Professor White, were a spur "to reach [his] fullest potential as a scientist in [his] field." But, according to Professor White, the rigors of the tenure process required me to lie in order to obtain tenure, and to treat the demands of my tenured colleagues as a "personal vendetta." In other words, I was neither competent nor tough enough to withstand the rigors of the tenure process. My only solution was to fabricate a story of harassment in order to insulate myself from the otherwise legitimate critiques of my record during the tenure process.

60. Response to DAA Findings, supra note 12, at 2 ¶2.
61. See supra notes 50-52 and accompanying text.
64. Id.
65. My case also arose against the backdrop of a prior tenure denial of another business law professor, Roger Staton. See Staton v. Miami Univ., No. C-1-95-311 (S.D. Ohio May 14, 1997) (on file with author); see also Staton v. Miami Univ., No. 00AP-410, 2001 WL 289952 (Ohio Ct. App. March 27, 2001). Only months before my arrival on campus, Professor Staton filed a complaint of sexual harassment against Barbara Lewis, the department's then Acting Chairwoman, claiming that the university had denied him tenure because he had rebuffed advances allegedly made by Professor Lewis. Letter from Roger Staton, March 1, 1994 (on file with author). The university found no reasonable cause to believe that Professor Lewis had engaged in sexual harassment toward Professor Staton. Memorandum re: Sexual Harassment Complaint by Roger D. Staton/Letter of Finding from Bruce Evans, Dir., Dep't. of Affirmative Action, May 13, at 3 (on file with author). It is
Back in 1996, a story broke in the national news media about Jonathan Prevette, a six-year-old boy who was suspended from school after having given a female classmate a kiss on the cheek. The attention given to the story by the national news media seemed odd to me, at first. While the primary school administration had overreacted to young Prevette's display of affection, not every instance of local bureaucratic bungling merits national news attention. Young Prevette's story did, however, because it played on an inaccurate but widely held belief that claims of sexual harassment are exaggerated and overblown.

Professor White drew on this powerful myth of female oversensitivity when he described my complaint of harassment as involving a "tasteless joke" and advised Professor Lang, the chairman of the P&T Committee, to "leave [his] humor at home." It was possible that Professor White told this story to no other member of the finance department. I, however, had no way of knowing to whom he had spoken. Once news got out that I had been to the DAA, the silence inside the department was deafening. It was clear that there was talk behind closed doors, but no one came to ask me what had happened.

Moreover, Professor Lang never bothered to ask for my side of the story. It was merely fortuitous that I learned of Professor White's comments and was able to address them directly with Professor Lang. I

interestingly that Professor White started out his personal reply to my harassment complaint by describing me as an "Assistant Professor of Finance, who has a J.D. and teaches business law courses within the department of finance." Personal Reply, supra note 23, at 1. It appears he was trying to draw a parallel sub silentio between my case and the recent harassment and tenure denial case involving Roger Staton, another business law faculty member. My status as a professor of business law otherwise bore no relevance to my sexual harassment complaint.

66. See Deborah Rhode, You Must Remember This, THE NAT'L LAW JOURNAL, Oct. 28, 1996, at A1 (noting that "the media predictably had a field day with 'the facts' concerning Jonathan Prevette"); Scott Baldauf, A Clash Over How To Discipline Sexual Harassment in Schools, CHRISTIAN SCIENCE MONITOR, May 7, 1997; Editorial: Odds and Ends, GREENSBORO NEWS AND RECORD, March 15, 1997. On news stories about whether the law has gone too far in the area of sexual harassment, see Lawton, Emperor's New Clothes, supra note 3, at 86 n. 62.

67. See RHODE, supra note 3, at 97; Audrey J. Murrell, Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers, 51 J. SOC. ISSUES 139, 146 (citation omitted).

68. See supra notes 25 and accompanying text.

69. See E-mail from author to Bob Little, Prof., Fin. Dep't., Miami Univ., (April 16, 1997, 07:30:22 EST) (stating that Professor Little was "the only person in this entire department (besides [my mentor], of course) who has ever said they were sorry this happened to me or who followed up with me to see if things were going okay") (on file with author).

70. See Formal Complaint, supra note 13, at 9; Journal of Events, supra note 24, at 10.
respected Professor Lang, yet he believed a fairly fantastic story woven by a man who openly admitted that he had been drinking at work on the weekend. Thus, to Professor Lang, it was more plausible that I had filed a complaint with the DAA over a single "tasteless joke" than that his finance department colleague had engaged in workplace sexual harassment.

Unfortunately, the legal standards governing sexual harassment cases reinforce the widespread myth of female overreaction. In Faragher v. City of Boca Raton, the Supreme Court explained that in order for sexual harassment to be actionable under Title VII, the conduct in question must be both "objectively and subjectively offensive." The Court noted that in order to "ensure that Title VII does not become a 'general civility code,'" it was necessary to "filter out complaints attacking the 'ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" By suggesting that its job was to construct a legal standard that balanced the possibility of overreaction to "trivial slights" against the possibility of discriminatory workplace harassment, the Court made clear its belief that harassment and overreaction were equally probable events. Yet, the research over the past twenty-five years consistently has shown that "[f]or the vast majority of sex harassment complaints, underreporting, not overreaction, is the norm." Moreover, in both Faragher and Burlington Industries v. Ellerth, amici curiae filed briefs with the Court that cited to various studies documenting the underreporting problem. The Court, on the other hand, had no studies before it nor did it cite to any evidence indicating that overreaction to normal workday interactions had become a problem under Title VII. But, by suggesting that overreaction and underreporting were equally probable consequences of a poorly crafted legal standard, the Court played into deeply held beliefs that sexual harassment law could become the legal dumping ground for overly sensitive, eggshell employees, unused to the "rough and tumble" of the workplace.

72. Id.
73. Rhode, supra note 3, at 99; see Lawton, Empirical Vacuum, supra note 3, at 208-10 (citing studies).
74. 524 U.S. 742 (1998)
75. Lawton, Bad Apple, supra note 3, at 859.
76. See Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp.2d 1237, 1250 (M.D. Ala. 2001) (explaining that an employee cannot "expect the rough and tumble professional world to completely accommodate his or her private sense of decency, civility, and morality") (citations omitted).
C. . . . and Persecuted Men

It is becoming more common for men to represent themselves as the victims of discrimination. The media has fed the perception that women and minorities hold employers hostage by threatening to sue over inconsequential slights or well-deserved criticisms of work product. Anti-discrimination law, of which sexual harassment is a part, is viewed as a weapon used to secure benefits or advantages to which women and minority group members are not otherwise entitled. Thus, it is the man who falls victim to the law's and the institution's willingness to countenance false or exaggerated claims of sexual harassment by vindictive or thin-skinned women.

Professor White portrayed himself as the victim in my sexual harassment case. I had the power and he was the powerless victim. For example, he considered the recusal letter that I drafted as "an attempt to coerce [him] into signing a document in which [he] would confess to allegations that were not true." In his reply to my harassment complaint, he twice mentioned that I was harassing him. On page one of his reply, he remarked that "Ms. Lawton continues to harass [sic] me with her allegations that I engaged in 'unwanted' touching of a 'sexual nature' toward her." Later, he once again painted himself as the victim, stating that he "no longer want[ed] to work" at Miami if "this harrassment [sic] of me by Ms. Lawton and her advisors does not stop."

Moreover, even though approximately 85% of the business school faculty was white and male, Professor White, like other men within the business school, saw himself as part of a powerless group. In this "strange, almost delusional reversal[] of institutional power relations," women and minorities held the power: they could claim discrimination, thereby holding the university hostage to their unreasonable demands. Professor White articulated this fear that the university would make an example of him, as a white man.

Because a federal court suit filed last month accuses the School of Business Administration of discriminating against women (and minority men), Mr. White is concerned that there may be unusual pressure to make an example of a white male business school professor charged with a form of sexism. Since he has absolutely no connection with the pending case, he hopes it won't forge any

77. See, e.g., Zalesne, supra note 43, at 358.
78. Personal Reply, supra note 23, at 3.
79. Id. at 1.
80. Id. at 3.
connection to him. 82

Furthermore, it was the university’s procedures, according to Professor White, that disadvantaged him. In his reply to my harassment complaint, he said that he stood ready “to challenge the process approved by the University Senate which has been used by Ms. Lawton to slanderously attack [him].” 83

Once again, however, Professor White failed to recognize the privileged position that he occupied within the university relative to me. First, the procedures of which he complained afforded him multiple opportunities to appeal the DAA’s findings of fact, a right he would not have possessed had I prevailed against him in a suit filed in federal district court. 84

Second, Miami’s policy was asymmetrical, affording rights to Professor White that it denied to me. For example, Professor White decided not to appeal the DAA’s findings. 85 In such a case, Miami’s policy provided that the DAA would “forward its findings to the appropriate vice president or President’s designate for further action of [sic] dismissal of the charge(s).” 86 That meant that the associate provost, who was the president’s designate in my case, could revisit the facts and dismiss the case against Professor White, even though he had decided not to appeal the DAA’s findings. Yet, had I lost at the DAA and decided not to appeal, my case would have ended. 87 Thus, Miami’s policy provided Professor White with two avenues for appeal: a de jure appeal, with a hearing before a five-person hearing committee, and a de facto appeal, the latter of which he exercised in my case. 88

The university’s sexual harassment policy also provided protection for Professor White’s reputation, in the event of a false or unsubstantiated claim of harassment. Miami’s policy stated that if “allegations of sexual harassment are found to be false or are unsubstantiated, reasonable and necessary steps will be taken by the appropriate University personnel to restore the reputation of the accused if it is damaged by the complaint

82. Response to DAA Findings, supra note 12, at 3.
83. Personal Reply, supra note 23, at 3.
84. See infra notes 119-20 and accompanying text.
85. See Response to DAA Findings, supra note 12, at 1 (stating that Professor White did not “wish to request a hearing”).
86. MUPIM, supra note 21, at §3.2123C.3.
87. An appeal required a hearing before a five-person hearing committee, comprised of faculty or staff members. See id. at §3.2123E.1.
88. See generally Response to DAA Findings, supra note 12, at 1 (stating that while Professor White did not want to appeal, he did want “to address the legal conclusions drawn in the [DAA’s] report”). Professor White also had the right to appeal to the university’s board of trustees any discipline handed down by the President’s office; I had no such right. See MUPIM, supra note 21, at §3.2123G.6.
The policy provided no such protection for my reputation, even if the professor involved repeatedly smeared my reputation by lying about the harassment and impugning my motives in bringing a sexual harassment claim.90

This asymmetry in the university’s policy was not surprising. At Miami, the university senate voted on changes to the sexual harassment policy and grievance procedures.91 Faculty members comprise almost two-thirds of the seats on the senate.92 But, in 1997, women comprised 29%—less than a third—of the faculty members across the entire university; moreover, they were concentrated in assistant professor positions, which typically are associated with untenured status.93 This disparity in the numbers of male versus female faculty members, coupled with the skewed ratio of men to women in the senior tenured ranks, gave male faculty members “greater opportunity for shaping university governance documents, policies, and procedures.”94 Of course, a person’s sex does not necessarily determine his or her perspective on sexual harassment. Nonetheless, painting in broad strokes, women are far more likely to be targeted for harassment than are men.95 Men, on the other hand, worry not about harassment, but about false claims of harassment. “The procedures are not neutral; they reflect the interests, concerns, and biases of the most powerful and influential members of the academic community, who are overwhelmingly male.”96 Thus, it is not surprising that a policy and procedure drafted largely by men would provide the alleged harasser with procedural and substantive protections not afforded to the victim.

Finally, while invisible to him, Professor White’s status as a tenured professor provided him with a shield from adverse university action that was not available to me. The university could decide not to renew my

89. MUPIM, supra note 21, at §3.2116A; see REVISED MUPIM, supra note 48, at §3.6F.
90. For a discussion of false claims provisions in university sexual harassment policies, see Lawton, Emperor’s New Clothes, supra note 3, at 124-125.
91. See, e.g., REVISED MUPIM, supra note 48, at §1.232 (stating that the senate “is the primary university governance body where students, faculty, and administrators debate university issues and reach conclusions on the policies and actions to be taken by the university”); id. at §3.21 et seq. (noting approval by university senate on December 2, 1996, of changes to sexual harassment policy)
92. Faculty members hold 44 of the 66 senate seats. See MIAMI UNIVERSITY, BYLAWS OF UNIVERSITY SENATE, §§1.B, 2 (July 2006) (on file with author). Seven administrators or staff members, and fifteen students hold the remaining 22 seats. See id. at §§3.A, 4.A.
93. There were 209 tenured or tenure-track female faculty members out of 722 tenured or tenure-track faculty members at Miami University in the fall of 1997. Summary Profile: Oxford Campus, Oct. 16, 1997 [hereinafter Profile] (on file with author). Forty-six percent (96 of 209) of the women were assistant professors. Id.
94. Lawton, Emperor’s New Clothes, supra note 3, at 118.
95. See RHODE, supra note 3; Lawton, Emperor’s New Clothes, supra note 3.
96. See supra note 3.
annual contract, or make it difficult for me to secure tenure. While there were procedures available within the university to challenge a tenure denial and I could always file a claim with the EEOC, I did not have a guaranteed job. Professor White, on the other hand, was guaranteed lifetime employment with the university, absent malfeasance on his part.

What is so striking, then, about Professor White’s perception is how contrary it was to reality. He failed to recognize how the university’s structures and procedures provided him with advantages denied to me. Moreover, while he portrayed himself as victimized and powerless, it was he who benefited from and drew upon dominant cultural myths about women’s behavior in sexual harassment cases. He used those myths to cloak himself almost visibly with a presumption of credibility that I had to overcome.

V. THE UNIVERSITY’S RESPONSE

A. The Credibility Gap

On April 30, 1997, nineteen days after filing my formal complaint, the DAA found “reasonable cause that Professor Alan White [had] violated Miami University’s Policy Prohibiting Sexual Harassment.” The DAA based its conclusion on two factors: the physical nature of the harassment and Professor White’s repeated denials of the allegations.

In determining whether Dr. White’s alleged past behavior and his current behavior constitute a hostile environment for Ms. Lawton, there are two areas to be examined. First, is that the alleged behavior was of an unwanted physical nature, i.e., patting on the rear end and an attempt to kiss Ms. Lawton in an isolated office area; the other is Dr. White’s denial of the allegations.

Both considerations raise the level of concern. Ms. Lawton has provided credible contemporaneous witnesses on her behalf and Dr. White has an absence of supportive evidence to his claim of mutual flirtation. My second concern is with the preponderance of evidence in clear favor of Ms. Lawton. Dr. White’s denial of

97. See infra Part VI.C.
99. See MUPIM, supra note 21, at §§3.428, 3.553 (stating that termination of a tenured faculty member could occur only for “adequate cause” or “fiscal emergencies”, and defining what constitutes cause).
100. DAA Findings, supra note 56, at 4.
her allegations pushes the alleged conduct to a higher level. It’s one thing to admit to misreading the level of a friendship and accepting responsibility for the conduct based on one’s misunderstanding; it’s quite another to add to the inappropriate conduct by denial, thus placing the burden on the victim to endure the offender’s unwillingness to accept responsibility for his own misconduct. It places the victim in a never ending situation of reliving something that could have been put to rest a long time ago thus restoring the victim’s peace of mind. Making one whole again is not simply discontinuing the offensive behavior, but acknowledging the dignity of the victim by taking responsibility for one’s own actions; to do otherwise makes the work environment hostile.101

The DAA’s findings were unusual in one respect: the recognition that the harasser’s repeated denials of the conduct perpetuate the harm done by the initial harassment. But, I believe the DAA’s findings are best explained by the fact that Professor White squandered the presumption of credibility that he enjoyed going into the process—a presumption based on stereotypes about women’s proclivity to lie about or exaggerate claims of sexual harassment,102 as well as on Professor White’s seven-year, versus my year-and-a-half, association with the university and his position as a recently promoted and tenured professor within the university.103

During the course of the informal resolution process and the formal complaint procedure, Professor White changed his story at least three different times. At first, he played dumb, suggesting during the informal resolution process at the DAA that he had “blacked out” at work and did not remember what had occurred on December 22.

But, shortly after I had filed my formal complaint, he changed his story and admitted the allegations. On April 15, the Director of the DAA called to tell me that Professor White was willing to admit that he had violated the university’s sexual harassment policy.104 When I asked what the admission meant, Mr. Evans explained that there was no need for a fact

101. Id.
102. See supra Parts IV.A & IV.B; see also Susan Deller Ross, Proving Sexual Harassment: The Hurdles, 65 S. CAL. L. REV. 1451, 1453 (1992) (noting that “the majority of people would simply find it too hard to believe that the high-status person, the person with so much to lose . . . could have behaved in this way. It is much easier to believe the all too familiar myths about how women behave”).
103. See Ross, supra note 102 at 1454 (explaining that “[i]f the leadership believed the woman, instead of the supervisor, that might suggest that the leaders had poor judgment in promoting the supervisor, for either they failed to see the inappropriate sexual behavior or they knew about it and didn’t care”).
finding, which was one of my requested remedies. He also told me that Professor White had agreed to counseling with a state-licensed counselor. I asked Mr. Evans whether he would speak with my attorney Sarah Poston, and he agreed to do so. Later that same day, Ms. Poston contacted me and reiterated what Mr. Evans had already told me—that Professor White had admitted to violating the university’s sexual harassment policy. I told my mentor Martin Brown and another business school colleague about the admission. I also mentioned it in an e-mail response to Karen Smith, who was then Miami University’s Provost.

But, only two days later, Professor White changed his story, once again. On the afternoon of April 17, my attorney informed me that Mr. Evans had contacted her, because Professor White no longer was admitting any violation of the university’s harassment policy. As a result, Mr. Evans asked the Provost to extend the time allotted under Miami’s policy for investigating my formal harassment complaint. Ms. Poston filed an objection with the Provost’s office to the time extension, but it was granted nonetheless, thereby delaying any resolution of my case an additional nine days. On April 21, Professor White filed his personal reply to my complaint, in which he categorically denied all of the allegations in my complaint.

105. Id.
106. Id.
107. Id.
108. Letter from Sarah Poston, author’s counsel, to Karen Smith, Executive Vice President for Academic Affairs and Provost, Miami Univ., filed April 17, 1997, with Dep’t. of Affirmative Action, Miami Univ., at 1-2 [hereinafter Objection Letter] (on file with author).
109. E-mail from author to Karen Smith, Executive Vice President for Academic Affairs and Provost, Miami Univ. (April 17, 1997, 11:48:25 EST) (on file with author).
110. Objection Letter, supra note 108, at 1-2; see also E-mail from author to Martin Brown, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ. (April 18, 1997, 10:56:38 EST) (stating that Professor White had “unadmitted it” and wondering what facts were left to find given his admission) (on file with author).
111. Memorandum re: Extension of Time Limits from Bruce Evans, Dir., Dep’t of Affirmative Action, Miami Univ., to Karen Smith, Executive Vice President for Academic Affairs and Provost, Miami Univ., April 17, 1997 (on file with author).
112. See generally Objection Letter, supra note 108.
113. Memorandum re: Request for extension of time to investigate sexual harassment complaint of Anne Lawton from Karen Smith, Executive Vice President for Academic Affairs and Provost, Miami Univ., to Bruce Evans, Dir., Dep’t of Affirmative Action, Miami Univ., April 18, 1997 (on file with author).
114. Personal Reply, supra note 23. Professor White changed his story at least two more times. In his response to the DAA findings, he denied kissing me, but claimed that “he ha[d] always admitted” most of “all the other lesser acts of which [I] complained”). Response to DAA Findings, supra note 12, at 2, ¶2. In his response to the university’s letter of reprimand, he admitted to all but the kiss and the affection comment. See Statement of Alan White Concerning Sexual Harassment Complaint of Anne Lawton, July 2, 1997
It would have proven difficult for the DAA not to have ruled in my favor, given the fact that Professor White had admitted the conduct to the Director of the DAA only days after I had filed my formal complaint. Regardless of Professor White’s subsequent retraction, the Director of the DAA had to know that, as an attorney, I would appeal any adverse decision. The university then would have to explain how an admission of sexual harassment made to a university official, even if later retracted, did not simply close the case. Thus, I was more fortunate than most victims of harassment; my harasser frittered away the presumption of credibility that he enjoyed.

Furthermore, unlike many victims of harassment, I had both the connections and the legal training necessary to negotiate the university’s complex procedure. As an attorney, I was comfortable dissecting complex procedures. While I had the resources to hire an attorney, I also saved money on legal fees by doing first drafts of letters and objections filed with the university. I also knew a local attorney whom I trusted to represent me and, as a professional courtesy, her firm agreed to do so at 50% of their normal hourly rate.

Moreover, prior to invoking the university’s informal resolution process, I confided the details of my case to two very powerful persons within the school of business, both of whom were witnesses on my behalf during the formal complaint procedure. The fact that they corroborated my story lent credibility to my allegations against Professor White. Finally, many of the persons to whom I turned for advice before initiating the informal resolution process advised me to report Professor White without delay. By doing so, neither Professor White nor the university could undermine my credibility by pointing to a delayed report of harassment.115

Consequently, I do not view the DAA’s findings as evidence of an enlightened attitude on the part of university officials nor of an erosion of the hurdles commonly facing women who report sexual harassment. Instead, the DAA’s findings reflect two facts not necessarily found in most sexual harassment cases. First, my harasser squandered the presumption of credibility with which he was cloaked by repeatedly changing his story, in particular, to the university official responsible for hearing sexual harassment complaints. Second, I had money, legal skills, and some powerful connections, all of which helped me to negotiate the university’s labyrinthine procedures and to overcome the credibility deficit with which I entered the process.

Unfortunately, my victory was short-lived. As I was about to learn, what the university gave with one hand it took away with the other.

115. See supra notes 50-52, 56 and accompanying text.
B. Perilous Procedures

In August of 1995, in Chan v. Miami University, the Ohio Supreme Court handed Miami a defeat in its attempt to terminate F. Gilbert Chan, a tenured professor, who had “engaged in both quid pro quo and hostile environment sexual harassment” toward a foreign student. The Ohio Supreme Court, in a 4-3 decision, held that the university had breached its contract with Professor Chan by following the procedures for affirmative action grievances, rather than affording Professor Chan the right to invoke the university’s procedures for termination of tenure.

After Chan, the university’s uncertainty about its own procedures and its concern about being sued once again by a tenured professor caused it to broadly interpret Professor White’s procedural rights under Miami’s policy. Thus, in my case, the associate provost concluded that Professor White had the right to four levels of appeal within the university, three of which gave him the right to contest the DAA’s findings of fact.

Under the Proposed Procedures, in short, Alan White would have the opportunity to appeal the Department of Affirmative Action’s fact-findings to [the Acting Provost], to the President, to the Committee on Faculty Rights and Responsibilities, and to the Board of Trustees. All but the last of these appeal opportunities allow for a revision of the original fact-findings by the Department of Affirmative Action. The last two of these appeals, if Mr. White chooses to take them, could not possibly be completed before the fall.

By affording Professor White multiple opportunities to appeal the DAA’s findings, the university gave Professor White leverage to secure concessions from me. I wanted the case to be over. The DAA had issued its findings on April 30, 1997, and by late June, the DAA’s findings still were not final. I was growing tired of the time, energy, and money that I was expending defending myself. I also did not want the case to drag on

117.  Id. at 651 (Sweeney, J., dissenting).
118.  Id. at 646-47.
119.  Because I had been friends with Karen Smith, the University’s Provost, Dr. Smith offered to recuse herself from consideration of my case. See Confidential Memorandum re: Sexual Harassment Complaint of Anne Lawton, from Karen Smith, Provost and Executive Vice President for Academic Affairs, Miami Univ., to author and Alan White, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ., May 16, 1997 (on file with author). Professor White requested her recusal and, therefore, Dr. Bishop, the Associate Provost, handled the case at the university level.
into the fall of 1997, which the university indicated would happen if Professor White decided to appeal to the Committee on Faculty Rights and Responsibilities. But, in order to secure Professor White’s agreement not to appeal further, I had to agree not to appeal the university’s discipline—a brief letter of reprimand placed in Professor White’s personnel file.

Anne . . . For your information, I have just received a signed waiver from Professor White waiving his right to a MUPIM 3.555 hearing should the President accept my recommendation for a letter of reprimand and should you not file an appeal with the President concerning the recommendation I’ve made. The way is thus open for the President to accept my recommendation and issue a letter of reprimand thus closing the entire matter.¹²¹

I had several problems with accepting the associate provost’s recommendation that Professor White receive only a reprimand for his harassing behavior. First, at the last minute, in response to lobbying by Professor White and his attorney, the university determined that Professor White had the right to include with his personnel file a statement responding to the formal reprimand.¹²² Section 3.26C of Miami’s policy manual provided that

[i]f any derogatory statements or allegations of unlawful or criminal conduct should be entered into a staff member’s file, the name of the person making the statement or allegations shall be included, and the staff member shall be informed at the time of such entry. If the staff member believes such allegations to be false, he or she shall have the right to counter them with statements or documents which shall also be placed in the file.¹²³

Section 3.26C provided a staff member with the right to counter

¹²¹ E-mail from James Bishop, Assoc. Vice President for Academic Affairs and Assoc. Provost, Miami Univ., to author (July 9, 1997, 10:52:05 EST) (on file with author); see Memorandum re: Sexual Harassment Complaint of Ms. Anne Lawton against Dr. Alan White from James Bishop, Assoc. Vice President for Academic Affairs and Assoc. Provost, Miami Univ., to author, June 17, 1997 [hereinafter Waiver Memo] (on file with author) (stating that Dr. Bishop wanted to “discuss the feasibility of [my] agreeing to waive further review/appeal . . . if Dr. [White] agree[d] to accept [Dr. Bishop’s] decision and the Letter of Reprimand”).

¹²² E-mail from James Bishop, Assoc. Vice President for Academic Affairs and Assoc. Provost, Miami Univ., to author (July 1, 1997, 14:55:41 EST) (on file with author); compare Waiver Memo, supra note 121, at Exh. A (containing no notation about Professor White’s right to respond to letter of reprimand) with Memorandum from James Bishop re: Sexual Harassment Complaint of Anne Lawton Findings and Recommendation to Adam Grant, President, Miami Univ., July 2, 1997, at Exh. A [hereinafter Provost Recommendation] (on file with author) (stating that in the event Professor White “elected” to do so, letter of reprimand should bear a notation that Professor White had filed a “responsive statement to [the] Letter of Reprimand”).

¹²³ MUPIM, supra note 21, at §3.26C.
allegations, but the university interpreted its policy to allow Professor White the right to respond to university fact-findings, not simply allegations. The university’s interpretation benefited Professor White and disadvantaged me, once again, even though §3.26C was not even at issue in Chan. Professor White took advantage of §3.26C; his one-page statement countering some of the DAA’s findings accompanied the three-sentence letter of reprimand placed in his personnel files.124

Second, considering the damage done to my reputation by Professor White’s repeated lies, I expected the university to take some action to restore my reputation. But, university officials obviously believed that they had no such obligation, as the university’s own policy provided protection only against damage to the reputation of the person accused, not the victim, of harassment.125 In addition, even though Professor White eventually admitted that he had engaged in much of the harassing conduct, both to Mr. Evans and in writing following the DAA’s investigation, the university saw no reason to sanction him more severely for lying about what had occurred and for casting aspersions on my character.126 In fact, by allowing him the right to place a responsive statement in his personnel file, the university afforded him a formal mechanism for further besmirching my reputation.

Moreover, when I asked Professor Green to disseminate, in some fashion to the members of the department, the university’s final findings on my sexual harassment complaint, as a means to quell the lies and rumors that were circulating, he declined to do so considering any such step to be a “penalty” imposed on Professor White.127 Nonetheless, during the DAA’s investigation of my complaint, Professor Green told my mentor that if he did not stop “campaigning” on my behalf within the department—a charge that my mentor vehemently denied128—Professor Green would “be forced to speak to the entire department concerning this situation and disclose all sides.”129

124. See Response to Reprimand, supra note 114; Letter from Adam Grant, President, Miami Univ., to Alan White, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ., July 11, 1997 (on file with author) (stating that the “letter [ ] serve[d] as a formal reprimand for [Professor White’s] violation of Miami University’s policy prohibiting sexual harassment”).
125. See supra notes 89-90 and accompanying text.
126. See supra notes 103-114 and accompanying text.
127. E-mail from John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ., to author (May 7, 1997, 15:05:13 EST) (on file with author).
128. See E-mail from Martin Brown, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ., to John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ. (April 22, 1997, 09:41:17 EST) [hereinafter Brown Response E-mail] (on file with author) (stating that Professor Brown had “not been ‘campaigning’ [and] very much resent[ed] [the] characterization”, having spoken to only one faculty member in the department).
129. E-mail from John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ., to Martin Brown, Assoc. Prof., Fin. Dep’t., Miami Univ. (April 18, 1997, 09:20:33) [hereinafter Green Threat E-mail] (on file with author).
Finally, the fact that Professor White stopped touching me after the January 10, 1997, informal resolution seemed to influence the university’s discipline decision. In his findings and recommendation to the university president, the associate provost noted that “Dr. White’s unwelcome sexual conduct ceased immediately after the parties’ meeting in Mr. Evans’ office on January 10, 1997, in the informal resolution process [and] Ms. Lawton does not claim that Dr. White has made any further alleged sexual advances toward her since January 10, 1997.”

Two sentences later, the associate provost stated that “[b]ased on the foregoing, I recommend that Dr. White receive a reprimand for his violation of Miami University’s Policy Prohibiting Sexual Harassment.”

While it was not the sole factor in the discipline decision, the fact that Professor White “immediately” stopped harassing me played some role in the token discipline imposed. But, had Professor White slapped me in the face twice, rather than patting me on the rear end two times, or slugged me instead of kissing me, would the university have imposed a lighter sanction simply because he had stopped slapping or slugging me when informed it was offensive or painful? I doubt it. That is the problem in sexual harassment cases. Even though Professor White’s conduct clearly breached the acceptable limits of workplace behavior, the assumption was that until I told Professor White to stop there was no way he could know his conduct was harmful. Once again, it was my responsibility as a woman to police the boundaries of my interactions with male employees, both supervisors and co-workers, rather than their responsibility to keep their hands to themselves.

In addition, I doubt that Professor White would have received a mere reprimand, with the right to respond, had he slapped me—or any other employee—several times at work. The reason for the meager discipline in my sexual harassment case is that sexual harassment is viewed differently: if the harassment stops, then the assumption is that there is no harm. But, the research shows that “sexual harassment, even at relatively low frequencies, exerts a significant negative impact on women’s psychological well-being and, particularly, job attitudes and work behaviors.” Thus, stopping the harassment does not wipe clean the slate; the psychological and work-related harms caused by the harassment remain.

Moreover, had I filed suit against the university, claiming that its sanctions against Professor White were inadequate, I would have lost. The

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130. Provost Recommendation, supra note 122, at 1. The DAA’s Findings contain similar comments. See DAA Findings, supra note 56, at 4.
131. DAA Findings, supra note 56, at 4.
federal courts are very deferential to employers in sexual harassment cases, and rarely examine whether an employer’s policy and procedure actually work in practice, or second guess how an employer implements its own policy, up to and including the sanctions imposed. Therefore, for the small minority of women, like me, who actually report sexual harassment, the sanction that the employer imposes is normally the only remedy available, even if that sanction is woefully inadequate given the conduct involved.

Thus, after using the university’s informal resolution process, negotiating a recusal agreement with Professor White, and figuring out the “ins” and “outs” of the university’s formal complaint procedure, I had “won.” All I got for my trouble, however, was a letter of reprimand to which Professor White was able to respond. Had I known at the outset that I would waste half a year of my life and spend almost $1,850 in attorney fees for such a paltry result, I doubt that I would have bothered. But, in the summer of 1997, I was relieved because the ordeal was finally over. Or, so I thought.

VI. REPERCUSSIONS AND RETALIATION

A. Moving My Line

In my formal complaint, I asked to have my teaching line moved out of the finance department. I had been in the department a mere year and


134. See e.g., Barton v. United Parcel Serv., 175 F. Supp.2d 904, 908 (W.D. Ky. 2001) (stating, in response to plaintiff’s argument that her employer had not disciplined the harassers sufficiently harshly, that “the focus of . . . Title VII . . . is upon prevention and cessation of harassment, not punishment of offenders”); see also Grossman, supra note 7, at 720-21 (explaining that the Supreme Court in its affirmative defense sexual harassment cases “elevated deterrence to the ‘primary’ goal [of Title VII] and left compensation by the wayside.”).

135. On the reporting problem, see Lawton, Emperor’s New Clothes, supra note 3, at 85-98. Denying victims of harassment the right to compensation also undermines the Civil Rights Act of 1991, which “provided the victims of sex discrimination with the right to compensatory and punitive damages against private employers—a right that had been denied them under the Civil Rights Act of 1964.” Lawton, Bad Apple, supra note 3, at 867 (footnote omitted).

136. Bill from Laufrnan, Rauh, & Gerhardstein to author, July 26, 1997 (on file with author); see also RHODE, supra note 3, at 101 (explaining that “[t]he infrequency of serious sanctions is a major reason for women’s reluctance to report abuse”).

137. See Formal Complaint, supra note 13, at 4, ¶3.
a half before having to file a sexual harassment complaint against one of my colleagues. Moreover, even after reporting Professor White to the DAA in January of 1997, he continued to act unprofessionally at work, yet no one in the department held him accountable.

In March of 1997, I overheard a conversation between a female work-study student in the finance department and an instructor in the department. The student was recounting a recent conversation that she had had with Professor White. Professor White had asked the student, who was 20 years old, whether she wanted to date a friend of his, who was 34 years old. The student declined. I asked her whether she felt any pressure to agree to this date, given her status as a work-study student in the department. She said “no.” Nonetheless, I was concerned. I reported the incident to the chairman of my department and the Director of the DAA. 138 My chairman told me that I had overreacted, and explained that he and his wife had asked students to baby-sit for them. 139 To the best of my knowledge, the DAA took no action.

Furthermore, the harassment by Professor White was not the first time I had had an uncomfortable interaction with a member of the department or witnessed inappropriate behavior by staff or faculty in the department. During my first year in the department, a colleague stopped by my office to talk. During that conversation, he rubbed his hand against my cheek. I stepped backward when he touched me and apparently looked startled. He responded that I had had face cream on my face and he was simply wiping it off for me. My mentor told me that this same colleague had commented on my legs during the departmental meeting at which I was hired.

The unprofessional and inappropriate conduct included racist behavior, as well. One day I walked into the main finance department office and one of my colleagues who was white proceeded to recount a racist joke about the Miss Black America pageant. 140 When I indicated my discomfort with the joke, my colleague left the office and repeated the joke in the hallway, thinking that my discomfort stemmed from having the joke told in a “formal” department office.

On another occasion, some time in the late summer or early fall of 1995, I was in the department’s main office copying materials for class. The chairman of the zoology department came in to introduce Joseph Arthur, the newest addition to the zoology faculty, to Professor Green, the finance department chairman. The reason for the visit soon became

138. Id. at app. J.

139. See Journal of Events, supra note 24, 6.

140. There were no minority tenured or tenure-track faculty members in the finance department. Minority faculty members, defined as black, American Indian, Asian, or Hispanic, constituted only 9% (65 of 722) of the entire tenured or tenure-track faculty at Miami. See Profile, supra note 93.
apparent. Earlier in the week, one of the finance department secretaries, a white woman, had contacted campus police after seeing Professor Arthur in the hall one day. She did so, she claimed, because Professor Arthur, an African, was carrying no books with him and resembled a drawing of a black male on a campus alert poster circulated by university police. At that year’s Christmas party, the secretary described the events leading up to the call to campus police. But, instead of admitting her mistake, she denied that her conduct was motivated, at all, by race and said that she was never going to call the campus police again.

Perhaps the most important factor in my decision to request a change of departmental homes, however, was the fact that my relationship with Professor Green, the chairman of the finance department, had soured. In my formal complaint, I described why the informal resolution process had “been both impractical and unsuccessful.”141 Professor Green’s failure to provide me with complete information during the negotiation of the recusal agreement was a large part of the problem. For example, even though I had made a written request to Professor Green for Professor White’s recusal, I did not learn about the department’s “absence equals a no vote” rule until two and a half weeks later.142 Moreover, during the time that I was negotiating with Professor White about recusing himself from the P&T Committee, a process in which Professor Green participated, Professor Green never once mentioned that Professor White was hosting the department’s party, even though that party had been planned three months earlier.143

While I described Professor Green’s role in the recusal negotiation process in my formal complaint, I did not allege that he had harassed me. Thus, the DAA did not provide Professor Green with a copy of my complaint. Professor White did, however, and Professor Green filed a seven-page response.144 At that point, I already had asked for a transfer of departments, but Professor Green’s response to my complaint and his conduct both during and after the DAA investigation cemented my conviction that I needed a new departmental home.

In his response to my formal complaint, Professor Green lied. He said that while my formal complaint “list[ed] four specific incidents that occurred between [me] and Professor White . . . [a]t no point [had I] ever inform[ed] [him], the Chairman of the Finance Department, of these

141. Formal Complaint, supra note 13, at 3. MUPIM provided that “[w]hen informal resolution is impractical or unsuccessful, individuals are urged to employ the available formal mechanism.” MUPIM, supra note 21, at §3.2123.
142. See supra notes 33-37 and accompanying text.
143. Memorandum re: Formal Complaint of Professor Lawton from John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ., to Bruce Evans, Dir., Dep’t. of Affirmative Action, Miami Univ., filed April 21, 1997, at 6-7 (on file with author).
144. Id. at 1.
Yet, on the morning of January 10, before the informal resolution process at the DAA, Professor Green called me into his office, because Professor White had contacted him about the DAA meeting. I told Professor Green what had happened and he remarked that I had done the right thing in reporting it to Bruce Evans at the DAA.

Moreover, Professor Green interfered during the DAA's investigation, using his position as department chairman to threaten at least one of my witnesses. On April 18, only one day after receiving a copy of my formal complaint from Professor White, Professor Green e-mailed Martin Brown, my finance department mentor, claiming that Professor Brown had discussed the case with members of the department, thereby "violating the spirit of any confidentiality agreement." Even though the DAA's investigation was underway at that point, Professor Green told Professor Brown that if he did not stop talking with other members of the department about my case, Professor Green would "be forced to speak to the entire department concerning this situation and disclose all sides." Professor Brown's response—that Professor Green had lost his "objectivity and was becoming defensive"—had merit; Professor Green's e-mail followed on the heels of his getting a copy of my formal complaint in which I had complained about his failure to provide me with complete information during the recusal negotiation process. While my formal complaint described Professor White's lies to Professor Lang about the informal resolution process, Professor Green did not cite Professor White's misrepresentations as reason to "disclose all sides." Furthermore, because Professor Green directed this threat at my mentor, who he claimed had been campaigning on my behalf, it is likely that "disclos[ing] all sides" meant providing Professor White, not me, with a platform for disseminating his story. Thus, Professor Green chose to align his interests

145. Id. at 2.
146. Handwritten Journal, at 12 (on file with author); Facsimile from author to Sarah Poston, counsel for author, at 2 (April 21, 1997, 09:48 EST) (showing handwritten comments on Chairman's Response) (on file with author).
147. I subsequently learned that during the investigation Professor Green also confronted Professor Cassidy, another one of my witnesses. See Continuing Journal of Events III, at 1 (May 20, 1997, 16:42:37 EST) (on file with author). Professor Cassidy did not disclose the substance of her conversation with Professor Green, but indicated that Professor Green was angry. See id. Both Professor Cassidy, a tenured member of the Decision Sciences/MIS faculty, and Professor Brown were listed as witnesses on my sexual harassment complaint. See Formal Complaint, supra note 13, at app. A.
148. Green Threat E-mail, supra note 129.
149. Id.
150. E-mail from Martin Brown, Assoc. Prof., Fin. Dep't, Sch. of Bus., Miami Univ., to John Green, Chairman, Fin. Dep't., Sch. of Bus., Miami Univ. (April 22, 1997, 09:41:17 EST) (on file with author)
151. See Formal Complaint, supra note 13, at 9.
with those of Professor White—protecting Professor White’s right to misrepresent what occurred during the informal resolution process while binding me to some vague “spirit of confidentiality.”152

But, what was most telling was Professor Green’s response to my request to call the department together to read the results of the DAA’s investigation. He refused to do so, even though he had been willing to “disclose all sides” during the pendency of the DAA’s investigation, when there were no official findings of fact, only allegations.153 Moreover, even though Professor Green refused my request, he warned Professor White that I had made such a request, precipitating a flurry of phone calls by Professor White to various faculty members on the witness list attached to my formal complaint.154

Thus, it is not surprising that by the spring of 1997, I was ready to change departments. The DAA, however, expressed no opinion on my request for a new departmental home, arguing that it was a “curriculum and personnel issue” better left to the business school, and the Provost’s and President’s offices.155 As a result, there was no formal mechanism in place for me to obtain the relief that was necessary. But, with the assistance of my mentor and sympathetic faculty members within the department of management, I negotiated a transfer out of the finance department and began teaching in the management department in September of 1997.156

B. Plausible Deniability

The university would not accept my move to the management department premised on my sexual harassment experience. Therefore, my mentor and I, along with the chairman of the management department, packaged the move as a curricular one, based on a business legal studies program proposal that my mentor had floated three years earlier in 1994.157

152. See Brown Response E-mail, supra note 128 (noting that “the spirit of confidentiality” . . . ha[d] been breached weeks ago by many of the parties involved”).
153. See supra notes 127-29 and accompanying text.
154. E-mail from author to John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ. (May 8, 1997, 11:52:30 EST) (on file with author); see also Cassidy Statement, supra note 25; E-mail from Martin Brown, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ., to Alan White, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ. (May 8, 1997, 09:38:36 EST) (on file with author).
155. DAA Findings, supra note 56, at 5.
156. E-mail from John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ., to Members, Fin. Dep’t., Sch. of Bus., Miami Univ. (Aug. 12, 1997, 09:53:30 EST) [hereinafter Move E-mail] (on file with author).
157. 1994 Draft Business Legal Studies Program Proposal (on file with author); see also Memorandum re: Summary of April 21, 1997 Meeting from author to Rex Knight, Dean, Sch. of Bus., Miami Univ., Kevin Black, Chairman, Mgmt. Dep’t., Sch. of Bus., Miami Univ., and Martin Brown, Assoc. Prof., Fin. Dep’t., Sch. of Bus., Miami Univ., May 9, 1997
This solution, however, ignored the organizational context which necessitated my move in the first instance. Disguising the reason for my change of departments reinforced the impression that my sexual harassment case was an aberration, rather than a symptom of a broader pattern of overt and, at times, unconscious sexism that characterized the dominant culture within the business school.

It also allowed the university to portray the move as a choice freely undertaken, thereby placing on me the burden of unforeseen contingencies, such as a change in the criteria for raises. Furthermore, concealing the real reason behind the move of my departmental home meant that the university could attribute adverse consequences that I suffered as a result of the move to honest mistakes or bureaucratic bungling, rather than to retaliation.

1. The Chilly Climate

The research on sexual harassment demonstrates that organizational factors, not individual ones, predict the incidence of harassment within the workplace.\textsuperscript{158} Thus, harassment is more likely to occur in workplaces with male identified occupations, a skewed ratio of men to women, and a culture tolerant of harassing workplace conduct.\textsuperscript{159}

While I was at the business school, women comprised approximately 15\% of the tenured or tenure-track faculty. Both hiring patterns and retention problems exacerbated the disparity in numbers of male versus female professors. Over a fourteen-year period, from 1982 through 1995, the business school hired 80 assistant professors, 23 of whom were female, for a hiring rate for female faculty members of 29\%.\textsuperscript{160} The "market" could be blamed for the differential hiring rates within the business school, because fewer women earn Ph.D.'s in business than in the arts and humanities.\textsuperscript{161} But, the "market" could not account for the differences in tenure rates between male and female faculty members. While 73\% of men hired into tenure-track positions earned tenure in the business school, only

\footnotesize{(outlining process for and curricular advantages of move); Move E-mail, supra note 156 (informing finance department that my move to management "was made on academic grounds to support interdisciplinary efforts").
\textsuperscript{158} See Lawton, \textit{Bad Apple}, supra note 3, at 838-841 (noting that "social science researchers consistently have found that organizational factors play an influential, if not determinative, role in the occurrence of sexual harassment in the workplace").
\textsuperscript{159} Id at 839-41.
\textsuperscript{160} Information on Hiring and Retention of Tenure Track Faculty by Gender, Miami Univ., tbl. I, May 2, 1996 [hereinafter Hiring Information] (on file with author).
\textsuperscript{161} In 1994, men earned 71.6\% and women 28.4\% of doctorates in business and management. In the same year men earned 52.3\% and women 47.7\% of doctorates in the arts and humanities. \textit{Fact Files: Who Got Doctorates from U.S. Universities}, CHRON. OF HIGHER EDUC., Dec. 8, 1995, at A18.
44% of women did so.\textsuperscript{162} Part of the explanation for the differential rates was that a higher percentage of women (38%) left the business school before their tenure year than did men (21%).\textsuperscript{163} The retention problem, while more pronounced at the business school, was not unique to it. A 1996 study of hiring and tenure rates by then Provost Karen Smith found that "females are less likely to be tenured than males and more females proportionately leave Miami University than males before the point of the tenure decision."\textsuperscript{164}

The low hiring and tenure rates were not surprising given the attitudes of some male faculty members within the business school. For example, a male full professor in the business school, upon receiving the form to evaluate Provost Karen Smith remarked "Let's rape the bitch."\textsuperscript{165} When Ellen Hope, an associate professor in the economics department, "commented on an article about the shortage of women professors, one professor said that was from the 'good old days when women chose not to become professors.'"\textsuperscript{166}

During my first year at the business school, I asked Edgar Lewis, a professor in Decision Sciences/MIS, to help me to design an exercise for my business law students. In the exercise, the students played managers responsible for allocating raises among male and female employees of different races. The goal of the exercise was to determine whether the sex and/or race of the employee unconsciously influenced the students' pay decisions. When I explained to Professor Lewis the purpose of the exercise, he remarked that there were some jobs that women could not perform.

This chilly climate faced by female faculty within the school of business explained the retention problem. A university-sponsored study conducted in 1999 at the business school found that "there [was] 'no broad-based support of diversity among faculty/[administration,] and some evidence of clear resistance."\textsuperscript{167} In quantitative departments, in which men predominated and the skill set was considered "male,"\textsuperscript{168} the resistance

\textsuperscript{162} See Hiring Information, supra note 160, at tbl. II.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 1.
\textsuperscript{165} E-mail from author to Rex Knight, Dean, Sch. of Bus., Miami Univ. (April 4, 1997, 13:37:36) (on file with author).
\textsuperscript{166} Plaintiffs, Elizabeth Li's, Memorandum in Opposition to Motion for Summary Judgment at 24, Li v. Miami Univ., No. C-1-97-395 (S.D. Ohio Aug. 21, 2000) [hereinafter Li Opposition Memorandum] (on file with author).
\textsuperscript{167} Id.
\textsuperscript{168} See Shelley J. Correll, Gender and the Career Choice Process: The Role of Biased Self-Assessments, 106 AM. J. SOCIOLOGY 1691, 1711 (2001) (finding that "males are more likely to perceive that they are good at math than are those females with equal math grades and test scores").
often was overt. For example, a professor in the economics department told Professor Hope that "women did not major in economics because they 'aren't analytical.'" George Beck, the ex-chairman of the economics department, "shouted out in the hall that women are 'lousy researchers.'" A full professor in the department left in Professor Hope's mailbox a passage about villagers' auctioning off "girls of marriageable age." The passage recounted how the rich men bid on the prettiest girls, "while the humbler folk . . . were actually paid to take the ugly ones, [with] the auctioneer . . . call[ing] upon the plainest, or even perhaps a crippled one, to stand up, and then ask[ing] who was willing to take the least money to marry her."

Professor Beck did not limit his offensive behavior to the confines of the economics department. One day, after I had moved to the management department, he sat down at a table I was occupying in the faculty lounge. I barely knew him, but Professor Beck began by saying that he had heard of my sexual harassment case and did not want me to be wary of associating with male faculty members. He then invited me to go to a concert and perhaps dinner, an invitation which I declined once I realized his wife was not to accompany us.

Thus, for many women, coming to work at the business school meant running a gauntlet of sexist and offensive comments, and fending off physical assault. The harassment, both sexual and sexist, served an important function: it "policed[ed] the boundaries of the work and protect[ed] its idealized masculine image—as well as the identity of those who [did] it." Many men in the business school, however, dismissed the problem, because they failed to see the pattern of behavior and its impact on the well-being and, therefore, retention of female faculty members.

2. Putting Out Fires

During my third year at Miami—my first in the management department—I spent a good deal of time addressing problems resulting from the transfer of departments. Issues with my salary proved the most significant.

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169. Li Opposition Memorandum, supra note 166, at 24.
170. Id.
171. E-mail from Ellen Hope, Assoc. Prof., Econ. Dep't., Sch. of Bus., Miami Univ. to author (Feb 28, 1997, 15:24:53 EST) (on file with author).
173. See Li Opposition Memorandum, supra note 166, at 27-28 (detailing deposition testimony of Professor Rebecca Luzadis, who found the work environment so inhospitable that "she took a year off from work, to get away from her job"). Professor Hope left the university several years after earning tenure.
At the end of my first year in the management department, I received the lowest raise, both in absolute dollars and percentage of salary, which I had received in the three years that I had been at Miami. I had had a very productive year—good teaching evaluations, acceptance for publication of an article by a teaching periodical put out by the Academy of Legal Studies in Business, and an "Outstanding Paper" award at a regional business law conference for another work in progress.\textsuperscript{174} Scholarly activity supposedly counted for forty percent of the annual raise. Yet, I received only a 2.75% merit raise and no money for what the university called "salary improvement."\textsuperscript{175} At the same time, my mentor received a 3.88% merit raise and David Hogan, the other business law professor, received a 2.69% merit raise; neither had published during the 1997-1998 academic year, as had I.\textsuperscript{176} Adding in salary improvement, which both Professors Hogan and Brown received, their raises were 6.27% and 6.42%, respectively, compared to my 2.75% raise.

Moreover, during my time in the finance department, I had closed to only $1,000 (from $3,400) the gap in salary between myself and Professor Hogan. Professor Hogan was a tenured associate professor and I was only an untenured assistant professor, but Professor Hogan had never published a law review article; in fact, during my five years at Miami, he published nothing at all and did not present scholarly work at a single professional meeting.\textsuperscript{177} By my third year at Miami, I already had published two articles, one a law review article and the other a pedagogical piece, and was working on a third. I anticipated closing the salary gap between Professor Hogan and myself if I continued to publish, but after my first year in the management department, the gap between his and my salary increased from $1,000 to $1719.\textsuperscript{178}


\textsuperscript{175} Memorandum re: 1998-99 Salary Recommendations for Assistant, Associate and Full Professors from Kevin Black, Chairman, Mgmt. Dep't., Sch. of Bus., Miami Univ., to author, May 15, 1998, at 2 (on file with author).

\textsuperscript{176} See Salary Table (on file with author). I obtained the salary figures through a public records request to Miami University. See Letter from author to Melissa Wright, Gen. Counsel, Miami Univ., March 13, 1999 (on file with author). The Department of Finance, Miami University, Annual Report 1998, at 4-5 (listing publications) (on file with author); The Department of Finance, Miami University, Annual Report 1997, at 5 (same).

\textsuperscript{177} See supra note 176; see also The Department of Finance, Miami University, Annual Report 1999, at 2-4 (listing publications and presentations at professional meetings) (on file with author); The Department of Finance, Miami University, Annual Report 1996, at 4-6 (same); The Department of Finance, Miami University, Annual Report 1995, at 6-8 (same).

\textsuperscript{178} Originally, the gap increased from $1,000 to $2993. After registering a complaint with both Professors Black and Dean Knight, the difference between Professor Hogan's salary and mine was $1719.
I came to realize that the reason for the difference in raises was that the members of the management department, on the whole, were simply more productive scholars than the members of the finance department. By changing departments, I had changed comparison groups to my detriment. I had not realized that fact when I requested the change of departmental homes.

I raised with both Professor Black, the chairman of the management department, and the dean the concerns about my salary. The dean's response to my salary complaints, however, missed the mark.

Last year, when you requested to move to the management department, I asked you to discuss P&T and annual evaluation procedures within the department to be sure you were comfortable. At that time, you assured me that you were. In our most recent meeting, you indicated that you did not fully understand the procedures because you felt you had no real option other than moving to the management department. Because of this new concern, I reviewed salary adjustments in both departments. 179

This description of the process ignored the context in which my change of departments had occurred. I had not suddenly decided that for curricular reasons it made sense to change departments in the third year of my tenure at Miami; sexual harassment and the deteriorating relationship with my ex-chairman necessitated the move. If I wanted to stay at Miami, I had no choice but to change departmental homes. Thus, it was simply disingenuous to suggest that my lack of options constituted a "new concern."

Nonetheless, my salary complaints did bear some fruit. Professor Black increased my salary for the 1998-99 academic year; with merit and salary adjustment monies, I received a 5.1% raise. While Professor Black agreed to "consider the compensation of others teaching business law" in the business school, he would not consider the "productivity of Finance Department faculty" in raise recommendations. 180 Thus, my modified raise left open the internal equity issue. The dean's response that it was "impossible to accurately determine a hypothetical salary if you had remained in finance," once again, missed the mark. 181 Had I remained in the finance department, Professor Green would have had a difficult time

179. Memorandum re: Your E-mails from Rex Knight, Dean, Sch. of Bus., Miami Univ., to author, July 15, 1998, at 1, ¶1 [hereinafter Dean E-mail Memo] (on file with author) (emphasis added).
181. Dean E-mail Memo, supra note 179, at 2.
justifying giving me a lower raise than the two male business law faculty members when I had published and they had not done so during the relevant academic year. Yet, the dean was unwilling to recognize this fact, because the university was unwilling to acknowledge that sexual harassment had necessitated my change of departmental homes.

I did not view my salary problem as evidence of retaliation. Instead, I considered it to be an unforeseen consequence of my move to the management department which the university and business school proved unwilling to fully address. Other problems that I encountered, such as the loss of the dean’s comments on my second-year review and certain scheduling issues, however, were less easy to explain and more suggestive of retaliation.

First, when I changed departments, my promotion and tenure file, complete with my first two annual reviews, moved with me. While reviewing the file for my third-year review, Professor Black discovered that the dean’s comments on my second-year review were missing. In May of 1998, a year after he originally had commented on my second-year review, the dean reconstructed his earlier comments for my file. He “remember[ed] seeing the second year report” and commented that it was “unclear why an endorsed copy [was] not in [my] file.”

Later, however, after I had complained about possible retaliation by Professor Green, the dean attributed the loss of his comments on my second-year review to what he described as “a fairly complex process,” involving three levels of review—by the department, the dean, and the provost. But, at that time at Miami, the second-year review entailed nothing more than a departmental, followed by a decanal, review; the provost’s office did not provide comments until the faculty member’s third year. Moreover, I was the only untenured faculty member in finance; therefore, the department was not managing comments and reviews on multiple faculty members at different stages of the tenure process. Thus, it is unclear what made the process so complex.

Second, when I moved departments, the university left my course scheduling in the hands of the finance department. As a result, I straddled two departments, with my course selection and scheduling remaining in finance, but my promotion and tenure decision moving over to management. Decisions on both issues—course scheduling and priority, as well as salary—always redounded to my detriment. For example, even

182. Memorandum For the Files from Rex Knight, Dean, Sch. of Bus., Miami Univ., May 8, 1998 (on file with author).
183. Id.
184. Id.
though I continued to teach what were identified as finance department courses, I was taken off the summer teaching priority system for finance courses; only after registering a complaint with Professor Green was I placed back on the normal rotation.\textsuperscript{186}

Furthermore, when I moved to the management department, Professor Green stopped providing me with the course preference sheet that each member of the finance department received prior to his preparation of the following year's draft academic schedule. Therefore, he prepared the draft schedule for the 1998-99 academic year without any input from me about the courses and times that I preferred teaching.\textsuperscript{187} As a result, I was not listed on the initial draft schedule for the fall term 1998, and for spring term 1999 was scheduled to teach three sections of the required business law course—a less favorable teaching assignment.\textsuperscript{188} I sent Professor Green an e-mail objecting to teaching three sections of the required course, but received no response.\textsuperscript{189} The only other time that I had had to teach three sections of the required course was in my first semester at Miami, before I arrived at the university and could provide input on my teaching preferences. Furthermore, Professor Green assigned only one section each of the required course to the two male long-term visiting professors for the spring term 1999.\textsuperscript{190}

Professor Green also gave preference to one of the male long-term visiting professors over me, a tenure-track professor, in scheduling. For the fall term 1997, I had asked for, and secured, a two-day per week teaching schedule with 75-minute, rather than 50-minute, classes. I made the request in order to secure more days and larger blocks of time for writing. Unfortunately, I had to teach my three 75-minute courses, back-to-back, from 3:00 to 7:15 p.m., which was not ideal. I also requested a two-day
schedule for spring term 1998, which Professor Green accommodated. But, instead of giving me the two-day schedule ending at 4:45 p.m., which one of the male visiting professors merited for the entire 1997-98 academic year, I had to teach from 3:00 until 7:15 p.m. I suggested to Professor Green that he switch me into the visitor’s time slots; after all, I was a tenure-track faculty member and, therefore, “should get priority” over a visitor. 191 He declined to do so. 192

Individually, each of these problems appears trivial. But, taken together, a pattern of questionable behavior emerged. After my transfer to management, the finance department retained authority over only my teaching schedule. Yet, whenever possible, that authority was exercised to my disadvantage: removing me from the summer teaching rotation, failing to provide me with the course selection preference sheet, allowing visitors to teach upper-level electives while relegating me to teaching three sections of the required course, and giving more favorable teaching times to visiting professors. Moreover, the scheduling issues did not arise in a vacuum. The finance department had lost the dean’s comments on my second-year review, and Professor Green, on more than one occasion, had used his position as department chairman to my disadvantage. 193

I complained about Professor Green’s conduct to Dean Knight, who made it abundantly clear that he did “not believe that [Professor Green] retaliated against [me.]” 194 Dean Knight explained away each incident of alleged retaliation, some more convincingly than others, but failed to address the overall pattern of conduct. 195 His responses to my allegations reveal the deficiencies of retaliation law, and demonstrate how the law’s shortcomings create few incentives for organizations to deal effectively with retaliation complaints.

First, a complaint of sexual harassment often triggers retaliation. 196 The research demonstrates that in both unionized and non-unionized firms organizations punish employees who file grievances against their supervisors. 197 “Specifically, supervisors seem to react negatively to

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192. E-mail from John Green, Chairman, Fin. Dep’t., Sch. of Bus., Miami Univ., to author (Nov. 14, 1997, 14:10:06) (on file with author). The management department found available classrooms so that I could teach two days per week and end at 4:45 p.m. See E-mail from Michael King, Prof., Mgmt. Dep’t., Sch. of Bus., Miami Univ., to author (Nov. 19, 1997, 11:31:59) (on file with author).

193. See, e.g., supra notes 147-52 and accompanying text.

194. See Retaliation Response, supra note 185, at 2.

195. Id.


197. See Peterson & Lewin, supra note 10, at 401 (explaining that “grievants had lower job performance ratings, promotion rates, and work attendance rates and higher voluntary and involuntary turnover rates than did non-grievants in the periods following grievance
employees who file grievances... especially when those grievances are decided in favor of the employee.”198 Therefore, a claim of sexual harassment against a supervisor likely will result in some form of retaliation, in particular, in situations in which the grievant prevails, as in my case.

Yet, the law presumes objectivity on the part of organizational supervisors.199 Thus, it is the plaintiff’s burden to demonstrate the elements of a retaliation claim, even if she has proven successful in pursuing her claim of sexual harassment through her employer’s internal grievance machinery. By permitting employers to engage in this deceit of objectivity, the law privileges the supervisor’s account of alleged retaliatory conduct over that of the employee. As a result, even if the employee decides to file yet another grievance, this time for retaliation, she enters the process with a presumption that retaliation has not occurred, notwithstanding significant empirical evidence to the contrary.200

This privileging of the supervisor’s story comports with the natural tendency of organizational managers to side with one another in a dispute with a subordinate. Professor Green was one of six department chairmen in the business school and, as such, worked more closely with the administration than I. Moreover, his behavior, if retaliatory, subjected the university to liability. No doubt the dean and other administrators worried that I might sue and use any admission of retaliation against the university.

Thus, the university adopted an interim strategy, one which would have insulated them from legal liability, given the state of Sixth Circuit precedent at the time.201 The university refused to acknowledge that any of filing and settlement”); Klaas & DeNisi, supra note 7, at 713-15 (finding that supervisors gave lower performance ratings to employees who had filed grievances against the supervisor, in particular if the employee prevailed on the grievance); David Lewin, Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis, 31 J. CONFLICT RES. 465, 499 (1987) (concluding that “the empirical evidence presented here lends some support to an organizational punishment-industrial discipline perspective on workplace dispute resolution”).

198. Klaas & DeNisi, supra note 7, at 713.

199. See Lawton, Empirical Vacuum, supra note 3, at 264-66 (discussing hypothetical based on facts of Kortan v. Cal. Youth Auth., 217 F.3d 1104 (9th Cir. 2000)).

200. See Lawton, Emperor’s New Clothes, supra note 3, at 145 (suggesting that, at a minimum, if a victim of harassment uses her employer’s grievance procedure and prevails, then a presumption of retaliation should attach in any subsequent internal retaliation proceeding when the victim alleges particular types of behavior, such as a negative performance review).

201. See Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542, 546 (6th Cir. 1999) (concluding that female professor had not “suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII”, because the university had reversed the initial denial of tenure and awarded her back pay), cert. denied, 529 U.S. 1019 (2000). Dobbs-Weinstein was not a retaliation case. Subsequently, in White v. Burlington N. & Santa Fe Ry. Co., the Sixth Circuit adopted the
Professor Green’s conduct constituted retaliation, yet it addressed many of my complaints of retaliation. For example, the management department took over the scheduling of my courses, and the finance department voted to put me back on the normal summer teaching rotation. The problem with this solution, however, is that it ignored the purpose of Title VII's anti-retaliation provision.

As the Supreme Court recently noted in Burlington Northern and Santa Fe Railway Co. v. White, the “anti-retaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms.” In Burlington Northern, Sheila White, who previously had won an internal sexual harassment grievance against her supervisor, alleged that a 37-day suspension without pay constituted retaliation. The Court concluded that the suspension was a materially adverse employment action, a required element in a retaliation claim, even though the firm subsequently reinstated White with back pay.

A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.

Thus, the relevant inquiry is not whether the employer cures retaliatory conduct, but whether the retaliatory conduct would chill a reasonable employee’s exercise of her rights under Title VII. Such an approach makes sense, so long as the lower federal courts do not limit its application to unpaid suspensions or similarly egregious acts of employer retaliation. After all, if the law allowed employers to escape liability for retaliation by subsequently curing the retaliation, few employees would dare to complain about Title VII violations, because curing the retaliation does not make the victim whole. She has expended time, energy, and effort fighting the retaliation, all of which make her job more stressful and

rationale of Dobbs-Weinstein in a retaliation case, concluding that the company’s 37-day suspension without pay did not constitute an adverse employment action, because the company had reinstated White and awarded her backpay. 310 F.3d 443 (6th Cir. 2002). In 2005, however, the Sixth Circuit retreated from its earlier position, holding that a “thirty-seven day suspension without pay constitutes an adverse employment action regardless of whether the suspension is followed by a reinstatement with back pay. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 791 (2005) (en banc), aff’d, 126 S.Ct. 2405 (2006).

202. See Retaliation E-mail, supra note 189, at 2 (noting that Michael King of the management department had taken over the scheduling of my courses).
204. Id. at 2415 (2006). (citation omitted).
205. Id. at 2409.
206. Id. at 2415-18.
207. Id. at 2417 (citation omitted).
challenging than that of similarly situated colleagues.

Second, by disaggregating my claims of retaliation from the whole, Dean Knight changed the context in which the conduct occurred. The inquiry in retaliation cases should focus on whether the employer’s conduct in the aggregate is “likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.” 208 Therefore, university administrators should have asked how my experience in the aggregate affected other women’s willingness to complain about workplace harassment at the business school. How many women would complain about harassment if doing so alienated the chairman of their department, thereby requiring a change of departmental homes midway through their tenure track, affected their ability to get good teaching schedules and summer teaching assignments, and adversely affected their ability to obtain tenure? 209

But, the university’s response to my complaints was not surprising given the legal framework in retaliation cases. For example, some federal courts compartmentalize the retaliation analysis, deciding whether each allegation of retaliatory conduct, standing alone, constitutes an adverse employment action. 210 Unfortunately, the Supreme Court’s recent decision in Burlington Northern provides no assurance that those lower federal courts inclined to disaggregate incidents of retaliation will not continue to do so.

Burlington Northern involved two acts of retaliation—reassignment of job duties and a 37-day suspension without pay. After determining that a Title VII retaliation claim requires that the employer’s conduct be “materially adverse,” the Court analyzed the two acts of retaliation separately, concluding that each was materially adverse. 211 Nowhere did

208. Id. (citation omitted).

209. See infra Part VI.C.

210. See, e.g., Galloway v. Ga. Tech. Auth., 2006 U.S. App. LEXIS 12042, at *7-11 (11th Cir. May 16, 2006) (affirming trial court order granting summary judgment to employer, concluding that allegations regarding plaintiff’s pay raise, promotion, and termination were not retaliatory because employer proffered a legitimate, nondiscriminatory reason for each, and none of the other allegations of retaliation amounted to an adverse employment action, because none “had any tangible effect on [his] employment”); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376-80 (4th Cir. 2004) (affirming trial court’s order granting summary judgment to employer on retaliation claim after dividing into three categories plaintiff’s “litany of adverse changes” and concluding that no category satisfied the requirement in a retaliation case of an adverse employment action), cert. denied, 543 U.S. 959 (2004); cf. Osborne v. Elmer, 140 F. Appx. 509, at *3-4 (5th Cir. 2005) (concluding that even if the court accepted plaintiff’s “theory” that “th[e] court [should decide whether] the Postal Service’s conduct ‘as a whole’ constituted a "campaign of retaliatory harassment’ that satisfy[ed] the requirement of ‘adverse employment action,’” the plaintiff “ha[d] failed to show that the record evidence support[ed] it”).

211. Burlington Northern, 126 S.Ct. at 2415, 2417.
the Court suggest that the relevant inquiry is whether the retaliatory conduct as a whole satisfies the material adversity test, not whether each act of alleged retaliation is materially adverse. The open question after Burlington Northern is whether the lower federal courts will follow suit, disaggregating each act of alleged retaliation from a larger pattern of retaliatory conduct. Unfortunately, such an analytical framework very well may lead to erroneous results when applied to seemingly minor acts of retaliation—like my scheduling problems—that form a pattern of retaliatory conduct over time.

Finally, it is precisely in organizations like Miami, which view their management obligations largely through a legal filter, that the federal courts' pronouncements on the contours of retaliation law matter most. Employers that view the law as a floor, rather than a ceiling, are not the problem; anti-discrimination law is merely part of these employers' overall approach to workplace diversity and organizational justice. But, for those employers who regard the law as the limit on their obligations to employees, judicial oversight and the creation of meaningful incentives are critical. While it is too early to predict the impact of Burlington Northern, there is cause for concern on this count.

In Burlington Northern, the Court limited the scope of Title VII's retaliation protection to "materially adverse" acts of retaliation, justifying its decision to do so as a means of filtering out "trivial harms," and "petty slights or minor annoyances."212 As in sexual harassment law, however, there is little empirical evidence to suggest that employees are filing frivolous retaliation grievances with employers or flocking to federal court over trivial slights. Actually, the research shows the opposite. Fear of retaliation discourages employees from using their employers' grievance procedures, even when other safeguards against retaliation, for example, a collective bargaining agreement, exist.213 In fact, the research "provides strong support for the proposition that loyal employees largely 'suffer in silence' in response to unfair workplace treatment."214

Nonetheless, as in its sexual harassment jurisprudence, the Court allowed the perception of a problem to shape its legal analysis. As a result, it adopted a standard of material adversity in order to balance the risk of reprisal against what it considered the equally probable risk of employee overreaction to petty workplace slights. Unfortunately, the message sent to employers is that retaliation is allowed, so long as it is de minimis. The Court's baffling statement that "[i]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an

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212. Id. at 2415.
213. See Peterson & Lewin, supra note 10, at 401.
214. Id.
injury or harm” only reinforces that disturbing message.\textsuperscript{215}

Moreover, it is unclear how the lower federal courts will interpret what constitutes \emph{de minimis} retaliation. The standard, according to the Court in \textit{Burlington Northern}, is whether the alleged retaliatory conduct would “dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.”\textsuperscript{216} But, who is this reasonable worker? In sexual harassment law, the reasonable victim bears no resemblance to real-world working women. Given the propensity of many federal judges to greet claims of discrimination with skepticism and, at times, hostility, it is quite likely that the reasonable person used henceforth in Title VII anti-retaliation cases will bear little resemblance to the ordinary worker.\textsuperscript{217}

\textbf{C. Exit}

By the spring of 1999, I had decided to leave Miami. The stress of constant vigilance was wearing thin. Moreover, what occurred during my fourth-year review convinced me that my application for tenure, regardless of my record,\textsuperscript{218} would involve a bruising, and perhaps losing, battle.

On February 5, 1999, the tenure committee for the management department (the “Committee”) provided me with its comments on my progress toward tenure, as part of my fourth-year review.\textsuperscript{219} The Committee concluded that I was “meeting or exceeding [its] expectations of progress toward tenure.”\textsuperscript{220} I received positive comments on my

\begin{thebibliography}{9}
\bibitem{215} \textit{Burlington Northern}, 126 S.Ct. at 2414.
\bibitem{216} Id. (citation omitted).
\bibitem{217} In \textit{Jordan v. Alt. Res. Corp.}, the Fourth Circuit held that an employee who was terminated shortly after complaining about a co-worker’s racially offensive remark failed to state a claim under Title VII for retaliation, because he did not have an objectively reasonable belief that he was opposing an employment practice that violated Title VII. \textit{Jordan v. Alt. Res. Corp.}, No. 05-1485, 2006 WL 2337333, at *5-8 (4th Cir. Aug. 14, 2006). The co-worker, upon seeing a television news program about the arrest of the snipers who had murdered 13 people in D.C., Virginia, and Maryland, allegedly commented: “They should put those black monkeys in a cage with a bunch of black apes and let the apes fuck them.” \textit{Id.} at *1. The court explained that “no objectively reasonable person” could conclude that this single “abhorrent slur” would constitute a racially hostile work environment. \textit{Id.} at *6.
\bibitem{218} Cf. Sharon K. Parker and Mark A. Griffin, \textit{What Is So Bad About a Little Name-Calling? Negative Consequences of Gender Harassment for Overperformance Demands and Distress}, 7 J. OCC. HEALTH PSYCHOL. 195, 206 (2002) (concluding that “one reason that gender-harassing behaviors are harmful for [ ] women [in traditionally male occupations] is because these behaviors lead to women feeling they need to overperform to be accepted and recognized within the organization”).
\bibitem{219} Letter from The Department of Management Tenure Committee, Sch. of Bus., Miami Univ., to author, February 5, 1999 (on file with author).
\bibitem{220} Id.
\end{thebibliography}
teaching, scholarship, and service. The dean of the business school made brief handwritten comments on the bottom of the Committee’s letter, “concur[ring] with the Tenure Committee evaluation.” Thus, I was taken aback to receive, little more than a month later, the following memorandum from James Bishop, then the acting provost:

I have reviewed your fourth-year dossier as well as the evaluative comments of the department tenure committee and Dean Knight. It is evident that your colleagues are satisfied with your progress toward tenure and that you are developing a record of professional accomplishment consistent with their expectations.

While I concur in your colleagues’ assessments of your teaching and service, I am less accepting of the nature, sufficiency and quality of your published work. I believe it would be prudent to seek informally an early external evaluation of your published work to assess its scholarly rigor and also to establish an informed opinion of how your body of work fits against expectations nationally for tenure aspirants at leading non-doctoral programs.

I wish you well in your ongoing professional efforts and take note of your achievements to date.

Dr. Bishop’s memo surprised me because I had published or had had accepted for publication four articles, three of which were lengthy law review pieces, in a period of three and a half years. I sent both a formal letter and an e-mail to Dr. Bishop asking him to explain “what factors led [him] to question the nature, sufficiency, and quality of my research such that I need[ed] to obtain early external review of my work?” His response stunned me. Dr. Bishop admitted that he had “not read [my] scholarship nor [did he] feel qualified to evaluate several of [my] papers.” But, he contended that “the ‘nature, sufficiency and quality’ of

221. Id.
222. Id. (handwritten comments dated February 11, 1999).
224. Letter from author to James Bishop, Acting Provost, Miami Univ., March 10, 1999, at 1 (emphasis in original) (on file with author); E-mail from author to James Bishop, Acting Provost, Miami Univ. (March 10, 1999, 16:33 EST) (on file with author).
225. E-mail from James Bishop, Acting Provost, Miami Univ., to author (March 11, 1999, 15:44 EST) [hereinafter Bishop Response] (on file with author). Reprints of my journal articles were not forwarded to Dr. Bishop along with the other materials for my fourth-year review. Memorandum from Kevin Black, Chairman, and Mark Jones, Chairman, Tenure Comm., Mgmt. Dep’t., Sch. of Bus., Miami Univ., to Rex Knight, Dean, Sch. of Bus., Miami Univ., and James Bishop, Acting Provost, Miami Univ., April 12, 1999, at 1 [hereinafter Resubmission Memo] (on file with author). But, given the fact that Dr. Bishop stated that he felt unqualified to judge my scholarship, the absence of reprints likely had no effect on Dr. Bishop’s decision to flag my fourth-year review portfolio.
[my] work was not as clearly demonstrated as [he] believe[d] [would] be necessary when [I was] reviewed for tenure. 226

Dr. Bishop further claimed that the reason for early external review in my case was the dearth of "faculty locally [with] a sufficiently well informed understanding of [my] field of legal scholarship as to ensure [me] the depth and breadth of constructive advice most probationary faculty [were] able to receive within the University." 227 Only three years before, however, the university had tenured my mentor Martin Brown without requiring him to submit his scholarly portfolio to early external review. At that time, David Hogan was the only tenured business law faculty member in the business school, and he had never published a law review article. 228 When I was hired into the finance department, there were only two business law faculty members, one of whom was Professor Hogan. Yet, in the management department, two faculty members, while not attorneys, did publish in law reviews. Thus, any structural problem resulting from the paucity of local faculty equipped to judge my scholarship existed when the University hired me and tenured Professor Brown, and did not result from the move of my departmental home.

Moreover, I was the only faculty member across the entire university to whom Dr. Bishop's suggestion of early external review applied. When I received Dr. Bishop's original memo expressing concern about my scholarship, I requested, pursuant to Ohio's public records law, "[c]opies of the promotion and tenure review letters written" by Dr. Bishop to all tenure-track faculty during the 1998-99 academic year. 229 Dr. Bishop wrote letters to seven other probationary faculty members, and in each he echoed the comments or concerns of either the department and/or the dean of the school in which the faculty member was housed. 230 Mine was the only case in which he disagreed with the department's observations about the faculty member's progress toward tenure. 231 Moreover, I was the only faculty member to whom he suggested early external review. 232

The members of the management department, disturbed not only by Dr. Bishop's questioning of my scholarly record, but also by his implicit suggestion that the department was not competent to evaluate my work, once again intervened on my behalf. At my chairman's behest, I provided additional documentation, e.g., journal acceptance rates, to the management

226. See Bishop Response, supra note 225.
227. Id.
228. See supra notes 177 and accompanying text.
229. OHIO REV. CODE §149.43 (2006); Letter from author to Melissa Wright, Gen. Counsel, Miami Univ., March 10, 1999 (on file with author).
230. Letters to Probationary Faculty from James Bishop, Acting Provost, Miami Univ., March 9, 1999 (on file with author).
231. Id.
232. Id.
department’s tenure committee. Professor Black and Mark Jones, the chairman of the department’s tenure committee, subsequently submitted additional documentation to Dr. Bishop, accompanied by a letter explaining why the members of the “Management Department [were] fully competent to review [my] scholarship.” Three days later, Dr. Bishop retracted his earlier suggestion that I obtain early external review, based on the department’s “assurance” that it was “fully competent to review” my scholarly work. Dr. Bishop also noted that the additional documentation provided to him “clearly support[ed] the Tenure Committee’s earlier assessment” of the timeliness and relevance of my research.

I realized that my experiences with Dr. Bishop during my sexual harassment case had tainted his ability to objectively evaluate my work. Dr. Bishop disguised his bias behind facially helpful suggestions—the benefit of early external review for a faculty member who counted few lawyers among her colleagues on campus. But, his memo to me was retaliation—an ultimately successful attempt to punish me for pursuing my sexual harassment case and challenging his and the university’s interpretations of university policy and procedure.

While I had prevailed once again, this latest dust-up with the administration was the last straw for me. I began in earnest to look for another job. At the end of March of 2000, having secured other employment, I tendered my resignation to the university.

VII. EPILOGUE

Looking back on my time at Miami, I realize that reporting Professor White’s harassment started a chain of events that led ultimately to my leaving the university. Reporting the harassment did little good. I simply exchanged one problem—harassment—for another—retaliation. I was like Odysseus, trying to chart a safe course between two perilous alternatives.

I confronted a problem faced by many victims of harassment: while the law encourages them to report harassment to their employers, it does very little to make reporting a reasonable or safe choice in practice. The Supreme Court in its harassment jurisprudence consistently has failed to

234. Letter from James Bishop, Acting Provost, Miami Univ., to Kevin Black, Chairman, and Mark Jones, Chairman, Tenure Comm., Mgmt. Dep’t., Sch. of Bus., Miami Univ., April 15, 1999 (on file with author).
235. Id.
236. See supra Part V.B. and accompanying text; see also Deborah L. Brake, Retaliation, 90 MINN. L. REV. 18, 20 (2005) (stating that when people “voic[e] their concerns about bias and discrimination... retaliation often steps in to punish the offender and restore the social norms in question”).
237. See supra note 1.
recognize that harassment is not a random event; it is far more likely to occur in particular kinds of workplaces. But, it is in precisely these workplaces, such as the business school at Miami University, where reporting harassment is the most risky due to the threat of retaliation. Rather than address the structural causes of harassment, however, the Supreme Court and the lower federal courts have placed the burden for change on those least able to bear it: the victims of workplace harassment.

Moreover, I hold out little hope that the Supreme Court’s recent decision in Burlington Northern heralds a more nuanced and realistic approach to anti-discrimination law. Nor do I expect that this narrative, my earlier work on sexual harassment, or any of the numerous law review articles documenting the significant shortcomings of sexual harassment law will effect significant legal change. Instead, my purpose in recounting my tale of harassment is simply to give voice to the other side of the story—the costs to victims of following the law’s dictate to report harassment. Thus, the next time that a woman confides to you, the reader, her story of sexual harassment, perhaps you will hesitate before asking: “Why didn’t you just report him?”
