

“REASONABLE CARE TO PREVENT AND CORRECT”: EXAMINING THE ROLE OF TRAINING IN WORKPLACE HARASSMENT LAW

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* J.D. 2018, New York University School of Law. Special thanks to Professors Sally Katzen and Paulette M. Caldwell for their insightful comments during the drafting of this Note, to the Journal of Legislation & Public Policy staff for their excellent editing work, and to Michael and my family for your support. Many thanks also to the staff at the National Women’s Law Center, without whom I would not have begun this research.

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INTRODUCTION

In May 2018, NBCUniversal released the findings of an internal probe into allegations of sexual harassment by Matt Lauer while he was employed as the longtime co-host of the Today Show.¹ The allegations against Lauer, which were made public in late 2017 amidst the flood of allegations against other workplace harassers in entertainment, politics, media, and beyond now referred to as the #MeToo movement,² detailed years of sexually suggestive, abusive, and harassing behavior by Lauer as described by dozens of NBC employees.³ While the internal investigation found credible four allegations of serious sexual harassment over several years, the report also concluded that corporate leadership responded appropriately to the allegations and that no “widespread or systemic pattern of behavior” or “culture of harassment” could be identified at NBC.⁴

The Lauer harassment illustrates how severe workplace harassment continues to occur despite employers taking seemingly appropri-

1. NBC NEWS WORKPLACE INVESTIGATION (2018), http://media1.s-nbcnews.com/i/today/z_creative/NBC%20News%20Workplace%20Investigation.pdf.

2. See, e.g., Marin Cogan, *The Powerful Predators on Capitol Hill*, THE CUT (Nov. 9, 2017), <https://www.thecut.com/2017/11/sexual-harassment-washington-dc-capitol-hill.html>; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Chloe Melas, ‘House of Cards’ Employees Allege Sexual Harassment, Assault by Kevin Spacey, CNN (Nov. 3, 2017, 10:34 AM), <http://money.cnn.com/2017/11/02/media/house-of-cards-kevin-spacey-harassment/index.html>; Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html?smid=tw-nytimesarts&smtyp=cur>; Sarah Wildman, *I Was Harassed at the New Republic. I Spoke Up. Nothing Happened.*, VOX (Nov. 9, 2017, 10:40 AM), <https://www.vox.com/first-person/2017/11/9/16624588/new-republic-harassment>.

While it gained national attention in 2017, the #MeToo movement began several years earlier as an initiative led by Tarana Burke. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

3. See Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017, 12:34 PM), <http://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/>.

4. NBC NEWS WORKPLACE INVESTIGATION, *supra* note 1, at 5.

ate steps to address it. In responding to this paradox, the #MeToo movement, which exposed the allegations against Lauer as well as countless other workplace harassers, has led employers, advocates, and policymakers alike to reconsider the available corporate and policy-based responses to systemic workplace harassment and has reinvigorated discussions of workplace harassment prevention.⁵ Of the various types of organizational responses to the #MeToo movement, one of the most seized-upon strategies has been to implement anti-harassment training—as NBC promised to do in moving forward after the Lauer probe.⁶ The perceived threat of increasing litigation and the exposing of entrenched toxic workplace culture have caused demand for anti-harassment trainings to skyrocket as employers seek out training opportunities for their employees.⁷

Anti-harassment training in the workplace is not a new practice. In two foundational workplace harassment opinions, the Supreme Court emphasized that it is an employer's primary duty under federal anti-harassment law to exercise "reasonable care to prevent and correct promptly any [] harassing behavior" that occurs in the workplace.⁸ For decades, employers have offered anti-harassment trainings in seeking to comply with this duty. However, in the twenty years since the Supreme Court held that employers should adopt affirmatively preventative practices to comply with their legal responsibilities under anti-harassment law, the effectiveness of the trainings most commonly offered by employers has not been confirmed by empirical evidence. Indeed, sociological theories of employer responses to civil rights regulation may point in the opposite direction—that the very practices employers gravitate toward adopting in seeking to comply with anti-harassment law may focus more on limiting liability than on preventing the behaviors and cultural norms that allow harassment to flourish in a workplace.⁹

5. See, e.g., Susan Davis, *'Me Too' Legislation Aims to Combat Sexual Harassment in Congress*, NPR (Nov. 15, 2017, 5:25 PM), <https://www.npr.org/2017/11/15/564405871/me-too-legislation-aims-to-combat-sexual-harassment-in-congress>; TIME'S UP, <https://www.timesupnow.com/> (last visited Oct. 31, 2018).

6. NBC News Workplace Investigation, *supra* note 1, at 5–6 (recommending that NBC improve and increase employee and supervisor training on workplace harassment).

7. See Roger Showley, *More Companies Invest in Training to Prevent Sexual Harassment — But It Might Not Be Doing Much Good*, L.A. TIMES (Feb. 20, 2018, 3:00 AM), <http://www.latimes.com/business/la-fi-sexual-harassment-training-20180220-story.html> (one company received eight times the number of requests for training in January 2018 compared to a year prior).

8. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

9. See *infra* notes 97–105 and accompanying text.

As the #MeToo movement renews attention to the thorny problem of ridding workplaces of harassment, this Note seeks to evaluate the current role of anti-harassment training in anti-harassment law and policy. Policymakers, courts, and employers alike have generally presumed that the adoption of anti-harassment training in any form is a reasonable preventative practice, despite the growing body of evidence detailing the factors that make a training effective rather than cosmetic—and the nuances of what makes training effective over time. This evidence calls into question whether an employer's utilization of just any training merits the acceptance and deference it receives from policymakers and judges. Instead, employment lawyers should prioritize and encourage independent research into what makes an employer-held training program effective, while courts and litigators should reevaluate their deference to and preference for evidence of employer-instituted trainings in making determinations of hostile work environment liability.

This Note proceeds in six parts. Part I reviews the ongoing incidence of workplace harassment and details the basic legal regime and policy goals under Title VII of the Civil Rights Act to address this problem. Part II considers the proliferation of anti-harassment training as an employer practice putatively aimed at the prevention of workplace harassment, despite empirical evidence that casts doubt on the effectiveness of many trainings currently operating in the private sector. In light of inconclusive research findings on the preventative effectiveness of employer-offered trainings, Part III considers the judicial treatment of anti-harassment trainings in hostile work environment opinions. Part IV then considers whether state laws requiring private sector employers to hold anti-harassment trainings offer a plausible way forward in shaping preventative practices and whether those state requirements have an impact on judicial interpretations of the role of employer-offered trainings. Finally, Part V offers two recommendations: that research into training effectiveness be prioritized and aided by employment lawyers and that the effectiveness of training be considered in both judicial interpretations of an employer's preventative practices and in future legislation mandating anti-harassment training.

I.

WORKPLACE HARASSMENT AND ANTI-DISCRIMINATION LAW

A. *Harassment in the Workplace*

While there is no single definition, workplace harassment as a general term refers to unwelcome or offensive conduct in the workplace on the basis of an individual's identity.¹⁰ According to the EEOC, harassing behavior in the workplace can include "offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures."¹¹ In popular parlance, workplace harassment is most often discussed in the context of harassment on the basis of sex, usually involving unwanted sexual desire or attention.¹² However, workplace harassment also involves various forms of non-sexual abuse¹³ and can occur on the basis of virtually any identity—sex, race, color, national origin, religion, age, disability, sexual orientation, and gender identity.¹⁴

There is no single conclusive theory describing the causes of workplace harassment, but there is evidence that certain organizational factors influence the prevalence of harassment in a workplace. A recent report by the EEOC's Select Task Force on the Study of Harass-

10. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 3 (2016) [hereinafter EEOC TASK FORCE REPORT], https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf (defining harassment as "unwelcome or offensive conduct in the workplace that: (a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; and (b) is detrimental to an employee's work performance, professional advancement, and/or mental health"). Note that "harassment" also has a legal definition understood to be narrower than this general definition. See *infra* notes 29–45 and accompanying text.

11. *Id.*

12. Catharine MacKinnon's groundbreaking work *Sexual Harassment of Working Women* brought the term "sexual harassment" into the mainstream and shed the first substantive light on the types of harassment faced by women in the workplace. See generally CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

13. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998) (noting that under Title VII, harassment need not be "motivated by sexual desire" and should be evaluated in context.)

14. EEOC TASK FORCE REPORT, *supra* note 10, at 3. Note that only harassment on the basis of sex (including pregnancy, and sexual orientation and gender identity), race, color, national origin, and religion are actionable under Title VII; other antidiscrimination statutes, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act, protect against discrimination, including harassment, on the basis of other identities.

ment in the Workplace (“EEOC Task Force”) identified several environmental and structural risk factors that “may increase the likelihood of harassment” in a workplace, including workplaces with homogeneous employee populations or groups of employees that do not conform to workplace norms; workplaces with significant power disparities between groups of workers; workplaces that rely on primarily “high value” employees, young workers, or workers who perform primarily low-intensity tasks; workplaces that rely on customer service; and workplaces that are isolated or decentralized.¹⁵

For sexual harassment in particular, sociological literature has advanced two theories of why individuals engage in sexually harassing conduct.¹⁶ The “natural/biological model” hypothesizes that “sexual harassment is a function of sexual desire generally and a function of men’s tendency toward sexual aggression specifically.”¹⁷ Many sociologists now reject this model as unsupported by empirical evidence, although legal scholars have noted that this theory of sexual harassment may motivate legal notions of sex discrimination.¹⁸ Alternatively, the “boundary differentiation model” instead theorizes that men and women “perceive sexual harassment differently,” in that men are more likely to see workplace interactions that are clearly sexual as having a positive sexual undertone, whereas women are more likely to find such conduct harassing and threatening.¹⁹

Harassment in the workplace remains a significant problem despite years of study and decades-old anti-harassment laws. In Federal Fiscal Year 2017, the EEOC received 26,978 charges alleging harassment, a prevalence level that has remained largely unchanged in the past decade.²⁰ Official data from the EEOC does not capture the full

15. EEOC TASK FORCE REPORT, *supra* note 10, at 25–29; see Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 35–38 (2003) (summarizing sociological literature finding that sex-based power differentials in the workplace and certain work environments result in opportunity structures that make workplace harassment possible).

16. For a more in-depth review of the sociological literature on workplace harassment, see Grossman, *supra* note 15, at 27–39 (describing the “biological” and “boundary differentiation” models explaining individual causes of harassment, and identifying power imbalance and work environment as organizational causes of harassment in the workplace).

17. *Id.* at 28–30.

18. *Id.* at 28–29.

19. *Id.* at 30–35. This model also theorizes that men are also more likely than women to believe that ambiguous workplace interactions with women are of a sexual nature. *Id.* at 31.

20. See *All Charges Alleging Harassment (Charges Filed with EEOC) FY 2010 – FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statis->

picture of workplace harassment, as the majority of workplace harassment victims never report or take any kind of formal action.²¹ Private surveys generally estimate a much higher prevalence of workplace harassment—certain studies have documented that over seventy-five percent of women, seventy percent of people of color, and half of LGBT employees have experienced harassing behavior at work.²²

The persistence of harassment in the workplace results in significant consequences. Victims of harassment experience substantial and often irreparable harms, including “injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”²³ Workplace harassment also has consequences beyond the physical, emotional, and economic harms experienced by individual victims. Recent studies have shown that workplace harassment has a direct impact on workforce participation and the economic security of women, who face various, and often intersectional, forms of workplace harassment.²⁴ As data on the socioeconomic impact of discrimination continues to show, women and people of color face a substantial wage and lifetime earnings gap,²⁵ are more likely to live in poverty,²⁶ and still make up a minority of leadership positions in virtually all sectors

tics/enforcement/all_harassment.cfm (last visited Oct. 31, 2018) (number of annual charges have remained between 26,000 and 28,000 for the past eight fiscal years).

21. For example, the EEOC has found that taking formal action against a harasser is the *least* common response of a victim of workplace harassment, and that as many as ninety percent of victims never take formal action, such as reporting or filing a complaint against their harasser. These victims and their experiences are not captured in EEOC data. See EEOC TASK FORCE REPORT, *supra* note 10, at 15–16.

22. *Id.* at 8–12.

23. Margaret E. Johnson, *Avoiding Harm Otherwise: Reframing Women Employees’ Responses to the Harms of Sexual Harassment*, 80 TEMP. L. REV. 743, 763 (2007) (quoting H.R. REP. NO. 102-40(I), at 64–65 (1991), as reprinted in 1991 U.S.C.C.A.N. 549, 602–03); see also NAT’L WOMEN’S LAW CTR., SEXUAL HARASSMENT IN THE WORKPLACE (2016), <https://nwlc.org/wp-content/uploads/2016/11/Sexual-Harassment-Fact-Sheet.pdf> (discussing harms resulting from workplace harassment); EEOC TASK FORCE REPORT, *supra* note 10, at 20–22 (discussing physical, psychological, emotional, and economic harms resulting from harassment).

24. See Johnson, *supra* note 23, at 765–70 (documenting behavioral and structural impacts of sexual harassment); see also Angela Onwuachi-Willig, *What About #Us-Too?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. 105 (detailing intersectional forms of harassment specific to women of color).

25. See NAT’L WOMEN’S LAW CTR., THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO 1–2 (2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2018.pdf>.

26. See NWLC Resources on Poverty, Income, and Health Insurance in 2016, NAT’L WOMEN’S L. CTR., <https://nwlc.org/resources/nwlc-resources-on-poverty-income-and-health-insurance-in-2016> (last visited Oct. 31, 2018).

and industries.²⁷ Workplace harassment also imposes costs on businesses—both quantifiable, such as the financial costs of addressing harassment complaints, and intangible, such as reputational losses.²⁸

B. Title VII and Workplace Harassment

Workplace harassment is a form of discrimination prohibited under Title VII of the Civil Rights Act of 1964.²⁹ Under Title VII, an employer is liable for discriminatory behavior in the workplace on the basis of race, color, religion, sex, and national origin.³⁰ The Supreme Court first recognized sexual harassment as a form of sex discrimination that violates federal anti-discrimination laws in 1986 in *Meritor Savings Bank v. Vinson*.³¹ In *Meritor Savings Bank*, the Supreme Court articulated two different types of harassment claims—“quid pro quo” harassment, where an employment decision is conditioned on requests for sexual favors,³² and “hostile work environment” harassment, where unwelcome harassment is so severe and pervasive as to

27. See Anna Brown, *The Data on Women Leaders*, PEW RESEARCH CTR. (Sept. 13, 2018), <http://www.pewsocialtrends.org/fact-sheet/the-data-on-women-leaders/>.

28. EEOC TASK FORCE REPORT, *supra* note 10, at 17–23.

29. See 42 U.S.C. § 2000e-2 (2012) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s [protected class].”) (emphasis added). Most of the EEOC charges (and most case law) for harassment is sexual harassment; however, workplace harassment on the basis of other protected classes, e.g., race, religion, national origin, follow a similar doctrinal proof model. I use the term “workplace harassment” to cover harassment on the basis of all protected classes, including sex, race, national origin, religion, etc., and have included cases of non-sexual harassment in this Note.

30. Title VII makes discrimination on the basis of a protected class an “unlawful employment practice” for which the employer is liable. See 42 U.S.C. § 2000e-2. This Note deals primarily with employer liability for supervisor harassment. In hostile work environment cases where the harasser is not a supervisor—such as a coworker or customer—the standard for employer liability is negligence, i.e., the employer is liable if it knew or should have known about the harassment. See *Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013) (an employer is only liable for harassment by coworkers if the employer “was negligent in controlling work conditions”). However, note that the definition of “supervisor” was dramatically narrowed by the Supreme Court’s decision in *Vance v. Ball State University*. *Id.* (holding that low-level supervisors who have the “ability to exercise significant direction over another’s daily work” but do not have the authority to take tangible employment actions are not considered “supervisors” for the purpose of Title VII vicarious liability).

31. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (holding that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment” as well as quid pro quo harassment).

32. See *id.* at 63–69.

alter an employee's terms and conditions of employment.³³ Since *Meritor Savings Bank*, Title VII hostile work environment claims have been recognized on the basis of race, religion, color, national origin, and sexual orientation/gender identity.³⁴

While the Court found that employers are strictly liable for a supervisor's quid pro quo harassment, *Meritor Savings Bank* left open the question of under what circumstances an employer is liable for a supervisor's hostile work environment harassment.³⁵ In rejecting a rule of strict liability for employers whose supervisors create a hostile work environment, the *Meritor Savings Bank* Court reasoned that Congress demonstrated "an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."³⁶ However, the Court declined at the time to articulate a bright line rule.³⁷ The issue was instead resolved twelve years later in a pair of hostile work environment cases—*Faragher v. City of Boca Raton*³⁸ and *Burlington Industries, Inc. v. Ellerth*³⁹ ("*Faragher-Ellerth*"). In articulating a new rule of employer liability, the *Faragher-Ellerth* Court reiterated that supervisor harassment resulting in "tangible" job detriments "like hiring, firing, promotion, compensation, and work assignment"—in other words, quid pro quo or "tangible" harassment—

33. *See id.*; *see also id.* at 67 ("For [hostile work environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (internal quotation marks omitted)).

34. *See Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited Oct. 31, 2018) .

35. *Meritor Sav. Bank*, 477 U.S. at 70–71 ("[Lower] courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."); *see also Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 760–61 (1998) (citing the foregoing from *Meritor* and stating "[a]lthough few courts have elaborated how agency principles support this rule, we think it reflects a correct application").

36. *Meritor Sav. Bank*, 477 U.S. at 72 (reversing Court of Appeals ruling that would have held employer strictly liable for all forms of supervisor harassment). Justice Marshall would have affirmed the D.C. Circuit's rule of strict liability for all forms of supervisor harassment. *See id.* at 78 ("I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer . . .") (Marshall, J., concurring in the judgment).

37. *Id.* at 72 ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.").

38. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

39. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998).

merits strict liability.⁴⁰ In cases where supervisor harassment resulted in a hostile work environment with no tangible job detriment, the Court reasoned that employers are entitled to raise an affirmative defense to limit their liability. The resulting *Faragher-Ellerth* affirmative defense is a two-part test, requiring an employer to show that it “exercised reasonable care to prevent and correct” harassing behavior and that the employee then failed to take advantage of preventative or corrective opportunities.⁴¹

The affirmative defense has proven to be a low bar for defendants to meet, driving most cases to be decided for the employer at the summary judgment stage and barring relief for many workplace harassment plaintiffs.⁴² For workplace harassment plaintiffs who are successful, however, both equitable and legal relief are available. As passed in 1964, Title VII provided only equitable relief, including back-pay, front-pay, and injunctive relief. The 1991 Civil Rights Act amended Title VII to allow for compensatory and punitive damages in addition to equitable relief for plaintiffs bringing intentional discrimination charges, including all forms of harassment.⁴³ Recovery of damages is not unlimited. The 1991 Act capped the total amount of combined compensatory and punitive damages on a sliding scale based on the size of the defendant employer, with a maximum recovery of \$300,000.⁴⁴ The Supreme Court further limited recovery of punitive damages in *Kolstad v. American Dental Ass’n*, holding that a

40. See *Faragher*, 524 U.S. at 790; see also *Ellerth*, 524 U.S. at 762 (“Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.”).

41. *Ellerth*, 524 U.S. at 765.

42. See generally Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672–73 (2012) (detailing certain summary judgment statistics and agreeing that summary judgment is granted more often in employment cases than other kinds of cases).

43. 42 U.S.C. § 1981a(a)(1), (b)(1) (2012) (describing compensatory and punitive damages for victims of sexual harassment). Congressional findings adopted in the 1991 Civil Rights Act demonstrate that the adoption of compensatory and punitive damages was intended to incentivize employers to adopt policies and practices that would prevent harassment and discrimination. See Civil Rights Act of 1991, Pub. L. No. 102-166, §2(3), 105 Stat. 1071, 1071. (“[A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace”). But see *id.* §3(1), 105 Stat. at 1071. (“The purposes of this Act are . . . to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . .”).

44. 42 U.S.C. § 1981a(b)(3). The current caps, which have not been modified since their adoption in 1991, limit combined compensatory and punitive damages to \$50,000 for small-sized employers (those with 15 to 100 employees), with a maximum payout of \$300,000 for the largest employers (those with more than 500 employees).

defendant employer could avoid punitive damages altogether if the employer demonstrates that it has engaged in “good faith efforts to comply with Title VII.”⁴⁵

C. *Theories and Purposes of Title VII Harassment Liability*

As a general matter, Title VII’s imposition of civil liability on employers was intended to serve both remedial and preventative functions. In creating a cause of action with remedies for victims of discrimination, anti-discrimination policy serves a remedial function by allowing an affected employee to sue for recovery of damages and equitable relief.⁴⁶

However, as the Supreme Court famously observed in *Albemarle Paper Co. v. Moody*, “the primary objective [of Title VII] was a prophylactic one.”⁴⁷ By imposing liability on employers for discrimination in the workplace, Congress made it the legal responsibility of employers to rid their workplaces of discriminatory practices and cultural norms. As workplace law scholar Susan Bisom-Rapp explains, Title VII liability was intended to incentivize employers to “proactively scrutiniz[e] their employment policies to identify and eliminate those of ‘dubious legality,’” therefore deterring employers from engaging in or condoning discrimination and motivating them to “purg[e] their own workplaces of biased policies without the necessity of litigation or judicial intervention.”⁴⁸ Title VII’s emphasis on preventing discriminatory conduct, therefore, was intended to achieve not just harm avoidance, but full workplace equality for previously disfavored groups of workers as well.⁴⁹

The Supreme Court has confirmed the applicability of Title VII’s twin aims to anti-harassment law as a subset of Title VII jurisprudence. Indeed, in creating the *Faragher-Ellerth* defense, the Court re-

45. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (holding that an employer cannot be held strictly liable for punitive damages where the employer made “good-faith efforts to comply with Title VII” and managerial agents made discriminatory employment decisions contrary to those efforts).

46. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (“It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers.”).

47. *Id.* at 417.

48. Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *BERKELEY J. EMP. & LAB. L.* 1, 7 (2001).

49. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (finding that Title VII was intended to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group”).

iterated that “[Title VII’s] ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.”⁵⁰ It was in serving the preventative goal that the Court reasoned that a rule of absolute liability would not sufficiently serve anti-discrimination law’s preventative purpose.⁵¹ Instead, the Court hypothesized, a liability rule with an affirmative defense would achieve Title VII’s “basic policies of encouraging forethought by employers.”⁵²

Despite an otherwise insistent commitment to prevention in anti-harassment jurisprudence, the Supreme Court also cautioned in *Oncale v. Sundowner Offshore Services* that Title VII’s harassment prohibition is not intended to function as a “general civility code” for the workplace.⁵³ *Oncale*’s outer limit on the scope of harassment prevention responds to concerns by employers and some legal scholars that requiring employers to achieve the preventative goals of anti-harassment law threatens to devolve into a strict code of conduct for the workplace, whereby personal relationships and employee free speech are tightly controlled.⁵⁴ Indeed, *Oncale* begs the question of how Title VII’s goal of harassment prevention is meant to be achieved.⁵⁵

50. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); see also *Misty L. Gill, The Changed Face of Liability for Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth*, 32 CREIGHTON L. REV. 1651, 1716 (1999) (“According to the [*Faragher- Ellerth*] Court, creating vicarious liability for supervisory harassment gives incentives to employers to prevent violations . . .”).

51. See *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (“To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”).

52. See *id.* at 764. Some scholars have argued that *Faragher- Ellerth* represents a shift in the Supreme Court’s jurisprudence on anti-discrimination prevention away from earlier cases such as *Albemarle*. See, e.g., Bisom-Rapp, *supra* note 48, at 911 (positing that *Faragher- Ellerth*’s conceptualization of discrimination prevention amounted to a “new jurisprudence of education and prevention”).

53. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–82 (1998).

54. See *id.* at 80 (responding to defendant-employer and amici). For arguments that anti-harassment law lead employers to adopt restrictions on employee conduct and free speech, see generally Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

55. But see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (“Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.” (citing 45 Fed. Reg. 746,76 (1980))).

II.

TRAINING AS WORKPLACE HARASSMENT PREVENTION

In its formulation of the affirmative defense, the Court in *Faragher-Ellerth* articulated its vision for how Title VII's preventative goals should be met in the context of workplace harassment. Title VII, the *Faragher-Ellerth* Court says, is "designed to encourage the creation of antiharassment [sic] policies and effective grievance mechanisms."⁵⁶ Limiting employer liability, which the Court believed would incentivize employers to adopt such practices, thus effectuates Title VII's preventative goal.⁵⁷ Both prongs of the affirmative defense are predicated on the employer's prophylactic policies and procedures—it is through the adoption and implementation of such policies that the employer "exercise[s] reasonable care to prevent and correct" harassment, and the employee succeeds or fails to avail themselves of the opportunities provided.⁵⁸ While the *Faragher-Ellerth* Court cautioned that "proof that an employer had promulgated an antiharassment [sic] policy with complaint procedure is not necessary in every instance as a matter of law," the Court also made it clear that an employer's choice to adopt affirmative prevention policies was a relevant consideration in determining whether a defendant has met the first prong of their affirmative defense.⁵⁹

The adoption of affirmative preventative policies by employers, both before and after *Faragher-Ellerth*, is well documented. Grievance procedures, trainings, and other preventative practices existed in the private sector before *Faragher-Ellerth*,⁶⁰ and newer practices, such as 1-800 reporting hotlines and monitoring employee emails for potentially harassing behavior, continued to proliferate in response to the incentives arising out of the affirmative defense.⁶¹ The two most

56. *Ellerth*, 524 U.S. at 764.

57. *See id.*

58. *See id.* at 765; *see also* Bisom-Rapp, *supra* note 48, at 10 ("[W]hile the plaintiff employee's failure to use a complaint procedure is not the only way to establish the second prong of the defense, 'a demonstration of such failure will normally suffice to satisfy the employer's burden.'" (quoting *Ellerth*, 524 U.S. at 808)).

59. *See Ellerth*, 524 U.S. at 765 ("[T]he need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

60. Indeed, as Bisom-Rapp notes, Lauren Edelman's seminal study providing her managerialization theory evaluated employers' use of grievance procedures in the late 1970s and early 1980s, years before *Faragher-Ellerth*. *See* Bisom-Rapp, *supra* note 48, at 14–15.

61. *Id.* at 15 (noting that anti-discrimination training has been "part of the employer's litigation prevention arsenal" since the 1980s); *see also* Grossman, *supra* note 15, at 13–14.

common preventative responses are issuing a formal anti-harassment policy and offering some form of employee education and training. A survey taken in 1999, immediately following the decision in *Faragher-Ellerth*, by the Society for Human Resources Management (SHRM) found that of responding employers, ninety-seven percent had a written sexual harassment policy and sixty-two percent provided some form of anti-harassment training.⁶² Recent surveys have found a similar prevalence of such practices today.⁶³

Of the potential organizational responses to the continuing problem of workplace harassment, the EEOC Task Force's report found in 2016 that "[anti-harassment] training is one of the primary mechanisms used to prevent harassment" by private sector employers.⁶⁴ Anti-harassment training has also been one of the most seized-upon responses to the #MeToo movement, and the demand by employers for anti-harassment trainings increased beginning in late 2017 in response to the elevated visibility of workplace harassment.⁶⁵ A January 2018 SHRM survey found that thirty-two percent of responding organizations had updated their sexual harassment trainings in 2017, and twenty-two percent of organizations planned to make changes in the next year.⁶⁶ Congress and state legislatures, in their capacity as employers, have adopted policies and proposed legislation to institute and modernize trainings for legislative staff and public sector employees.⁶⁷ In 2018, Delaware and New York adopted new requirements for pri-

62. See Grossman, *supra* note 15, at 19–20 (citing Soc'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 6 (1999)).

63. See *Harassment-Free Workplace Series: The Executive View*, Soc'Y FOR HUM. RESOURCE MGMT. (Jan. 25, 2019), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Workplace-Sexual-Harassment.aspx> (of the human resources professionals who responded, 94% reported that their employer had a "formal" sexual harassment policy); Julia Belluz, *Congress Is Making Harassment Trainings Mandatory. Science Shows They Don't Work.*, Vox (Nov. 14, 2017, 4:20 PM), <https://www.vox.com/science-and-health/2017/11/04/16498674/corporate-harassment-trainings-dont-work> (finding over 90% of employers offer anti-harassment trainings).

64. EEOC TASK FORCE REPORT, *supra* note 10, at 45.

65. For example, TrainUp, a training company, received 2,150 requests for services in January 2018, an eightfold increase over the 267 requests in January 2017. See Showley, *supra* note 7.

66. *Harassment-Free Workplace Series: A Focus on Sexual Harassment*, Soc'Y FOR HUM. RESOURCE MGMT. (Jan. 31, 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/a-focus-on-sexual-harassment.aspx>.

67. See Belluz, *supra* note 63 (Congress); David A. Lieb, *States Tackling Shortcomings in Sexual Misconduct Policies*, AP (Jan. 11, 2018), <https://apnews.com/6c62ed3e420f4e4092ce5f6066f1ed7b> (states); *2018 Legislation on Sexual Harassment in the Legislature*, NAT'L CONF. ST. LEGISLATURES (June 6, 2018), <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx> (states).

vate sector employers to provide sexual harassment training to their employees.⁶⁸

In advancing these proposals, courts, employers, policymakers, and legislators laud anti-harassment training as an intuitive first step toward a preventative response to the problem for workplace harassment. Given the almost universal acceptance of training as a tool of prevention, it is worth considering what is known about the effectiveness of training in achieving Title VII's preventative goal. While exposure to anti-harassment training in any capacity is on balance a positive step towards eradicating harassment in a workplace,⁶⁹ the existing empirical evidence demonstrates that not all trainings are created equal in terms of transforming behavior and cementing long-lasting change.

A. *Anti-Harassment Training*

Despite its ubiquity in the private sector, the content, method, scope, regularity, and length of anti-harassment trainings can vary widely. Most trainings are designed to educate managers, supervisors, and employees on three topics: the mandates of harassment law, the employer's internal policies and procedures, and both permissible and prohibited behavior, although the precise content can vary greatly between employers and trainings.⁷⁰ The methods used to communicate such content also vary greatly and increasingly take advantage of technological media. According to the SHRM's 2018 survey, the most common anti-harassment training method currently in use by employers is a video or online module, although some employers offer a face-to-face seminar or a combination of the two methods.⁷¹ Online and face-to-face trainings are often interactive, asking participants to answer questions about the knowledge they have acquired or to participate in role-playing exercises.⁷²

When anti-harassment trainings first proliferated, they were aimed primarily at managers and supervisors in an effort to apprise

68. H.B. 360, 149th Gen. Assemb. (Del. 2018), <http://legis.delaware.gov/BillDetail?LegislationId=26453>; S.B. S7507C, 2018-2019 Leg. Sess. (N.Y. 2018), <https://www.nysenate.gov/legislation/bills/2017/s7507>.

69. *But see infra* notes 85-88 and accompanying text.

70. Bisom-Rapp, *supra* note 48, at 16.

71. SOC'Y FOR HUMAN RESOURCE MGMT., *supra* note 66 (finding that thirty-seven percent of responding employers used online/video training, twenty-seven percent used face-to-face training, and thirty-six percent used a combination of the two).

72. *Id.*

them of their legal duties and responsibilities.⁷³ However, many employers now offer or mandate trainings for all employees.⁷⁴ Training often takes place during orientation as a part of a wider education for new employees on company policies, although some employers also require a regular retraining, typically annually or biannually, to reacquaint employees with the course material.⁷⁵

Finally, who administers the training has changed over time. The earliest trainings were provided by an employer's human resources personnel or general counsel, and some companies continue with this approach today.⁷⁶ However, many employers, especially larger corporations, are turning to professional education and training services, resulting in the growth of a billion-dollar cottage industry that provides employers with training materials, programmatic support, and even visiting training staff.⁷⁷

B. *The Empirical Effectiveness of Anti-Harassment Training*

Anti-harassment training has been a part of many workplaces for several decades, but the empirical evidence showing if, and under what circumstances, private sector anti-harassment trainings do in fact work as a preventative method is generally inconclusive. This question of effectiveness is critical, as employers, policymakers, and judges alike have assumed that Title VII's prevention goals are served by employers' adoption of training.

Social science studies on training effectiveness find that training does have a positive effect on increasing employees' knowledge about sexual harassment.⁷⁸ A seminal study by Robert Moyer and Anjan Nath found that training videos and written materials increased the ability of training participants to identify possible instances of sexual

73. Bisom-Rapp, *supra* note 48, at 17–18 (tracing the origin of anti-discrimination and anti-harassment training programs to the Equal Employment Opportunity Commission's 1980 *Guidelines on Discrimination Because of Sex*, which states that “employers are strictly liable for supervisor harassment regardless of whether the acts were forbidden by the employer and whether or not the employer knew or should have known of their occurrence” (citing Sally Jacobs, *Sexual Harassment*, 7 NEW ENG. BUS. 25 (1985), 1985 WL 2254793, *5)).

74. SOC'Y FOR HUMAN RESOURCE MGMT., *supra* note 66.

75. *Id.*

76. *Id.*; see also Bisom-Rapp, *supra* note 48, at 14–15 (describing some problems that arise when organizations implement legal compliance strategies internally, like anti-discrimination training programs).

77. Belluz, *supra* note 63; Bisom-Rapp, *supra* note 48, at 18–19.

78. See Bisom-Rapp, *supra* note 48, at 31. For more detail on studies, see generally *id.* at 29–45 (summarizing studies on training effectiveness).

harassment.⁷⁹ A later study by Elissa Perry, Carol Kulik, and James Schmidtke confirmed this conclusion, finding that training videos positively affected the knowledge of participants who had a high likelihood to sexually harass.⁸⁰ Some studies suggest that training is effective in teaching participants to identify very severe types of harassment, but that this effect may not extend to identifying more ambiguous forms of harassment.⁸¹

While the existing evidence seems to confirm that training increases knowledge of harassing conduct, social scientists have been unable to conclude what effect different types of training have on participants' behaviors, especially once they return to the workplace. The Perry study—one of the earliest to look at the impact of training on behaviors rather than just knowledge retention—found that a commercial training video did change the behavior of individuals with a high likelihood to sexually harass, making them less likely to engage in touching behaviors.⁸² However, other studies have come to an alternative conclusion.⁸³ A 2001 study found that men who participated in a thirty-minute training were more likely to identify workplace sexual harassment as inappropriate behavior for the workplace, but could not better identify which behaviors were harassing.⁸⁴

Similarly, most studies have been unable to conclude that common workplace training techniques such as training videos or seminars alone are effective in changing overall levels of harassment in an organization. An early study found only weak support for the hypothesis that training participants will translate what is learned in trainings into their regular workplace interactions.⁸⁵ A 2013 study tested the specific question of whether training had an effect on sexual harassment in the workplace and found that training had no statistically significant impact on decreasing incidents of sexual harassment.⁸⁶ Of some concern are a few studies that have found an adverse effect as a result of training—that training may deter men from working closely with female

79. *Id.* at 31–32.

80. See Grossman, *supra* note 15, at 47–48.

81. Bisom-Rapp, *supra* note 48, at 35–36 (summarizing James Wilkerson's studies on the effect of prior training); Grossman, *supra* note 15, at 44–45 (summarizing Blakely, Blakely, and Moorman's study on perceptions of harassment).

82. Bisom-Rapp, *supra* note 48, at 33–34.

83. See, e.g., EEOC TASK FORCE REPORT, *supra* note 10, at 47 (summarizing Magley's study finding trainings had minimal effect on personal attitudes regarding sexual harassment).

84. *Id.* (Bingham-Scherer study).

85. Bisom-Rapp, *supra* note 48, at 34–35 (summarizing Keyton-Rhodes's study on the effect of training on empathic skills).

86. EEOC TASK FORCE REPORT, *supra* note 10, at 48 (Magley study).

employees,⁸⁷ or may cause resentment among participating employees.⁸⁸

While the overall impact of training on workplace harassment is in question, certain training methods have been shown to hold more promise than others. Requiring participants to attend several hours of training rather than shorter trainings has been shown to be more effective, as has regular retraining.⁸⁹ At least one study found that using a combination of different training methods—for example, showing a video and requiring individual reading material—has a more significant impact on knowledge and behavior than using a single method.⁹⁰ Similarly, some results indicate that using more interactive methods of training may have a positive impact.⁹¹ Some social scientists have started to look toward bystander intervention and civility training, which have been shown to have positive behavioral impacts in certain workplace settings, as promising strategies to use to educate employees.⁹²

In reviewing much of this social science literature for their 2016 report, the EEOC Task Force was unable to draw any conclusive generalizations regarding whether commonly used trainings were effective or not, based on the empirical data.⁹³ In particular, the report noted that it could only identify two studies that were based on evaluations of operating workplaces.⁹⁴ The majority of studies, including

87. Grossman, *supra* note 15, at 48–49 (citing Fuchs-Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 376–77 (1995)).

88. *Id.* (citing Barbara A. Gutek, *Sexual Harassment Policy Initiatives*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 195, 195 (William O'Donohue ed., 1997)).

89. See Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, *N.Y. TIMES* (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html> (“The most effective training, researchers say, is at least four hours, in person, interactive and tailored for the particular workplace . . .”).

90. Bisom-Rapp, *supra* note 48, at 32–33 (summarizing York's study).

91. Grossman, *supra* note 15, at 45–46.

92. Cain Miller, *supra* note 89 (explaining that traditional harassment trainings can reinforce gender stereotypes, while interactive trainings such as bystander intervention are effective).

93. EEOC TASK FORCE REPORT, *supra* note 10, at 45 (“There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, empirical data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.”).

94. The studies identified by the EEOC were Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 *J. APPLIED BEHAV. SCI.* 125 (2001) and Vicki Magley et al., *Changing Sexual Harassment Within Organizations via Training Interventions: Suggestions and Empirical*

most of those discussed in this section, were researcher-designed and carried out on students or volunteers, making their results limited and ungeneralizable given the wide variety of trainings offered in real workplaces.⁹⁵ Based on the limitations of the empirical data to date, the EEOC Task Force concluded that additional research was needed, and that in broad terms a training “cannot stand alone but rather must be part of a holistic effort undertaken by the employer to prevent harassment” in order to be effective in addressing workplace harassment.⁹⁶

C. *Anti-Harassment Training and Theories of Behavioral Responses to Title VII*

The open question of the role of training in achieving workplace harassment prevention goals raises the question of why training seems to play such a central part in employers’ preventative responses to workplace harassment. Using training as a way to communicate workplace policies and make employees and supervisors aware of their rights and procedures seems both intuitive—without effective communication employees do not know of their rights and supervisors do not know of their legal responsibilities—and supported by empirical evidence showing a positive impact on knowledge retention. However, the evidence addressing whether commonly utilized training methods can alter employee behavior by changing their attitudes about harassment acceptability, which would seem to be the key to long-term social change in the workplace, is far less conclusive, bringing into question the reliance on existing employer-held training as such a ubiquitous prevention mechanism.

Given the mismatch between the rationales for anti-harassment training and the available empirical evidence, it is important to consider how training became a preventative measure recommended by policymakers and cited so favorably in anti-harassment doctrine. In a series of papers, noted sociologist and legal scholar Lauren Edelman conducted rigorous empirical analyses of various employer responses to anti-discrimination laws, including anti-harassment laws, to evaluate this very question.⁹⁷ In reviewing the empirical findings, Edelman

Data, in *THE FULFILLING WORKPLACE: THE ORGANIZATION’S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH* 225 (Ronald L. Burke & Cary L. Cooper eds., 2013). EEOC TASK FORCE REPORT, *supra* note 10, at 45.

95. See EEOC TASK FORCE REPORT, *supra* note 10, at 46 (finding only two studies of sexual harassment training effectiveness in operating workplaces).

96. *Id.* at 45.

97. The studies and resulting theories were originally introduced in a series of papers and have since been consolidated in a single, recent publication. LAUREN B.

and her colleagues have advanced a theory explaining how unproven managerial practices such as anti-harassment training have become so universally accepted as an appropriate employer response. Edelman's theory, called "managerialization of the law," hypothesizes that employers faced with ambiguous or flexible legal mandates will seek to comply in ways that conform with managerial values and goals.⁹⁸ By reorienting legal mandates with business friendly values, managerialization "tends to produce rules that are unenforced, procedures that are biased, [and] programs that are ineffective."⁹⁹ These "symbolic structures" that employers adopt appear to be aimed at anti-discrimination goals, even if their efficacy at achieving those goals is questionable or unproven, resulting in a "cosmetic compliance."¹⁰⁰ Anti-discrimination laws like Title VII, which broadly prohibit discrimination and harassment in the workplace with little statutory or regulatory guidance on how to best meet such mandates, provide an ambiguous legal landscape ripe for managerialization.¹⁰¹ Ultimately, the policies that proliferate as a result of managerialization will "legitimate extant racial and gender inequality" rather than achieve preventative anti-discrimination goals.¹⁰²

Other legal scholars—most notably, Susan Bisom-Rapp and Stacey Hawkins—have applied Edelman's theory to anti-harassment trainings specifically. In a pair of 2001 articles, Bisom-Rapp argued that "[a]nti-discrimination training nicely fits [Edelman's theory] because it is an example of organizations actively creating the terms of

EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016) [hereinafter, EDELMAN, *WORKING LAW*].

98. *Id.* at 124; see also Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61, 96 (2017) ("This theory [of managerialization] posits that when business managers translate legal rules into business practice, they get filtered in a way that reorients them away from an emphasis on legal compliance and towards an emphasis on managerial concerns such as maximizing productivity and profitability.").

99. EDELMAN, *WORKING LAW* *supra* note 97, at 124.

100. *Id.* at 101–102; see also Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 425 (2002) ("The key is that it is rational for organizations to take preventive measures only to the extent that doing so saves more than it costs."); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 508 (2003) (documenting the rise of policies that were facially compelling enough to comply with anti-harassment liability but resulted in ineffective prevention tools).

101. EDELMAN, *WORKING LAW*, *supra* note 97, at 126–8.

102. *Id.* at 124.

legal compliance.”¹⁰³ Bisom-Rapp concluded that “through their responses to [Title VII],” employers “defined a form of legal compliance” that included training.¹⁰⁴ In a more recent application of the theory, Stacey Hawkins observed that the managerialization theory explains workplace diversity trainings in a similar way.¹⁰⁵ Edelman’s managerialization theory and related empirical findings thus offer a compelling explanation of the relationship between anti-discrimination law and employer responses to regulation. The theory also accurately captures the near-universal acceptance of anti-harassment training as an unquestionable tool in achieving Title VII’s prevention aims despite increasing evidence that the most commonly deployed employer trainings have little demonstrated impact of the prevalence of workplace harassment.

III.

THE JUDICIAL TREATMENT OF ANTI-HARASSMENT TRAINING

The managerialization of anti-harassment trainings represents a concerning phenomenon that may threaten the achievement of Title VII’s preventative goals. By validating unproven practices such as anti-harassment trainings, employers risk complying with anti-harassment law in form but not in substance.¹⁰⁶ Because “social science literature suggests that a near-perfect state of rule compliance can peaceably co-exist with an uncomfortably high level of harassment,” the need for a strict monitoring of what should be considered a legitimate “preventative practice” in the context of workplace harassment is critical.¹⁰⁷

By interpreting employers’ compliance with the law, the role of policing the line between substantive prevention and cosmetic compliance ultimately falls to the federal courts.¹⁰⁸ Thus, judicial decision-making in evaluating compliance with Title VII is critical to the en-

103. Bisom-Rapp, *supra* note 48, at 15; *see also* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 152 (2001).

104. Bisom-Rapp, *supra* note 48, at 14.

105. Hawkins, *supra* note 98, at 96–100.

106. *See* Grossman, *supra* note 15, at 4–5 (arguing that when employers proliferate policies that lack effectiveness but appear to be compliance mechanisms, “the triumph of form over substance in sexual harassment law occurs”).

107. *Id.* at 70.

108. *See* 42 U.S.C. § 2000e-5(f) (2012) (creating a federal cause of action for enforcement of Title VII). The EEOC also has jurisdiction to enforce and investigate non-compliance with Title VII, and in most instances, exhaustion of the EEOC’s administrative remedies and a right-to-sue letter are required before a suit may be

forcement of anti-harassment law. However, there is increasing evidence that anti-discrimination law, including anti-harassment law, is what Edelman calls endogenous. In evaluating the impact of managerialization on judicial interpretations of Title VII, Edelman developed a theory of judicial decision-making termed “legal endogeneity,” which describes the process by which adoption of managerialized compliance efforts came to be seen by courts as legitimate ways of complying with anti-discrimination laws.¹⁰⁹ According to Edelman, legal endogeneity occurs in three stages. First, as employers adopt managerial practices to respond to anti-discrimination law, judges begin to reference such practices in their decision-making.¹¹⁰ Second, employers use these managerial practices as evidence of their compliance, and judges increasingly agree with employers that such practices are relevant to meeting their burden of compliance.¹¹¹ Finally, judges move beyond finding such practices only relevant, and presume the legal adequacy of such measures without scrutinizing their effectiveness—in effect, deferring to managerialized conceptions of compliance and, thus, making anti-discrimination law endogenous.¹¹² Edelman’s empirical analyses of Title VII cases from 1965 to 1999 provides strong support for the theory.¹¹³

Edelman’s theories tell us that courts will take at face-value the fact that trainings are an effective and legitimate tool of harassment prevention.¹¹⁴ While the Supreme Court hasn’t spoken directly to the question of training,¹¹⁵ lower court decisions have generally borne out

brought in federal court. See § 2000e-5(a)-(b) (EEOC jurisdiction and investigatory power); § 2000e-5(e) (administrative exhaustion requirements).

109. EDELMAN, *WORKING LAW*, *supra* note 97, at 216–18; see also Hawkins, *supra* note 98, at 95–100 (applying endogeneity theory to workplace diversity trainings).

110. Lauren B. Edelman et. al, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC’Y 888, 893 (2011).

111. *Id.* at 893–94.

112. *Id.*

113. *Id.* at 922–931 (“Our findings on reference, relevance, and deference suggest that judicial constructions of law have over the past 40 years become increasingly likely to incorporate and eventually to defer to institutionalized organizational structures.”).

114. See Bisom-Rapp, *supra* note 48, at 14 (arguing that employers subject to Title VII “through their responses to [the law], defined a form of legal compliance ultimately recognized and legitimized by the judiciary”); Hawkins, *supra* note 98, at 95–100 (applying endogeneity theory to conclude that judges in Title VII cases exhibit a “presumption of legitimacy” with regards to training despite lack of empirical effectiveness).

115. The Supreme Court did, however, deny certiorari in a recent case holding that, as a matter of law, a defendant was not required to present evidence of training to assert an affirmative defense. See *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013), *cert denied*, 134 S. Ct. 2664 (2014).

the prediction that affirmative measures beyond simply having an anti-harassment policy are needed for employers to meet *Faragher-Elberth's* duty of prevention.¹¹⁶ In the early years following *Faragher-Elberth*, lower courts came to all but require an employer to have some form of anti-harassment policy with grievance procedures to meet the employer prong of the defense, and have looked for employers' adoption of other affirmative practices as well.¹¹⁷ Early analyses of lower court decisions on harassment prevention immediately following *Faragher-Elberth* found that courts generally accepted training as evidence of preventative efforts without any kind of evaluation into the form or effectiveness of training, although most noted that the full impact of the decisions on both harassment law and employer incentives—and how lower court reaction would bear out Edelman's theory—would not be known for some time.¹¹⁸

Given the question of the effectiveness of common anti-harassment training, some scholars recommended that courts take a closer look at the substance of trainings, with a particular eye toward their effectiveness, before signing off on trainings as evidence of reasonable preventative care.¹¹⁹ With these recommendations in mind, this Part reviews federal court treatment of training in Title VII hostile work environment cases in the twenty years since *Faragher-Elberth*.

A. *Training in Hostile Work Environment Cases*

In hostile work environment cases, anti-harassment training is most often raised in three contexts. An employer's anti-harassment training is referenced most often in the first prong the *Faragher-Elberth* test evaluating whether an employer took "reasonable care to prevent and correct."¹²⁰ Training is also cited as evidence in the second prong of the *Faragher-Elberth* test evaluating whether the employee-plaintiff availed themselves of available remedial procedures

116. See *infra* notes 123–138 and accompanying text.

117. See Grossman, *supra* note 15, at 11–12 ("Courts have been strict with employers who do not meet this basic requirement of having a policy specifically dealing with sexual harassment, but have been flexible in approving different types of policies.").

118. See Grossman, *supra* note 15, at 72–73.

119. See, e.g., Bisom-Rapp, *supra* note 48, at 44–47 (noting further that "training, in order to be relevant to the issue of employer good faith, must be considered in context with the events that give rise to the suit"); EDELMAN, *WORKING LAW*, *supra* note 97, at 219–20.

120. See *infra* notes 123–129 and accompanying text.

and “avoid[ed] harm otherwise.”¹²¹ Finally, training is cited in determining whether punitive damages should be sustained or waived.¹²²

1. *The Employer Prong*

The first prong of the *Faragher-Ellerth* affirmative defense, called the “employer prong,” requires a defendant employer to show that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”¹²³ The affirmative defense thus requires an employer to show proof of two things—that the employer acted reasonably to prevent workplace harassment, and that any harassing behavior that came to light was corrected promptly. While not required in most circuits, evidence relating to anti-harassment training is overwhelmingly cited as evidence that an employer has met both the prevention and correction elements of the employer prong. The Sixth Circuit has gone so far as to require proof of training for an employer seeking to meet their duty of prevention in the employer prong of the affirmative defense, although no other circuit has followed this approach.¹²⁴

In determining whether an employer has met their burden of reasonably preventing harassment, most lower courts will cite training as a component of a broader prevention scheme. In cases where an employer has multiple putative prevention methods, such as an anti-harassment policy, training, and a hotline, employers are found to have met their burden of persuasion as a matter of law.¹²⁵ In some cases, evidence that training occurred alongside a formal anti-harassment

121. See *infra* notes 130–138 and accompanying text.

122. See *infra* notes 139–142 and accompanying text.

123. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

124. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349–50 (6th Cir. 2005) (“While there is no exact formula for what constitutes a ‘reasonable’ sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) *provide for training regarding the policy.*” (emphasis added) (citations omitted)).

125. See, e.g., *Crocco v. Advance Stores Co.*, 421 F. Supp. 2d 485, 496 (D. Conn. 2006) (there was “no genuine dispute of material fact” that the defendant employer had met its burden of proving the employer prong where the employer “had a sexual harassment policy, an online sexual harassment training course, and a hotline that employees could call to report sexual harassment”); *Hooker v. Wentz*, 77 F. Supp. 2d 753, 757 (S.D.W. Va. 1999) (finding that defendant met employer prong with evidence that they offered training, distributed a policy guide, and had a toll-free hotline); *Fiscus v. Triumph Grp. Operations, Inc.*, 24 F. Supp. 2d 1229, 1240–41 (D. Kan. 1998) (finding evidence that defendant conducted trainings for supervisors in addition to having a policy and disseminating the policy sufficient to meet the employer prong).

policy is dispositive of the prevention element of the employer prong.¹²⁶ Alternatively, courts cite a lack of training or failure to properly implement training as evidence that defeats a defendant's duty to prevent, particularly at the summary judgment stage.¹²⁷

Anti-harassment training is also cited as evidence that an employer acted to correct harassing behavior. Evidence that trainings were required of an alleged harasser or to a plaintiff's supervisor as a response to reports of harassment are cited favorably as a corrective measure.¹²⁸ For example, an employer who offered anti-harassment training following plaintiff's reports of harassment was granted summary judgment on the basis of meeting their burden under the employer prong; evidence that there was no further reported harassment was taken by the court as evidence that the training had worked.¹²⁹

2. *The Employee Prong*

Evidence of training is most commonly introduced to show an employer's reasonable care to prevent and correct harassment under the employer prong. However, employers also produce evidence of training to meet their burden of persuasion under the second prong of *Faragher-Ellerth*. The second prong of the affirmative defense, called the "employee prong," requires proof that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm other-

126. *See, e.g.*, *Rios v. Buffalo & Fort Erie Pub. Bridge Auth.*, No. 04-CV-375A, 2008 WL 657121, at *5 (W.D.N.Y. Mar. 7, 2008), *aff'd*, 326 F. App'x 612 (2d Cir. 2009) ("The existence of the training and the anti-harassment policy satisfies the first prong of the defendant's affirmative defense."); *Taylor v. Tex. Dep't of Criminal Justice-Instit. Div.*, No. 3:98CV2972-AH, 2000 WL 528410, at *6-7 (N.D. Tex. May 1, 2000) (siding with the employer's argument that its anti-harassment trainings and policy alone satisfy the employer prong).

127. *See, e.g.*, *Fox v. Premier Immediate Med. Care, LLC*, No. CIV.A. 10-4516, 2012 WL 6043286, at *7 (E.D. Pa. Dec. 3, 2012) (citing lack of training and policy to reject summary judgment motion for defendant); *Watkins v. Tex. CES, Inc.*, No. CIV.A. 4:08-CV-243-Y, 2009 WL 3424736, at *7 (N.D. Tex. Oct. 26, 2009) (reliance on general sexual harassment policy alone as evidence of reasonable prevention was not enough to meet the employer prong where training on the policy was not given); *Bruce v. Vahala Foam, Inc.*, No. 3:07-CV-361-TS, 2008 WL 3086224, at *10 (N.D. Ind. Aug. 4, 2008) (same).

128. *See, e.g.*, *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1052-53, 1057 (9th Cir. 2007) (requiring harasser to attend harassment sensitivity training cited as evidence of corrective employer behavior); *Nicholson v. Dart Container Corp.*, 602 F. Supp. 2d 760, 766-67 (S.D. Miss. 2008) (defendant met employer prong with evidence that "as part of its response, [defendant] provided additional intensive sexual harassment training at the plant to all employees").

129. *Torres v. Bodycote Int'l*, No. 13-1245-EFM, 2014 WL 11878452, at *6-7 (D. Kan. May 23, 2014).

wise.”¹³⁰ A defendant employer typically meets the second prong by demonstrating that the plaintiff unreasonably did not report the harassment using the proper channels put in place by the employer.¹³¹

Courts cite the existence of training to show that a plaintiff’s failure to properly report harassment was unreasonable if a plaintiff attended a training that included information about reporting procedures.¹³² Courts have limited liability on the basis of the employee prong where plaintiffs “stayed silent even after [defendant] provided sexual harassment training,”¹³³ or otherwise did not report “though plaintiff was trained on th[e] policy and was aware of its provisions.”¹³⁴ At least one case found that a plaintiff had failed to meet her reporting obligation by reporting to a supervisor not specified in the policy given evidence that she was trained on a specific reporting chain of command.¹³⁵ These cases do not acknowledge the unique dynamics at play that chill or impact victim reporting regardless of whether training was given, relying instead on the presumption that it is unreasonable as a matter of law for a plaintiff to fail to report once trained on the internal procedures.¹³⁶ For example, in two recent

130. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

131. *See Johnson, supra* note 23, at 764 (arguing that the standard for “avoid[ing] harm otherwise” has been interpreted primarily to require reporting).

132. *See, e.g., Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1062–64 (10th Cir. 2009) (affirming summary judgment for employer given evidence that plaintiff “received the harassment training and knew that the incidents should have been reported, we find no adequate excuse for her delay [in reporting]”); *Hawk v. Americold Logistics, LLC*, No. 02-3528, 2003 WL 929221, at *8–9 (E.D. Pa. Mar. 6, 2003) (defendant met the employer prong by showing that plaintiff “had attended anti-harassment training and was aware of [defendant’s] anti-harassment policy” but did not take formal action for eight months).

133. *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (10th Cir. 2013) (affirming summary judgment for employer); *see also Dye v. BNSF Ry. Co.*, No. CV-14-150-BLG-CSO, 2016 WL 492755, at *9 (D. Mont. Feb. 8, 2016) (“Although [plaintiff] had received training respecting the type of harassment she alleges she endured and information about when and to whom to report such treatment, it is undisputed that she did not report Greer’s alleged harassment ‘immediately’ pursuant to the policy . . .”).

134. *Delima v. Home Depot U.S.A., Inc.*, 616 F. Supp. 2d 1055, 1091 (D. Or. 2008) (granting summary judgment for employer); *see also Williams v. Barnhill’s Buffet Inc.*, 290 F. App’x 759, 763 (5th Cir. 2008) (granting summary judgment for employer where plaintiff “had the opportunity to meet personally with corporate representatives of [defendant] during the training, but she chose not to notify them of Taylor’s previous harassment”).

135. *See Dowdy v. North Carolina*, 23 F. App’x 121, 123 (4th Cir. 2001) (affirming summary judgment where plaintiff should have known whom to properly report to based on training participation).

136. *See, e.g., Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, No. 108cv173, 2010 WL 1780185, at *10–11 (N.D. Ind. Apr. 30, 2010) (granting summary judgment for employer where evidence demonstrated that plaintiff attended training but did not

cases, evidence that a plaintiff attended training was enough to defeat plaintiffs' contentions that management did not take the trained reporting procedures seriously.¹³⁷ Instead, a plaintiff's participation in anti-harassment trainings can be the dispositive factor in determining failure to report or avoid harm otherwise under the employee prong.¹³⁸

3. Punitive Damages Determinations

Beyond the *Faragher-Ellerth* defense, courts have used evidence of training in making punitive damages determinations in hostile work environment cases. Under *Kolstad v. American Dental Ass'n*, recovery of punitive damages is limited in cases where an employer demonstrates that it has engaged in "good faith efforts to comply with Title VII."¹³⁹ Courts have held that training is a relevant factor in considering whether an employer has acted in good faith sufficient to limit a punitive damages instruction.¹⁴⁰ However, evidence that training was not offered or was improperly implemented is also frequently used as evidence that a defendant did not act in good faith, thus defeating its

make an internal report prior to being terminated, even though plaintiff took other measures to avoid harm including complaining to her mother). *See generally* Johnson, *supra* note 23, at 771–785 (summarizing social science literature documenting the variety of victim responses to harassment other than official reporting); EEOC TASK FORCE REPORT, *supra* note 10, at 15–17 (noting that taking formal action against a harasser is the *least* common response of a victim of workplace harassment).

137. *See, e.g.,* *Martinez v. Colvin*, No. 3:14-cv-01487-AA, 2016 WL 8737442, at *4 (D. Or. Mar. 4, 2016) (rejecting plaintiff's argument that she did not use the reporting procedures on which she was trained because "no one in management would have believed her and [defendant] had convinced her that management was ineffective"); *EEOC v. GNLV Corp.*, No. 2:06-CV-01225-RCJ, 2014 WL 7365871, at *28 (D. Nev. Dec. 18, 2014) (granting summary judgment for employer where plaintiff attended training and did not subsequently report despite testimony that plaintiff "did not complain because it was her supervisors who engaged in the conduct and [plaintiff] 'never thought about' going to [another] manager to complain [as was specified in the policy]").

138. *See, e.g.,* *McRunnels v. Calsonic Kansei N. Am., Inc.*, No. 5:07-cv-113(DCB)(JMR), 2008 WL 4965307, at *8–10 (S.D. Miss. Nov. 18, 2008) ("The Court finds that the failure of the plaintiffs to utilize [defendant's] reporting procedures is unreasonable as a matter of law, *especially in light of the plaintiffs' training on sexual harassment procedures.*" (emphasis added)).

139. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (holding that an employer cannot be held strictly liable for punitive damages where the employer made "good-faith efforts to comply with Title VII" and managerial agents made discriminatory employment decisions contrary to those efforts).

140. *See, e.g.,* *Bjornson v. Dave Smith Motors/Frontier Leasing & Sales*, 578 F. Supp. 2d 1269, 1279–81 (D. Idaho 2008) (evidence that training was not provided was relevant to determining whether employer "implemented its policy in good faith"); *Ferguson v. Associated Wholesale Grocers, Inc.*, 469 F. Supp. 2d 961, 972–73 (D. Kan. 2007) (limiting punitive damages under *Kolstad* where employer showed all employees had received sexual harassment training).

Kolstad jury instruction or allowing punitive damages to stand.¹⁴¹ In particular, evidence that the putative harasser or the plaintiff's supervisor did not receive anti-harassment training has been used to defeat motions to limit punitive damages under *Kolstad*.¹⁴²

B. Judicial Scrutiny Given to Training

Training plays an important—and sometimes dispositive—part in judicial decision-making about employer liability for hostile work environment harassment. In the context of existing evidence about training effectiveness, however, the weight given to training in these cases is curious and perhaps alarming, as the affirmative defense is a complete bar to liability. The unproven effectiveness of current corporate trainings and the varying nature of how trainings can be administered raises the question of what circumstances justify considering anti-harassment training to be a “reasonable employment practice” that merits judicial endorsement.

In her analysis of judicial deference to the practices used as evidence in hostile work environment cases, Bisom-Rapp recommended that courts scrutinize the effectiveness of a proffered preventive method before assigning such practice any weight for or against employer liability.¹⁴³ Until such inquiries were made, and until more was known about the empirical bases for training effectiveness, Bisom-Rapp cautioned that “the existence of sexual harassment or diversity

141. See, e.g., *EEOC v. Cal. Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1285–86 (E.D. Cal. 2009) (rejecting summary judgment to limit punitive damages; evidence that training was offered but may have been “illusory” was a question for the jury); *EEOC v. Smokin’ Joe’s Tobacco Shop, Inc.*, Civ. Action No. 06-01758, 2007 WL 1258132, at *10 (E.D. Pa. Apr. 27, 2007) (finding that lack of employee training or implementation of anti-discrimination policy is a relevant factor for the jury to consider in determining punitive damages); *Freeman v. Spencer Gifts, Inc.*, 333 F. Supp. 2d 1114, 1132 (D. Kan. 2004) (in racial harassment case, rejecting *Kolstad* defense where “defendant has not produced any evidence regarding the content of the racial harassment training”). But see *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 468 (5th Cir. 2013) (overturning jury punitive damages award where failure to train was “ill-advised” but “not malicious or recklessly indifferent”).

142. See, e.g., *Loudermilk v. Stillwater Milling Co.*, 551 F. Supp. 2d 1281, 1298 (N.D. Okla. 2008) (evidence that neither the plaintiff nor plaintiff’s supervisor received training was sufficient to defeat a limiting *Kolstad* instruction); *Lopez v. Aramark Unif. & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 964–65 (N.D. Iowa 2006) (evidence that harassers were not trained and training was illusory when provided was relevant to punitive damages determination).

143. Bisom-Rapp, *supra* note 48, at 45–46 (arguing that “no training regimen should be wholeheartedly embraced or considered relevant [to employer liability] before a meaningful assessment of its features and purported impact has been conducted,” particularly as empirical literature begins to articulate the more effective characteristics of successful anti-harassment trainings).

programs should not be considered a fact relevant to employer liability.”¹⁴⁴ In her recent book rearticulating her managerialization and legal endogeneity theories, Edelman made the similar recommendation that judges deciding Title VII claims should “engage in a more careful scrutiny of organizations’ symbolic structures to avoid the erroneous assumption that the mere presence of symbolic structures indicates nondiscrimination.”¹⁴⁵

Despite these recommendations, very few opinions give any scrutiny to the effectiveness of individual employers’ training programs. Most opinions that mention training note cursory details such as the length of the training in hours,¹⁴⁶ whether training occurred once or regularly,¹⁴⁷ or the type of training method used.¹⁴⁸ Overwhelmingly,

144. *Id.* at 44.

145. EDELMAN, *WORKING LAW*, *supra* note 97, at 219–220 (“[J]udges should realize that discrimination and harassment often coexist with formal policies . . . and with diversity or sexual harassment training programs.”); *see also id.* (“Judges, in short, should exercise skepticism when drawing inferences from the presence of structures that appear to signal compliance.”).

146. *See, e.g.*, *Nicholson v. Dart Container Corp.*, 602 F. Supp. 2d 760, 763 (S.D. Miss. 2008) (30 to 40 minutes); *Mariegard v. Wynne*, No. 1:06CV53, 2008 WL 748348, at *6 (N.D. Miss. Mar. 18, 2008) (four hours); *Lapenta v. City of Philadelphia*, No. 03-CV-518, 2004 WL 1656607, at *2 (E.D. Pa. July 23, 2004) (“one half day training seminar”).

147. *See, e.g.*, *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2003) (“periodic training”); *Green v. MOBIS Alabama, LLC*, 995 F. Supp. 2d 1285, 1300 (M.D. Ala. 2014), *aff’d*, 613 F. App’x 788 (11th Cir. 2015) (“annual sexual harassment training”); *Morales-Diaz v. P.R. Elec. Power Auth.*, 899 F. Supp. 2d 170, 177 (D.P.R. 2012) (one training during orientation); *Molina v. Phoenix Union High Sch. Dist.*, No. CIV 05–0751–PHX–SMM, 2007 WL 1412530, at *7 (D. Ariz. May 14, 2007) (harasser participated twice in anti-harassment training); *Reed v. Cedar Cty.*, 474 F. Supp. 2d 1045, 1063–64 (N.D. Iowa 2007) (single mandatory training); *Taylor v. Texas Dep’t of Criminal Justice-Instit. Div.*, No. 3:98CV2922-AH, 2000 WL 528410, at *6–7 (N.D. Tex. May 1, 2000) (training on sexual harassment policy offered once a year, with one additional specialized training);

148. *See, e.g.*, *Chin v. Crete Carrier Corp.*, No. 3:15-CV-1235-D, 2016 WL 6565851, at *5 (N.D. Tex. Nov. 3, 2016) (video entitled “Harassment in the Workplace/Employee Awareness”); *EEOC v. GNLV Corp.*, No. 2:06-CV-01225-RCJ, 2014 WL 7365871, at *31–32 (D. Nev. Dec. 18, 2014) (“in person ‘zero tolerance’ trainings”); *Setser v. Idaho Home Health & Hospice/LHC Grp., LLC*, No. 4:12-CV-00444-EJL-REB, 2014 WL 970041, at *8–9 (D. Idaho Mar. 12, 2014) (training given “by a human resources employee”); *Green*, 995 F. Supp. 2d at 1291 (Power Point slides with information on duty to report); *Davis v. River Region Health Sys.*, 903 F. Supp. 2d 424, 428 (S.D. Miss. 2012) (post-training quiz); *Nicholson*, 602 F. Supp. 2d at 763 (30 to 40 minute video on harassing conduct); *Rios v. Buffalo & Fort Erie Pub. Bridge Auth.*, No. 04-CV-375A, 2008 WL 657121, at *5 (W.D.N.Y. Mar. 7, 2008), *aff’d*, 326 F. App’x 612 (2d Cir. 2009) (in-person training conducted by “a prominent employment discrimination attorney”); *Crococo v. Advance Stores Co. Inc.*, 421 F. Supp. 2d 485, 496 (D. Conn. 2006) (“online sexual harassment training course”); *Finnerty v. William H. Sadlier, Inc.*, No. 04CIV7007CLB, 2005 WL 5353241, at *4 (S.D.N.Y. July 25, 2005) (“on-site training”); *Stricker v. Cessford*

these details are mentioned in passing and do not serve a dispositive function in a court's decision-making. Some opinions will note that a stronger showing of training effectiveness would have been preferable but is not necessary as a matter of law.¹⁴⁹

A minority of opinions have taken a more scrutinizing look at the effectiveness of a proffered anti-harassment training when making determinations about employer liability and punitive damages. The foremost example of such heightened scrutiny is the Sixth Circuit's rule in determining whether an employer has satisfied the employer prong of the *Faragher-Ellerth* defense under *Clark v. United Postal Service, Inc.*¹⁵⁰ The Sixth Circuit in *Clark* stated that for a defendant to meet its burden of persuasion under the employer prong, the inquiry must "[look] behind the face of a policy to determine whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior."¹⁵¹ At least one lower court decision has interpreted this to require employers to provide substantive information about the effectiveness of their preventative practices, including information regarding training.¹⁵² In *Stewart v. Trans-Acc, Inc.*, the Southern District of Ohio went further than requiring substantive evidence, and fully rejected the defendant employer's contention that distribution of PowerPoint slides with information about the defendant's reporting procedure constituted sufficient training to meet its burden of proof under the employer prong.¹⁵³ In determining whether the slides constituted training under *Clark*, the Court considered the content of the slides, the extent to which they were in fact distributed to employees, and the fact that employees had to take a four-question quiz relating to sexual harassment following exposure to the slides.¹⁵⁴ In considering these factors, the Court found that "[d]espite Defendant's

Constr. Co., 179 F. Supp. 2d 987, 1009–10 (N.D. Iowa 2001) (annual sexual harassment training "conducted by outside specialists, such as an outside human resources manager or corporate counsel").

149. See, e.g., *Brenneman v. Famous Dave's of Am., Inc.*, 410 F. Supp. 2d 828, 842–43 (S.D. Iowa 2006), *aff'd*, 507 F.3d 1139 (8th Cir. 2007) (evidence that training was held was sufficient to meet employer prong despite no showing of the harasser's attendance at the training).

150. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341 (6th Cir. 2005).

151. *Id.* at 349.

152. See *Meadows v. Wahler Auto. Sys., Inc.*, 45 F. Supp. 3d 645, 657–58 (E.D. Mich. 2014) (defendant fails employer prong because no evidence of training as required under *Clark*). But see *Cole v. Tenn. Watercraft, Inc.*, No. 3:06-CV-381, 2008 WL 2783520, at *9–10 (E.D. Tenn. July 15, 2008) (no hard look into effectiveness of training despite applying *Clark*).

153. *Stewart v. Trans-Acc, Inc.*, No. 1:09-CV-607, 2011 WL 1560623, at *11–12 (S.D. Ohio Apr. 25, 2011).

154. *Id.* at *11.

effort to shoehorn them in, the slides seen during the presentation are not themselves part of Defendant's sexual harassment policy" sufficient to meet the *Clark* standard, further stating that "[t]o say that Defendant's policy includes presentation slides seen one time, in the middle of an eight hours-long orientation covering many topics, and not provided in paper form would stretch the term far beyond its meaning."¹⁵⁵

While no other Circuit has a rule requiring effectiveness to be actively considered when assessing employer practices given as evidence of prevention, certain individual cases have demonstrated a willingness to question employers' evidence of training offered in support of their claim to meet the affirmative defense. In *EEOC v. California Psychiatric Transitions, Inc.*, the Eastern District of California denied the defendant's request for a *Kolstad* punitive damages instruction based on a showing that the employer's training was "illusory" because the putative harassers did not pay attention during the training and that one of the harassers conducted part of the training.¹⁵⁶ Two other courts have similarly required that employers show that the training was specific to the type of harassment alleged in the case in order to demonstrate effective reasonable care.¹⁵⁷

IV.

ANTI-HARASSMENT TRAINING AS A STATE MANDATE

The opinions discussed above provide further evidence that judicial decision-making lacks scrutiny, as is expected under the theory of legal endogeneity. Inherent in the legal endogeneity explanation for such judicial deference is the fact that, at the federal level, there is no law mandating private sector training.¹⁵⁸ Because Title VII only instructs employers broadly not to discriminate on the basis of a pro-

155. *Id.* at *12.

156. *EEOC v. Cal. Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1285–86 (E.D. Cal. 2009).

157. *See Pullen v. Caddo Par. Sch. Bd.*, 830 F.3d 205, 213 n.10 (5th Cir. 2016) (finding employer had not shown that training on "harassment in the workplace" included any training on *sexual* harassment "as distinct from other prohibited forms of hostile-environment harassment"); *Freeman v. Spencer Gifts, Inc.*, 333 F. Supp. 2d 1114, 1127–28, 1132 (D. Kan. 2004) (rejecting *Kolstad* defense in racial harassment case where defendant offered sexual harassment training but did not produce evidence as to whether racial harassment training was offered).

158. The EEOC has encouraged education and training since the early 1980s, but its guidance is only voluntary. *See Sexual Harassment*, 29 C.F.R. § 1604.11(f) (2018) (advising employers that "informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned" is an appropriate and preferable employer practice).

tected class, employers can translate the terms of their compliance to include training, and courts will broadly assume that those affirmative practices constitute adequate compliance with Title VII.¹⁵⁹

Unlike federal law, five states—California, Connecticut, Delaware, Maine and New York—do mandate harassment training for all covered businesses within their state. In contrast to the adoption of training as a managerialized response to the broad mandates of Title VII and *Faragher-Ellerth*, state-mandated harassment training should leave less room for employers to control the terms of how training is integrated into workplace harassment prevention and give policymakers more of an ability to control the precise circumstances under which training must be administered.¹⁶⁰ In addition, the existence of a state training mandate raises questions of how judicial interpretation should treat an employer's duty to reasonably prevent workplace harassment. In considering the influence of state-mandated training requirements on harassment prevention, this Part examines anti-harassment training as a state statutory requirement and evaluates whether there is any impact of state training laws on judicial decision-making.

A. *Training as a Statutory Requirement*

Five states—California, Connecticut, Delaware, Maine, and New York—currently require employers operating within their state to provide some type of anti-harassment training. In 1991, Maine passed the first statewide mandatory training law, requiring businesses of fifteen employees or more to train all employees on workplace harassment within one year of hire.¹⁶¹ Under the Maine law, supervisors are required to receive an additional training within one year of hire or promotion.¹⁶² The Maine statute requires that a training contain certain content to be compliant, including defining and describing sexual harassment “utilizing examples,” discussing a victim's recourse under the employer's internal complaint process and state and federal law, and training supervisors on their “specific responsibilities . . . to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.”¹⁶³

159. See *supra* notes 97–105 and accompanying text.

160. See EDELMAN, *WORKING LAW*, *supra* note 97, at 222 (suggesting that managerialization can be controlled to some extent if policymakers “include substantive and tangible metrics of compliance”).

161. ME. REV. STAT. ANN. tit. 26, § 807(3) (2017).

162. *Id.*

163. *Id.*

Connecticut adopted a similar training law in 1992, requiring businesses of fifty employees or more to provide sexual harassment training to all supervisory employees within six months of hire.¹⁶⁴ Like Maine, Connecticut's law requires that certain content on the rights, responsibilities, and remedies under federal and state law be covered in the training.¹⁶⁵ Connecticut's law does not require retraining after the initial orientation training.¹⁶⁶

California adopted its mandatory training law in 2004. California's Fair Employment and Housing Act requires businesses of fifty employees or more to provide two hours of sexual harassment training to all supervisory employees within six months of hire, with regular retraining every two years thereafter.¹⁶⁷ California's law states that the training must include "information and practical guidance" on preventing sexual harassment and the remedies available to a victim, as well as "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation."¹⁶⁸ The California statute also requires that the training be presented by trainers "with knowledge and expertise in the prevention of harassment, discrimination, and retaliation."¹⁶⁹

In 2018, Delaware and New York adopted mandatory training laws.¹⁷⁰ Delaware's law requires business of fifty employees or more to provide training to all employees within one year of hire, with regular retraining every two years thereafter.¹⁷¹ The statute requires the training to be "interactive" and include the definition of sexual harassment, the employee's legal rights and complaint process, and legal prohibitions against retaliation.¹⁷² New York's law requires all businesses in New York State to provide training to all employees annually.¹⁷³ The statute directs the New York State Department of Labor to develop a model sexual harassment training, and requires any em-

164. CONN. GEN. STAT. § 46a-54(15)(B) (2018).

165. *See id.* ("Such training and education shall include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment.").

166. *Id.*

167. CAL. GOV'T CODE § 12950.1(a) (Deering 2018).

168. *Id.*

169. *Id.*

170. H.B. 360, 149th Gen. Assemb. (Del. 2018), <http://legis.delaware.gov/BillDetail?LegislationId=26453>; S.B. S7507C, 2018-2019 Leg. Sess. (N.Y. 2018), <https://www.nysenate.gov/legislation/bills/2017/s7507>.

171. DEL. CODE ANN. tit. 19, § 711A (2018).

172. *Id.*

173. N.Y. LAB. LAW § 201-G (McKinney 2018).

ployer-adopted training to “equal[] or exceed[] the minimum standards” set forth by the model training program.¹⁷⁴

B. Managerialization and Legal Endogeneity in Mandatory Training States

Proponents of mandatory training laws argue that the purpose of the training mandate is achieving affirmative prevention of harassment in the workplace. The 1991 Maine bill included a statement of fact finding that “[i]ndependent studies as well as companies that have instituted training programs confirm that educational efforts successfully change attitudes and behavior, and therefore reduce costs resulting from civil litigation or settlements, lost productivity, employee turnover and other expenses related to sexual harassment in the workplace.”¹⁷⁵ The author of the California bill similarly stated that the training mandate was necessary because existing sexual harassment law does not sufficiently prevent workplace harassment.¹⁷⁶ However, as Edelman’s research demonstrates, stating a prevention goal will not in itself counteract managerialization—the statute must be sufficiently clear and unambiguous in requiring demonstrably effective practices.¹⁷⁷

In requiring certain content to be communicated during trainings, specifying that all supervisors or employees must attend, and detailing the number of hours or regular retraining required, the existing mandatory training laws have incorporated requirements that have some empirical basis in effectiveness at improving knowledge or changing behavior.¹⁷⁸ However, whether mandatory training laws do in fact impact employers’ adoption of more effective training methods than those that operate in the rest of the private sector has not been the subject of any study to date.

In terms of legal endogeneity, these laws appear to have no impact on judicial decision-making in the federal courts. One would expect a legally-enforceable training mandate to impact judicial determinations of what constitutes reasonable prevention and correction under the employer prong of the *Faragher-Ellerth* affirmative defense—for example, it would seem unreasonable as a matter of law for

174. *Id.*

175. H.P. 279, 1991 Reg. Sess. (Me. 1991).

176. A.B. 1825, 2004 Gen. Assem. (Cal. 2004) (“The author argues that, . . . [e]ven with current laws to prevent sexual harassment, during the 2002-03 fiscal year, 4,231 sexual harassment cases were filed with the Department of Fair Employment and Housing (DFEH)—totaling 22% of all cases filed at DFEH.”).

177. See EDELMAN, *WORKING LAW* *supra* note 97, at 222.

178. See *supra* notes 73–92 and accompanying text on training effectiveness studies.

an employer to fail to provide training if they are required to do so under state law.¹⁷⁹ However, only one federal case references the state training mandate. In *Hoydic v. Genesco, Inc.*, the plaintiff argued that defendant employer's failure to comply with Connecticut's state-mandated harassment training was evidence that the defendant could not meet its burden under *Faragher-Ellerth*.¹⁸⁰ The Court rejected this argument, holding instead that "[defendant's] alleged failure to provide state-mandated sexual harassment training for [the harasser] is irrelevant because plaintiff did not pursue an internal grievance."¹⁸¹ In other words, the Court held, because the employee failed at the employee prong, the defendant's sufficiency at the employer prong was irrelevant—thus, "plaintiff cannot attack the effectiveness of [defendant's] anti-harassment policy when she did not attempt to make use of it."¹⁸² Connecticut's mandatory training requirement therefore had no impact on the Court's analysis under *Faragher-Ellerth*, providing at least one example of a mandatory training law failing to overcome the other endogenous forces at play in judicial decision-making. There is also no reference to any state training laws in any other federal case, suggesting that courts generally do not consider whether the employer is required to offer training under state law in making determinations about employer liability.¹⁸³

V.

RECOMMENDATIONS

A. *Prioritize Research on Creating Effective Corporate Training Programs*

This Note first recommends that the legal profession prioritize and encourage research on the effectiveness of the anti-harassment

179. Such an employer could be considered negligent *per se* under widely accepted principles of tort law. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL OR EMOTIONAL HARM § 14 (AM. LAW INST. 2010) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

180. See *Hoydic v. Genesco, Inc.*, No. 3:04-CV-1703 (RNC), 2007 WL 987541, at *1 (D. Conn. 2007).

181. *Id.* at *2.

182. *Id.*

183. See, e.g., *Ferrante v. MAS Med. Staffing*, No. 2:13-CV-00211-JAW, 2015 WL 1401023, at *15 (D. Me. Mar. 26, 2015) (no mention of Maine training requirement); *EEOC v. Braun Elec. Co.*, No. 1:12-CV-01592-LJO, 2014 WL 1232212, at *3 (E.D. Cal. Mar. 24, 2014) (no mention of California training requirement despite finding that defendant "provides sexual harassment training to all supervisors"); *Burford v. McDonald's Corp.*, 321 F. Supp. 2d 358, 364 n.4 (D. Conn. 2004) (no mention of Connecticut training requirement in discussing defendant's training).

trainings most in use in American workplaces. The purpose of such research would be twofold—first, in helping to shape judicial conceptions of what constitutes reasonable care to prevent and correct harassment, and second, in assisting employment lawyers in counseling their clients to adopt programs with demonstrated effectiveness. In particular, empirical research into the effectiveness of existing corporate training methods should take into account the wide array of forms that training can take, including content, regularity, and length of trainings, as well as the combination of training with other anti-harassment policies and practices. To be considered effective, training schemas should show a demonstrable impact on increasing victim reporting rates, altering organizational norms and culture, and minimizing the incidence of harassing behavior in the workplace.¹⁸⁴ Most studies have occurred in laboratory settings, resulting in a lack of evidence on the existing training methods currently operating in workplaces. To aid in this venture, employment laws should encourage employers to give access to their workplaces to researchers to conduct studies of operating trainings.¹⁸⁵

Relatedly, research on the impact of state laws mandating training in shaping employer training practices is also critically needed. Given the strong support for theories of the managerialization of law, it is critical for proponents of mandatory training laws to understand how employers will interpret training requirements when implemented in their workplaces, and if compliance results in the adoption of more evidence-based practices.

*B. Reorient the Use of Training as a Factor in the
Faragher-Ellerth Affirmative Defense*

In addition to increased research on training effectiveness, this Note concludes that there is an indefensible mismatch between the deference afforded to employers for implementing training and the existing empirical evidence about the effectiveness of the most commonly used training methods. While there is a growing body of research identifying the training components that do, in fact, influence the behavioral and cultural changes needed to combat workplace harassment, most defendants in hostile work environment cases have been relieved of liability under the *Faragher-Ellerth* defense by

184. See EEOC TASK FORCE REPORT, *supra* note 10, at 49 (“[W]e need better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective.”).

185. See *id.* at 46 (recommending employers grant access to their workplaces to aid research of the effectiveness of their harassment-prevention schemes).

merely presenting evidence of training programs whose efficacy has been called into question by researchers.

Instead, the legal profession should push back against the deference afforded to the existing employer-held trainings in judicial decision-making about employer liability for harassment. Until the efficacy of a particularized training method or program can be supported by data, courts should move beyond accepting training in any form to look instead at the substance of its structure in fact. Evaluating the substance of a defendant's training mechanism should rise above simply looking at the industry standard in training to affirmatively question whether the training is aimed at encouraging preventative education and behavior, including evaluating factors such as the content of the program, whether regular retraining is offered or required, and the relationship of training to other policies within a larger prevention scheme.

In particular, courts should implement three specific analytical changes within the *Faragher-Ellerth* affirmative defense with respect to the use of anti-harassment training as evidence favoring the limitation of a defendant's liability. First, courts should reject a defendant's argument that training alone, or in addition to only a formal anti-harassment policy, is sufficient to "prevent and correct" under the employer prong of the *Faragher-Ellerth* affirmative defense. There is a growing consensus among social scientists that training must be accompanied by clear policies, a commitment by an organization's leadership to eradicate harassment, and other internal reforms to be effective. A mere presentation by a defendant that training occurred should therefore be insufficient to justify the affirmative defense.

Second, plaintiffs' lawyers should be permitted to introduce evidence or expert testimony questioning the effectiveness of a defendant's specific training method. Whether a defendant's training regime is based on practices and methods that in fact have been shown to positively impact workplace behavior and culture is probative in determining whether the employer has acted to prevent and correct harassment in their workplace. A skeptical analytical approach as to the ability of training to serve a dispositive role in an employer's duty to prevent harassment should require employers to justify their practices on the basis of effectiveness.

Third, courts must begin to consider the impact that state-mandated training laws will have on the *Faragher-Ellerth* analysis. In states where training is required by private sector employers, evidence that a defendant did not comply with the state law mandating training should be *per se* evidence that the defendant did not meet their burden

under the employer prong to act reasonably to prevent and correct harassment in their workplace.¹⁸⁶ On the other hand, state legislatures promoting and adopting mandatory training laws should anticipate that courts will interpret an employer's compliance with state-mandated training as evidence that their burden under the employer prong has been met. In considering that courts may interpret compliance with state law as evidence that an employer has met their burden under the affirmative defense, proponents of mandatory training laws should also consider providing substantial substantive guidance to employers on how to implement training practices with empirical backing, so as to remove ambiguity and retain control over the terms of legal compliance.¹⁸⁷

These three changes to the *Faragher-Ellerth* analysis will undoubtedly make the affirmative defense a more substantive hurdle for defendants to overcome in hostile work environment cases. However, these changes are necessary if the *Faragher-Ellerth* is to remain useful in serving the prophylactic purposes of Title VII. The failure of courts to question the impact on workplace culture and employee behavior of the very anti-harassment practices the affirmative defense was meant to incentivize calls into question the utility of allowing employers to assert an affirmative defense at all. If *Faragher-Ellerth* does not incentivize employers to adopt practices that in fact prevent and correct harassment, there is little rational justification for offering employers a complete bar to liability.

CONCLUSION

If Title VII is to fully realize its goal of exerting a prophylactic and preventative influence on workplace harassment, the premise that employer-shaped preventative practices can unquestionably achieve behavioral and organizational change must be questioned and carefully considered. The unsettled state of the empirical evidence on the effectiveness of anti-harassment training should give judges, policy-makers, and employers pause in relying on trainings to unilaterally eliminate harassment in the workplace. This is not to say that efforts at educating and training employees on workplace harassment should be abandoned—indeed, empirical evidence is beginning to identify training practices that are more or less likely to alter employees' knowledge and behavior. Instead, reorienting legal thinking on anti-

186. *Contra Hoydic v. Genesco, Inc.*, 2007 WL 987541 at *1.

187. See EDELMAN, *WORKING LAW* *supra* note 97, at 223 (suggesting that minimizing regulatory ambiguity and creating performance metrics may minimize the negative effects of managerialization).

harassment training to better achieve smarter and more effective preventative workplace practices can help meet the immense responsibility of the legal profession in responding to the #MeToo movement.