



ESSAY

Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention

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Introduction

Professors who study harassment are in demand by the media. As allegations unsettle Hollywood, Silicon Valley, Washington, D.C., and various state capitals, reporters covering the #MeToo movement seek academic perspectives on the problem. Those who call me often mention two articles I published over fifteen years ago, which questioned the embrace of sex harassment and diversity training by the judiciary and the legal profession.¹ In those works, I voiced concern about a developing jurisprudence of education and prevention in employment discrimination law that inoculated against liability those employers who provided harassment and diversity training. Such an approach, I argued, promoted a cosmetic rather than a substantive solution to bias eradication for there was scant evidence that such training actually curbed harassment and discrimination. In fact, training could backfire, triggering stereotypes about bias victims and inspiring the resentment of others.²

Responding to the #MeToo movement, employers, legislators, human resources professionals, and the training industry are now defaulting to a

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1. 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 (2001) [hereinafter Bisom-Rapp, *An Ounce of Prevention*]; 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 (2001) [hereinafter Bisom-Rapp, *Fixing Watches*].
2. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1, at 4; Bisom-Rapp, *Fixing Watches*, *supra* note 1, at 163.

familiar solution to what seems like an epidemic of workplace harassment: harassment training.³ The reporters want my opinion on the chosen antidote. Does harassment training prevent harassment? The query and its answer are important because courts treat training as relevant to employer liability in federal hostile environment harassment cases.⁴ Specifically, employers who promulgate harassment policies and conduct workplace trainings are held to have taken reasonable steps to prevent and correct harassment.⁵ Training also serves in harassment and discrimination cases as a shield for employers from punitive damages.⁶ Additionally, training is often incorporated into consent decrees resolving claims of systemic discrimination.⁷ Beyond the courts, a few states—notably California, Connecticut, and Maine—mandate workplace harassment training.⁸

There has been a significant change since I wrote about my concerns in 2001. That we lack sufficient evidence that training works is no longer a subject limited to the academic literature. In 2016, the co-chairs of the Equal Employment Opportunity Commission (EEOC) Select Task Force on the Study of Harassment in the Workplace, Chai Feldblum and Victoria Lipnic, published a report noting, *inter alia*, that after a comprehensive literature review, they were not able to determine whether standalone training “is or is not an effective tool in preventing harassment.”⁹ Moreover, the report opined that while “it appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment . . . it is less probable that training programs, on their own, will have a significant impact on changing employees’ attitudes, and they may sometimes have the opposite effect.”¹⁰ Speaking at the 2016 Society for Human Resource Management annual conference, EEOC Commissioner Lipnic described as “jaw-dropping” that the task force, after reviewing thirty years of social science research, failed to find that training prevents harassment.¹¹ Knowledge of the report’s findings has since spread

3. See *infra* Part II.B

4. See *infra* Part I.

5. *Id.*

6. *Id.*

7. See *infra* Part II.

8. CAL. GOV'T CODE § 12950.1(a) (West 2018); ME. STAT. tit. 26, § 807(3) (2018); CONN. AGENCIES REGS. § 46a-54-204 (2015). While this Essay recommends that training be legally irrelevant in employment discrimination litigation, I also suggest states with mandatory training requirements reconsider those mandates in light of the concerns discussed herein.

9. 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 45 (2016) [hereinafter EEOC TASK FORCE REPORT], <https://perma.cc/2K3M-MMRL>. The EEOC is the federal agency tasked with enforcing workplace antidiscrimination law.

10. *Id.* at 46-47.

11. Christina Folz, *No Evidence that Training Prevents Harassment, Finds EEOC Task Force*, SOC'Y FOR HUM. RESOURCE MGMT. (June 19, 2016), <https://perma.cc/US2L-LKSE>.

widely, and, in the wake of the #MeToo moment, articles in the popular press questioning the efficacy of harassment training are common.¹² Calls for a holistic, multifaceted approach to creating non-discriminatory work environments are rising. Echoing the report, the need to transform organizational culture rather than rely on standalone training or paper policies is a popular refrain.¹³

Below, this Essay references the new popular understanding about training inefficacy and proceeds in two parts. Part I summarizes the legal relevance of harassment training. While training is not legally mandated under Title VII of the Civil Rights Act of 1964,¹⁴ the federal law that prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, training continues to be viewed as evidence of employer due care in harassment litigation. Training is also relevant to the assessment of punitive damages.

Part II shifts the focus to the EEOC and the recent popular realization that standalone training does not prevent harassment. In addition to assessing the EEOC's position over time vis-à-vis harassment training efficacy, Part II reviews suggested changes in training protocols recommended in the 2016 EEOC report. Turning to the #MeToo movement, this part also considers the recent reaction in the popular press to suggestions by legislators, employers, and others, that the solution to widespread harassment is more harassment training.

This Essay ends with a brief conclusion. The confluence of the #MeToo movement, an important government report with counterintuitive conclusions about training efficacy, and greatly altered public perceptions about harassment prevention presents an opportunity for courts to reevaluate legal doctrines that make training relevant to discrimination claims. As commonly administered, training does not prevent discrimination and harassment. Such training must therefore be legally irrelevant to employer liability for compensatory damages. Only those employers demonstrating efforts to reform educational programming and link it to comprehensive and holistic bias elimination efforts should be able to reference training as a shield from punitive damages. Creating doctrinal incentives for transformative prevention efforts can strengthen the impact of equal employment opportunity (EEO) law and make harassment a rare, rather than everyday, phenomenon.

12. *See infra* Part II.B.

13. *See id.*

14. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)).

I. Harassment Training and the Legal Context

Harassment training is a legal compliance technique that nicely illustrates Lauren Edelman's theory of legal endogeneity.¹⁵ Edelman notes that statutory EEO law contains general and ambiguous terms; prohibitions are issued without explanations of how to comply. Beginning over fifty years ago, when EEO law was first enacted, this ambiguity allowed organizations themselves—the subjects of regulation—to define the meaning of compliance.¹⁶ Human resources and legal professionals continue to play primary roles in crafting compliance solutions for employers.¹⁷

These compliance professionals encouraged employers to develop policies and programs that signal attention to EEO law, including antidiscrimination policies, anti-harassment procedures, and training.¹⁸ Such policies and programs operate mainly symbolically, preserving management's prerogative to manage its workforce with minimal disruption; in other words, the structures on their own do not scrub organizations of bias.¹⁹ Courts, Edelman argues, accept these symbolic structures as relevant evidence on whether discrimination took place, a phenomenon she calls "judicial deference."²⁰ When courts, without assessing effectiveness, reference symbolic structures in their written decisions and legal doctrines, the law becomes endogenous. Problematically, the meaning of legal compliance is shaped by those who are regulated, and the transformative potential of antidiscrimination law is undermined.²¹

Title VII does not mandate harassment training, but as early as 1980, the EEOC's Guidelines on Discrimination Because of Sex²² recommended steps employers could take to ensure harassment-free environments:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, 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.²³

While the 1980 guidelines do not mention training explicitly, an obvious vehicle for raising the subject of harassment, expressing disapproval, informing

15. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 12 (2016).

16. *See id.* at 12-14.

17. *Id.* at 13-14.

18. *Id.* at 101, 106-07.

19. *See id.* at 124-25.

20. *Id.* at 5.

21. *Id.* at 39.

22. 29 C.F.R. §§ 1604.1-11 (1980).

23. *Id.* at § 1604.11(e).

employees of their rights, and sensitizing the workforce is educational programming.²⁴ Indeed, the 2016 EEOC task force report notes that after the publication of its 1980 guidelines, many employers began to offer training programs as a mechanism to prevent harassment.²⁵

Frank Dobbin and Erin Kelly, however, argue that personnel professionals began advocating harassment training as early as the late 1970s, after the first district court rulings on harassment as discrimination were handed down, and that after the 1980 guidelines were issued, these same professionals began erroneously suggesting in the professional literature that training was legally required.²⁶ In 1986, the Supreme Court decided a landmark sexual harassment case, *Meritor Savings Bank, FSB v. Vinson*,²⁷ which for the first time recognized sexual harassment as a violation of Title VII. That case did not mention training, yet Dobbin and Kelly date the explosive growth in harassment training to the period following that decision.²⁸ An additional boost to training occurred when Congress passed the Civil Rights Act of 1991, which, among other things, made compensatory and punitive damages available to discrimination plaintiffs.²⁹

Dobbin and Kelly note that by the late 1990s, most large employers provided sex harassment training to at least some of their employees.³⁰ Ultimately, the Supreme Court responded to existing organizational practices in twin landmark cases in 1998, which created an affirmative defense to hostile environment harassment cases, and an important decision in 1999, which defines the standard for punitive damages under Title VII. These three cases established what I call the Supreme Court's jurisprudence of education and prevention.³¹

The Court's 1998 decisions in *Burlington Industries v. Ellerth*³² and *Faragher v. City of Boca Raton*³³ tackled the question of when an employer is liable for sex harassment perpetrated by a supervisor. The Court concluded that where the harassing supervisor takes a tangible employment action against a subordinate, vicarious liability is always appropriate because the ability to alter a subordinate's employment status is aided by the agency relationship between

24. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1, at 17.

25. EEOC TASK FORCE REPORT, *supra* note 9, at 44.

26. Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1212 (2007).

27. 477 U.S. 57 (1986).

28. Dobbin & Kelly, *supra* note 26, at 1216.

29. Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a (2016)); see Dobbin & Kelly, *supra* note 26, at 1220.

30. See Dobbin & Kelly, *supra* note 26, at 1204.

31. See generally Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1; Bisom-Rapp, *Fixing Watches*, *supra* note 1.

32. 524 U.S. 742 (1998).

33. 524 U.S. 775 (1998).

the employer and the supervisor.³⁴ Yet where no tangible action is taken—in so-called hostile environment cases—employer liability is less clear. To assist in determining the liability parameters in the latter case, the Court created a two-part affirmative defense. To establish the defense, employers must show: (1) they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,”³⁵ and (2) that the victim unreasonably declined to avail herself or himself of “preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁶ Justice Souter, writing for the majority in *Faragher*, noted that the central goal of Title VII is prophylactic—“to avoid harm”—and that employers must “inform[] employees of their right to raise and how to raise the issue of harassment.”³⁷ Such information is, in fact, a standard part of harassment training.³⁸ Not surprisingly, in 1999, the EEOC published enforcement guidance interpreting *Ellerth* and *Faragher*, which recommends, among other things, that if feasible, employers should provide all employees with harassment training “to ensure that they understand their rights and responsibilities.”³⁹

That same year, the Supreme Court more fully articulated its jurisprudence of education and prevention in *Kolstad v. American Dental Ass’n*.⁴⁰ Justice O’Connor, in a part of the opinion joined by four other justices, provided a shield to employers from punitive damages in Title VII cases. Employers who engage in good-faith compliance efforts should not be assessed punitive damages because the law encourages employers “to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”⁴¹

Edelman found that after the *Ellerth* and *Faragher* decisions, judicial deference to anti-harassment policies and grievance procedures increased

34. *Ellerth*, 524 U.S. at 760-62; *see also Faragher*, 524 U.S. at 808.

35. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

36. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

37. *Faragher*, 524 U.S. at 806 (quoting 29 CFR § 1604.11(f) (1997)).

38. A recent study of harassment trainings from 1980-2016 found program content today is significantly influenced by the approach embraced in the 1980s and early 1990s, which “solidified into a genre sometime in the mid-1990s.” Elizabeth Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. (forthcoming 2018) (manuscript at 6-7), <https://perma.cc/5Q48-KNEJ>. The genre, consisting of an authoritative narrator providing legal rules, examples of impermissible conduct, and advice for permitted workplace interaction, has been “remarkably durable.” *Id.* (manuscript at 7). Tippet notes, however, that post-*Faragher* harassment trainings “suggest a trend towards more institutionalized responses to harassment,” advise that human resources should be informed where harassment is perceived or complaints are made, and assume the employer has a policy against harassment in place. *Id.* (manuscript at 33, 36).

39. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, at § V(C)(1) (1999), <https://perma.cc/232V-MQKQ>.

40. 527 U.S. 526 (1999).

41. *Id.* at 545.

significantly.⁴² Deference does not imply that a plaintiff necessarily loses the suit. Even so, Edelman and her co-authors in one study determined that “judicial deference [in the sense of considering a symbolic structure relevant] makes it much more likely that employers will win the case.”⁴³ Training is an integral component of the anti-harassment compliance repertoire. There is no reason to suspect that it might function any differently than anti-harassment policies and grievance procedures in assisting employers in their arguments in court. In fact, courts considering both the affirmative defense in hostile environment cases and employer good faith in cases where punitive damages are at issue often mention training.⁴⁴

In 2001, I argued that until we know more about training efficacy, educational programming about sex harassment should not be relevant to employer liability for compensatory damages.⁴⁵ Hence, training should not assist an employer in its efforts to establish an affirmative defense to vicarious liability for harassment. That a practice of speculative value might defeat claims for make-whole relief for subjects of harassment is too destructive of employee rights to countenance. In contrast, I recommended careful scrutiny of employer educational efforts for the purpose of evaluating employer good faith under the punitive damages standards set by *Kolstad*.⁴⁶ The utility of these suggestions is underscored by the discussion below. Training, at least as generally practiced, does not prevent harassment—a conclusion of the 2016 EEOC task force report, which has been echoed in popular press coverage of the #MeToo movement.

II. The EEOC and the Popular Realization of Harassment Training's Inefficacy

The EEOC has played an underappreciated role in popular conceptions of the steps necessary to eradicate workplace harassment. As noted above, the

42. EDELMAN, *supra* note 15, at 185 (noting that deference in district courts occurred in about 24% of opinions in the twelve years preceding the cases but in about 58% of opinions afterwards).

43. *Id.* at 194 (citing Linda Hamilton Krieger et al., *When ‘Best Practices’ Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843 (2015)).

44. *See, e.g.*, *Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011) (“The State also provided training regarding the sexual harassment policy to management-level employees.”); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) (noting that an effective harassment policy should “provide for training regarding the policy”). The embrace of training as an integral part of the anti-harassment toolkit is also evident in state law hostile environment cases. As noted by the New Jersey Supreme Court: “The prospect of an [Ellerth/Faragher] affirmative defense in litigation is a powerful incentive for an employer to unequivocally warn its workforce that sexual harassment will not be tolerated, to provide consistent training, and to strictly enforce its policy.” *Aguas v. New Jersey*, 107 A.3d 1250, 1268 (N.J. 2015) (emphasis added).

45. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1, at 44-45.

46. *Id.* at 45-47.

agency's 1980 Guidelines on Discrimination Because of Sex stressed prevention as the most effective way to confront this workplace scourge. Along with the Supreme Court's first harassment decision in 1986, the guidelines served as a springboard for human resources professionals' recommendations that employers adopt harassment training programs.⁴⁷ Human resources professionals are attentive to EEOC pronouncements, and their reinterpretations of, for example, the agency's guidance and other documents, can shape the strategies adopted by employers, which in turn influence the way the public understands harassment law and prevention.

For many years, the EEOC's embrace of harassment training as an important component of compliance programming was reflexive and unquestioning. Indeed, Margo Schlanger and Pauline Kim in their study of the agency's systemic litigation and remedial efforts from the years 1997 to 2006 found that the injunctive relief obtained by the EEOC consisted of "routinized, bureaucratic solutions—the kinds of 'best practices' endorsed by human resources professionals . . . as a rational (if not necessarily effective) response to anti-discrimination mandates."⁴⁸ Close to half of the cases brought by the agency during the period relevant to the study raised the issue of harassment.⁴⁹ Over 87% of the cases were resolved through settlement.⁵⁰ The consent decrees and court orders associated with the settled cases typically contained remedies considered peripheral to the core functions of the organizations; in other words, these remedies lacked the ability to transform the workplaces in question. Notably, 87% of the remedial orders contained mandates for EEO training of the workforce.⁵¹

Schlanger and Kim conclude that the remedies pursued by the EEOC during the decade they studied are managerialist; they mirror the compliance policies long recommended by human resources professionals. The authors single out as troubling a "heavy emphasis on EEO and sexual harassment training."⁵² Little evidence exists that techniques such as training create harassment-free or unbiased workplaces.⁵³ In fact, training programs may be

47. This does not imply that the EEOC has taken the leading role in developing compliance mechanisms. As Edelman notes: "[T]he EEOC advised employers to create anti-harassment policies and grievance procedures long after these structures were commonplace in organizations, and . . . the EEOC supported judicial deference to these procedures many years after lower courts began deferring to them . . ." EDELMAN, *supra* note 15, at 211.

48. Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1566 (2014).

49. *Id.* at 1565 fig.B.

50. *Id.* at 1568 & tbl.4.

51. *Id.* at 1574.

52. *Id.* at 1586.

53. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 29 (2006); see also Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250-51 (2003).

nothing more than symbolic or cosmetic gestures meant to signal non-discriminatory environments to outsiders without positively affecting conditions on the ground.⁵⁴ Such efforts may even “produce backlash harmful to women and minority employees.”⁵⁵ Thus, Schlanger and Kim voice concerns about the EEOC’s promotion of training in terms similar to those I made years earlier regarding the courts’ and the legal profession’s uncritical endorsement of such programs.⁵⁶

A. EEOC Select Task Force on the Study of Harassment in the Workplace

In January 2015, a shift occurred. The agency formed the Select Task Force on the Study of Harassment in the Workplace.⁵⁷ An idea conceived of by former EEOC Chair Jenny Yang,⁵⁸ the task force was co-chaired by Commissioners Feldblum and Lipnic, and consisted of sixteen members drawn from the ranks of academia, the legal profession, business and worker advocacy groups, and labor unions.⁵⁹ The focus of the task force was on harassment prevention. After over a year of work, in June 2016, the co-chairs released a report of close to ninety pages, which concluded:

1. Workplace harassment remains a persistent problem.
2. Workplace harassment too often goes unreported.
3. There is a compelling business case for stopping and preventing harassment.
4. It starts at the top—leadership and accountability are critical.
5. Training must change.
6. New and different approaches to training should be explored.
7. It’s on us (a suggested workplace campaign to eradicate harassment).⁶⁰

The fifth and sixth points represent a significant departure from the agency’s previously undiscerning advocacy of harassment training. That the task force took pains to engage seriously with the social science literature on training efficacy is evident. While the co-chairs expressed concern that most such studies were researcher-designed and administered to university students

54. See Selmi, *supra* note 53, at 1250; see also Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1, at 6, 29.

55. Schlanger & Kim, *supra* note 48, at 1586.

56. See *supra* note 1 and accompanying text.

57. See EEOC TASK FORCE REPORT, *supra* note 9, at iv.

58. Transcript, EQUAL EMP. OPPORTUNITY COMMISSION (June 20, 2016), <https://perma.cc/B6UB-7D3S> (comments of Commissioner Feldblum).

59. See EEOC TASK FORCE REPORT, *supra* note 9, at iv.

60. *Id.* at iv-vi.

rather than employer-designed and administered in actual workplaces, they nonetheless found aspects of the studies useful. The research, they noted, indicates that training can boost the trainees' ability to identify the kind of behavior that constitutes harassment.⁶¹ Yet the co-chairs also concluded that training, on its own, is not likely to change participants' attitudes towards harassment, and that some may react negatively to training.⁶² Notably, the co-chairs called for "better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective."⁶³

Feldblum and Lipnic make a number of recommendations about how training should be structured. They note that training must be: supported at an organization's highest levels, held regularly but in a varied and dynamic way, conducted live if possible and in an interactive manner, and regularly evaluated for efficacy.⁶⁴ Regarding content, they recommend that trainers teach employees, through workplace-relevant scenarios, what conduct is not acceptable in the workplace, clarify the behavior that is acceptable, cover employee rights and responsibilities, and detail the formal complaint and investigation process.⁶⁵ The co-chairs opine that all employers at a minimum should tailor their programs to the suggested training structure and content detailed in their report.⁶⁶ That this suggestion will be embraced by human resources professionals, who will argue that new and enhanced harassment training is warranted, seems far from fanciful. Acting as interpreters of the legal environment, these professionals previously have bolstered their organizational status and influence by promoting bureaucratic solutions such as training as an antidote to the risk of EEO litigation.⁶⁷ There is reason to assume they will act similarly now.

Going forward, the task force report sets forth a number of intriguing recommendations. Feldblum and Lipnic evidently see the EEOC as playing a significant role in advancing relevant empirical research on harassment training. To that end, the co-chairs suggest that the EEOC "seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment" in workplaces before and after compliance

61. *Id.* at 46.

62. *Id.* at 47.

63. *Id.* at 49.

64. *Id.* at 52-53.

65. *Id.* at 50-51.

66. *Id.* at 53.

67. The widespread embrace by employers of harassment training by the late 1990s is described by Dobbin and Kelly as a jurisdictional victory for the human resources profession over legal professionals in the battle to provide solutions to potential liability for harassment. See Dobbin & Kelly, *supra* note 26, at 1204-05.

training, and the effect of particular training components.⁶⁸ Relatedly, the co-chairs exhort groups of employers to work together with researchers to allow the latter to examine training efficacy, especially educational programming embedded in holistic prevention efforts.⁶⁹ Additionally, the co-chairs suggest that the EEOC update its own compliance training protocols, which are used for technical assistance, customer trainings, and trainings for federal agencies.⁷⁰

Most notable, however, is the report's recommendation that harassment trainers innovate and develop programs that move beyond traditional compliance efforts.⁷¹ To that end, the report suggests harassment prevention training incorporate workplace civility training (sometimes referred to as anti-bullying training) and bystander intervention training.⁷² As powerfully put by Lipnic at a June 2016 meeting at which the report was discussed:

[I]t became clear to us that too much of what we've been doing in the last 30 years hasn't worked. That fact is empirically evident in the academic literature and was echoed by witnesses and Task Force members who have devoted their careers to working on these issues. Training may be helpful in satisfying an employer's legal compliance or making out an affirmative defense to liability. But as a standalone to prevent and reduce harassment in the workplace, it has not proven to be effective. In simplest terms, training must change.⁷³

Query whether such statements are potentially disruptive of popular understandings of how to prevent workplace harassment or simply responsive to the public's already existing sense that training has not put a dent in an epidemic level of harassment. Either way, in 2017, the year after the issuance of the EEOC task force report, training inefficacy was very much in the news as journalists endeavored to cover the #MeToo movement.

B. Harassment Training Inefficacy and the #MeToo Movement

In October 2017, the *New York Times* reported on actress Ashley Judd's accusations of sex harassment against movie producer Harvey Weinstein,⁷⁴ which set off a cascade of accusations against and resignations by notable men

68. See EEOC TASK FORCE REPORT, *supra* note 9, at 53.

69. *Id.* at 54.

70. *Id.*

71. See *Transcript*, EQUAL EMP. OPPORTUNITY COMMISSION (June 20, 2016), <https://perma.cc/B6UB-7D3S> (Commissioner Feldblum commented, "[W]e need different types of training. Employers must move beyond what we call in the report, 'compliance training,' training designed to teach employees what is unacceptable conduct in the workplace and how to report it.>").

72. See *id.*

73. See *id.* (comments of Commissioner Lipnic).

74. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://perma.cc/6YCT-W99G>.

in entertainment, the arts, politics, the media, and the restaurant industry,⁷⁵ and sparked personal disclosures by millions participating in the #MeToo movement on Twitter, Facebook, and other social media platforms.⁷⁶ As headlines accumulated, employers in the public and private sectors turned to a traditional strategy to vanquish harassment: training.⁷⁷ Interestingly, the reception to such educational programming has been less than enthusiastic.

There are a number of notable aspects about the recent reporting on training in the popular press. First, countless articles question harassment training efficacy, with the common refrain being that training does not work.⁷⁸ Next, reporters and columnists assert that training exists primarily as a shield against employer liability.⁷⁹ Further, many articles mention the 2016 EEOC

75. See Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Apr. 27, 2018, 12:43 PM), <https://perma.cc/KBJ8-BDX9>.

76. See, e.g., Abby Ohlheiser, *How #MeToo Really Was Different, According to Data*, WASH. POST (Jan. 22, 2018), <https://perma.cc/A6UD-6RK9>; Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017, 12:43 PM), <https://perma.cc/A3Y4-E63H>.

77. See Katherine Barrett & Richard Greene, *The #MeToo Effect Trickles Down the Public Workforce*, GOVERNING (Jan. 11, 2018), <https://perma.cc/92JJ-LS7P> (“In the last two months, at least five governors issued executive orders dealing with sexual harassment policies, training and practices for their own state employees.”); Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), <https://perma.cc/5GWH-4QRH> (stating demand for training is “booming”); Wendy Lee, *Sexual Harassment Training in Vogue for Companies After Scandals*, S.F. CHRON. (Nov. 28, 2017), <https://perma.cc/G3PW-8WRD>; Rhana Natour, *Does Sexual Harassment Training Work?*, PBS NEWS HOUR (Jan. 8, 2018, 4:06 PM EDT), <https://perma.cc/NCS5-B2DJ> (“Congress approved legislation in November requiring all members to undergo mandatory sexual harassment training.”).

78. See, e.g., Julia Belluz, *Congress Is Making Harassment Trainings Mandatory. Science Shows They Don't Work*, VOX (updated Nov. 14, 2017, 4:20 PM EST), <https://perma.cc/4VLF-TTAP>; Hilary Brueck, *Members of Congress Now Have To Do Sexual-Harassment Training—Here's What Would Actually Make It Effective*, BUS. INSIDER (Nov. 18, 2017, 9:09 AM), <https://perma.cc/J4TA-4DLD>; Julia Carpenter, *When Workplace Trainings Can Backfire*, CNN MONEY (Jan. 29, 2018, 2:01 PM ET), <https://perma.cc/C5SD-ELMQ>; Claire Lampen, *Why Sexual Harassment Training Doesn't Work*, BBC (Nov. 22, 2017), <https://perma.cc/8XJN-P9GU>; Jena McGregor, *Why Sexual Harassment Training Doesn't Stop Harassment*, WASH. POST (Nov. 17, 2017), <https://perma.cc/8832-4N9X>; Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do*, N.Y. TIMES (Dec. 11, 2017), <https://perma.cc/C4QQ-JMFY>; Madison Pauly, *There's Little Evidence Sexual Harassment Trainings Work*, MOTHER JONES (Nov. 1, 2017, 6:00 AM), <https://perma.cc/7F6A-57JK>; Michael Pope, *Is Mandatory Training Effective in Stopping Sexual Harassment?*, WVTF (Dec. 14, 2017), <https://perma.cc/7KR5-5BSY>; Maya Rhodan, *Does Sexual Harassment Training Work? Here's What the Research Shows*, TIME (Nov. 21, 2017), <https://perma.cc/JFK6-ZB8Z>.

79. See, e.g., Belluz, *supra* note 78; McGregor, *supra* note 78; Miller, *supra* note 78; Pauly, *supra* note 78; Pope, *supra* note 78; see also Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (Nov. 15, 2017), <https://perma.cc/NMD3-YF9S>; Lauren B. Edelman, *What's the Point of Sexual Harassment Training? Often, To Protect Employers.*, WASH. POST (Nov. 17, 2017), <https://perma.cc/Q7MS-AVCZ>; Liz Mair, *Hire More Women*, U.S. NEWS (Dec. 29, 2017,

task force report and its conclusions.⁸⁰ Finally, reporters set forth suggestions that might actually reduce harassment. These include improving educational programs by including bystander and civility training, changing workplace cultures, and promoting more women.⁸¹ These changed and nuanced popular perspectives on harassment training may signify a tipping point. If training is an ineffective prophylactic, why should it be legally relevant? I hope to answer that query in the conclusion.

Conclusion

In 2001, I argued that until research provides more insight into training's effects, harassment or diversity programming should be legally irrelevant to employer liability or compensatory damages.⁸² Today's widespread popular acceptance of training's inefficacy strengthens my commitment to that legal solution. There is little incentive to adopt effective educational interventions under present doctrine. Greater potential exposure to liability may spur employers to make changes not only to training but to transforming workplace culture.

I also argued that to incentivize good-faith efforts to prevent discrimination, training should remain relevant to the imposition of punitive damages.⁸³ Employers, however, should not be credited for cosmetic compliance in the form of standalone training and paper anti-harassment and non-discrimination policies. A full treatment of the evidence that might signal good faith for this purpose is beyond the scope of this Essay. That said, as an initial matter, employer efforts should be tied to current empirical research, which increasingly is able to discern those techniques that create a culture of diversity and inclusion. Integration of traditionally underrepresented groups throughout the organization is vital to cultural change and harassment prevention efforts. For example, Frank Dobbin and Alexandra Kalev note that since harassment is rife in settings where men dominate in the organizational hierarchy, the best way to prevent harassment is to hire and retain women in

6:00 AM), <https://perma.cc/5KNN-NDBS>; Katie Moritz, *Does Sexual Harassment Training Work?*, REWIRE (Feb. 2, 2018), <https://perma.cc/4CS7-26XW>.

80. See, e.g., Brueck, *supra* note 78; Lampen, *supra* note 78; McGregor, *supra* note 78; Rhodan, *supra* note 78; see also Sue Shellenbarger, *Sexual-Harassment Training Gets a Revamp*, WALL ST. J. (Dec. 19, 2017, 10:15 AM ET), <https://perma.cc/XE4X-SLNP>.

81. See, e.g., Belluz, *supra* note 78; Brueck, *supra* note 78; McGregor, *supra* note 78; Miller, *supra* note 78; Rhodan, *supra* note 78; see also Sabri Ben-Achour, *What Makes Sexual Harassment Training Effective—and Ineffective*, MARKETPLACE (Nov. 9, 2017, 10:44 AM), <https://perma.cc/3KZ9-TRVV>; Ron Zamir, *Combating Ineffective Sexual Harassment Training: Creating a Culture of Respect and Empathy*, TRAINING INDUSTRY (Jan. 3, 2018), <https://perma.cc/ZJF3-VC6V>.

82. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 1, at 44.

83. *Id.* at 45.

the managerial ranks.⁸⁴ Additionally, good-faith efforts to eliminate harassment would include regular, data-driven evaluation and improvement of educational programming.⁸⁵ Similarly, employers truly committed to ending harassment would regularly administer anonymous climate surveys to their workforce to discern and correct toxic work environments.⁸⁶ Other indicators of good faith might include employers' willingness to work with researchers on a holistic prevention program,⁸⁷ and experimentation with diversity training that is voluntary rather than mandatory.⁸⁸ Finally, good faith might be evidenced by conducting civility and bystander training, and generally following the EEOC task force report's prescriptions.

If the #MeToo movement represents a cultural rupture with the power to change the workplace, perhaps the EEOC task force report will assist a long-overdue doctrinal rupture that restores in part the promise of antidiscrimination law.

84. See Dobbin & Kalev, *supra* note 79.

85. See Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Prevention Trainings Really Work?*, SCI. AM. (Nov. 10, 2017), <https://perma.cc/E8YP-EJT8>.

86. See Maya Raghuram & Joanna Suriani, Nat'l Women's Law Ctr., #MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability 6 (2017), <https://perma.cc/X96S-5KWN>.

87. See EEOC TASK FORCE REPORT, *supra* note 9, at 79.

88. See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail—And What Works Better*, HARV. BUS. REV. (July-Aug. 2016), <https://perma.cc/3Y67-2FB7>.