



ESSAY

Sexual Harassment and the Bench

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Introduction

A story to start: I applied for a federal court of appeals clerkship after my graduation from Yale Law School in 1971. I was a feminist and a women's rights activist; I was a participant in one of the first courses on women and the law, organized and run by women law students. There were twenty of us in a class of 160 men. None of us was shy at criticizing professors or students who betrayed a demeaning attitude to women or stereotypical gendered perspectives. *Especially me.*

During an interview, one appellate court judge asked me if I planned to marry and have children because if I did, he would think twice about hiring me. He didn't want to waste this clerkship on a woman who wouldn't use it. I didn't know what to say. I knew the question was inappropriate, but if I called him on it, I would never get the job. So I compromised, as most women did and do, despite their feminism. I said, "No, I never plan to marry. I never plan to have children." At that moment—it didn't last long—it was true.

I got the job; the clerkship was wonderful. Notwithstanding his comments, the judge became a mentor to me and the women clerks who followed me. Indeed, he came to brag about the area in his law library reserved for the clerks who were nursing.

Fifteen years later, at his retirement party, he asked me to speak on behalf of all the clerks. I got up for the assembled group; I told the story of my interview—and then I turned to the judge and got on my knees, in mock prayer. "Judge," I said, "fifteen years ago, I swore that I never would marry or have children. I am now 39, unmarried, barren—release me from the pledge!" He laughed heartily, as did everyone else in the room who knew who he was and what he had become.

While I tell the story now by lightly poking fun at a man I came to adore, the point is more serious. The #MeToo movement has cast all employment settings in a new, more critical light, including the judiciary. As Chief Justice Roberts said in his 2017 year-end report, "[e]vents in recent months have

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illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune.”¹ The Chief Justice then directed James C. Duff, Director of the Administrative Office of the United States Courts, to undertake a “careful evaluation of whether [the judiciary’s] standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.”² In response, Duff established the Federal Judiciary Workplace Conduct Working Group (Working Group) to explore whether the judiciary’s procedures are adequate to protect law clerks and other courtroom employees from sexual harassment and to develop enhancements to any protections that are not working.³

There is no question that the judiciary can do better, not just in making its procedures more transparent but also in giving them meaningful content. While Title VII of the Civil Rights Act of 1964 does not apply to most employees in the judicial branch,⁴ the judiciary’s governing body, the Judicial Conference of the United States, has set up internal Equal Employment Opportunity (EEO) complaint processes.⁵ Each court is obliged to establish a “plan tailored to its own needs based on the Model Plan established by the [Judicial] Conference.”⁶ The Model EEO Plan outlines the judicial branch’s commitment to a discrimination-free workplace. The Model Employment Dispute Resolution (EDR) Plan reiterates the prohibition on discrimination and provides for “dispute resolution” procedures to be set up within each circuit to address EEO claims.

Both plans could not be more general. The Model EEO plan refers to the “national policy of providing equal employment opportunity.”⁷ The Model EDR Plan says nothing more than that discrimination based on sex (including

1. John G. Roberts, Jr., 2017 Year-End Report on the Federal Judiciary 11 (2017), <https://perma.cc/7D8U-WPRE>.

2. *Id.*

3. Letter from James C. Duff, Dir., Admin. Office of the U.S. Courts, to Charles E. Grassley, Chairman, Senate Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Feb. 16, 2018), <https://perma.cc/P3K9-8CUA>.

4. Only employees of the judicial branch who hold positions in the competitive civil service are covered by substantive provisions against discrimination. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 111 (codified as amended at 42 U.S.C. § 2000e-16(a) (2016)); 29 C.F.R. § 1614.103(b)(4) (2017).

5. See 12 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY §§ 220, 240 (2016) (referring to the Model EEO plan, attached as Appendix 2A, and the Model EDR Plan, attached as Appendix 2B).

6. *Id.* § 240.

7. JUDICIAL CONFERENCE OF THE U.S., MODEL EQUAL EMPLOYMENT OPPORTUNITY (EEO) PLAN 1 (revised 1986).

pregnancy and sexual harassment) is prohibited.⁸ Further, the judicial officer hearing an EEO complaint “shall be guided by judicial and administrative decisions under the laws related to Chapters II through VIII of this Plan,”⁹ which presumably include Title VII, although the plan does not expressly say so. When a judge is the subject of an EEO complaint, the complaint process is kicked upstairs to the circuit judicial council.¹⁰ The circuit judicial council is the governing body of each circuit; it is composed of the chief circuit judge and an equal number of circuit and district court judges.¹¹ The allegations, however, are kept confidential, and the final records are filed with the court’s EDR coordinator.¹² To the extent that the complaint process is supposed to give content to the rules—defining what is or what is not harassment or discrimination—the rules are effectively inaccessible to employees or, for that matter, other judges.

In addition to the EEO rules, judges are bound by ethical rules in the Code of Conduct for United States Judges, enforceable through a complaint process pursuant to the Judicial Conduct and Disability Act of 1980.¹³ If a judge becomes the subject of both an EEO complaint and a judicial misconduct claim, the circuit judicial council will “craft a procedure for determining any common issues of fact and processing both complaints.”¹⁴ Again, the canons defining judicial misconduct are phrased in the most general terms, ostensibly given content by advisory opinions through the Judicial Conference’s Committee on Codes of Conduct, and through the formal judicial misconduct complaint process, the outcome of which is public.¹⁵

At least at this early stage of the Working Group’s efforts, its proposals—like the canons of judicial ethics and the various Model Plans—are content-less;

8. JUDICIAL CONFERENCE OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION (EDR) PLAN ch. 2, § 1 (2010).

9. *Id.* ch. 10, § 10(B)(2)(e).

10. *Id.* ch. 10, § 3.

11. *Governance & the Judicial Conference*, U.S. COURTS, <https://perma.cc/283P-PRVY> (archived May 24, 2018).

12. JUDICIAL CONFERENCE OF THE U.S., *supra* note 8, ch. 10, §§ 4, 5(F).

13. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, div. C, tit. I, § 11042(a), 116 Stat. 1758, 1853 (2002) (codified at 28 U.S.C. §§ 351-364 (2016)). The Judicial Conference promulgated rules for judicial conduct and judicial disability proceedings “to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of the office because of mental or physical disability.” 2E JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 320, art. I (2016). A sexual harassment complaint could be brought either as a judicial conduct complaint or an EEO complaint. See 12 JUDICIAL CONFERENCE OF THE U.S., *supra* note 5, § 250(c) (“The Model EDR Plan . . . as well as courts’ local EDR plans are implemented to resolve allegations of discrimination and workplace violations . . .”).

14. JUDICIAL CONFERENCE OF THE U.S., *supra* note 8, ch. 10, § 3.

15. 2E JUDICIAL CONFERENCE OF THE U.S., *supra* note 13, § 320, art. VII (explaining Rule 24 about public availability of decisions).

they do not describe what comprises sexual harassment. Rather, they assume, as do the existing procedures, that substantive definitions and rules will somehow evolve from good procedures and a more transparent complaint process. The Working Group recently issued an update on interim reforms, which, though are commendable, follow a familiar pattern of better procedures with little substantive guidance, including: (1) enhanced training and education programs for staff, judges, and law clerks; and (2) procedural changes to improve access to complaint mechanisms, including making certain that the confidentiality of communications within a judge's chamber does not dissuade an employee from complaining about misconduct.¹⁶

But there is a certain irony to this approach. These kinds of remedial steps have not stopped sexual harassment in the ordinary employment setting (as the #MeToo movement suggests) in large part because of crabbed *judicial* interpretations of harassment. Judicial attitudes reflected in ordinary Title VII sexual harassment cases do not bode well for the strict or consistent enforcement of the judiciary's internal anti-harassment policies. At the same time, the judicial branch is surely unique—its context, its personnel, its governing procedures, and its norms. It may not take the same kinds of rules and procedures as apply to ordinary employment to effect change here. The “cure,” in short, is not at all clear.

I. A Unique Setting

When placing sexual harassment in the judiciary within the landscape of workplace sexual harassment, it is essential to take into account the demands of a unique setting like judicial chambers. As a general matter, scholars have identified environments in which sexual harassment is more likely to occur—for example, where men outnumber women and where leadership is male-dominated.¹⁷ They include environments where the power structure is hierarchical, where lower-level employees are largely dependent on superiors for advancement, and where power is highly concentrated in a single person. Academia is one such example; Wall Street brokers with large accounts and doctors in academic medicine with substantial grants are others. These environments are defined by contexts in which employees are isolated, working not in collaborative settings but with a single supervisor.

16. *Judicial Conference Receives Status Report on Workplace Conduct Review*, U.S. COURTS (Mar. 13, 2018), <https://perma.cc/5PDH-EYTJ>.

17. See, e.g., Kimberly T. Schneider et al., *Sexual Harassment Research in the United States*, in *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE* 245, 250-52 (Ståle Einarsen et al. eds., 2d ed. 2011); see also Dieter Zapf et al., *Empirical Findings on Prevalence and Risk Groups of Bullying in the Workplace*, in *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH AND PRACTICE*, *supra*, at 75, 76, 83 (describing the conditions under which bullying—defined generally to include persistent insults and offensive remarks, which include sexual remarks—occurs).

Judicial employment shares some of the institutional characteristics of workplaces in which harassment is more likely—a hierarchical structure in which individual employees are relatively isolated from one another and there exist large power differentials between judges and employees. Dahlia Lithwick described it as a setting of “worshipful silence” and added, “[t]here is no other work relationship left in America that is comparable.”¹⁸ In fact, judges and clerks underscore the importance of the clerk-judge relationship; the judge is a mentor, sometime a confidant, the person who performs wedding ceremonies, posts pictures of their clerks’ families, and organizes reunions. The judge’s recommendations are critical to the clerk, not just in the year or two after the clerkship, but often throughout her legal career. It is not unusual for judges—like me, in fact—to say that the relationship with one’s clerks was a high point of the job. At the same time, few judges interact with the clerks of other judges or know how other judges conduct themselves in their chambers. It is as if each chambers is a fiefdom, with its own rules and norms. There may have been rumors about the judge who bullied his clerks, but we—the judges, employees, and clerks—rarely say anything about it.

At the same time, the judiciary is a workplace that is supposed to have different and much higher standards of conduct and ethical codes than others, with unique requirements of confidentiality, and with its own norms of behavior. Unlike ordinary employment, the judicial branch is bound by the Code of Conduct for United States Judges,¹⁹ enforceable by formal disciplinary proceedings, as well as strong professional and ethical norms of behavior. Judges feel constrained by these rules and norms, within the courtroom and without, and surely within their chambers. I can attest that most people who put on the robe and take the oath of office feel transformed by it—surely in their public life, and even in private dealings with friends and colleagues. But the premise of the Chief Justice’s remarks, and the Working Group’s mission, is that this oath may not be sufficient to stop sexual harassment; as James Duff said, “[a]ny harassment in the judiciary is too much.”²⁰

II. Training in Ordinary Employment

The Working Group has focused on enhanced trainings for judges, law clerks, and staff. The Group seeks to include a session on sexual harassment during ethics training for newly appointed judges, to add in-person programs to the curricula at the Federal Judicial Center programs for chief district and chief bankruptcy judges, and to improve law clerk training to address the clerks’ recourses within judicial complaint mechanisms.²¹

18. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11PM), <https://perma.cc/46LU-57ML>.

19. 2A JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY ch. 2 (2014).

20. *Judicial Conference Receives Status Report on Workplace Conduct Review*, *supra* note 16.

21. *Id.*

But the issue is not the *existence* of training; it is the content. The case law under Title VII has enabled symbolic compliance with the law. Companies can implement training programs and formal policies that protect the institution from lawsuits, but these programs need not be remotely effective for companies to escape liability. They are often nothing more than a fig leaf. Under the *Faragher/Ellerth* doctrine, for example, an employer cannot be held responsible for a supervisor's sexual harassment if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," including by holding trainings, and (2) "the . . . employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."²²

Too often courts have allowed companies to defend themselves against Title VII charges by simply pointing to the existence of policies and training, without determining whether they are fully implemented, let alone remotely effective. Too often courts have failed to inquire about the content of the training, whether it enables trainees to identify harassment, or whether it just tells them where to complain if they have figured out what "it" looks like. Training about how to file complaints is not training to stop harassment or to identify it when it appears. As Lauren Edelman describes it:

[O]rganizational policies that symbolize diversity have become widely accepted indicia of compliance with civil rights laws, irrespective of their effectiveness. When we see company brochures that highlight their diverse workplaces or university websites that emphasize their commitment to equity and inclusion, we tend to think of those organizations as fair and nondiscriminatory even though we know little about whether men and women . . . are subject to harassment that makes it difficult for them to succeed.²³

Edelman suggests that these policies represent an organization's response to ambiguous law—creating a variety of policies and programs designed to symbolize attention to law, which then spread. In time "employers and employees alike tend to equate the mere presence of these structures with legal compliance and become less aware of whether the structures actually promote legal ideals."²⁴

In October 2017, the Equal Employment Opportunity Commission (EEOC) launched what it characterized as a training program on "Respectful Workplaces."²⁵ It is described as follows: "Instead of traditional compliance training that solely focuses on legal definitions and standards for liability," the new program focuses on "respect, acceptable workplace conduct, and the types

22. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

23. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 3 (2016).

24. *Id.* at 12.

25. Press Release, Equal Emp't Opportunity Comm'n, EEOC Launches New Training Program on Respectful Workplaces (Oct. 4, 2017), <https://perma.cc/WM42-D7B8>.

of behaviors that contribute to a respectful and inclusive . . . workplace.”²⁶ As Commissioner Chai Feldblum put it, “workplace incivility often acts as a ‘gateway drug’ to workplace harassment,” so the training program is designed to “stop improper behavior before it ever rises to the level of illegal harassment.”²⁷ It specifically noted that much of the existing training has not worked to prevent sexual harassment, precisely because it has been focused just on avoiding legal liability. And it emphasized that training must be tailored to the specific workplace—an admonition that applies with equal force in the unique context of the judicial branch.

III. Training in the Judiciary

There are multiple opportunities for training in the judiciary for both new judges and more experienced ones. Existing training covers all aspects of the job, including the ethical demands of the Code of Conduct. The Working Group commendably seeks to incorporate sexual harassment training as part of the discussion of judicial ethics—as it should. Including sexual harassment training should make it clear that this part of the job is every bit as important as the rules with respect to conflicts of interest, interactions with the media, and other conduct. Indeed, how a judge treats those within his chambers may well reflect how he treats litigants.

But as the EEOC suggests, training programs can be nothing more than kabuki rituals, in which the trainers intone the right words—the legally relevant words—without affecting behavior in the real world at all. Training is not enough without tests to see if the training is efficacious. The fact that a company has few formal complaints is not the measure of whether there is sexual harassment in ordinary employment. This measure is particularly inaccurate in the judiciary, given the nature of chambers relationships. The Working Group noted, for example, that in the fiscal year 2016, “[n]o complaints were filed by law clerks or judiciary employees and no misconduct complaints related to sexual harassment [were filed].”²⁸

If done right, and only if done right, training could help prevent harassment in the judiciary. Will the training endorsed by the Working Group offer examples of conduct that is not only prohibited under the fair employment laws, but is also the “gateway drug” of incivility, as the EEOC recommends? Will it have participants roleplay? Or will it simply announce what the procedures for filing complaints are—as if substantive standards will emerge

26. *Id.*

27. *Id.* The new training program grew out of a report by Commissioners Feldblum and Victoria A. Lipnic, which underscored the importance of a “workplace culture” which allows harassment to flourish—a culture framed by the organization’s leadership. 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 31 (2016), <https://perma.cc/2K3M-MMRL>.

28. *Judicial Conference Receives Status Report on Workplace Conduct Review*, *supra* note 16.

from that process? Worse, will the training just recite the case law on sexual harassment, without comment or criticism? And what message does that case law convey?

IV. Formal Complaint Procedures in Ordinary Employment

The Working Group seeks to enhance reporting by providing “one click” website access to obtain information about how to report misconduct, creating alternative and less formal options for seeking assistance with concerns about workplace misconduct, encouraging exit interviews to see if there have been issues, and lengthening the time allowed to file complaints.²⁹ But relying on the complaint process is not enough to stop sexual harassment—not only because individuals may be reluctant to complain, but also because the conduct itself is ill-defined. Significantly, the Working Group has apparently not sought to describe what conduct comprises sexual harassment, what the line is, and how it may be crossed.³⁰ Instead of taking on the difficult but important task of defining sexual harassment and bringing more clarity to the vague Model Plans, the Working Group may seek to rely on the enhanced complaint process to spell out what is or is not appropriate, in much the same way that judicial disciplinary proceedings are supposed to provide flesh on the bones of the very general Code of Conduct.

But even the most robust complaint procedure—the simplest, the most transparent—may not adequately tackle the task of defining norms of conduct that cover more than the most egregious behavior, as the judiciary’s own Title VII case law shows. Sexual harassment behavior is, after all, behavior on a spectrum—from quid pro quo conduct, in which an employer seeks to condition employment benefits on sexual favors, unwanted sexual encounters, sex talk, or off-color jokes, all the way to non-sexual but stereotypical and/or demeaning comments about women, their competence, and their role (not unlike what my judge said to me in our first interview). And when the allegations are at the “demeaning comments” end of the spectrum, the Title VII case law intones a familiar theme. Title VII, the courts say, is not a general civility code for the American workplace; only conduct that effectively changes the conditions of employment is to be prohibited.³¹ Indeed, even allegations at the other end—physical assault—have been trivialized in the case law. As I have written:

29. *Id.*

30. *See id.*

31. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (rejecting the argument that including same-sex harassment under Title VII would “transform Title VII into a general civility code for the American workplace”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (arguing that the standards for judging hostile work environments are “sufficiently demanding to ensure that Title VII does not become” a general civility code, and that the “ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing,” will not be actionable (quoting

[P]laintiffs in discrimination cases tend to lose on summary judgment, more so than any other party in any other type of case. If they manage to get to trial and, significantly, if they convince a jury of their claims, their damage verdicts run a substantial risk of being reduced by trial judges and their counsel's fees slashed—again more than the verdicts or fees of plaintiffs and plaintiffs' counsel in any other category of case. On appeal, the story is even more striking: [W]hile summary judgment dismissals are overwhelmingly affirmed by appellate courts, even successful plaintiffs' verdicts are reversed more than jury verdicts in other types of cases.³²

Seventy percent of civil rights cases (of all kinds) fail to get to trial in federal court;³³ in some places, the number is as high as 80% or 90%.³⁴ The issue is not just the decisions that dismiss or grant summary judgment under the “severe and pervasive standard,” which the Court has used to narrow the kind of harassment actionable under Title VII,³⁵ but how they are dismissed. Anti-women comments are dismissed as “stray remarks,”³⁶ a doctrine that discounts *explicitly* discriminatory statements³⁷—ironically just when social scientists are

BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en banc); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999).

32. Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration's "Signature" Achievement*, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 165, 165 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015) (citations omitted).
33. See, e.g., Memorandum from Joe Cecil & Georg Cort, The Fed. Judicial Ctr., to Hon. Michael Baylson (revised June 15, 2007), <https://perma.cc/UC8S-AV9L> (showing that in fiscal year 2006 the rate for summary judgment grants resulting in termination of cases was 70% in civil rights cases and 73% in employment discrimination cases among the federal cases analyzed—the highest percentage for categories of federal civil cases); see also, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104-05, 112-13 (2009) (noting that federal courts disfavor employment discrimination plaintiffs, who now have a “fear of judicial bias”); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (finding that employment discrimination cases settle less often than other types of cases and that plaintiffs in employment discrimination cases are less likely to win than other plaintiffs); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 566 (2003) (showing that employment discrimination plaintiffs fare poorly on appeal with a 7% reversal rate when defendants win at trial, compared to a 42% reversal rate when plaintiffs win at trial).
34. See, e.g., Gertner, *supra* note 32, at 169 (discussing a study of 2011 and 2012 employment summary judgement orders from the Northern District of Georgia that showed that the court dismissed 95% of the cases in part and 81% in full).
35. See *infra* notes 37-39.
36. See Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 159-60 (2012); see also *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 323 (D. Mass. 2011) (defining “stray remarks”).
37. See *Murphy v. City of Aventura*, 383 F. App'x 915, 918 (11th Cir. 2010) (per curiam) (holding no hostile work environment was created when female plaintiff was called gender-specific terms in addition to generally vulgar terms); *Webb-Edwards v. Orange Cty. Sheriff's Office*, 525 F.3d 1013, 1026-28 (11th Cir. 2008) (finding that weekly lewd

concerned about implicit bias. In one case, where the plaintiff's supervisor referred to her as a "dumb shit," "whore," "stupid bitch," and "hooker," the district court dismissed the case because the conduct was a type of "general vulgarity that [the law] does not regulate."³⁸ Even physical encounters have been rationalized away as insufficiently "severe or pervasive" to comprise a hostile work environment.³⁹

Will the judiciary do better with respect to its internal complaints than it has done in "ordinary" employment cases? More importantly, given the existing norms of judicial conduct, does it have to?

V. Formal Complaint Procedures in the Judiciary

As described above, the Judicial Conference of the United States' Model EDR Plan prohibits sexual harassment but does not explicitly define it. It provides that the presiding judicial officer "shall be guided by judicial and administrative decisions under the laws related to Chapters II through VIII of this Plan."⁴⁰ And Title VII is presumably one of the laws to "guide" the enforcement of the EDR Plan. Given the limitations of the substantive Title VII law as it has already been interpreted by the courts, it is not at all clear what this will mean going forward.

Simply borrowing principles of Title VII case law to define sexual harassment may appear, at least at first blush, to not bode well for the adjudication of complaints against a judge under the judiciary's own sexual harassment policy. Taking a page from Title VII's book would mean that the complaint process would focus only on one end of the spectrum—quid pro quo harassment, most (but sadly, not all) unwanted physical encounters, and sex talk or demeaning comments so long as they are "severe and pervasive."⁴¹ And even

comments made over an eight-week period are not enough for a finding of sexual harassment).

38. *Murphy*, 383 F. App'x at 917-18 (quoting *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 n.4 (11th Cir. 2010) (en banc)); see also *Heim v. Utah*, 8 F.3d 1541, 1546-47 (10th Cir. 1993) (holding that the comment "[f]ucking women, I hate having fucking women in the office" was not evidence of discriminatory intent against the plaintiff and instead was directed at women in general).

39. See, e.g., *Mitchell v. Pope*, 189 F. App'x 911, 913-14 (11th Cir. 2006); see also *Derrico v. Pinkerton's, Inc.*, No. 97 C 5851, 1999 WL 311757, at *4 (N.D. Ill. May 12, 1999) (dismissing the sexual harassment claim because the defendant grabbing his crotch was not "sufficiently obscene," and the plaintiff was "not exactly a blushing violet"); Final Report and Recommendation at 15, 34, *Lindquist v. Fulton County*, No. 1:09-CV-1102-RWS-WEJ (N.D. Ga. Nov. 23, 2010) (recommending dismissal of the plaintiff's claim even though the defendant leaned over and "kissed her right buttocks").

40. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 8, ch. 10, § 10(B)(2)(e).

41. The EEOC issued guidelines stipulating that "sexual harassment" is a type of sex discrimination, actionable under Title VII. 29 C.F.R. § 1604.11(a) (2017). It consists of the following: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either

as to that kind of conduct, the attitudes that the Title VII case law reflects are hardly encouraging.

This raises a more fundamental question: Should ordinary Title VII standards be engrafted in this setting, or does the bench require more—or just different—standards given the norms of conduct and the ethical codes already in place? Arguably, just arguably, the bench already has a very general civility code—the Code of Conduct and the norms governing judicial behavior that, at the very least, create an atmosphere in which offensive comments are discouraged. If that is the case, then it may well be appropriate that the conduct to be stopped via an improved complaint process will, similar to Title VII, only be on the more extreme end of the spectrum—the overtly sexual references, contact, or quid pro quo. That would leave training—not training that just intones the procedures but training that models appropriate behavior—as the better of the Working Group’s reforms for preventing sex harassment more generally.

Preliminary Conclusions

The Working Group proposals—to be sure at an early stage—seem curiously passive. They rely on the victims of sexual harassment to raise the issue, training them about how to do so. It is—in effect—an adversary model for sexual harassment remedies. If the issue isn’t raised, it doesn’t exist.

Still, rigorous enforcement of Title VII-like standards—assuming that can be done at all given the ambivalent judicial attitudes—seems inappropriate here. The public may call for it: Why not hold the bench accountable just as you would ordinary employers? But it is an unrealistic ask. Given the unique nature of the judiciary, the reticence of clerks to talk about their experiences, and the reluctance of one judge to criticize another, the best approach may be different.

The best approach may well be all about prevention rather than formal complaints and enhanced procedures—for judges and court staff to openly discuss what harassment is or is not; to hold regular interviews with clerks and staff to understand the atmosphere; to conduct exit interviews (like those proposed by the Working Group); to train, not in a way to suggest this is ancillary to judicial education, but in a way that makes it clear this is an important part of it. And it surely requires leadership on the issue from chief judges and court executives.

explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” *Id.* And in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court clarified a cause of action for sexual harassment—when it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” 477 U.S. 57, 67 (1986) (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (1982)).