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## Panel 4 - Severe or Pervasive: Towards Empowering Workers

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TRANSCRIPT OF VIDEO FILE:

## PANEL 4 - SEVERE OR PERVASIVE: TOWARDS EMPOWERING WORKERS

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BEGIN TRANSCRIPT:

FACILITATOR: All right. We're back and I wanted to introduce our moderator for our panel, Severe or Pervasive: Towards Empowering Workers. We have Ms. Allegra Fishel moderating. Ms. Fishel is a seasoned civil rights advocate and the founder of The Gender Equality Law Center. So, thank you so much for being here and, Ms. Fishel, I turn it over to you.

ALLEGRA FISHEL: Thank you so much. I hope everybody can hear me. I guess we should all be used to speaking this way after nineteen months but I still wish I was looking at the audience more directly. Anyway, as I was introduced, my name is Allegra Fishel. I am the Founder and Executive Director of the Gender Equality Law Center, an organization I founded about five and a half years ago that uses a combination of litigation, legislative and public advocacy, and training to advance gender and racial equality. Our work focuses primarily on redressing gender-based discrimination in the workplace, but to some extent, we also handle matters addressing gender-based discrimination in academic settings. Today we're going to talk with our wonderful panelists, who I'll introduce in a moment, about the scope of Title VII of the 1964 Civil Rights Act, including its historical place in jurisprudence in terms of protecting the rights of sexual harassment victims in the workplace, the challenges that practitioners and other folks face currently using it, and some hopes and views about how that law could be better used in the future. [00:01:43]

First, I'd like to briefly introduce my co-panelists. They all have more extensive bios that you've been provided with. So, I will keep my introductions brief. First, I would like to introduce Ann McGinley. [Ann does the wave] Ann is the William S. Boyd Professor of Law and co-director of the Workplace Law Program at the University of Nevada, Las Vegas, Boyd School of Law.

Then we have Alexis Ronickher who very kindly stepped in for Lisa

Banks, who had a personal matter to attend to today. Alexis is a partner with Katz, Marshall, & Banks, a civil rights and employment law firm based in Washington, DC. We also have with us on this panel Joseph Sellers, who chairs the civil rights and employment practice at Cohen, Milstein, Sellers, & Toll. He was previously the head of the employment discrimination group at the Washington Lawyer's Committee for Civil Rights and Urban Affairs. And certainly not least, but last, we have Bernice Yeung who is a California-based reporter for ProPublica, which is a not-for-profit organization that works on producing journalism for the public interest.<sup>1</sup> Bernice was previously a reporter at The Center for Investigative Reporting. [00:03:20]

I'd like to start out with asking Joe to give us a little perspective on what the law of Title VII is, what the severe and pervasive standard is, and how you've been able to use Title VII in your practice to help address harms done to sexual harassment victims.

JOE SELLERS: Thanks very much Allegra and thanks so much for having me here. It's a real honor. Let me begin by making a few observations. As you probably all know, the protection against sexual harassment is not explicit in Title VII, and indeed as you may also know, the protection against discrimination on the basis of sex was added at the last minute to the Title VII legislation, with the intention of scuttling the bill. So, there's very little in the way of explanation in the legislative history about what the protection against sex discrimination was intended to prohibit, leaving to the courts to interpret its meaning. [00:04:22]

I have had a fair amount of experience in litigating sexual harassment cases. One case involving claims of severe and pervasive harassment was the first sexual harassment class action tried to a jury in this country. The case was brought in the DC federal court against the DC Department of Corrections on behalf of women correctional officers. But perhaps of most interest to you might be the case before the Supreme Court that launched this area of protection. The *Vinson v. Meritor Savings Bank* case articulated for the first time that a victim of sexual harassment must show that the sexual overtures to which she was subject were unwelcome. I represented Ms. Vinson on remand, where we had to discern for the first time what the Court had in mind by articulating this standard. [00:05:18]

So, just to put this in context for a moment. Michelle Vinson was a victim of sexual harassment when she worked as a teller in a bank in Washington, DC in the 1970s. This was an era when the courts had routinely dismissed claims of sexual harassment. One court rejected a claim of sexual harassment

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1. Ms. Yeung is currently the Managing Editor of the Investigative Reporting Program at the UC Berkeley Graduate School of Journalism.

as simply an after-hours affair that went badly, while another wrote, “These are simply controversies underpinned by the subtleties of an inharmonious personal relationship.” That was in 1978, around the same that Mechelle Vinson was being victimized by sexual harassment. Perhaps not surprising, against this jurisprudential back drop, the District Court in DC ruled against Ms. Vinson. [00:06:01]

Notwithstanding that Ms. Vinson had been groped and grabbed repeatedly and at one point raped, the court ruled that the sexual interactions in which she had engaged had been voluntary. Perhaps the most striking abuse occurred when the bank manager directed her to come to a hotel room nearby the bank and to undress while he took a shower before they had intercourse. Instead of fleeing the room, Ms. Vinson submitted to the demand for sex. As there had been no physical coercion, the court concluded her submission was consensual. In reaching this conclusion, the court found non-dispositive the evidence that Ms. Vinson had been threatened multiple times with her termination if she failed to cooperate in his overtures. She was a single mother. She needed the job, and so she acceded to these sexual demands. [00:07:04]

On appeal, the Supreme Court ruled that whether sexual harassment occurred depended on whether the victim showed that the sexual advances were unwelcome, not whether the participation was voluntary or uncoerced. In articulating this standard, the Court made a leap light-years ahead of the previous jurisprudence by recognizing that the exercise and abuse of power in the workplace was ultimately behind the incidence of sexual harassment, not simply a social relationship that went awry. But Justice Rehnquist, writing for the Court, didn’t elaborate on how to prove the sexual overtures were unwelcome, leaving that challenge to us on remand and to dozens of courts thereafter. We ultimately concluded that it would have been difficult to satisfy this standard. While Ms. Vinson, in her own mind, had shown the overtures were unwelcome because she was slow to comply with the demands made of her, objectively that subtle resistance might have been insufficient to prove the overtures were unwelcome. Ultimately, we settled the case. [00:08:14]

As we’ve come to learn in the years following the Supreme Court ruling, while the standard it articulated was not necessarily easily satisfied, it represented a sea change in recognizing that sexual harassment was typically the result of abuse of the dynamics of the workplace and not simply social interactions that went badly.

ALLEGRA FISHEL: Thank you so much, Joe. Alexis, do you want to tell us a little in your practice how you actually used Title VII? We heard before a lot of really helpful things from Professor Schultz about legal theories and

jurisprudence, but how do you actually use Title VII to help advance protections for sexual harassment victims in your work?

ALEXIS RONICKHER: Sure. Just to give a little bit of context for what my work is, as Allegra mentioned, I am at the law firm Katz, Marshall, & Banks. We primarily represent individuals, or sometimes groups of individuals, in cases of sexual harassment, among other types of discrimination and retaliation. So, when someone comes to us who is facing sexual harassment, and, in what is often the case, has also complained about sexual harassment and the client finds themselves terminated, we use the statute first and foremost. The person comes to us and we evaluate their claim. As Joe mentioned, there are significant hurdles in the legal standards for sexual harassment that you have to overcome if you're assessing the legal landscape on the claim. You have to establish whether you can meet the unwelcomeness requirement. You have to establish whether you can meet the severe or pervasive requirement. You have to show that there is a liability for the employer. Is the person who's harassing a potential client a supervisor or are they a coworker? [00:10:10]

As far as jurisprudence goes [chuckles] hurdle, after hurdle, after hurdle that someone's staring down the gun of bringing a sexual harassment claim is conceivably looking at. But I think what is critical to know is that—particularly because I think as the landscape has evolved—that doesn't necessarily mean that a person can't get an outcome that allows them to move forward from a very terrible situation. For many of my clients, ideally in a confidential way that gives them economic redress and allows their career to continue. [00:10:54]

And so, when someone comes to us, we're looking at not only what are the strengths of the claims, but what is the leverage in this situation that can help our client despite all of these jurisprudential hurdles that a not-always-friendly judiciary has created? What can we do to leverage this statute and this legal landscape and then the media landscape, depending on the profile of the case? But sometimes even just the reputational landscape to get our clients in a situation that's going to allow them to move forward.

(background noise 00:11:32)

ALLEGRA FISHEL: Speaking of media, Bernice, do you want to tell us a little bit about how you've been able to use some of your reporting to help advance some of the rights that maybe you're not actually using the law in the same way as a lawyer would? But you know the law, and you're aware of it. Can you give us a little insight into some of the work that you've done?

BERNICE YEUNG: Absolutely. Also, by way of context, I'm a reporter with ProPublica. Before that, I was a reporter for The Center for Investigative Reporting where I did the bulk of the journalism that I'm about to talk about.

I, along with a number of colleagues at UC Berkeley's Investigative Reporting Program and KQED Public Radio, set out to look at the issue of extreme sexual harassment among both farmworkers and nightshift janitors, and those pieces resulted in some documentaries, radio pieces, and text articles. Those projects were called Rape in the Fields and Rape on the Nightshift. Both of those projects led to my book "In a Day's Work: The Fight to End Sexual Violence Against America's Most Vulnerable Workers," where I also looked at how this issue plays out among domestic workers. [00:12:56]

But essentially, we came to this story because a journalism student at UC Berkeley had gone out to look at issues related to child labor in the fields and came back telling us this story about how she had encountered a woman who said that she had previously been a farmworker and had been required to have sex with her supervisor every year at the start of each season in order to keep her job. For us, that was a shocking revelation and it really led us to ask the question: is this a singular, horrible, one-off situation, or is this something that is actually unfortunately quite systematic and demanded a greater scrutiny and also some kind of systemic reform? [00:13:20]

So, as reporters, and especially as investigative reporters, we were interested in looking at this problem from a big-picture, systemic point of view. As we all know, sexual harassment is not new and I think as journalists—and sometimes with good reason—we tend to focus on the so-called news peg. What is new about this issue? Is there some high-profile individual who's involved? But as a reporting team, we were really much more interested in, and luckily had the space and time to look at it from, a more systemic point of view. What we heard from talking to workers from across the country and across various industries was that low-wage immigrant workers—and it tended to be female workers—were experiencing essentially unabated sexual harassment. Some of it was very extreme sexual violence and rape and they were experiencing it with some regularity. We learned that there were tactics that were being used across the country, that were similar across industries, where supervisors and co-workers would use isolation as a way to sexually exploit the workers. [00:15:11]

For example, we heard that supervisors would ask a farmworker to go into their truck to move them from one part of the orchard or one part of the farm to another, and that's where the sexual violence would happen. We were hearing this repeatedly.

It was very difficult to do this reporting because it was not something that people were particularly interested in sharing in such a public way. But yet, we believed that there was something very important about excavating and surfacing these stories so that the public could be more aware of what had

been happening for decades, for generations, in these industries and among this population. I think it was also very important for us to surface these stories so that systemic reform could be considered, so that policymakers and others could really have a better sense of what the reality is for female workers across all industries. [00:16:14]

I guess I think it's always important for me to mention #MeToo because I think that when we started this reporting in 2012, it was a completely different cultural landscape. I mean, I frankly marvel at the difference between now and then. Of course, we still face incredible challenges culturally, legally, and everything else. But back then we didn't know whether this story would resonate with the public. There were some serious considerations that we faced as journalists about whether we could even bring this story to light. It wasn't just a question of whether people would talk to us but also, we didn't know if the public would care. In fact, we were highly concerned that people would not care, and we had to go into all sorts of intellectual contortions about how to make this relevant for the public. For example, how would we make it relevant to consumers? Really at the end of the day, I think we can all understand that this is a human rights issue, this is a worker's rights issues, this is basic justice, and I'm glad to say that I think all of the efforts of the participants on this panel, along with other reporting efforts on this topic, have helped situate this issue as one that needs to be confronted directly. [00:17:23]

ALLEGRA FISHEL: That's great. Thank you so much. Ann, do you want to give us a little bit more of the bird's eye view about redressing sexual harassment in the workplace and a little bit more of how some of legal jurisprudence holds together?

ANN MCGINLEY: Yes. You're asking about our backgrounds and about the kinds of work that we've done. I teach employment discrimination, disability law, other employment law courses, and I research and publish mostly in the area of Title VII. So, one thing I want to mention is my focus on using theory and social science research to improve the law on the ground. So, I published a number of articles, but I think the most relevant publication I have for this topic is my book, *Masculinity at Work: Employment Discrimination through a Different Lens*,<sup>2</sup> which was published by New York University Press. I've researched and written about masculinities theory for many years, which is a theory that notes that gender is socially constructed. Masculinity is not something necessarily biological but is actually taught; this theory posits that exaggerated versions of masculinity

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2. ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* (2016).

are harmful. Not only to men and boys for forcing them to live up to this unrealistic ideal, but it's also harmful to women. Work is a key location where men demonstrate their worth as men. Men and boys harass other men and boys, especially when in groups; punish other boys and men for their failure to live up to masculine stereotypes and to police the masculinity of the group or job. So, I want to emphasize that. They're engaging in this behavior to make sure the group or the job remains masculine. This reaffirms the men's or boys' masculinity and makes them feel good about their masculinity. [00:19:14]

Of course, when women enter those workforces, men prove their masculinity to each other by harassing women in those workplaces. The harassment becomes the mechanism and women become the pawns of men who, in most cases, are not sexually interested in the women but need to prove their worth to other men at work. Now, I'm not saying it's always a lack of sexual interest, but very often it's a power issue that we're talking about. [00:19:39]

But there are many different versions of what we call masculinity. Masculine practices, and identities, and expectations of men are going to change depending on race, class, sexual orientation, et cetera. But most of them have in common this need to compete to prove that they're men depending on what they're supposed to be in their particular environments. Now, as far as the law is concerned, and how masculinity affects the law, the arguments that I've made were around men using harassment of other men or of women to prove their own masculinity. Now, this isn't just only to protect men as victims but it's also to protect women who become victims of these groups of men and individual men as well as a result. [00:20:20]

So, when men harass other men, the courts generally are calling the behavior natural and horseplay. Some people call it bullying. That's not covered by Title VII, and they say, "boys will be boys," which reinforces our society's views of what masculinity means, and this is by the way also a very racialized view of the behaviors, because we don't excuse Black boys. We don't say they're engaged in horseplay, and we don't say, "boys will be boys." Black boys end up in jail for the same or similar behaviors. So, white boys act naturally, but Black boys end up in jail. [00:20:59]

So, masculinities theory is intersectional and multidimensional, and you have to look at the different axes (gender, race, class, and sexual orientation) in the context of the situation to understand the dynamics that take place. So, that highlights a key failure of Title VII law which is that it doesn't even now, years after Professor Kimberlé Crenshaw's original article on



intersectionality, which I think was 1989.<sup>3</sup> Years, and years, yes, a court here and there will talk about intersectionality, but generally courts don't recognize intersectionality. If you come up with evidence that you were harassed based on your sex and your race, you have to prove each one separately, and the courts are separating the two axes without understanding that discrimination against a Black woman, for example, differs from discrimination based on race or gender alone. I think this is the proceduralism that Vicki Schultz might have been talking about. [00:21:41]

So, I think one of the things that really has to change is that we have to look at discrimination through an intersectional lens, and we have to understand that it's not only men that cause harassment of women but it's a matter of gender. We are teaching men to engage in a particular behavior. Even women engage in some of these behaviors, but I don't have enough time to talk about that. In the next part, I would love to talk a little bit about the proceduralism because I have written also a lot about how the courts' grants of summary judgment and motions to dismiss, et cetera, are causing real problems with these kinds of cases... in most employment discrimination cases, but especially these. Thank you. [00:22:21]

ALLEGRA FISHEL: Thank you. Those are very inciteful remarks. I'll just add—very briefly in the interest of time—which is that we have been saying it in different ways, but we need to address the intersectionality between sexual harassment victims and economic status and/or national origin. Depending on where you live, but in most of the places we live. I'm from New York, where recognizing claims of sexual harassment in many instances implicate claims of immigration status discrimination. So, this combination of vulnerability really exists with women who are immigrants.<sup>4</sup> (). And, part of the problem is that a lot of these undocumented, low-wage workers cannot find legal representation, because even in contingency cases, so much of how cases are valued is really based on how much someone earns, not how much they've suffered. So, that's something that I'm very interested in and we are always working to try to increase access for legal representation but it looks like Alexis wants to say something. [00:23:24]

ALEXIS RONICKHER: I was so compelled by what you said because (crosstalk 00:23:27). You're so right and I think even in the structure of Title VII, by having caps on compensatory damages and punitive damages, you're essentially tagging the worth of redress to someone's economic earnings,

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3. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139.

4. I am using the word "women," because the vast majority of sexual harassment survivors are women

which just prevents—I mean that private-public partnership in enforcing employee discrimination can work so well, but those caps really prevent it from working well for the lower-wage earners. I mean, I will say almost every sexual harassment client I represented has faced a particular vulnerability that puts them in that place, whether they are a C-suite level person down to a grocery store worker, but it's obviously much easier to get a lawyer when you're a C-suite level person than when you're a grocery store person or someone who's out in the fields and even has language access issues. So, those caps are just extremely damaging for making sure that our laws protect everyone they need to protect. [00:24:33]

ALLEGRA FISHEL: Thank you Alexis for those inciteful comments. Joe, do you want to jump in?

JOE SELLERS: Yes, just one other thing to add to what Alexis said. Another deterrent to victims of sexual harassment seeking legal protection is the way in which victims of harassment are themselves questioned about their motives, and what happened, and ultimately often blamed or suspected that they did something to provoke the incidents that gave rise to the harassment. As a result, our clients have to be prepared to weather questions during discovery. While many victims are strong enough to do this, it is not a pleasant or easy process. Then, to add to the challenges they face, where they claim emotional harm damages from the harassment, of course, they may be subject to discovery about every facet of their personal life, their medical history, and the like. So, it requires a level of fortitude besides surviving the harassment to try to actually challenge it through the legal system in addition to the challenges that Alexis identified. The actual pursuit of legal challenges to sexual harassment can be daunting sometimes. [00:25:50]

ALLEGRA FISHEL: That's a really good point. You're both well into the second question which is, what are some of the challenges to bringing Title VII, or if you're not a lawyer, to helping to advance the rights of individuals who were harmed by sexual harassment? Did you want to add something more to this point?

ALEXIS RONICKHER: Yes, I want to echo exactly what Joe said which is what I see as the biggest—there are several hurdles. The biggest one is coming forward, right? Are you going to risk your career by coming forward, even internally? Especially if you can go and just find another job, for those people who are able to do that. Two, are you going to risk the psychological harm of having to first fight for proving the case itself and then proving your emotional distress damages? Then, are you going to risk your privacy? Your medical records or psychological? I mean, I had a client who the court allowed the defendants to inquire about every sexual act that she ever had.

That was part of the order. Every sexual act and every mental health visit she'd had and she was in her early 20's. So, that literally meant everything. Her whole entire life was open. [00:27:18]

So, that's, like Joe said, a hurdle that we have to educate our clients about. But then you need to prove your case. So much of this happens, as Bernice said, in isolation. It's intentional that way. So, it boils down to a he-said/she-said situation. Sometimes our clients, knowing that, attempt to record and then you're in this situation where employers have no-recording policies. So, they're able to then have an excuse to fire someone or cut off their damages. Or you're in a state where it's unlawful and now the person has unwittingly, for example, in Maryland, committed a felony. Then employers lock up evidence. Former employees will be subject to non-assist provisions. Current employees are too terrified to come forward and jeopardize their job. So, the hurdle of proving that can be very daunting for someone who's come aboard thinking about pursuing a claim. [00:28:20]

And then the hostile judiciary is just infuriating (chuckles) as an advocate. There's just a true hostility to sexual harassment cases becoming a super HR committee, to plaintiffs getting a windfall. I mean, I don't want to only focus on the negatives because while those are hurdles, I think that there are ways that we can work around that. I think #MeToo changed the landscape and has meant that society is pushing for a change and the role of media highlighting these—I particularly want to call out how amazing it is, the work that Bernice did; it's easy to highlight the sexual harassment of governors or movie producers. That's important because people have come to me saying, "I felt like I could come forward because Gwyneth Paltrow went through this. I too can come forward." But the work of the most vulnerable or what the most vulnerable go through doesn't always get the media attention. [00:29:30]

But the change in the landscape means that—I don't want any of these hurdles to indicate that you can't achieve redress, but there are some hurdles out there.

ALLEGRA FISHEL: Yes. Ann, it sounds like you want to jump in (background noise 00:29:43). Please.

ANN MCGINLEY: I'd love to pick up on this idea about this hostility of the courts because the courts' use of procedure to get rid of good cases when there are clear questions of fact is a real problem; and that, combined with the creation of substantive rules. I'm just going to say one example is the "same actor" defense but that's not generally in harassment law, but other types of employment discrimination. But, anyway, these substantive rules have no basis in the text of the statute and are not supported by social science literature. So, this has been going on for a while and I pulled together some

empirical evidence that I thought you might find interesting. [00:30:32]

So, in federal courts for other cases the success rate—when I say other cases, other than employment discrimination cases—of plaintiffs is fifty-one percent. This is an overall success rate. For employment discrimination cases, it's fifteen percent. In jury trials, the plaintiffs win about thirty-eight percent but in bench trials about—and this is employment discrimination plaintiffs—twenty percent. So, there's a big distinction between the juries and the bench even though the juries aren't that great either. On appeal when the defendants win, their victories are overturned only about nine percent of the time, but when plaintiffs win below, they're overturned forty-one percent of the time. In the lower courts, as I've mentioned, courts have granted defense motions for summary judgment and of course, since the *Twombly* and *Iqbal* cases,<sup>5</sup> motions to dismiss, very aggressively. One of the things that more recent research shows is that the demographics of the judges matter. So, for defense motions for summary judgment, white judges grant them sixty-one percent of the time in employment discrimination cases. But judges of color grant them only thirty-eight percent of the time. For motions to dismiss since *Twombly* and *Iqbal*, there has been an increase in grants of motions to dismiss that is statistically significant. But that only applies to judges appointed by Republican presidents, white judges, and male judges. (chuckles) It doesn't apply to judges appointed by a Democrat or female judges or Black judges. So, those are the statistics. [00:32:05]

So, let's talk about a couple of cases—I'm not going to say a whole lot—but in the harassment cases, for instance, courts grant summary judgment motions, concluding, for example, that as a matter of law, the behavior is not severe or pervasive. I know a lot of you know all of this, but that's kind of outrageous when you think about it. First of all, because Bernice and a number of you have talked about how things have happened since #MeToo. Today, the courts are relying on harassment cases that are thirty-years-old and comparing the facts to those. So, the community involvement and understanding are going to be very different, and why is a judge deciding that it's not severe or pervasive without sending it to a jury in that situation? There's an interesting article by Joan Williams about what she called the norm cascade; she demonstrates that attitudes and norms have changed significantly over the years.<sup>6</sup> So, I would recommend that article to you. [00:32:53]

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5. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding that to survive a motion to dismiss allegations in the complaint must demonstrate claim is plausible).

6. Joan C. Williams, et al., *What's Reasonable Now? Sexual Harassment Law After The Norm Cascade*, 2019 MICH. STATE L. REV. 139 (2019).

Also, the other thing I've been finding is that they're granting summary judgment to defendants when it is the defendants' burden of persuasion to prove the affirmative defense. It's kind of crazy, because courts almost never grant summary judgment to plaintiffs when they have the burden of persuasion. When defendants have this burden of persuasion to prove the affirmative defense, they have to prove that they acted reasonably and the plaintiff acted unreasonably. What happens is when we talk about negligence cases, and this basically is a negligence defense, those cases should be going to juries because reasonableness and unreasonableness are jury questions, at least in the negligence cases I know about, but that's not what happens. What happens is there's also empirical research on this that if the employer can prove that it had a good policy and it responded pretty well after it found out about the harassment, it doesn't matter whether the person who was harassed actually reported it or not or was reasonable. The courts just grant summary judgment to employers, and literally there is empirical research that shows that. [00:33:54] And, remember, the Supreme Court held that the defendant has to prove both prongs to prevail, but lower courts are not requiring more than proof of the first prong.<sup>7</sup>

So, this is a problem and I'm sorry to be so negative. I mean, in my next answer I'll talk about things that I think we can do to correct it. Thank you.

ALLEGRA FISHEL: I'm wondering about, when we're talking about some of the burdens of remedying sexual harassment, if any of you could talk maybe a little bit about the EEOC Task Force.

JOE SELLERS: I'm happy to do that.

ALLEGRA FISHEL: Perfect! I read your mind. Because I think that some of the statistics that came out of that are deeply concerning for all of us in terms of barriers to reporting sexual harassment. We will then get to you, Bernice, too. [00:34:29]

JOE SELLERS: I served on the recent EEOC Task Force on Workplace Harassment. In addition to hearing from a number of scholars and researchers about the phenomenon of workplace harassment and considering factors that mitigated against and enhanced the likelihood of harassment, we also collected data reported from a number of workplace surveys about whether employees, and most often women, believed they had been the subject of sexual harassment and if so, did they report it? Unfortunately, the results were very discouraging. Taken together, the survey results were that only about thirty percent of the victims of verbal harassment reported it and only about eight percent of the victims of unwanted touching reported it in

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

the workplace. Eight percent! Therefore, more than ninety percent of women experiencing unwanted physical contact did not report it to anyone in their workplace. This reluctance to report various forms of sexual harassment, especially the most severe forms, is especially significant, as reports of such harassment are the only means by which it can be detected and recorded by third parties. Unlike discrimination in awarding promotions or pay, or even in discharges, where various forms of reporting about the workplace to enforcement agencies may permit the detection of patterns of such unlawful conduct, there is no form of reporting that captures the incidence of workplace harassment. The only way harassment is identified and challenged is through complaints. It's one of the few areas of employment misconduct that requires the actual complainant to come forward in order to detect it. [00:35:54]

I would like to offer one example of the adverse consequences that can occur to employers when they fail to create environments in which complaints of harassment can be made safely and addressed, which highlights the importance of the work that Bernice and others like her have done. In litigation that is ongoing, and therefore I won't identify the parties, more than a hundred accounts of conduct demeaning to women were concealed from the public because the litigation was pending in arbitration, which required that the evidence collected through the litigation was normally kept confidential, even from other women who were members of the case. [00:36:49]

At a later point in the case, the evidence of the conduct demeaning to women, much of which qualified legally as forms of sexual harassment, was made public. It was comprised of sworn statements from women and men reporting mistreatment to which those women and others had been subject. The day after those disclosures occurred, the value of the stock of this publicly traded company dropped hundreds of millions of dollars. So, I'd say to Bernice and to others, shining sunlight on this pernicious form of conduct can create one of the most powerful incentives for employers to promptly and effectively address this conduct to avoid the public embarrassment and the adverse financial consequences that patterns of sexual harassment can, and do, cause when they fester and then are publicized. [00:37:34]

ALLEGRA FISHEL: That's important information, Joe. Bernice, why don't you tell us a little bit about your experience in working with women who are working in isolated working environments, often not just experiencing verbal harassment but actual assault and violence. What can you share with us about how these women are or have been ultimately able to come forward, either to make their companies comply with the law, or even to find the courage to [speak with] you? How do you create that trust?

How do you create that sense of security or a safe space for them to come forward? [00:38:10]

BERNICE YEUNG: Yes. Well, I think that my experience as a reporter echoes so much of what everyone else has said, which is that there are some parallels to not wanting to come forward to file a lawsuit and there are also very many parallels to not wanting to speak publicly about your experiences in this way. There are so many barriers for workers to come forward with a complaint and the system does seem to be quite reactive in terms of waiting for that complaint to surface before taking action. As a result, as Joe mentioned, a very small fraction will actually come forward. Just based on the experiences of the women that I have gotten to know in farm work, nightshift, janitorial, and domestic work, there are basically a number, a confluence, of complexities and vulnerabilities that made it very difficult for people to come forward—that intersectionality that Kimberlé Crenshaw talks about. It’s immigration status, it’s being monolingual, having limited English proficiency. Some may be illiterate. There’s economic fragility from being in a low-wage job. They may be supporting families here but also abroad and so the weight of their economic responsibility is tremendous. [00:39:40]

They may come from countries where law enforcement and the government cannot be trusted with this type of complaint, or the laws might not be in place in a similar way. Then of course, there’s shame and as undue as it is, it’s obviously real. They may have no prior experience talking about these types of topics in a public way. So, I think all of those things kind of come together to make it extremely difficult for someone to come forward. We’ve met with women who’ve described actual threats of having immigration called on them, threats to their family. [00:40:15]

There’s one woman whose story I’d love to share with all of you today. She’s had a tremendous impact on me as a reporter. Her name is Georgina, and she was a nightshift janitor in Los Angeles. She started out working in movie theaters and she was dealing with just a terrible situation where she was being underpaid. She was undocumented, she was a single mother, she landed this job cleaning movie theaters, and she was earning something like \$200 a week for more than forty hours of work a week. She was barely making it. Finally, because of a really interesting organization that works out of parts of California where they do direct outreach to the workers themselves on the nightshift, she met a worker advocate who helped her file a wage-and-hour complaint. After that, she left the job cleaning the theater and took a new job cleaning a hotel. Things seemed to improve for a while except for the supervisor at the hotel. Unfortunately, he decided to take advantage of Georgina sexually and he raped her several times on the job.

She was in a situation where she just did not feel like she could report what was happening to her at work. She had already spent several nights homeless in the park with her then-toddler daughter because she hadn't made enough money to make rent. So, keeping her job was foremost in her mind, and as she puts it so powerfully, "There's no way to say no in a situation like that. When you need the job, you become the victim of others." [00:42:11]

She was dealing with this horrific situation and when she was trying to think about how to escape this scenario, she remembered that worker advocate who had come to see her in the middle of the night when she was cleaning the theater. That worker advocate was part of a group called the Maintenance Cooperation Trust Fund<sup>8</sup> and Georgina got back in touch with that advocate. From there, the MCTF was able to help Georgina find legal representation and also social support so that she could go and file a police report. By filing a lawsuit, she was able to get some kind of financial recovery from having faced that horrible situation. And I'm happy to report that things have improved for her. She is now married. She has a couple of more kids. She still struggles sometimes finding reliable work but she's trying to learn English and she's trying to learn to read and write. So, I think that there is such power in people coming forward and we really appreciate when they share their stories. Because I agree, Joe, that if we can shine a light on this issue, more people will become familiar with where the gaps in law and policy exist. I think at the same time, quite understandably, this is an incredibly difficult topic to talk about. [00:43:24]

ALLEGRA FISHEL: I would just add following that, that I still think that sexual harassment, whether it involves women or members of the LGBTQ community, is something that our society really doesn't get. That creates tremendous stigma and shame for victims who might come forward. We work primarily with low-wage workers and even with all of the intersectionality, even when they're undocumented, even when maybe they don't speak English very well, if they don't get paid overtime, they're able to go and make that complaint. They are able to show their paycheck and say, "Hey, I'm owed more." But when it comes to, let's say for a woman to come forward and talk about some kind of sexual harassment or other sexual assault violation on the job, I think our society still puts so much sense of shame and stigma to that type of complaint that we really need to work on what kind of social messaging, changes in views, I think that is beginning to happen. I think the #MeToo movement has done some very, very positive things to move the credibility issue toward believing survivors. Believing individuals who have survived sexual harassment and/or sexual assault in the

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<sup>8</sup> The Maintenance Cooperation Trust Fund is abbreviated as MCTF.



workplace is sometimes what our clients want most. I know from my own experience working with victims of sexual harassment and workplace violence over the past twenty-five years that most want more than anything else to be believed and to have their employers make the harassment stop. [00:44:49]

Not being believed often leads to employees being pushed out after the harm is done or leading to employees resigning. That can be far worse than verbal harassment. I'm not saying always. Obviously, if they're assaulted, it might not be. But to be believed, to be valued, and to have redress is so important and I still think there's so much social messaging that's very destructive to women about coming forward to complain about sexual harassment. Women still blame themselves for unlawful sexual harassment at work, even sometimes for enduring sexual violence in the workplace because women and men have been socialized with some very destructive notions about why women are targeted for such conduct. Did you want to say something else, Joe?

JOE SELLERS: Why don't we go to the next topic.

ALLEGRA FISHEL: Okay.

JOE SELLERS: Actually, there's one thing I do want to add as an example of how social science research helped explain to a jury that the reluctance of some women to lodge complaints about sexual harassment at the time it occurred shouldn't be construed as evidence that the harassment never occurred. In a class action sexual harassment case we tried to a jury in the mid-1990s against the DC Department of Corrections on behalf of several hundred women correctional officers, there had been few complaints of harassment lodged before the class action was filed. While the women officers were encompassed within the class, most hadn't made their own individual claims. The question raised, of course, was why not? We called as an expert witness a psychiatrist who specialized in treating victims of harassment and other kinds of abuse. Drawing upon years of clinical experience and familiarity with the research in this area, the expert witness educated the jury about the kinds of forces that deter harassment complaints, many of which Bernice has identified. After examining a sampling of the class members, the expert witness was able to testify about the reasons those class members had been reluctant to lodge complaints about the harassment to which they were subject. The interviewed class members explained their reluctance as due to an array of factors, including fear of being pariahs among their co-workers, as well as of being blamed for the sexual overtures directed at them and fear that, as correctional officers, lodging complaints would have portrayed them as weak and unable to tolerate the harassment. After the plaintiffs' verdict, the jurors interviewed reported that this

testimony was very effective in helping them credit the complaints of harassment made by women at trial who had not lodged complaints before. [00:47:17]

This example illustrates the importance of the research and insights into human behavior that our friends in the fields of social science, whether they're mental health professionals or have other areas of expertise, can bring to educate the courts and the public about the phenomenon of sexual harassment in ways our clients who have been victims of this misconduct may be unable to explain.

ALEXIS RONICKHER: I wanted to riff off of that a bit too because I do think that educating both the judiciary and jurors that survivors of trauma don't engage in the same kind of conduct that a reasonable person, like a judge, might think should be evidence of harassment is important. So many of the clients that we have, particularly in this age of text, come to us and their text messages show this. It happens over and over again, this effort to normalize the relationship that is going on. So, you have this history of text messages and sometimes e-mails and other things, but text messages have really (chuckles) come up a lot. Even after assaults, there will be, in the next day, a communication that attempts to normalize it, and I think that it's really important as practitioners to—you won't always be successful to get a judge to allow you to do so since there is this judicial hostility even towards social sciences—but to educate people who have not endured trauma or have not gone through this about how you would respond is not going to be how someone who has survived trauma responds. Whether it's to complain, whether it's to normalize through communications to try to segregate that trauma, but it is an important tool that we should still attempt to use. [00:49:10]

ALLEGRA FISHEL: Alexis, would you think in that kind of situation you need an expert to help navigate the case?

ALEXIS RONICKHER: Well, I certainly have in those cases when—we haven't ever gotten to a point of needing to try one of those cases, but I have been prepared to think that we would get an expert to particularly explain that this is how victims—this is a normal response for victims of trauma. Because it really just comes off, if you're not somebody who has survived trauma, as discordant and as evidence that it didn't happen. It's just really essential. I think my memory serves me that there was some of this evidence in the Weinstein trial because there was some of that same kind of attempts to normalize. Even more so. It goes along also with saving your job or saving that relationship. But, yes, I think that it would come through, through an expert. [00:50:11]

ALLEGRA FISHEL: Go ahead, Joe.

(background noise 00:50:14)

JOE SELLERS: In another respect, unfortunately, the legal framework for addressing sexual harassment is poorly suited to the realities of workplace harassment. The pair of decisions issued by the Supreme Court twenty-five years ago in the *Faragher* and *Ellerth* cases set forth rules for holding employers liable for harassment committed by lower-level managers while also imposing on workers aggrieved by sexual harassment the requirement that they make timely complaints through an employer's complaint process. The Court only imposed on harassment victims the expectation that any failure to participate in their employer's complaint process not be unreasonable. So, there is some room to allow victims to pursue harassment complaints after failing to participate in their employer's complaint process if they have good reasons for doing so. [00:51:23]

Victims of harassment may be forgiven for their reluctance to participate in their employer's complaint process, for example, if the complaint must be lodged with the perpetrator or the complaint process fails to protect the privacy sought by the aggrieved worker, or the presence of harassment is so pervasive in the workplace that the complaint process lacks credibility. These are not clear rules, however. Instead, the availability of these reasons to excuse victims from promptly lodging complaints with their employers depends on the discretion of the courts that are adjudicating their claims. This is another place where I think the use of social science can help courts to appreciate the circumstances that may excuse non-compliance with the employer's complaint process. [00:52:02]

Unfortunately, I think, the unwelcomeness standard, the requirements to satisfy the severe and pervasive standard, and the *Faragher-Ellerth* paradigm have each erected requirements that victims of sexual harassment must satisfy, which are often unrealistic given the actual dynamics of sexual harassment in the workplace.

ALLEGRA FISHEL: Ann, do you want to talk a little bit about where practitioners need to look instead of Title VII? What can we do? There are so many constraints under Title VII. They're not just legal constraints; they are constraints that really impact the ability of targeted individuals to seek redress.

ANN MCGINLEY: Yes. Certainly, I don't think we can rely on the federal courts, the lower federal courts, or the Supreme Court, or Congress to correct any problems. The Trump administration has packed the lower federal benches as well as the Supreme Court. Moreover, most of the cases decided by lower courts are virtually unreviewable. All of these procedural cases don't get up to the Supreme Court. And really, even if they were reviewed, we don't know if the Supreme Court would go the right way. Even when the

Supreme Court has erred in the past, we had Congress that could amend the statute to overturn the Court. We have, for example, the 1991 Civil Rights Act and the 2009 Lilly Ledbetter Act. I don't see those amendments happening especially now that we've seen what's going on with how difficult it is to enact voting rights legislation. [00:53:42]

So, my solution, as petty as it might be, is that we need to consider using state court. But even if we sue in state court using federal law, the cases are going to be removed to federal court. So, what we have to focus on now, at least for the people who are in good states that are progressive, is enacting good state and local laws that are better than Title VII. Actually, this is starting to happen and it's pretty interesting the way the state legislatures are acting, and the way state courts are also responding. So, there are many different changes. Some are recommended by, for instance, the National Women's Law Center and other non-profit groups. I don't know if this is going to happen but some of these new provisions in state laws are aspirational. But we really need state laws that say, "If you have one employee, it's sufficient, in order to be covered by the state anti-discrimination statute." As the students might not know, you have to have fifteen employees under Title VII to be a covered employer. [00:54:40]

We have to expand the statutes of limitation because right now, under federal law, they're either 180 or 300 days to file with the EEOC. That's way too short. State laws can expand the time permitted to file under state law in state court or in-state agencies. State laws should not have caps on damages. Those federal caps are really problematic. I would argue that we should eliminate the severe or pervasive standard, and some jurisdictions are doing that. Even if they're using the severe or pervasive standard in the state law, other jurisdictions are saying expressly in the state law that a single incidence is sufficient. Lawyers in the Ninth Circuit used to say that one "boob grab" was fine, based on the precedent. Incidents like that can meet the standard, and state legislatures and state courts are expressly saying that the community standards are changing. They say that we should be judged by today's standard and that it should be highly unusual to grant summary judgment on a severe or pervasive standard. [00:55:45]

Even if the state law has the same language as the federal law does, state courts, as I mentioned, can interpret the same language as more protective than the federal courts do. Certainly, many state courts don't grant motions for summary judgment as aggressively or motions to dismiss as aggressively. Some state laws are actually requiring policies and training. I'd love to see more on this because most of the research shows that policies aren't very good and they don't really work. Sometimes the training actually makes hostile environments worse. [00:56:25]

But I do think we need more research about polices and training. First of all, I think if you're going to have a good policy, you need to look at the EEOC Sexual Harassment Task Force. I thought the EEOC did a pretty good job talking about this, so that Report which is available online, is a great source of information. Another thing state law can do is recognize intersectional harassment. Also, our policies and training should include all types of harassment including sex, race, et cetera. So, as I've said, we're still unclear about what policies can do, but in a perfect world, we could get employers to open up their workplaces to social scientists to do empirical research in the workplace, because I do think a lot of harassment is industry-dependent. Now, are employers going to do that? I don't know. There are some suggestions that employers should have limited immunity for cooperation, but I don't know what I think about that. I'd have to see how it looks. [00:57:13]

As the state laws change, I also think we need to do empirical research on these various state provisions to find out what works and what doesn't. Hopefully, when Congress is ready to pass progressive legislation in the future, the states will actually be the "laboratories of democracy," and many of the things we find out from the states could be enacted into federal law. [00:57:39]

ALLEGRA FISHEL: Those are important comments, Ann. Bernice, if you were going to address legal or policy considerations that impact some or all of low-wage workers that you've had the opportunity to investigate, what would you say are some of the greatest barriers to women keeping silent when they are being abused and/or harassed in workplace settings? [00:58:21]

BERNICE YEUNG: Wow, that's a hefty question (laughs).

ALLEGRA FISHEL: I know that's big, but you could narrow the answer if you prefer.

BERNICE YEUNG: What I think—to kind of get underneath this whole trouble of expecting a complainant to come forward before it triggers any response. I think of that the worker advocacy group that I mentioned earlier from Los Angeles, The Maintenance Cooperation Trust Fund. There are other organizations like that out there in various parts of the country who are doing that kind of direct outreach to the hardest-to-reach populations. I think those are very impactful because some of these workers have no idea where to turn even if they want to make a complaint or they don't have time to go and make the complaint during normal working business hours at the government agency that they need to go and visit. Maybe they can't afford the bus fare. There are so many practical limitations to making that complaint, and having someone doing that targeted outreach seems like a

very powerful approach that is full of possibilities. [00:59:32]

I think there's also something just very important about—and I know this can sound trite—developing worker empowerment and worker education around these issues. I think for some of us, we might think, “Oh, I've been reading all of the #MeToo articles. I'm fully aware of this issue and so everybody else must be.” But I think there is a decent segment of the workforce out there that is not clear on what sexual harassment actually is and that they are experiencing it. They just know it doesn't feel right, but as one janitor put it to us, “I just thought that was just the culture of the buildings at night.” Again, a normalizing of that problematic behavior. [01:00:15]

So, I think having those direct conversations, even if it seems very simple, is important, especially if workers are given the opportunity to come together and talk about their experiences. So, Georgina, who I mentioned earlier, was part of a novel program called “promotoras”, where a number of survivors came together and talked about what they had experienced on the job. In the process, they realized they weren't alone. They developed the vocabulary for talking about it. They learned their rights. The idea behind a promotora program is that each one teaches one. And again, it seems very straightforward, but in just having those conversations, it gave Georgina a sense of empowerment, and she's taken that into every job that she's gone into ever since then, and has been a leader in efforts at the California state level to pass legislation that would require increased training around sexual harassment for the janitorial industry. [01:01:13]

I think also filing that lawsuit and confronting her employer was actually a very empowering moment for her. So, I think that once workers are able to get plugged into that system and figure out how to access and have the supports in place to really facilitate accessing this system, I think a lot of good can come of it. I guess finally, I do think culture change within the workplace is so critical. It seems like such a pie-in-the-sky idea of, how do we erase toxic masculinity? How do we change the culture of the buildings at night? But I think I've seen some examples of farmworker trainings where the concepts of bystander intervention were introduced, where it was made very explicit that everybody in that room had a responsibility and was empowered to support a coworker who was going through a problematic situation; where it was made clear that there were multiple ways for that worker, or workers, to make complaints not only directly to the employer but also through third-party organizations. I think just laying out this information in a clear way for a lot of the workers is a big step forward. [01:02:39]

ALLEGRA FISHEL: That's very valuable information, Bernice. Thank you. I just want to jump in and say just a couple of things with that. I live in New York City, obviously, in New York state, which has mandatory sexual

harassment training, and on the state level, it's for every employer with even just one employee. And yet, despite this mandatory training law, many employees have never received this training. They still have absolutely no idea who to go to, how to make those complaints, and so that's why when you're saying, Bernice, that they don't know how to complain or trust that complaining is safe, i.e., that it won't detrimentally impact their jobs, that is critically important. Most important of all, most workers don't know their legal rights even in cities such as New York with broad sexual harassment prevention laws and mandatory training. That's a huge problem. I just want to say I think that goes back to what you were saying, Joe, that there has to be some kind of government accountability because otherwise, it's just piecemeal one person coming forward at a time. I know you want to say something, Ann. (crosstalk 01:04:01)

ANN MCGINLEY: Just one sentence and then Alexis I think wanted to— just one sentence.

ALLEGRA FISHEL: Please, please.

ANN MCGINLEY: Yes, it's kind of shocking that we're all sitting here, and we're all saying all of these great things, and not one of us has mentioned the word "unions." That's because the law is really bad when it comes to unionization. But that change, if we were able to change how the laws were enforced as far as unionization, I think we could go a long way. Of course, it would have to cover farmworkers and people like that who are not covered right now. [01:04:40]

ALLEGRA FISHEL: But also, just to add one thing, unions don't always protect sexual harassment victims. For instance, in one case in which we represent a unionized worker, we just got a ruling that the union is refusing to represent our client who was harassed on the job. I have seen this happen many times before this case. Unions so often don't take an interest in individual sexual harassment cases.

ANN MCGINLEY: Yes. So, we're talking about the unions that are dominated by men, I guess.

ALLEGRA FISHEL: (laughs) Are there other unions?

ANN MCGINLEY: Well, actually, in Las Vegas we've gotten some good things to protect female workers who work in the hotels, largely because there are many women in the unions. For example, panic buttons in the hotel rooms for cleaners who work there, et cetera. But I don't want to take any more time.

ALLEGRA FISHEL: Thank you, Ann, for your good point about unions being able to take collective action on behalf of a group of workers. Alexis, did you want to add to this?

ALEXIS RONICKHER: I wanted to just refer back to what Bernice said

about bystander engagement. Going back to my comment relatively early, which is proving the case, I can tell you that in the cases where someone has spoken up, a survivor of sexual harassment reports internally, and someone speaks up and says, “Yes, I saw something.” That changes the dynamic hugely and I also represent whistleblowers. So, I’m keenly aware of this. Being a bystander who speaks up, also known as a whistleblower, is very scary. If employers really do want to change the culture, they need to embolden bystanders to speak up and make it clear that that’s the expectation in the workplace. That if you see something, you say something. As I said, most every client I’ve had who suffered from sexual harassment has been in a vulnerable position. So, having someone else speak up who is not as vulnerable can make the biggest difference. [01:06:47]

And then I’m just going to throw out one other thought I had when we were talking changes that could happen. This is a little out-of-the-box, but I’ve been thinking a lot about—so often you have to have a conversation with a client about, “Well, if you move forward, this is going to be a public action and we know that the deck is stacked against you,” as the stats that Ann shared made clear. And, “Your name is going to be tied. You’re going to be a public litigant. So, I was just thinking, wouldn’t it be a change if in sexual assault cases, if the parties could choose to proceed pseudonymously, maybe even until trial, right? So, you’re not putting your entire career on the line knowing that the deck is stacked against you. [01:07:40]

I know that open courts are open information. But I was just thinking of how many more of my clients would have felt able to move forward despite all of the legal hurdles, despite the psychological harm of being a plaintiff, if they weren’t jeopardizing their career for the rest of their life by being a public litigant. So, I just want to throw that out there because I think that is under-considered when people talk about going forward. I mean, I can’t tell you how many times a client of mine who sues publicly, they have to go and start their own business, because who’s going to hire a public litigant?

ALLEGRA FISHEL: Joe, do you want to close us out? Because we actually have a lot of questions. I’d love to get to those questions but please wrap up for us.

JOE SELLERS: Yes, I have two really quick points in response to your question about other things that can be done to enhance the protections against workplace harassment.

ALLEGRA FISHEL: That’s fine, Joe. [01:08:35]

JOE SELLERS: First, the EEOC task force identified factors that can mitigate the likelihood of harassment flourishing in a workplace and those factors that can aggravate or heighten the risk of harassment. I commend the discussion of those factors, set forth in the Task Force Report to those



employers, and I believe there are many of them, which are genuinely concerned about protecting against harassment. One of the aggravating factors was assigning workers to locations where they are isolated, as Bernice was discussing. Such isolation alone or in combination with other aggravating factors can increase the vulnerability to sexual harassment. Conscientious employers can anticipate these kinds of vulnerabilities and provide enhanced protections. [01:09:29]

Second, the legal standards we've discussed that govern the adjudication of sexual harassment claims were created by the courts and not enacted as statutory language. They were informed in part by amicus briefs that reported the social science research available at the time. We should continue to educate the courts, and especially the Supreme Court, about the realities of the workplace and ways in which the legal standards governing adjudication of sexual harassment claims should be fine-tuned or revised altogether to reflect the current realities of the workplaces in this country. [01:10:17]

ALLEGRA FISHEL: That's great.

JOE SELLERS: Thank you.

ALLEGRA FISHEL: Thank you so much. So, I'm just going to try to summarize a few questions. I know we don't have a lot of time. First, Ann, a lot of folks want the statistical information you referenced. So, if that's available, maybe we can work with the conference coordinator to get that out. But there are some questions about that.

ANN MCGINLEY: Yes, I have sources. It's in my paper. So, if I could just pull this out. But that probably won't be published for a while. So, I can pull them out, put them on a page, and maybe send them to Corine or whoever wants them. [01:10:52]

ALLEGRA FISHEL: Thank you so much. So, here's a really interesting question. It says, "Thank you for talking about the societal victimization of Black men and boys. It's not often discussed in these public spaces. What happens when men are the victims? We often hear about men as perpetrators. Vera and others have done studies, et cetera, on this." So, that's a good question for you, Ann.

ANN MCGINLEY: I didn't hear the question. I heard a comment.

ALLEGRA FISHEL: What happens when men are the victims? We often hear about men as perpetrators. Vera and others have done studies, et cetera, on this. I guess I mean, what happens when men are the victims?

ANN MCGINLEY: Yes. So, basically, I want to make clear that the research also shows that when men are the victims, usually the perpetrators are other men. Very infrequently, a small percentage of cases, women are victimizing men, but generally when men are victims, it's other men. That's where this masculinities theory fits in with the idea being that other men are

victimizing men often because either they don't fit in with the group, they're not masculine enough, and they are stereotypically too feminine. They thought they were gay. I mean, there are a whole lot of things. [01:12:12]

Luckily, *Bostock* has cut off some of that, but even so, what's happened seems to have happened a lot with the courts.<sup>9</sup> It's— they just don't even see it. So, men are victims of other men just like in high school. I mean, I've done some research and I've done some Title IX work, and in grade school even there's a lot of really horrible stuff. I wouldn't even want to tell you the things they're doing to each other. But very physical, sexual assaults that are the same behaviors that occurred in *Oncale*.<sup>10</sup> Unfortunately, the courts aren't really recognizing it. It's either horseplay, "boys will be boys," or not severe or pervasive enough. [01:12:56]

Go head Alexis.

ALEXIS RONICKHER: We had a case in which it was a female harasser and a male harassee and gender was not the important piece. It was power, right? The female harasser was very powerful and then the male harassee was in a position where he couldn't say no. But I will say the social stigma of coming forward in that is very immense for the survivor of that harassment. Not to belittle what women experience but to society's expectation of men. So, I think that while it's very uncommon, the harm that they experience is that much more for not living up to social expectations. Even coming forward for any kind of redress is undermining of your very sense of masculinity. So, I think it's a very terrible experience. [01:14:00]

ANN MCGINLEY: I published an article called *Reasonable Men*,<sup>11</sup> which discussed a case with a similar fact pattern where a female co-worker harassed a male co-worker, and the question was in the Ninth Circuit whether they should use the reasonable woman-reasonable man standard. But the reasonable man standard is a totally different standard because most men don't think that's a bad thing to be harassed by a woman. Or at least that's what the workers in the case said. That was kind of the way the lower court handled it. The Ninth Circuit overturned it but didn't talk about it. It just

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9. *Bostock v. Clayton Cnty., Ga.*, 140 U.S. 1731, 1737 (2020) (holding that discrimination based on a persons' sexual orientation or transgender status is discrimination prohibited because of sex under Title VII).

10. *Oncale v. Sundowner Serv., Inc.*, 523 U.S. 75, 79 (1978) (holding that Title VII forbids sexual harassment by individuals of the same sex, and that romantic or sexual interest need not motivate the harassment for it to be illegal).

11. Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1 (2012) (discussing EEOC v. Prospect Airport Services, No. 2:05-01125-KJD-GWF, 2007 U.S. Dist. LEXIS 72904, at \*16, \*22 (D. Nev. Sept. 27, 2007), rev'd, 621 F.3d 991 (9th Cir. 2010)).

focused on welcomeness of the behavior, not the severe or pervasive standard.

ALEXIS RONICKHER: I read that case recently (chuckles).

ALLEGRA FISHEL: Let me ask another question. This is another question; I won't be able to get nearly to all of them. But the statistics about the uphill battle that employees face in discrimination claims are sobering but not surprising. What suggestions do the speakers have about educating the public and judges, many of whom have no background in discrimination law, so that plaintiffs have a better chance of prevailing? Who would like to respond to that? [01:14:50]

Well maybe get other judges. We can't control many instances of who gets placed on our judicial benches, certainly not in federal court, but you can potentially influence magistrate judges. New York just received appointments for many very progressive women of color magistrates. The Biden administration is appointing women and women of color to federal judgeships. I think these appointments are extremely important because we need more judges that look like the workers that many of us are representing in sexual harassment and/or assault cases. We need more judges that can relate to our client's experiences. Does anyone else have any other ideas, responses, or thoughts? If not, I will go onto another question. [01:16:03]

What about this question: how do we get information out to people who need it? How do we provide meaningful public education? Is there a type of form? Is there a way to connect with workers? I know Bernice, you gave some examples of these worker's rights organizations, but it sounded a little bit like they were more one-offs than a real presence for a lot of the workers. Did I misunderstand that? If they are sort of one-off, how could we increase that kind of support for the most vulnerable workers? [01:16:56]

BERNICE YEUNG: They did have a very targeted weekly outreach. I mean, this one outreach worker would carry a huge stack of papers in her purse and hand them out. There are also more concerted efforts like the Fair Food Program in Florida, which some of you may have heard of, that has a whole infrastructure around improved pay and zero tolerance for sexual harassment in the fields. There's an auditing system that's very powerful and makes sure that zero tolerance for sexual harassment is actually upheld in the farms, which I think is a critical piece of it all. I think the other aspect of that is the auditing is unannounced and when they do it, they're going to talk to more than half of the workers in the fields about what's actually happening on the job. So, that's a way of achieving some level of accountability and making it clear that if things are not okay at the workplace, that there is a clear avenue for surfacing, discussing it, and making it known. [01:18:03]

ALLEGRA FISHEL: Yes, I'm getting signals from the powers that be that

we have to close out this panel. I think that the other questions in the chat were provided to us. I think most of us have said we welcome folks contacting us by e-mail. I'm sorry that we're limiting this pretty robust conversation right now, but I do hope all of the audience feels that they can reach out to the panelists. I know that I can personally speak for myself if anyone wants to talk about any of these topics further, to please contact me. I really want to thank you, in the order that I see you in my boxes (chuckles). Alexis, and Joe, and Ann, and Bernice, and the dog, and to say that it has been so great talking with all of you. I know I've learned so much. I hope that the next time that we do this it is in person. So, thank you.

ALEXIS RONICKHER: Thank you.

BERNICE YEUNG: Thank you.

JOE SELLERS: Thank you.

FACILITATOR: I hope you can hear the applause that was briefly in the main room that we're watching this in. But thank you to all of our panelists and we will be back at 4:30 for our next panel. Thank you so much.

END TRANSCRIPT

