

# FIXING WATCHES WITH SLEDGEHAMMERS: THE QUESTIONABLE EMBRACE OF EMPLOYEE SEXUAL HARASSMENT TRAINING BY THE LEGAL PROFESSION\*

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## I. INTRODUCTION

Although judicially recognized as a form of sex discrimination for over two decades,<sup>1</sup> sexual harassment remains a persistent problem for many American workers, especially those who are women. The recent suits brought against and ultimately settled by Mitsubishi and Ford illustrate how pervasive sexual harassment can be in a given workplace and, more importantly, how difficult it can be to eradicate.<sup>2</sup> Such working conditions clearly take their toll. Social science research consistently concludes that sex harassment produces adverse "psychological, job related, and health effects."<sup>3</sup>

Awareness about sexual harassment and fear of liability has prompted many employers to promulgate sexual harassment policies

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\* This essay is based in part on work previously published by the author. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1 (2001).

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1. Sexual harassment was judicially recognized as a form of sex discrimination in 1976. *Williams v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976), *rev'd on other grounds sub nom.*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). For important critiques of current sexual harassment doctrine see Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Katherine Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169 (2001); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

2. See Reed Abelson, *If Women Complain, Does Ford Listen?*, N.Y. TIMES, Jan. 28, 2001, at BU1; Joann Muller, *Ford: The High Cost of Harassment*, BUS. WK., Nov. 15, 1999, at 94; *Plan To Distribute Mitsubishi Settlement is Approved by Judge*, WALL ST. J., June 28, 1999, available at 1999 WL-WSJ 5458102 [hereinafter *Mitsubishi Settlement*].

3. Liberty J. Munson et al., *Longitudinal Analysis of Dispositional Influences and Sexual Harassment: Effects on Job and Psychological Outcomes*, PERSONNEL PSYCHOL., Apr. 1, 2000, available at 2000 WL 19364662.

and adopt sexual harassment training programs. This essay interrogates the widely shared conviction that drives sexual harassment training: the belief that employee education can prevent, or at least greatly curb, sexual harassment. This premise, broadly held and rarely questioned by the legal profession, has spawned a multi-billion dollar sexual harassment training industry staffed by attorneys, consultants, and human resource professionals who offer programs aimed at litigation prevention.<sup>4</sup>

Focusing on the twin claims typically made by training advocates—that education can alter employee behavior<sup>5</sup> and limit employer liability for harassment<sup>6</sup>—this essay examines the empirical support for the first claim and assesses the response of courts in sexual harassment suits to evidence that employers conducted training. In fact, as will be discussed below, there is absolutely no empirical support for the premise behind the instruction—that it fosters employee tolerance and greatly alters workplace culture. Nonetheless, over time, the second claim of training advocates—that it limits liability for harassment—has proven to be true. Training programs were initially cited by lower courts as favorable evidence for employers that reasonable steps had been taken to prevent or correct harassment. Moreover, a recent turn in the United States Supreme Court's civil rights jurisprudence explicitly confirms the accuracy of the training advocates' assertions—training programs do indeed limit liability for harassment.

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4. Stuart Silverstein, *Fear of Lawsuits Spurs the Birth of a New Industry*, L.A. TIMES, June 27, 1998, at A1.

5. E.g., Barry J. Baroni, *Unwelcome Advances: Sexual Harassment in the Workplace*, TRAINING & DEV., May 1992, at 19-20 (stating that employees who are taught about actionable conduct tend to avoid it); Joanne Cole, *Legal Sexual Harassment: New Rules, New Behavior*, HR FOCUS, Mar. 1999, at 1, 14 (citing consultant Darlene Orlov, who says that her work involves "changing behavior"); Mindy Friedler, *Sexual Harassment: Prevention Is Best Cure*, N.Y. L.J., Jan. 11, 1994, at 5 (implying that training can help employees become aware that some behavior is objectionable); Rebecca A. Thacker & Haidee Allerton, *Preventing Sexual Harassment in the Workplace*, TRAINING & DEV., Feb. 1992, at 50-51 (arguing that sexual harassment "training can be the first step toward eliminating the behavior").

6. E.g., Jennifer J. Laabs, *Sexual Harassment*, PERSONNEL J., Feb. 1995, at 36 ("When you combine a strong policy, regular training and a detailed and timely investigation procedure into your sexual harassment strategy, experts agree that you may have a fighting chance in limiting your liability."); Garry G. Mathiason & Mark A. de Bernardo, *The Emerging Law of Training*, FED. LAW., May 1998, at 24, 31 ("[I]t is now very clear that employers face significant liability if they fail to thoroughly train employees in all aspects of sexual harassment."); Eric Wallach & Stacey B. Creem, *Handling Sexual Harassment Charges in the Workplace*, N.Y. L.J., July 16, 1996, at 1 (describing a "comprehensive education program" as the first step employers can take "to insulate themselves from liability").

To facilitate the discussion of the Supreme Court's embrace of employee education, this essay references a sociology study that provides the basis for a more insightful understanding of the implications of the training phenomenon.<sup>7</sup> The study is part of a recent strand of law and society research. Rather than view law as an autonomous force imposed upon the culture that it regulates, socio-legal scholars increasingly acknowledge that those subject to legal regulation act upon and influence legal rules.<sup>8</sup> Recognizing a "complex reciprocity" between "law-on-the-books" and society at large, the focus of this research is "law-in-action"; i.e., an examination of how formal legal rules are "altered, manipulated, elaborated, or ignored by social actors."<sup>9</sup>

In the employment area, this approach requires examining employers' responses to and effect upon employment discrimination law. A close look at the decades-long practice of sexual harassment training reveals why the Supreme Court's civil rights jurisprudence took the turn that it has and highlights the danger inherent in allowing those subject to the law to define its terms.

## II. UNDERSTANDING EMPLOYERS' RESPONSES TO AND EFFECT UPON CIVIL RIGHTS LAW

Sociologists are able to document an impressive range of employer-initiated policy innovations since the passage of Title VII of the Civil Rights Act of 1964 (Title VII).<sup>10</sup> Responding to the ambiguity in civil rights legislation, which prohibits discrimination but does not require specific employment actions beyond that, organizations acted to demonstrate their adherence to principles of equality and to the law itself.<sup>11</sup> The compliance structures created include: nonunion grievance

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7. See *infra* notes 17-36 and accompanying text.

8. E.g., Frank Munger, *Mapping Law and Society*, in *CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH* 21, 53 (Austin Sarat et al. eds., 1998).

9. Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 *LAW & SOC. INQUIRY* 903, 907-08 (1997).

10. 42 U.S.C. §§ 2000e to 2000e-17 (1994). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2.

11. Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 *RES. SOC. STRATIFICATION & MOBILITY* 107, 108 (1999).

procedures,<sup>12</sup> equal employment opportunity (EEO) and affirmative action offices,<sup>13</sup> formal promotion mechanisms,<sup>14</sup> and employment-at-will clauses designed to forestall wrongful discharge suits.<sup>15</sup> Anti-discrimination training has long been a part of the organizational response.<sup>16</sup>

One particular sociological study, however, has had a profound impact on my thinking about preventative practices such as sexual harassment training and their role in catalyzing doctrinal change. Lauren Edelman and her colleagues recently provided strong support for the theory that the process of regulation in the civil rights area is endogenous.<sup>17</sup> Rather than view law as an outside force imposed upon organizations, their theory of legal endogeneity posits that the "content and meaning of law is determined [by the organizations] it is designed to regulate."<sup>18</sup> Edelman and her colleagues argue that employers and their advocates actively create the definition of legal compliance with anti-discrimination law and that courts, over time, legitimate those efforts by making them relevant to the determination of liability.<sup>19</sup> The authors use EEO grievance procedures, a common litigation prevention tool, as an example of this process.

The study's review of business and professional journals revealed that in the late 1970s and early 1980s human resource professionals and management attorneys began making claims that grievance procedures would shield employers from liability for discrimination.<sup>20</sup> At that time, however, there was almost no legal support for such an assertion. In fact, few discrimination cases before the mid-1980s even mention grievance procedures.<sup>21</sup> By the mid-1980s, however, "the theme that

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12. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990).

13. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

14. Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396 (1993).

15. John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Uncertainty in U.S. Firms, 1955-1985*, 61 AM. SOC. REV. 794 (1996).

16. Edelman, *supra* note 12, at 1435.

17. See Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures As Rational Myth*, 105 AM. J. SOC. 406 (1999).

18. *Id.* at 407.

19. See *id.* at 409.

20. *Id.* at 412-13.

21. *Id.* at 432.

grievance procedures could internalize disputes and gain favor with courts" was well established in the personnel literature.<sup>22</sup>

In 1986, the Supreme Court decided a sexual harassment case that provided a big boost for the claim that a grievance procedure could forestall liability.<sup>23</sup> In *Meritor Savings Bank v. Vinson*,<sup>24</sup> the Court for the first time recognized that unwelcome sexual advances that create a hostile work environment violate Title VII.<sup>25</sup> As important as that ruling is, it is actually dicta in the opinion that provided support for grievance procedure advocates. Writing for the majority, Justice Rehnquist, in a section of the opinion discussing employer liability for hostile work environment harassment, directly addressed an interesting argument posited by the defense. The bank argued that its anti-discrimination policy and the victim's failure to use an established employee grievance procedure to complain about her supervisor's harassment should insulate it from liability.<sup>26</sup>

Justice Rehnquist rejected the employer's argument, noting that the bank's anti-discrimination policy did not specifically discuss sexual harassment. Moreover, the grievance procedure required that the employee complain directly to her supervisor, an action most victims would be reluctant to take when the harassment perpetrator is that very same supervisor.<sup>27</sup> Rehnquist did note, however, that the bank's defense would be far "stronger if its procedures were better calculated to encourage victims of harassment to come forward."<sup>28</sup> This observation implicitly suggests that employers might be able to shield themselves from liability by adopting procedures for preventing or minimizing harassment when it occurs.

Edelman's study found that after the *Vinson* decision, employers began increasingly to raise grievance procedures as a bar to liability and lower courts increasingly began to defer to their arguments.<sup>29</sup> Twelve years after the Court's decision in *Vinson*, the Supreme Court fully incorporated the grievance procedure defense into sexual harassment doctrine in two decisions,<sup>30</sup> which will be discussed more fully below.<sup>31</sup>

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22. Edleman et al., *supra* note 17, at 414.

23. *Id.* at 434-35.

24. 477 U.S. 57 (1986).

25. *Id.* at 65.

26. *Id.* at 70-73.

27. *Id.* at 73.

28. *Id.* at 73.

29. Edelman et al., *supra* note 17, at 439.

30. *Id.* at 435-36.

31. See *infra* notes 56-73 and accompanying text.

Thus, those subject to anti-discrimination law, through their responses to it, defined a form of legal compliance ultimately recognized and legitimated by the judiciary.<sup>32</sup> In other words, the law has come to greatly resemble the claims made in the personnel literature in the late 1970s and early 1980s.

There are problems, however, with allowing those parties constrained by a law to define its terms. Grievance procedures, for example, may actually undercut the legal rights of the employees who use them.<sup>33</sup> Edelman and her colleagues warn that the absence of due process protections, the lack of the full panoply of remedies available in litigation, and the propensity of complaint handlers to recast complaints as managerial problems rather than instances of discrimination may adversely affect the claims of grievants.<sup>34</sup> Moreover, employees may be legitimately concerned about retaliation or decisionmaker bias and decide not to use such procedures.<sup>35</sup> If courts uncritically accept grievance procedures, without understanding the subtle organizational context in which they are located, "legal ideals may be compromised."<sup>36</sup>

The study's admonitory conclusions are highly relevant to the practice of sexual harassment training. Part III provides what I hope is a nuanced interpretation of those educational efforts and their effects on sexual harassment doctrine based on Edelman's theory of legal endogeneity.

### III. A NUANCED INTERPRETATION OF SEXUAL HARASSMENT TRAINING AND DOCTRINE

Sexual harassment training nicely fits Edelman's endogeneity model because it is an example of organizations actively creating the terms of legal compliance and judicial deference to those efforts. Comprehensive employee education has been promoted as a method for

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32. See Edelman et al., *supra* note 17, at 436.

33. See *id.* at 448-49. For a fascinating and much more optimistic appraisal of employers' internal problem-solving systems, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

34. See Edelman et al., *supra* note 17, at 448-49; see also Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

35. See Edelman et al., *supra* note 17, at 448-49; see also Krieger, *supra* note 1, at 185-86 (describing the reasons why women fail to report sexual harassment through formal channels).

36. Edelman et al., *supra* note 17, at 449.

preventing employment litigation for at least two decades. As one early training advocate noted, “[t]he key to reducing an employer’s exposure to unjust dismissal and other employment-related litigation is supervisor training.”<sup>37</sup> By 1990, anti-discrimination seminars were quite common.<sup>38</sup>

Harassment training, in particular, can be understood as an employer response to ambiguity in civil rights law.<sup>39</sup> A brief history of that response and the Supreme Court’s recent endorsement of it will be discussed in Sections A and B below.

#### A. Sexual Harassment Training as a Response to Ambiguity in Civil Rights Law

Many of the first anti-discrimination training programs were designed to educate management on the subject of sexual harassment.<sup>40</sup> Such workshops were likely prompted in great part by the Equal Employment Opportunity Commission’s (EEOC) 1980 *Guidelines on Discrimination Because of Sex* (Guidelines).<sup>41</sup> The Guidelines expressly define sexual harassment as a violation of Title VII,<sup>42</sup> and at the time of their adoption chillingly stated that employers were strictly liable for supervisor harassment.<sup>43</sup> Harassment prevention is also referenced in the Guidelines as “the best tool for the elimination of sexual harassment.”<sup>44</sup> Suggested preventative steps that employers should undertake include informing employees of their rights and how to raise harassment claims, as well as “developing methods to sensitize all concerned.”<sup>45</sup>

There are a few important points to note about the prevention provision and the Guidelines in general. First, while the section on

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37. Susan G. Tanenbaum, *Employee Relations Guide*, in ADVANCED STRATEGIES IN EMPLOYMENT LAW 483, 515 (PLI Litig. & Admin. Practice Course, Handbook Series No. 342, 1987).

38. See Edelman, *supra* note 12, at 1435 (noting that respondents in the study “repeatedly emphasized the value of . . . workshops” that “demystify” Title VII and teach supervisors techniques that make it more likely that an organization will “prevail in lawsuits”).

39. See *supra* notes 10-16 and accompanying text.

40. Sally Jacobs, *Sexual Harassment*, 7 NEW ENG. BUS. 25 (1985), available at 1985 WL 2254793.

41. See *id.* Early court cases and Catherine MacKinnon’s pathbreaking book on the subject no doubt also influenced employer responses. See *supra* note 1; see generally CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

42. 29 C.F.R. § 1604.11(a) (2001).

43. 29 C.F.R. § 1604.11(c) (2001). This provision of the Guidelines was subsequently rescinded.

44. 29 C.F.R. § 1604.11(f) (2001).

45. *Id.*

prevention does not specifically mention educational programs, training is one obvious method by which a workforce can be sensitized and information can be conveyed about sexual harassment. Thus, while employers had to make an inferential leap to settle on training as a preventative technique, that leap was a small one.

Second, as one early commentator correctly noted, the provision "do[es] not imply, much less guarantee, the adoption of affirmative steps will immunize an employer from liability."<sup>46</sup> Yet the underlying logic of the provision is apparent: the best way to avoid liability is to decrease the incidence of harassment, which may perhaps be accomplished by taking the affirmative steps recommended. Indeed, the commentator himself recommended supervisory training in sexual harassment law as a necessary component of a preventative program.<sup>47</sup>

Third, it was understood at the time of the issuance of the Guidelines that they were not binding on the courts.<sup>48</sup> Rather, the rulings, interpretations, and opinions issued by the EEOC were and continue to be considered "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>49</sup> Thus, although it was possible that the courts might ultimately disregard the Guidelines, the risk that they might be judicially embraced certainly existed. Harking back to the sociological studies described in Part II, it makes sense that the ambiguity in the law—represented by both the Guidelines and the first harassment cases—prompted many employers to promulgate sexual harassment policies and develop training programs in the wake of the Guidelines' publication.<sup>50</sup> Notably, these early educational efforts were initiated despite the absence of a doctrinal mandate for training nor any express judicial statement that such programs could limit employer liability.

Over time, sexual harassment training has become a routine feature of the American workplace, with annual revenue for the training industry estimated to be in the billions.<sup>51</sup> Management attorneys and human resource specialists regularly counsel employers to educate

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46. Fred W. Suggs, Jr., *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAW. 176, 180 (1985).

47. See *id.* at 181.

48. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (noting that the EEOC does not have authority under Title VII to promulgate binding, substantive regulations).

49. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

50. See Horace A. Thompson III, *Employer Liability for Sexual Harassment after Vinson: The Regulation of 'Romance' in the Workplace*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION* 239, 249 (1989); Jacobs, *supra* note 40.

51. Silverstein, *supra* note 4, at A14.



employees in all aspects of sexual harassment in order to reduce the frequency of potentially actionable conduct, and correspondingly, employer liability.<sup>52</sup> Because litigation prevention remains the primary objective of sexual harassment training,<sup>53</sup> important cases like the 1986 *Vinson* decision, which made no mention of employee education at all but raised a host of questions about employer compliance, appear to fuel the training trend.<sup>54</sup> Indeed, demand for sexual harassment training has reportedly increased since 1998, when the Supreme Court handed down two decisions that signaled a major shift in Title VII jurisprudence and, ultimately, express judicial incorporation of the longstanding employer practice of harassment training into legal doctrine.<sup>55</sup>

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52. See Thompson, *supra* note 50, at 256 (noting that written policies are ineffective without "training of supervisors regarding prohibited conduct"); Baroni, *supra* note 5, at 19 (noting that "education and training can be an effective prevention tool"); Thacker & Allerton, *supra* note 5, at 50 ("Keep harassment incidents at bay by training employees in how to respond to them."); Howard G. Ziff & Donald G. Cherry, *Clear Policies Prevent Claims of Harassment*, N.Y. L.J., Apr. 4, 1994, at S1 ("Supervisors must be trained about sexual harassment."). The typical course has three integrated components. First and foremost, the workshops are designed to educate employees about applicable law. Mathiason & de Bernardo, *supra* note 6, at 31; Wallach & Creem, *supra* note 6, at 1. Next, the programs also function to disseminate information about the particular employer's sexual harassment policy and grievance procedure. Mathiason & de Bernardo, *supra* note 6, at 31; Wallach & Creem, *supra* note 6, at 1. Finally, training often aims to sensitize employees about permissible and prohibited behavior. Donald R. Livingston, *Current Developments in Sexual Harassment Law*, in GEORGETOWN UNIVERSITY LAW CENTER, TWELFTH ANNUAL EQUAL EMPLOYMENT OPPORTUNITY UPDATE 211, 229-30 (1994); Jay W. Waks, *Curbing Sexual Harassment in the Firms*, in THIRD ANNUAL EMPLOYMENT LAW & LITIGATION CONFERENCE 131, 135 (1994) (reprinted from NAT'L. L.J., Aug. 2, 1993) (discussing basic elements of a comprehensive sexual harassment policy); Wallach & Creem, *supra* note 6, at 1. Those attending sexual harassment seminars are frequently shown videotaped vignettes, and engage in role-playing and discussions of the course material. Cole, *supra* note 5, at 1; Laabs, *supra* note 6, at 36; Hellen Hemphill & Ray Haines, *Confronting Discrimination in Your Workplace*, HR FOCUS, July 1998, at S5; Brigid Moynahan, *Creating Harassment-Free Zones*, TRAINING & DEV., May 1993, at 70.

53. See Joann Keyton & Steven C. Rhodes, *Organizational Sexual Harassment: Translating Research into Application*, 27 J. OF APPLIED COMM. RES. 158, 161 (1999).

54. See Donald J. Petersen & Douglas P. Massengill, *Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson*, 18 EMPLOYEE RELS. L.J. 489, 514 (1993) (concluding that harassment training is an important measure in preventing costly litigation).

55. See Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears*, NAT'L L.J., Nov. 9, 1998, at A1 (noting that since the decisions "employment law specialists are reporting a dramatic increase in inquiries and requests for training"); Rebecca Ganzel, *What Sexual Harassment Training Really Prevents*, TRAINING, Oct. 1, 1998, at 86, 87 (describing the recent attention generated by the decisions as a "bonanza for independent trainers and employment lawyers alike"); Robert Mullins, *Law Firms Sell Acumen in Harassment Policy*, BUS. J.-MILWAUKEE, Aug. 7, 1998, at 21; Kathy Robertson, *Sex Talk Keeps Ex-FBI Agents Busy*, BUS. J.-SACRAMENTO, Feb. 5, 1999, at 3. *Contra* Carol

## B. The Supreme Court's Endorsement of Employee Education

Lauren Edelman's legal endogeneity theory posits that organizations covered by civil rights law devise legal compliance strategies that the courts subsequently incorporate into legal doctrine. Evidence for the endogeneity phenomenon may be found in twin landmark sexual harassment decisions issued in 1998 and in a watershed 1999 punitive damages decision. In those cases, the Supreme Court legitimated the extensive employer practice of employee training. I dub the legal philosophy that emerged from the cases "the jurisprudence of education and prevention."

Employer and employee advocates alike hailed the Supreme Court's opinions<sup>56</sup> in *Burlington Industries v. Ellerth*<sup>57</sup> and *Faragher v. City of Boca Raton*.<sup>58</sup> Both cases addressed an issue that had long vexed the lower courts. Specifically, the *Ellerth* and *Faragher* opinions answered the question of how to determine employer liability for harassment perpetrated by a supervisor.

Using principles of agency law, the Court divided sexual harassment cases into two categories: those in which a supervisor has taken a "tangible employment action against the subordinate"<sup>59</sup> and those in which no such action has occurred.<sup>60</sup> In the former category, vicarious liability is always appropriate because the ability to change a subordinate's employment status is by definition aided by the existence of the agency relationship between the supervisor and the employer.

In the latter case, if there has been no definitive action like a firing or demotion, the assistance a supervisor receives by virtue of the authority delegated to him or her by the employer is less clear. Vicarious liability for the supervisor's harassment, stated the majorities in both cases, should therefore be more limited. To facilitate that limitation, the Court fashioned an affirmative defense for employers faced with claims in this category. Justice Kennedy, writing for the

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Kleiman, *Companies Dragging Feet on Training*, CHI. TRIB., Sept. 20, 1998, at 1, available at 1998 WL 2897636 (claiming that the increase in demand for sexual harassment training has been small).

56. E.g., Ganzel, *supra* note 55 (noting "many corporations hailed with relief the Supreme Court's June 26 rulings"); Linda Greenhouse, *Court Spells Out Rules for Finding Sex Harassment*, N.Y. TIMES, June 27, 1998, at A1 (noting that "[t]he rulings won praise across a broad spectrum of both management and civil rights groups").

57. 524 U.S. 742 (1998).

58. 524 U.S. 775 (1998).

59. *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 807-08.

60. *Ellerth*, 524 U.S. at 763; *Faragher*, 524 U.S. at 807-08.

majority in *Ellerth*, noted: "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>61</sup>

Employers need not always prove that they had an anti-harassment policy and complaint procedure to claim the defense. The necessity for such prophylactic devices, however, "may appropriately be addressed in any case when litigating the first element of the defense."<sup>62</sup> Moreover, while the plaintiff-employee's failure to use a complaint procedure is not the only way to establish the second prong of the defense, "a demonstration of such failure will normally suffice to satisfy the employer's burden."<sup>63</sup>

While agency principles form part of the justification for the new affirmative defense, Justice Kennedy found additional considerations implicit in *Vinson*. Elucidating a new understanding of the preventative aim of Title VII, Kennedy noted in a striking passage that the statute "is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."<sup>64</sup> To the extent these policies act as incentives for employees to report harassment before it becomes severe or pervasive, Kennedy noted, limiting vicarious liability advances "Title VII's deterrent purpose."<sup>65</sup>

This conceptualization of discrimination prevention is a far cry from that offered by a long line of Supreme Court cases. Under *Albemarle Paper Co. v. Moody*<sup>66</sup> and its progeny, the prophylactic purpose of Title VII is advanced by the fear of money damages, which inspires employers to *purge* their workplaces of discriminatory policies and practices.<sup>67</sup> Under *Ellerth*, fear of liability motivates employers to *create* procedures that victims must use or forfeit their right to recover for harm caused by discrimination. The term "prevention" is thus aligned with the kinds of litigation prevention techniques long recommended by defense attorneys and human resource professionals. Indeed, these professionals began recommending grievance procedures as litigation

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61. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 807.

62. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 807.

63. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 807-08.

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

65. *Id.*

66. 422 U.S. 405 (1975).

67. See *id.* at 417-18.

avoidance mechanisms beginning in the early 1980s, before *Vinson* was decided.<sup>68</sup>

Justice Souter, writing for the majority in *Faragher*, likewise referenced anti-discrimination law's deterrent aim in discussing the new affirmative defense.<sup>69</sup> Citing *Albemarle*, Justice Souter re-characterized the prophylactic purpose of Title VII, stating that the primary objective of the statute is "to avoid harm."<sup>70</sup> This rather anemic assertion of statutory purpose stands in stark contrast to the Supreme Court's earlier declaration that the "'primary objective' of Title VII is to bring employment discrimination to an end."<sup>71</sup>

Gone is the image from *Albemarle* of employers stamping out workplace discrimination when it occurs. In its stead, Souter provides the figure of a benevolent employer "informing employees of their right to raise and how to raise the issue of harassment."<sup>72</sup> Like Kennedy, Souter's vision of prevention focuses on policy creation. Unlike Kennedy's vision, it appears also to incorporate instruction. It is not enough for an employer to promulgate a sexual harassment policy. The policy must also be disseminated and its contents communicated to employees. In fact, failure to distribute an existing policy precluded the defendant in *Faragher* from raising the affirmative defense on remand.<sup>73</sup>

Late in the 1998-99 term, Justice O'Connor provided the clearest articulation to date of the new jurisprudence of education and prevention. In *Kolstad v. American Dental Ass'n*,<sup>74</sup> the Court grappled with the standards under which employers may be liable for punitive damages in discrimination cases.<sup>75</sup> Providing a literal interpretation of the language of the Civil Rights Act of 1991, which made available to intentional discrimination victims compensatory and punitive damages,<sup>76</sup> the majority held that Title VII plaintiffs must show that an employer acted with malice or reckless indifference before obtaining

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68. See Edelman et al., *supra* note 17, at 412-13.

69. *Faragher*, 524 U.S. at 806.

70. *Id.*

71. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

72. *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f) (1997)).

73. *Id.* at 806-09.

74. 527 U.S. 526 (1999).

75. For interesting discussions of *Kolstad*, see Robert Belton, *The Employment Law Decisions of the 1998-99 Term of the Supreme Court: A Review*, 3 EMPLOYEE RTS. & EMPL. POL'Y J. 183, 199-207 (1999); Ann M. Anderson, Note, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 828-30 (2000).

76. 42 U.S.C. § 1981a(a)(1)-(b)(1) (1994).

punitive damages.<sup>77</sup> The Court rejected the United States Court of Appeals for the District of Columbia's interpretation that egregious misconduct by the employer must be shown before a jury may consider a punitive damage award.<sup>78</sup>

In a portion of the opinion joined by four other justices, however, O'Connor provided employers with a shield from punitive damages if they "engage in good faith efforts to comply with Title VII."<sup>79</sup> Moreover, she specifically referenced anti-discrimination policies and programs as the kind of good faith efforts a court may look to in deciding whether the shield should apply. A liability rule that reduces the incentive for employers to undertake such preventative steps, noted O'Connor, is contrary to the prophylactic purpose of Title VII.<sup>80</sup> Just as the law promotes effective sexual harassment policies and grievance procedures, so too does it encourage employers "to adopt anti-discrimination policies and to educate their personnel on Title VII's prohibitions."<sup>81</sup> Thus, the new approach to punitive damage liability aims to deter discrimination by promoting preventative efforts, specifically, policy promulgation and employee education.

That O'Connor's articulation of the prophylactic purpose of Title VII pays such homage to employer anti-discrimination policies and educational programs is not surprising. Amicus curiae briefs were filed in *Kolstad* by three organizations with huge stakes in anti-discrimination training: the Society for Human Resource Management (SHRM),<sup>82</sup> the Chamber of Commerce,<sup>83</sup> and the Equal Employment Advisory Council (EEAC).<sup>84</sup> The last organization, the EEAC, describes its members as "devot[ing] extensive resources to training, awareness, and compliance programs designed to ensure that all their employment actions are carried out in accordance with Title VII."<sup>85</sup> The EEAC brief forcefully notes that most large corporations "provide regular, ongoing training to ensure that their managerial, supervisory, and in appropriate instances

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77. *Kolstad*, 527 U.S. at 534 (quoting 42 U.S.C. § 1981a(b)(1) (1994)).

78. *Id.* at 534-35.

79. *Id.* at 544.

80. *See id.* at 545 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

81. *Id.*

82. Brief of Amicus Curiae Society for Human Resource Management, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (No. 98-208).

83. Brief of Amicus Curiae Chamber of Commerce of the United States of America, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (No. 98-208).

84. Brief of Amicus Curiae Equal Employment Advisory Council, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (No. 98-208).

85. *Id.* at 2.

even non-supervisory personnel, are aware of Title VII and other employment-related laws."<sup>86</sup> It describes as "anomalous" any interpretation of Title VII that would subject such employers to punitive damages.<sup>87</sup> Similar support for the "safe harbor proposal" is found in the SRHM brief.<sup>88</sup> That brief advocates the safe harbor because it "rewards employers that take preventative measures" such as "effective EEO training."<sup>89</sup> The views and practices of litigation avoidance professionals were before the Court, and O'Connor's rendition of Title VII's preventive aim placed on those practices a judicial stamp of approval.

How the Court's new approach will ultimately affect Title VII doctrine is not now known. The claim by employer advocates that training can limit employer liability for harassment, however, has become quite specific since *Ellerth* and *Faragher*. For example, a little less than a year before the *Kolstad* decision created a punitive damage safe harbor for employers who take steps to educate their employees, attorney Margaret McCausland stated that sexual harassment training would likely keep a "jury [from] awarding punitive damages."<sup>90</sup> Additionally, some training advocates represent *Ellerth* and *Faragher* as expressly mandating sexual harassment training, even though the decisions say absolutely nothing of the kind. Susan Meisinger, of the SHRM, put it this way: "The [C]ourt said . . . [i]f you don't provide some kind of sexual harassment training to your employees, you're going to be liable."<sup>91</sup> Christine Amalfe, an attorney who regularly conducts sexual harassment training, noted that "[t]he Supreme Court has clearly indicated that employers . . . need to send a message to employees" and that trainers are the "messengers."<sup>92</sup> Perhaps the increased opportunity to sell their services, generated by employer concern about the harassment decisions, prompted such comments.

Interestingly, the EEOC recently issued a policy document interpreting the *Ellerth* and *Faragher* decisions that specifically references sexual harassment training.<sup>93</sup> Published in 1999, the guidance suggests that employers provide all employees with training "to ensure

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86. *Id.* at 12.

87. *Id.* at 13.

88. See SRHM Brief at 13, *Kolstad* (No. 98-208).

89. *Id.*

90. Aronson, *supra* note 55, at A1 (quoting Margaret McCausland).

91. Ganzel, *supra* note 55, at 86 (quoting Susan Meisinger).

92. *Id.* (quoting Christine Amalfe).

93. *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), EEOC COMPLIANCE MANUAL (BNA), N:4075 [Binder 3].

that they understand their rights and responsibilities.”<sup>94</sup> The EEOC further recommends periodic supervisory training to “explain the types of conduct that violate the employer’s anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of the alleged harassment; and the prohibition against retaliation.”<sup>95</sup> These suggestions will no doubt provide further impetus for the training trend.

The evolution of sexual harassment training described above seems a classic example of Edelman’s theory of legal endogeneity. Employers initially undertook sexual harassment training to evidence fair treatment in the face of ambiguities about the law. Subsequently, the judiciary recognized this extensive corporate practice through its articulation of a new jurisprudence of education and prevention. Edelman’s theory then posits that the “professions, sometimes with greater enthusiasm than is perhaps warranted, filter and disseminate court decisions” in a way that reinforces and legitimates the initial organizational response to the law.<sup>96</sup> The comments of training advocates in the wake of *Ellerth* and *Faragher* are filtering those decisions for the trainers’ constituents—employers subject to anti-discrimination law—thereby bolstering the practice of conducting sexual harassment training.

#### IV. THE IMPLICATIONS OF HARASSMENT TRAINING AS PRACTICE AND JURISPRUDENCE

Edelman’s theory warns that one should be cautious in permitting those subject to a law to define its terms. This admonishment certainly applies to sexual harassment training, which, as noted above, is an extensive employer practice recently incorporated into Title VII doctrine. In fact, sexual harassment training is more ubiquitous than ever. It is not only employed in a preventative fashion, but also as a method for correcting discriminatory work environments. For example, in a number of recent well-publicized discrimination suit settlements and consent decrees, the employer defendants agreed not only to provide compensation for aggrieved plaintiffs, but also to allocate significant sums for sexual harassment training.<sup>97</sup>

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94. *Id.* at 17.

95. *Id.* at 28.

96. Edelman et al., *supra* note 17, at 447.

97. See Mathiason & de Bernardo, *supra* note 6, at 27; Muller, *supra* note 2, at 94. See generally *Mitsubishi Settlement*, *supra* note 2.

Courts frequently cite sexual harassment training as evidence that an employer acted reasonably to prevent harassment and thus satisfies the first prong of the *Ellerth/Faragher* affirmative defense.<sup>98</sup> Moreover, sexual harassment training undertaken subsequent to an investigation of an employee complaint is typically viewed as a prompt remedial response enabling an employer to avoid liability.<sup>99</sup> Training is likewise portrayed as a valuable undertaking in judicial decisions considering whether a prayer for punitive damages is appropriate. Courts in two recent cases granted employer motions for summary judgment on the issue of punitive damages, holding that sexual harassment training was evidence of employer good faith.<sup>100</sup>

Given the prevalence of sexual harassment training, one might assume that its utility is beyond dispute. Yet very little empirical

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98. *E.g.*, *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) (noting that in "addition to distributing [a sexual harassment] policy to its employees, [the employer] regularly conducted training sessions on sexual harassment"); *Hetreed v. Allstate Ins. Co.*, 1999 WL 311728, at \*5 (N.D. Ill. May 12, 1999) (noting with approval that the employer had a detailed sexual harassment policy and provided managers with training); *DeWitt v. Lieberman*, 48 F. Supp. 2d 280, 287, 290 (S.D.N.Y. 1999) (noting that the defendant had "an anti-sexual harassment training program" and then concluding that the policy was effective); *EEOC v. Barton Protective Servs.*, 47 F. Supp. 2d 57, 60 (D.D.C. 1999) (noting that the employer provided "EEO training"); *Maddin v. GTE of Florida, Inc.*, 33 F. Supp. 2d 1027, 1032 (M.D. Fla. 1999) (citing favorably the fact that the employer "provided training about sexual harassment for its employees and supervisors"); *Fiscus v. Triumph Group Operations*, 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998) (stating that the company "conducted anti-harassment workshops/training for its supervisors"); *Landrau Romero v. Caribbean Rests.*, 14 F. Supp. 2d 185, 191-92 (D.P.R. 1998) (noting that the plaintiff received training in sexual harassment).

99. *See, e.g.*, *Mirakhorli v. DFW Mgmt. Co.*, 1999 WL 354226, at \*5 (N.D. Tex. May 24, 1999) (citing as favorable evidence fact that company renewed harassment training after investigating plaintiff's complaint); *Kohler v. Inter-Tel Techs.*, 1999 WL 226208, at \*3 (N.D. Cal. Apr. 13, 1999) (noting that after investigating plaintiff's complaint, "the company conducted mandatory sexual harassment training for [all] employees"); *Garcia v. ANR Freight Sys., Inc.*, 942 F. Supp. 351, 358 n.6 (N.D. Ohio 1996) (noting that employer had a sexual harassment perpetrator watch a sensitivity training video).

100. *Woodward v. Ameritech Mobile Communications, Inc.*, 2000 WL 680415, at \*16 (S.D. Ind. Mar. 20, 2000); *Hull v. APCOA/Standard Parking Corp.*, 2000 WL 198881, at \*15 (N.D. Ill. Feb. 14, 2000). *Contra* *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 445-46 (4th Cir. 2000) (indicating that punitive damages appropriate notwithstanding anti-discrimination training due to evidence of top executives' racial animosity). The Tenth Circuit recently held that an employer's failure to provide a manager with "training in employment discrimination" demonstrated a failure "to educate its employees" and "to prevent discrimination in the workplace," making an award of punitive damages appropriate. *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248-49 (10th Cir. 1999).



research has been conducted on the effects of these programs.<sup>101</sup> Although the lack of hard evidence has generally failed to capture the attention of employers, attorneys, and judges, ignorance about these matters is disturbing to social scientists.

Calling the gap in the sexual harassment literature "alarming," John Pryor and Kathleen McKinney note that we "really are not sure about what, if anything, works to educate people about sexual harassment [and to] reduce incidents of harassment."<sup>102</sup> Robert Moyer and Anjan Nath recently described the problem this way: "[T]he unpleasant empirical truth is that almost nothing is known about the effects of sexual harassment education and training programs."<sup>103</sup>

Some might view the scarcity of program outcome research as benign. Elizabeth O'Hare Grundmann and her colleagues, however, point out that the dearth of information is potentially dangerous for two reasons.<sup>104</sup> First, preventative programs, even when adopted with the best of intentions, can have negative effects.<sup>105</sup> For example, a seminar that indicates that sexual harassment is an underreported phenomenon may give some employees the message that "the likelihood is good that they can get away with harassing" others.<sup>106</sup> Training can also produce backlash effects such as prompting fears on the part of senior men about offering crucial mentoring to young professional women<sup>107</sup> or creating resentment on the part of those whose attendance at the program is required.<sup>108</sup>

Second, providing training "gives the impression that 'something is being done,'" lulling managers and others into a false sense of

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101. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 30-36 (2001) (reviewing current research on sexual harassment training).

102. John B. Pryor & Kathleen McKinney, *Research on Sexual Harassment: Lingering Issues and Future Directions*, 17 BASIC & APPLIED SOC. PSYCHOL. 605, 609 (1995).

103. Robert S. Moyer & Anjan Nath, *Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment*, 28 J. OF APPLIED SOC. PSYCHOL. 333, 334 (1998).

104. Elizabeth O'Hare Grundmann et al., *The Prevention of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 175, 182 (William O'Donohue ed., 1997).

105. See *id.*

106. *Id.*

107. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 376-77 (1995).

108. Barbara A. Gutek, *Sexual Harassment Policy Initiatives, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT*, *supra* note 104, at 195 ("[O]ne problem with mandatory training is that it creates resentment and may result in very little learning.").

security.<sup>109</sup> Yet an ineffective program may not affect the bottom line in the least; that is, it may not "reduce the incidence of sexual harassment" in the organization.<sup>110</sup>

In line with these problems, Grundmann and her colleagues find particularly worrisome the motivation behind the adoption of many anti-discrimination training programs: litigation prevention.<sup>111</sup> This understandable impetus for training can eclipse what should be the purpose of such programs—to have "a significant impact on an important social problem."<sup>112</sup> To accomplish that aim through training, an institution must strive to implement a "demonstrably effective program" that is systematically evaluated.<sup>113</sup> Unfortunately, employers typically do not evaluate their anti-discrimination training programs.<sup>114</sup>

Social scientists have only in the last few years begun to assess the effects of sexual harassment training programs.<sup>115</sup> The results of these early studies are highly inconclusive. While there is some slim evidence that training increases the sensitivity of trainees to possible instances of harassment,<sup>116</sup> the conclusion that trainees become more expert at identifying harassment is debatable.<sup>117</sup> While there is slim evidence that training, at least in a laboratory setting, may positively affect inappropriate touching behavior by men with a high propensity to harass, that same training did not affect their long-term attitudes.<sup>118</sup> Finally, that trainees will be able to retain knowledge and transfer it to their workplace encounters is entirely uncertain.<sup>119</sup> There is, in light of currently available research, absolutely no scientific basis for concluding that harassment training fosters employee tolerance and greatly alters workplace culture.

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109. Grundmann et al., *supra* note 104, at 182.

110. *Id.*

111. *See id.* at 176; *see also* Gutek, *supra* note 108, at 187 (noting that employers consider training a "useful" step "in defending themselves in a court case"); Keyton & Rhodes, *supra* note 53, at 161 (1999) ("Unfortunately, the primary objective of many [sexual harassment] training programs is to reduce the organization's legal and fiduciary responsibility.").

112. Grundmann et al., *supra* note 104, at 176.

113. *Id.* at 182.

114. *See id.* at 176.

115. *See* Gutek, *supra* note 108, at 196 (describing current research on harassment training effectiveness as scant yet promising).

116. *See* Bisom-Rapp, *supra* note 101, at 31-32 & nn. 236-42.

117. *See id.*

118. *See id.*

119. *See id.*

The scant empirical evidence described above should give pause to those in the legal profession who wholeheartedly endorse training as a foolproof antidote to workplace sexual harassment. An undiscerning view of the value of such programs may stymie the achievement of workplace equality.<sup>120</sup> In other words, seeing all such training as positive may make the goal of these programs—the elimination of harassment—that much harder to achieve.<sup>121</sup>

Moreover, the risks associated with ineffective training programs—backlash, sending the wrong message, and creating the erroneous impression that “something is being done about harassment”—are too potentially destructive to tolerate. And while an uninformed understanding of the implications of sexual harassment training is troubling, incorporating that viewpoint into Title VII jurisprudence deals a potentially devastating blow to the law’s effectiveness. An uncritical embrace of the jurisprudence of education and prevention requires acceptance of legal compliance in form rather than in substance. Yet if equality is to be more than cosmetic—indeed if Title VII’s preventative purpose is to be fulfilled—courts must look beyond symbols to determine whether the environment in which a plaintiff worked was actually discriminatory. Thus, as will be discussed in Part V, no training program should be considered relevant in litigation unless, in the context of a given dispute, it is demonstrably effective.

## V. CONCLUSION: REFORMULATING SEXUAL HARASSMENT LAW

Until we know much more about sexual harassment training and its effects, the existence of these programs should not be considered a fact relevant to employer liability for compensatory damages in any discrimination suit.<sup>122</sup> To allow a corporate practice with only specula-

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120. See Gutek, *supra* note 108, at 196 (warning that “[i]n their eagerness to show that they are doing something” employers may be selecting trainers who lack knowledge about harassment).

121. Craig Haney and Aida Hurtado issued a similar warning in another context. They argue that excessive faith in standardized employment tests diverts “public and political attention away from the structural legacies of slavery and racism.” Craig Haney & Aida Hurtado, *The Jurisprudence of Race and Meritocracy*, 18 LAW & HUM. BEHAV. 223, 244 (1994).

122. Theresa Beiner makes a similar suggestion about employer preventative efforts in sexual harassment cases, arguing that such efforts are only relevant at the punitive damage stage. See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 332 (2001). Professor Beiner notes that her approach

tive value to influence the make whole recovery of an employee injured by a sexually hostile environment is too destructive of employee rights to be countenanced. Sexual harassment training programs are general preventative efforts undertaken by employers, easily "decoupled from day-to-day organizational [activity]."<sup>123</sup> Thus, the existence of anti-discrimination training tells us little about the particular workplace conditions encountered by discrimination plaintiffs.

On the other hand, evidence of training efforts may be relevant to the issue of punitive damages.<sup>124</sup> Specifically, educational efforts may bear upon whether the employer's "good-faith efforts to prevent discrimination in the workplace" prohibit the imposition of vicarious liability for punitive relief, the standard adopted by the Supreme Court in *Kolstad*.<sup>125</sup> Those considering such evidence, however, must be exceedingly careful. Indeed, in reviewing the relevancy of educational programs, or for that matter, considering the incorporation of training into settlement agreements, three principles must be kept in mind.

First, conducting training cannot be equated with fostering cultural change. Social scientists note that employers that want to rectify discriminatory environments must tie training to specific organizational policies and systems designed to accomplish the task.<sup>126</sup> For example, an employer that wishes to eliminate glass ceilings would carefully analyze and perhaps revise career paths, train supervisors about the issue, and institute a system of rewards for achieving diversity goals.<sup>127</sup> Judges and juries should be reluctant to credit employers for educational efforts that are not "reinforced by policies, activities, and incentives within the organization."<sup>128</sup>

Second, no training regimen should be wholeheartedly embraced or considered relevant before a meaningful assessment of its features

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"strikes a balance between the compensatory nature of Title VII and the policy of encouraging employers to address and prevent sexual harassment." *Id.*

123. Edelman & Petterson, *supra* note 11, at 113-14.

124. Professor Beiner likewise finds training programs to be highly relevant at the punitive damage phase. See Beiner, *supra* note 122, at 332-38.

125. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999).

126. See Lee Ann Hollister et al., *Diversity Programs: Key to Competitiveness or Just Another Fad?*, 11 ORG. DEV. J. 49, 58 (1993).

127. See *id.*

128. Ruby L. Beale, *Invited Reaction: Response to Environmental Factors and the Effectiveness of Workforce Diversity Training*, 9 HUM. RES. DEV. Q. 125, 126-27 (1998). It should be noted that the *Kolstad* Court failed to describe the good faith safe harbor as an affirmative defense that must be proven by the employer. See Belton, *supra* note 75, at 205-06. Nonetheless, the discussion in this essay assumes that it is the employer, and not the employee, who has the burden of proof on the good faith issue.

and purported impact has been conducted. The training literature has begun to detail characteristics that should be incorporated into all training programs.<sup>129</sup> Common recommendations include obtaining a "visible commitment [to training] from top leaders," eschewing one-shot training courses, selecting qualified facilitators, and carefully assembling participant groups to avoid both homogeneity and tokenism.<sup>130</sup> Also vitally important are mechanisms for long-term program evaluation.<sup>131</sup> Employers proffering evidence of educational efforts should be required to describe their courses' designs and the methods by which they gauge program outcomes.<sup>132</sup>

Finally, training, in order to be relevant to the issue of employer good faith, must be considered in context with the events that give rise to the suit. An employer may conduct training that appears successful on an organization-wide basis and yet is obviously ineffective as applied to the part of the organization in which the plaintiff works. The training, in such a case, should not be dispositive evidence of good faith. Similarly, a corporate educational program may appear effective overall, but the employer's response to the plaintiff's harassment complaint may nevertheless be defensive and inappropriate. The program, in this example, should not bar the imposition of punitive damages.<sup>133</sup>

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129. See, e.g., Catherine Ellis & Jeffrey A. Sonnenfeld, *Diverse Approaches to Managing Diversity*, 33 HUM. RESOURCE MGMT. 79, 101-02 (1994); Herff L. Moore et al., *Eight Steps to a Sexual Harassment-Free Workplace*, TRAINING & DEV., Apr. 1998, at 12; Jonathan A. Segal, *Sexual Harassment Prevention: Cement for the Glass Ceiling?*, HR MAG., Nov. 1998, at 129.

130. Ellis & Sonnenfeld, *supra* note 129, at 101.

131. See Grundmann et al., *supra* note 104, at 182 (offering a list of methodological considerations for evaluating training programs).

132. One reason employers are reluctant to evaluate their training programs is fear that the findings could be used against them in subsequent discrimination litigation. Indeed my colleagues working in the social sciences note that it has become incredibly difficult to convince employers to open their doors to professional researchers. Creating an evidentiary safe harbor for employers and providing an academic research privilege for social scientists could ameliorate the concerns of employers and encourage professional field research on anti-discrimination training. See generally Kathleen M. Blee, *The Perils of Privilege*, 24 LAW & SOC. INQUIRY 993 (1999); Felice J. Levine & John M. Kennedy, *Promoting a Scholar's Privilege: Accelerating the Pace*, 24 LAW & SOC. INQUIRY 967 (1999); Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research Be Privileged?*, 24 LAW & SOC. INQUIRY 927 (1999); Robert H. McLaughlin, *Privilege and Practice in Social Science Research*, 24 LAW & SOC. INQUIRY 999 (1999); Rebecca Emily Rapp, *In re Cusumano and the Undue Burden of Using the Journalist Privilege as a Model for Protecting Researchers from Discovery*, 29 J.L. & EDUC. 265 (2000); Sudhir Venkatesh, *The Promise of Ethnographic Research: The Researcher's Dilemma*, 24 LAW & SOC. INQUIRY 987 (1999).

133. I owe these examples and my thinking on this subject to the insights of Linda

A good example of a contextual analysis of training relevancy can be found in a recent Fourth Circuit opinion. In *Lowery v. Circuit City Stores, Inc.*,<sup>134</sup> the Fourth Circuit considered the propriety of an award of punitive damages in a race discrimination case.<sup>135</sup> Circuit City proffered evidence of its good faith efforts to educate its employees about its anti-discrimination policy, focusing specifically on a week-long managerial and supervisory training seminar entitled *Managing Through People*, a small portion of which covered federal anti-discrimination laws.<sup>136</sup> Those efforts proved unavailing to the employer due to evidence that the company was permeated by racism at the highest levels and that African American employees feared reprisal for complaining about discrimination.<sup>137</sup> The court noted that this latter evidence "called into question" the "sincerity of Circuit City's commitment to a company-wide policy against racial discrimination."<sup>138</sup>

Some may argue that observing the three principles described above imposes too great a burden on employers. To do otherwise, however, is not only to refuse to face the truth about anti-discrimination educational programs; it is to endorse a form over substance approach to effectuating Title VII's preventative purpose. In *Kolstad*, the Supreme Court adopted the safe harbor concept to avoid "[d]issuading employers from implementing programs or policies to prevent discrimination."<sup>139</sup> If we really seek to encourage such efforts, only those employers interested in meaningfully addressing employment bias should be granted shelter from punitive damages.

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Krieger.

134. 206 F.3d 431 (4th Cir. 2000).

135. *Id.* at 436.

136. *Id.* at 445.

137. *See id.* at 445-46.

138. *Id.* at 446.

139. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999).