

2013

He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science

Joni Hersch

Beverly Moran

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Joni Hersch and Beverly Moran, *He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science*, 101 *Kentucky Law Journal*. 753 (2013)

Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/680>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Thu Oct 27 15:36:32 2022

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Joni Hersch & Beverly Moran, He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science, 101 KY. L.J. 753 (2012).

ALWD 7th ed.

Joni Hersch & Beverly Moran, He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science, 101 Ky. L.J. 753 (2012).

APA 7th ed.

Hersch, J., & Moran, B. (2012). He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science. Kentucky Law Journal, 101(4), 753-788.

Chicago 17th ed.

Joni Hersch; Beverly Moran, "He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science," Kentucky Law Journal 101, no. 4 (2012-2013): 753-788

McGill Guide 9th ed.

Joni Hersch & Beverly Moran, "He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science" (2012) 101:4 Ky LJ 753.

AGLC 4th ed.

Joni Hersch and Beverly Moran, 'He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science' (2012) 101 Kentucky Law Journal 753.

MLA 8th ed.

Hersch, Joni, and Beverly Moran. "He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science." Kentucky Law Journal, vol. 101, no. 4, 2012-2013, p. 753-788. HeinOnline.

OSCOLA 4th ed.

Joni Hersch & Beverly Moran, 'He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science' (2012) 101 Ky LJ 753

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science

*Joni Hersch and Beverly Moran*¹

INTRODUCTION

What do we know about sexual harassment? Apparently, before Anita Hill's famous Senate testimony as part of the confirmation of Justice Clarence Thomas, our knowledge was limited at best.² The now-popular television series *Mad Men* makes the point: not very long ago sexual harassment was just something that happened whenever women entered the workplace.³ Even today, the facts of sexual harassment—what it is and how it happens—are in dispute. At least one typical reaction is to trivialize or dismiss sexual harassment claims. Consider the following from *USA Today's* Opinion and Editorial page:

To hear some of Herman Cain's defenders tell it, sexual harassment claims are some sort of racket, invented by humorless, talentless prigs out to make a quick buck. "It always ends up being an employee who can't perform and is looking for a little green," opined radio host Laura Ingraham. California defense lawyer Kurt Schlichter wrote in the *New York Post* that "facts are optional" in these lawsuits. Sen. Rand Paul, R-Ky., complained that men can no longer tell jokes in the

1 Vanderbilt Law School. We thank V. Blair Druhan, Elissa Philip, and Jean Xiao for their outstanding help in data collection and coding the media data and court records. We especially appreciate V. Blair Druhan's superb assistance in all phases of data collection, coding, data analysis, and construction of tables. We would also like to thank Professor Sue Carter for her help with understanding the national media and how editors and reporters see their mission; thanks also to Janet Hirt and Amy Maples for endless support and technical expertise.

2 See, e.g., TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION*, at vii (1992) (detailing the "tumultuous events" surrounding Justice Thomas' confirmation); Geneva Smitherman, *Introduction to GENEVA SMITHERMAN, AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL—CLARENCE THOMAS 7* (Geneva Smitherman ed., 1995) (describing the Thomas-Hill controversy as a "catalyst for wide ranging debate and discussion of women's rights, gender issues in the workplace, sexual stereotypes . . ."). See generally *THE COMPLETE TRANSCRIPTS OF THE CLARENCE THOMAS—ANITA HILL HEARINGS: OCTOBER 11, 12, 13, 1991* (Anita Miller ed., 1994) (presenting excerpted testimony from Clarence Thomas' and Anita Hill's senate hearings).

3 See *Mad Men* (AMC television); see also Sarah Seltzer, *Two Women Walk into an Elevator: Mad Men and Workplace Sexual Harassment*, RH REALITY CHECK (Sept. 15, 2010, 6:00 AM), <http://rhrealitycheck.org/article/2010/09/15/women-walk-elevator-workplace-sexual-harassment/> (discussing the role of gender and sexual harassment on the television show *Mad Men*). See *infra* note 54 and accompanying text for a discussion of a REDBOOK magazine poll conducted in the 1970s that found nine out of ten women reported unwanted sexual advances at work.

workplace, fearful that some woman will misunderstand. And *National Review's* John Derbyshire asked: "Is there anyone who thinks sexual harassment is a real thing?"⁴

In this article, we examine whether two national newspapers (the *New York Times* and the *Wall Street Journal*) provide a realistic representation of sexual harassment in the workplace. Whether intentional or inadvertent, the national media influences attitudes and subsequent behavior. Victims of sexual harassment who encounter such accounts may find comfort and validation in learning that others have had similar experiences, and that may lead to greater willingness to report their own harassment.⁵ It is only through exposing illegal behavior that such workplace practices can be eradicated.

To make our comparison, we use empirical evidence on sexual harassment drawn from three distinct sources: reports of workplace sexual harassment that emerge from employee self-reporting through the United States Merit Systems Protection Board's (USMSPB) survey of *Sexual Harassment in the Federal Workplace*,⁶ charges of sexual harassment gathered through Equal Employment Opportunity Commission (EEOC) charge data,⁷ and federal district court complaints before the Eastern District of Pennsylvania as recorded by the Public Access to Court Electronic Records system (PACER).⁸

4 Editorial, *Yes, John, There is a Sexual Harassment Problem*, USA TODAY, Nov. 11, 2011, at 12A. The editorial further states: "In the real world, thousands of women, and some men, win sexual harassment claims that go far beyond a misunderstood joke or a single unwanted touch." *Id.*

5 This possibility seems to arise frequently among victims of sexual exploitation. Consider, for instance, the victims of Jerry Sandusky and Herman Cain: after initial victims came forward and received media attention, many others followed. *See, e.g.*, Michael Shear & Jim Rutenberg, *One of Cain's Accusers is Waiting for Others to Come Forward, Her Lawyer Says*, N.Y. TIMES, Nov. 11, 2011, at A20; Lisa Flam, *Sandusky Sex Abuse Victim: 'It is better to come forward'*, TODAY (Oct. 19, 2012, 3:46 PM), <http://www.today.com/id/49481172/site/todayshow/ns/today-books/t/sandusky-sex-abuse-victim-it-better-come-forward/#.UTanczAp8nM>.

6 U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES* (1995) [hereinafter USMSPB], available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>.

7 *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2011*, EEOC.GOV, http://eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm [hereinafter EEOC Sexual Harassment Charges] (last visited Mar. 26, 2013).

8 *Public Access to Court Electronic Records*, PACER, <http://www.pacer.gov/> (last visited Mar. 26, 2013) [hereinafter PACER]. The United States District Court for the Eastern District of Pennsylvania provides access to electronic case filings (ECF) through PACER on its website. *Electronic Case Filing (ECF)*, U.S. DISTRICT Ct. E. DISTRICT PA., <https://ecf.paed.uscourts.gov/cgi-bin/ShowIndex.pl> (last visited Mar. 26, 2013).

What we found is that media coverage of sexual harassment frequently resembles a game of *Mad Libs*. Taking as a template articles in the *New York Times*,⁹ we see a story that reads something like this:

John Doe, a prominent businessman (athlete, government official, celebrity) [no age, race, ethnicity given, though sometimes marital status is given] with a multi-billion dollar enterprise traded on the New York Stock Exchange (an important government agency, an entertainment company, a sports team) was accused in domestic documents filed in federal court (convicted after a jury trial, accused in a press conference, indicted by a grand jury) of sexual harassment (assault, rape, discrimination) [explicit descriptions of the actual behavior are rare] of a co-worker (subordinate) [no age, race, ethnicity, marital status—and often no name—given]. Speaking through his attorney (company representative), Mr. Doe denied all charges (resigned stating that he would need time to address the charges, announced his intention to appeal the conviction). Other women [no age, race, ethnicity, marital status—and often no name—given] have also stepped forward to tell their own experiences with Mr. Doe. Through her attorney, Miss Smith states that there was touching (consensual dating, derogatory comments, retaliation for making a complaint).

We expected the news articles to provide more information about age, marital status, and race of the parties. These facts are almost never given in the newspaper accounts. Nevertheless, the demographics of the victims covered in the newspaper articles we surveyed are largely reflective of the victims of sexual harassment reported in the three data sources we analyze. We also find that there is fairly limited information provided about the specific nature of the harassment.

We expected a more even distribution of attention between the accuser and the accused in all accounts. In fact, the accused is almost always the focus where the incident only generates one news story. On the other hand, where the incident generates several reports, the articles tend to become more even-handed in their coverage of the accused and the accuser. We also expected that the parties would speak for themselves. In fact, a large part of the communication with the press is through attorneys.

We found that there is virtually no coverage of events taking place before litigation. For comparison, a newspaper might print an article on sweatshops without waiting for a sweatshop to burn down. Yet, the articles on sexual harassment tend to wait for litigation, despite studies showing that the majority of incidents are not reported, much less litigated. Although understandable from the press' point of view, the focus on litigation gives the impression that most sexual harassment is handled in the courts.

⁹ See *infra* app. A, containing a number of examples of articles published in the last few years.

Contrasting the *New York Times* reports with the complaints submitted to the federal district courts in the Eastern District of Pennsylvania, we found that court complaints yield much more explicit descriptions of the behaviors that led to charges of sexual harassment than are recited in the news articles. In contrast to the explicit descriptions of sexually harassing behaviors, in both sources there was little mention of race, age, or marital status. The failure to recite race, age, and ethnic group is particularly odd in the case of district court complaints because race, age, and ethnic discrimination are all actionable. These omissions might indicate that sexual harassment occurs more often within a single race or ethnic group.

As expected, the complaints recite that the plaintiff made an internal complaint. Following internal procedures is often a pre-requisite to filing a lawsuit, so information on what internal procedures a victim followed should appear in district court complaints. Some of the news articles also mentioned internal company procedures.

News articles tend to focus on the individual accused of harassment. Federal complaints focus on the employer that the parties share. This is understandable because the employer is the deep pocket that can pay damages.

Not every complaint recited a claim of retaliation. The failure to state a claim of retaliation is unexpected because retaliation provides a separate basis for relief. For example, a court could find that the employer was not responsible for sexual harassment but was responsible for retaliation against the victim for filing a claim of sexual harassment. Although some of the news articles include claims of retaliation, the articles reported retaliation claims less frequently than district court complaints.

Some complaints allege only speech (e.g., sexual suggestions and retaliation for failure to agree to the suggestions), not touching. However, there are no news articles that report sexual harassment from speech alone. The absence of news articles reporting sexual harassment from speech alone is odd given that Anita Hill's Senate testimony, which opened many people's eyes to the problem of sexual harassment, concerned only harassing speech. Additionally, there are complaints that allege only retaliation (e.g. retaliation for supporting someone else who was sexually harassed). But there is no news story where the claim is only retaliation without touching or speech.

Unlike natural disasters or acts of terrorism that make headlines and take the world by surprise, by the time the media reports on a case of sexual harassment, there has been a long trail of law and social science research that contributes to our understanding of sexual harassment. We begin with a brief overview of the development of the understanding of sexuality in the workplace, followed by a brief review of how the law prohibiting workplace discrimination on the basis of sex came to be interpreted to also prohibit sexual harassment in the workplace. We next discuss how

sexual harassment is reported in surveys. Our main focus is on identifying whether the media's portrayal of sexual harassment accurately reflects the reality of sexual harassment as indicated in surveys, charge filings with the EEOC, and in complaints filed in district court. We provide and compare empirical evidence from these four different sources, and conclude with an assessment of whether the media does accurately characterize sexual harassment. We note that not all sexual harassing behaviors involve male harassers of female victims, but the majority of sexual harassment charges do, and we use the associated pronouns throughout for convenience.

I. LITERATURE REVIEW—SEXUALITY IN THE WORKPLACE

Employers know that sexuality in the workplace is dangerous.¹⁰ For example, one study showed that a quarter of surveyed companies expressed fear that sexuality in the workplace leads to legal liability,¹¹ though most companies lack a policy-written or oral-regarding workplace relationships;¹² about 40% of employees acknowledge involvement in workplace romance.¹³ A later study based on nationally representative data from the 1992 U.S. National Health and Social Life Survey found that 41% of surveyed females had reported workplace sexual harassment at some time in their work life.¹⁴ Nevertheless, much of the managerial literature on sexuality in the workplace disregards the legal consequences of sexual harassment and focuses on the effect of office romances on productivity.¹⁵ In

¹⁰ Nolan C. Lickey et al., *Responding to Workplace Romance: A Proactive and Pragmatic Approach*, 8 J. BUS. INQUIRY 100, 100 (2009) (explaining that managers often avoid the issue of workplace romances as one would avoid a "sleeping dragon"). *Id.* ("The workplace has always been a major place for individuals to meet and learn about each other. This proximity may lead to attraction and romance . . . [and] may lead to productivity losses for the organization, charges of sexual harassment, perceptions of employee favoritism, . . . and even workplace violence.").

¹¹ MICHAEL PARKS, SOC'Y FOR HUMAN RES. MGMT., 2006 WORKPLACE ROMANCE: POLL FINDINGS 3 fig.3 (2006), available at [http://www.shrm.org/Research/SurveyFindings/Articles/Documents/06-WorkplaceRomancePollFindings%20\(2\).pdf](http://www.shrm.org/Research/SurveyFindings/Articles/Documents/06-WorkplaceRomancePollFindings%20(2).pdf).

¹² *Id.* at 1 fig.1.

¹³ *Id.* at 6 fig.5; see also Sara Bliss Kiser et al., *Coffee, Tea, or Me? Romance and Sexual Harassment in the Workplace*, 31 S. BUS. REV., Apr. 2006, at 35, 42–46 (discussing how to properly develop a workable romance or sexual harassment policy in light of similar statistics).

¹⁴ Aniruddha Das, *Sexual Harassment at Work in the United States*, 38 ARCHIVES SEXUAL BEHAV. 909, 913 (2009).

¹⁵ See Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69, 71 (indicating that a typical Fortune 500 corporation can expect to lose \$6.7 million, in 1988 dollars, annually). These losses come from absenteeism, lower productivity, increased health-care costs, poor morale and employee turnover. See *id.* Not included in this dollar amount are the losses from litigation costs or court-awarded damages, damage to company image, nor loss to company reputation. *Id.* For a figure including legal fees, see FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 157 (1999) (estimating that in 1994 the

general, sociologists also pay scant attention to workplace sexual bantering, flirting, and dating.¹⁶

The few sociological studies of workplace sexuality that focus on sexual harassment use surveys to illuminate how employers and employees understand sexuality in that setting.¹⁷ For example, a survey of 218 recent business school graduates found that office romances rarely result from the desire to use sex for personal advancement.¹⁸ Nevertheless, to the extent that people suspect venal motivation behind office romance, those surveyed were more likely to associate females with entering into relationships in hope of material gain.¹⁹ Interestingly, these informants also believed that females are more likely than males to become victims of workplace sexuality.²⁰ The belief that females use sexuality in the workplace more frequently than males was echoed in a 2001 survey/experiment where MBA students “responded to a randomly assigned vignette in which they assumed the role of co-worker of . . . two romantic partners.”²¹ The MBA students, who expected to work as managers in the near future and who were significantly younger than the average manager, still identified females as more likely than males to use office romance for personal advancement.²²

In 2009, Nina Cole conducted a study based on actual workplace romances. Her interviews uncovered that employees prefer that employers ignore office romances unless (1) the romance has a negative effect on the workplace, (2) the parties work in the same department, or (3) the organization has an office romance policy.²³ Another survey concluded that whether employees consider workplace rules concerning sexuality fair is positively associated with the degree to which employees perceive their

average sexual harassment liability loss, including legal fees, was \$600,000).

16 Christine L. Williams et al., *Sexuality in the Workplace: Organizational Control, Sexual Harassment, and the Pursuit of Pleasure*, 25 ANN. REV. SOC. 73, 73 (1999); see also Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 127 (2007).

17 See Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 336–48 (1992) (reviewing “the social science research which addresses issues relevant to sexual harassment policy and lawsuits” and discussing sexual “nonharassment”—behavior not considered to be harassment—in the workplace).

18 Claire J. Anderson & Caroline Fisher, *Male-Female Relationships in the Workplace: Perceived Motivations in Office Romance*, 25 SEX ROLES 163, 163, 174–75 (1991).

19 *Id.* at 174 (“[Data on the perceptions of third-party observers] indicated that men were more likely to engage in ego-related affairs than women and women were more likely to engage in relationships in order to move up the organizational ladder.”).

20 *Id.* at 163 (“Women were also more likely to be perceived as victims of the office ‘fling.’”).

21 Gary N. Powell, *Workplace Romances between Senior-Level Executives and Lower-Level Employees: An Issue of Work Disruption and Gender*, 54 HUM. REL. 1519, 1519 (2001).

22 *Id.* at 1537–38.

23 Nina Cole, *Workplace Romance: A Justice Analysis*, 24 J. BUS. & PSYCHOL. 363, 363 (2009).

workplace as “fun,” as well as their self-perceived “person–organization fit.”²⁴ There are six factors that link workplace romances and sexual harassment: (1) type of workplace romance as defined by pairing of each partner’s primary romance motive; (2) partners’ social power; (3) initiation of romantic relationship dissolution; (4) male partner’s sexual harassment proclivity; (5) nature of each partner’s “residual affective state”; and (6) the organization’s tolerance for sexual harassment.²⁵

II. LEGAL HISTORY OF SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964²⁶ reaches two types of sexual harassment: quid pro quo harassment, which occurs when a supervisor conditions tangible job benefits on a subordinate’s submission to his sexual advances,²⁷ and abusive atmosphere harassment, which is based on the creation of a “hostile work environment.”²⁸ The law on both of these types of sexual harassment developed through judicial decisions and agency interpretations. The statute itself merely outlaws discrimination based on sex.

In keeping with the managerial literature addressing sexuality in the workplace discussed above, sexual harassment was initially understood as

24 Charles A. Pierce et al., *Role of Workplace Romance Policies and Procedures on Job Pursuit Intentions*, 27 J. MANAGERIAL PSYCHOL. 237, 252 (2012); see also Robert C. Ford et al., *Questions and Answers About Fun at Work*, 26 HUM. RESOURCE PLAN., 2003, at 18, 24 (analyzing similar survey findings, which showed that “rather than increasing . . . reports of sexual harassment, fun work environments tended to slightly lessen these possible negatives”).

25 Charles A. Pierce & Herman Aguinis, *A Framework for Investigating the Link Between Workplace Romance and Sexual Harassment*, 26 GROUP & ORG. MGMT. 206, 206, 214–20 (2001).

26 Civil Rights Act of 1964, Pub. L. No. 88–352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e–2(a)(1) (2006)) (making it unlawful for any employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

27 See, e.g., *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (finding there is no liability for quid pro quo sexual harassment without a showing that the employer required sexual favors as a precondition for continued or favorable employment). The term “sexual harassment” came into use in the 1970s, and the early definitions of sexual harassment emphasized the power relationship of men relative to women: men in power (such as a supervisor) could extract sexual favors from women with the threat of job loss and denial of employment benefits such as raises and promotions. All cases filed in federal courts before 1981 alleging sex discrimination on the basis of sexual harassment were quid pro quo cases. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–68 (1986) (analyzing hostile work environment cases from lower federal courts after certain EEOC guidelines were issued and citing no cases earlier than 1982).

28 See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (recognizing certain behavior as “sufficiently severe or pervasive” that it acts to “alter the conditions of [the victim’s] employment and create an abusive working environment”).

driven by sexual desire, personal conflicts, or misunderstanding. In fact, sexual harassment was not originally viewed as an actionable offense.

Although Title VII became law in 1964, the term sexual harassment was not coined until 1978, when the journalist Lin Farley defined sexual harassment as “unsolicited nonreciprocal male behavior that asserts a woman’s sex role over her function as a worker.”²⁹ In 1979, Catharine MacKinnon’s influential book *Sexual Harassment of Working Women* introduced the hostile work environment as a second type of violation.³⁰ In 1980, the EEOC followed MacKinnon’s analysis and added hostile work environment as actionable harassment in addition to quid pro quo sexual harassment.³¹ In 1986, the Supreme Court recognized both quid pro quo and hostile work environment harassment as a violation of Title VII in *Meritor Savings Bank v. Vinson*.³² The Court’s rationale for viewing hostile or abusive work environment harassment as sex discrimination was grounded in the fact that sexual harassment “creates a hostile or offensive environment for members of one sex [and] is . . . [an] arbitrary barrier to sexual equality at the workplace”³³

The EEOC is responsible for enforcing federal laws outlawing sexual harassment in the workplace.³⁴ One way that the EEOC enforces

29 LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 14–15 (1978).

30 See generally CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). MacKinnon argues that sexual harassment is a form of sexual discrimination and is thus a violation of Title VII of the 1964 Civil Rights Act, which forbids discrimination, among other social categories, on the basis of sex.

31 EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2012), available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title29-vol4/pdf/CFR-2012-title29-vol4-part1604.pdf>.

Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Id. The first two violations describe quid pro quo sexual harassment while the third describes hostile work environment harassment.

32 *Meritor Sav. Bank*, 477 U.S. at 65–67 (1986) (analyzing EEOC guidelines to come to the conclusion that the EEOC intended for “quid pro quo” and “hostile work environment” claims to be actionable under Title VII).

33 *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d. 897, 902 (11th Cir. 1982)).

34 See *About EEOC*, EEOC.GOV, <http://www.eeoc.gov/eeoc/> (last visited Mar. 26, 2013). The EEOC was created in the Civil Rights Act of 1964 and charged to enforce federal law outlawing discrimination in hiring, firing, and promotions, harassment, training, wages, and benefits on the basis of race, color, religion, national origin, and sex. See 42 U.S.C. § 2000e–4 (2006) (establishing the EEOC in Title VII of the Civil Rights Act of 1964). Throughout its existence, the EEOC has focused on one simply stated mission: the elimination of illegal

the nation's sexual harassment prohibitions is through its authority to investigate harassment charges filed against the alleged harasser's employer. If the EEOC finds that harassment has occurred, then the agency tries to settle the charge. If no settlement is reached, then the EEOC can decide to defer the lawsuit to the charging party or commence a lawsuit on behalf of the employee. The EEOC is more likely to defer than to proceed. In fact, at least in the first steps of its investigations, the EEOC disposes of most charges by either a finding of "additional investigation required" or "potential cause with no plan to litigate."³⁵ Indeed, an employee cannot force the EEOC to investigate a charge nor recover against the EEOC for negligently processing a charge.³⁶

discrimination from the workplace. *See Laws Enforced by EEOC*, EEOC.gov, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Mar. 26, 2013). These laws include: Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e–2 (2006)); Equal Pay Act of 1963, Pub. L. No. 88–38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006)); Pregnancy Discrimination Act (PDA), Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)); Age Discrimination in Employment Act (ADEA), Pub. L. No. 90–202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–634 (2006)); Americans with Disabilities Act (ADA) of 1967, Pub. L. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2006)); Genetic Information Nondiscrimination Act (GINA) of 2008, Pub. L. 110–233, 122 Stat. 881 (codified at 42 U.S.C. §§ 2000ff to 2000ff–11 (2006)). It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Civil Rights Act of 1964, 42 U.S.C. § 704 (2006).

³⁵ Calculation by the authors using EEOC charge data obtained by a Freedom of Information Act request shows that, of charges filed with the EEOC from 2006 to 2010 in which sexual harassment was one of the issues, 57% of the charges filed by women and 64% of the charges filed by men required additional investigation. Only 6.9% of the charges filed by women and 4.4% of the charges filed by men were categorized as "District Plans to Litigate." *See infra* Part IV.B (table on file with author).

³⁶ *See Ward v. EEOC*, 719 F.2d 311, 312 (9th Cir. 1983) (indicating that Congress neither expressly nor impliedly provided for an action against the EEOC for negligence); *Feldstein v. EEOC*, 547 F. Supp. 97, 98–99 (D. Mass. 1982) (holding that job applicant had no implied right under Title VII to bring action against the EEOC for its failure to pursue an investigation of the job applicant's discrimination charge).

Sexual harassment suits under Title VII may be brought in state or federal court³⁷ by either the EEOC³⁸ or private individuals.³⁹ An employee retains a right to a *de novo* trial on the merits, whatever the EEOC's conclusions regarding reasonable cause to support sexual harassment charges.⁴⁰

Nevertheless, before bringing a private lawsuit, the aggrieved employee must first file a claim with either the EEOC or the corresponding state or local Fair Employment Practices Agency (FEPA).⁴¹ The employee then decides whether to allow the EEOC to investigate the charge or let the requisite time pass and obtain a "right to sue letter."⁴² Requiring employees to go to the EEOC before bringing a lawsuit in federal district court is meant to encourage EEOC-sponsored mediation in lieu of trial.⁴³

37 *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) ("[W]e conclude that Congress did not divest the state courts of their concurrent authority to adjudicate federal claims."). This holding has been codified:

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1) (2006). For a discussion of regulation of workplace relationships in New York State, see *Rogers infra* note 44.

38 42 U.S.C. § 2000e-5(a)-(b) (2006) (vesting authority in the EEOC to file a charge); 42 U.S.C. § 2000e-6(e) (2006) ("[T]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.").

39 42 U.S.C. § 2000e-5(b) (2006) (providing that a charge may be filed by the person aggrieved, or on such person's behalf).

40 *See Hernandez v. Region Nine Hous. Corp.*, 684 A.2d 1385, 1393 (N.J. 1996) (pointing out that EEOC determinations are not final judgments; that there is no avenue of appeal from an EEOC determination; thus, "a subsequent district court suit on a Title VII claim will be *de novo* and on the merits").

41 42 U.S.C. § 2000e-5(e) (2006). *See also How to File a Charge of Employment Discrimination*, EEOC.gov, <http://www1.eeoc.gov/employees/howtofile.cfm?renderforprint=1> (last visited Mar. 26, 2013).

42 42 U.S.C. § 2000e-5(f)(1) (2006). The statute provides:

If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . by the alleged unlawful employment practice.

Id.

43 *Ex parte Sverdrup Corp.*, 692 So. 2d 833, 835-36 (Ala. 1996) (determining that the purpose of requiring "the filing of a charge of discrimination with the EEOC [as] a condition

Employers are potentially liable for sexual harassment under both Title VII and state law.⁴⁴ Based on the requirements for employer liability, whatever other remedies she pursues, a harassment victim should lodge her complaint with a responsible company official in accordance with company policy.⁴⁵ An internal complaint is important because, if the victim is suing based on a hostile work environment and the harassment did not result in a tangible employment action, then the employer can avoid liability by showing that it exercised reasonable care to prevent and promptly correct the harassment and that the employee failed to take advantage of the employer's complaint procedures.⁴⁶ In this way, if the harassment was the result of a coworker's actions, the employer will only be liable if it knew

precedent to the bringing of a Title VII civil action [under] 42 U.S.C. § 2000e–5(c) . . . is to permit the EEOC to act as a mediator between the employer and the employee so as to encourage the parties to settle disputes without a trial”).

44 See Jennifer L. Dean, Note, *Employer Regulation of Employee Personal Relationships*, 76 B.U. L. REV. 1051 (1996). Dean discusses employers' justifications for restricting employee personal relationships, *id.* at 1053–58, and explains that employers are automatically liable for quid pro quo harassment but may avoid liability for hostile workplace harassment if they have procedures in place that the employee does not follow, *id.* at 1054; see also Alyce H. Rogers, Comment, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687, 713 (1997) (concluding that “anti-dating policies” may work best if “employers promulgate the least restrictive policy on employees’ privacy” that nonetheless accomplishes company goals). Note that employees are not liable under Title VII, but certain state laws do allow a plaintiff to sue an employee for sexual harassment. See, e.g., *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (“[G]enerally only employers may be liable under Title VII.”).

45 See Paul E. Mirengoff & Heather French, *Limiting Discovery of Consensual Sexual or Romantic Relationships in Sexual Harassment Lawsuits*, 24 TRIAL LAW. 123, 125 (2001), available at <http://cdn.akingump.com/images/content/9/6/v2/962/309.pdf>; see also Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL'Y 237, 248–49 (2006) (showing that, in general, policies prohibiting consensual relationships take three forms: 1) an outright, formal prohibition; 2) an informal disapproval and discouragement of intra-organization fraternization; 3) a formal requirement that employees report the initiation and aftermath of consensual relationships); Alison J. Chen & Jonathan A. Sanbur, Note, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA LAB. & EMP. L.J. 165, 174 (1999).

46 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding an employer vicariously liable for any actionable hostile work environment created by a supervisor, who had authority over the employee, if the employer knew or should have known about the conduct and failed to stop it); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding that an employer may be held vicariously liable for actionable discrimination caused by a supervisor, but subject to a defense based on reasonableness of the employer's conduct). The Supreme Court in these companion cases sought to contour the parameters of employer liability for supervisory sexual harassment in the workplace. For discussion of these companion cases, see, for example, Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court than Those Who Say No . . . and Why They Shouldn't*, 20 YALE J.L. & FEMINISM 25, 31–38 (2008) (discussing *Faragher–Ellerth* defense to sexual harassment), and Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 1016–28 (2012) (discussing the impact of plausibility pleading on the *Faragher–Ellerth* defense).

or should have known of the harassment and did not take prompt and appropriate action to correct the abuse. Thus, the law creates incentives for employers to maintain sexual harassment prevention and correction policies and for victims to follow their company's internal procedures.⁴⁷

The basic route to a federal law suit for workplace sexual harassment includes at least four distinct actions: an alleged instance of harassment, followed by an internal complaint, leading to an EEOC charge, and finally, a federal district court complaint.⁴⁸ Within this structure there are many opportunities for the parties to settle or for the complainant to stop pursuing a remedy. Indeed, estimates are that most sexual harassment is never reported within the company, much less through an EEOC charge or a district court complaint. Thus, from the many incidents that are never reported, to those that remain in house, only a small fraction lead to EEOC charges and still fewer proceed to a federal district court complaint.

While the legal system has come a long way in protecting victims of harassment in the work place, there is still work to be done, particularly in the media's portrayal of sexual harassment. In order to accurately compare general instances of sexual harassment to those reported within the media, we analyze three separate data sources that each represent three of the four parts of this long and complicated process: the 1994 USMSPB survey *Sexual Harassment in the Federal Workplace*,⁴⁹ EEOC charge data from fiscal years 2006 to 2010,⁵⁰ and sexual harassment complaints filed in the district court for Eastern District of Pennsylvania from January 2000 to June 2011.⁵¹ We were unable to obtain reliable data on internal complaints.

47 See generally Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL'Y 27 (1999) (focusing on the legal defenses that management uses to defeat sexual harassment claims for which the employer should not be responsible).

48 Plaintiffs also have the right to sue under state statutes, many of which provide different rights or statutes of limitations. See, e.g., Jill A. Fukunaga & Carolyn M. Oshiro, Recent Development, *Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai'i*, 15 U. HAW. L. REV. 453, 454-55 (1993) ("[In Hawai'i,] a victim of workplace sexual harassment can seek recovery under four areas of law: 1) Title VII and the 1991 Civil Rights Act; 2) the Hawai'i FEP statute; 3) the Hawai'i workers' compensation statute; and 4) certain common law torts under Act 275 [1992 Haw. Sess. Laws 275 (codified as amended at HAW. REV. STAT. ANN. §§ 378-3, 386-5 (West 2008))]."); Rogers, *supra* note 44, at 688-98 (discussing N.Y. LAB. LAW § 201-d(2) (McKinney 2009), which prohibits an employer from discriminating against an individual based upon participation in certain activities outside the workplace).

49 See USMSPB, *supra* note 6.

50 See EEOC Sexual Harassment Charges, *supra* note 7.

51 See *Electronic Case Filing (ECF)*, *supra* note 8.

III. SEXUAL HARASSMENT SURVEY EVIDENCE OVERVIEW

Survey evidence documenting widespread sexual harassment was important to the development of sexual harassment law.⁵² Yet, estimates of the prevalence of sexual harassment vary considerably even among studies based on representative samples. Further, very few sexual harassment studies have been conducted recently.

The first sexual harassment case decided under Title VII occurred in 1976.⁵³ That same year a *Redbook* magazine poll found that almost nine out of ten women reported unwanted sexual advances at work.⁵⁴ Although voluntary responses from a non-representative sample have evident methodological weakness, the *Redbook* survey's findings raised public awareness of sexual harassment as a widespread problem.

Despite growing public awareness, sexual harassment literature failed to link data collection in a conceptual framework or ascertain the reliability and validity of the measures used. In response, Louise Fitzgerald and her colleagues and students developed the Sexual Experiences Questionnaire (SEQ).⁵⁵ It is the most commonly used survey of sexual harassment at work.⁵⁶ Although the survey was intended to measure psychological sexual harassment, the SEQ authors claim that their survey also parallels the legal definition of unlawful sexual harassment.⁵⁷

52 See Willness et al., *supra* note 16, at 150 (“[T]he organizational context . . . and the job gender context of the organization play an important role in facilitating the occurrence of [sexual harassment].”).

53 See *Williams v. Saxbe*, 413 F. Supp. 654, 657–61 (D.D.C. 1976) (finding a valid cause of action for sex discrimination under Title VII where plaintiff alleged retaliatory action after she declined her supervisor's sexual advances), *rev'd on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

54 Claire Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217 (noting that a survey of almost 9000 readers found 92% of REDBOOK's survey respondents identified sexual harassment as a problem, and nearly 90% reported personal experience with sexual harassment), *cited in* ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 442 (7th ed. 2004).

55 Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 152–56 (1988).

56 Barbara A. Gutek et al., *A Review and Critique of the Sexual Experiences Questionnaire (SEQ)*, 28 L. & HUM. BEHAV. 457, 457–58 (2004) (citing Bridget Murray, *Psychology's Voice in Sexual Harassment Law*, APA MONITOR, Aug. 1998, at 50, 50 (1998)) (noting that forensic psychologist Laura Brown lauded the SEQ as “the gold standard” in assessing the level of sexual harassment in lawsuits brought against employers).

57 Fitzgerald and colleagues have revised the SEQ over time, and sexual harassment surveys have used various modifications, but the essential form is a series of questions that are grouped into three categories: gender harassment, unwanted sexual attention, and sexual coercion. Barbara A. Gutek et al., *A Review and Critique of the Sexual Experiences Questionnaire (SEQ)*, 28 L. & HUM. BEHAV. 457, 460 (2004). Anyone reporting having experienced any of the behaviors at least once over the timeframe is recorded as having been sexually harassed. *Id.* at

IV. DATABASES

In order to compare media reports of sexual harassment to instances of sexual harassment in the workplace, instances that are filed with the EEOC, and complaints that are filed with the Eastern District of Pennsylvania, we use four different sources to construct our study:

- (1) The 1994 United States Merit Systems Protection Board's (USMSPB) survey data of approximately 8,000 federal workers;⁵⁸
- (2) EEOC charge data from 2006 to 2010;⁵⁹
- (3) Complaints filed in the Eastern District of Pennsylvania from 2000 to 2011 made available through PACER;⁶⁰ and
- (4) News reports on sexual harassment in the workplace from the *New York Times* (NYT) and the Wall Street Journal (WSJ).⁶¹

Information on these databases is provided below.

A. *United States Merit Systems Protection Board (USMSPB) Survey: Sexual Harassment in the Federal Workplace*

Perhaps the most reliable survey evidence on workplace sexual harassment comes from the USMSPB survey entitled *Sexual Harassment in the Federal Workplace*.⁶² Although the survey was conducted in three waves,

461. The presence and frequency of any behavior is recorded in various ways but usually with limited precision. For instance, the SEQ includes questions such as "often told dirty jokes," followed by responses such as "sometimes," "often," or "most of the time." *Id.* at 463–65. Presumably the only valid response to the frequency is "often." A known problem with the SEQ is that the coding system gives more weight to frequent incidents (such as being told dirty jokes often) and less weight to single incidents even if they are severe. *See id.* at 474–75.

58 *See* USMSPB, *supra* note 6.

59 *See* EEOC Sexual Harassment Charges, *supra* note 7.

60 *See* *Electronic Court Filing (ECF)*, *supra* note 8; PACER, *supra* note 8.

61 *See* *infra* app. A.

62 *See* USMSPB, *supra* note 6. Among other questions, the survey asked respondents to report whether they had experienced any of the following unwanted or uninvited behaviors in the past two years: sexual teasing, jokes, remarks, questions; sexual looks, gestures; deliberate touching, leaning, cornering; pressure for dates; letters, calls, sexual materials; stalking; pressure for sexual favors; and actual or attempted rape or assault. *Id.* at 5. For other uses of the USMSPB data, see V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 369–90 (2013) (using the USMSPB empirical evidence to support three legal theories of sexual harassment:

only responses from the third wave in 1994 appear in this article because it contains the most recent survey data.⁶³ As is discussed in more depth below, the anatomy of a sexual harassment charge begins with behavior that is likely never reported or is only reported in-house. The USMSPB survey data get at this first step in the long journey from behavior to litigation by providing information on sexual harassment that was not reported or that was only reported in-house.⁶⁴ The USMSPB survey elicits information from federal employees about their perceptions of and experiences with sexual harassment.⁶⁵ In addition, the survey allows employees to remain anonymous but asks them to report personal demographics and detailed information about instances of sexual harassment that they have experienced in the past two years.⁶⁶

B. EEOC Charge Data

The Office of Research, Information, and Planning compiles data from the EEOC's Charge Data System and additionally includes data from the EEOC's Integrated Mission System for the fiscal year 2004 forward.⁶⁷ The data reflect charges filed with the EEOC and with state and local Fair

1) the reasonable woman standard, 2) the acknowledgment that individuals view supervisor harassment as more severe, and 3) the importance of workplace integration).

63 The USMSPB is a survey of government employees conducted in 1980, 1987, and 1994. USMSPB, *supra* note 6, at vi. The USMSPB states that the centerpiece of the 1994 sexual harassment study was “a survey questionnaire sent, in April 1994, to almost 13,200 Federal employees at worksites all over the country.” *Id.* at 1.

64 *See id.* at 21. The USMSPB survey also provides information on the characteristics of the most likely victims of unwanted sexual attention. Workers who are most likely to be sexually harassed are those who work mostly with those of opposite sex, are unmarried, are supervised by members of the opposite sex, are college educated, and are under age thirty-five. *Id.* at 16–17.

65 *Id.* at 5–11, 13–21.

66 U.S. MERIT SYS. PROT. BD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: 1978–1980, 1987, AND 1994 (1994), available at <http://dx.doi.org/10.3886/ICPSR06893.v1> (providing data set files for all three waves of the USMSPB sexual harassment survey).

This collection consists of three separate surveys undertaken to assess the extent of sexual harassment within the federal government. The records in each file contain responses to a mail survey on sexual harassment in the federal workplace from a disproportionately stratified sample. Each record contains reactions to a series of statements about the respondent's workplace, such as “I feel free to bring up general work-related concerns or suggestions to my immediate supervisor.” Other data gathered include attitudes regarding sexual behavior that can happen at work, how the respondent defined sexual harassment, opinions on remedies that could reduce sexual harassment, descriptions of and actions taken in response to specific incidents of sexual harassment, and information about whether the respondent had been accused of sexually harassing others. Additional information includes respondent's work schedule, working hours, number of coworkers, number of supervisors, and gender of supervisors. Demographic variables include race, age, marital status, sex, and level of education.

Id.

67 *See* EEOC Sexual Harassment Charges, *supra* note 7.

Employment Practices Agencies (FEPA) that share their work with the EEOC. One of the authors of this paper (Joni Hersch) acquired the charge filing records through a Freedom of Information Act (FOIA) request.⁶⁸ The statistics reported in this article from the EEOC charge filings are derived from Hersch's statistical analysis of the individual charge filing records.

The EEOC charge data provide considerable information about the legal claim, the respondent (e.g., the employer, union, employment agency), and the charging party. The data set reports the relevant opening and closing date of the claim; the office that received the claim (e.g., Nashville Area Office); whether the claim was reported to the EEOC or FEPA; an initial assessment of the claim's strength, from "definitely litigate" to "dismiss"; the statute that supports the claim (e.g., Title VII, ADEA, with many claims filed under more than one statute); the basis for the claim (e.g., religion, sex, race, disability, with most claims reporting multiple bases); the issue involved (e.g., sexual harassment, terms/conditions, retaliation, with most claims reporting multiple issues); and information about the respondent, including the respondent's city and county, employer's North American Industry Classification System (NAICS) code, firm size reported in five categories, and institution type (e.g., private employer, educational institution). Demographic information on the claimant includes race, sex, date of birth, and national origin.

To identify sexual harassment charges, we selected from the full set of charge filings those that included "sexual harassment" as at least one of the issues raised in the victim's charge. We examined EEOC charge data for the fiscal years 2006 to 2010 in order to correspond to the period of our media review. There were a total of 38,019 charges of sexual harassment filed in fiscal years 2006 to 2010, with 30,741 charges filed by women and 6,005 charges filed by men. Sex is not reported for 3.35% of the charges. With 150 million people in the labor force, comparatively few workers file legal charges of sexual harassment.⁶⁹ However, the fact that only a small number of EEOC charges were filed does not necessarily mean that there were a small number of incidents; most sexual harassment is never reported or is handled on the employer level without outside reporting.⁷⁰

68 The EEOC charge filings are on file with the author: Professor Joni Hersch, Vanderbilt University Law School, 131 21st Avenue South, Nashville, TN 37203.

69 Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV.: PAPERS & PROC. 630, 631 (2011) ("There are about 150 million individuals in the labor force, so clearly few workers file legal charges of discrimination generally or of sexual harassment.").

70 See Jennifer Zimbhoff, Note, *Cultural Difference in Perceptions of and Responses to Sexual Harassment*, 14 DUKE J. GENDER L. & POL'Y 1311, 1318 (2007) ("Even when sexual harassment is perceived as such, it may not be reported or may not be reported promptly; the tendency to report varies, as well, with culture."); see also Hersch, *supra* note 69, at 631 ("[E]mployees who are sexually harassed must report such behavior to their employer, and the employer is given the opportunity to attempt to stop any sexually harassing behavior."). Hersch measures the risk of sexual harassment by industry, age, and sex using the EEOC charge data. *Id.* She

C. Public Access to Court Electronic Records (PACER) Complaints

Although the EEOC charge data relay substantial information about the legal basis of discrimination charges, these data provide little specific information on the behavior and relationship between harasser and complainant that led to filing the sexual harassment charge. For a deeper understanding of the specific nature of the behavior and relationships leading to the complaint, we turn to information available through court records. These records are drawn through the federal judiciary's Case Management/Electronic Case Files (CM/ECF) system.⁷¹ This management system provides courts the ability to make their documents available to the public over the Internet through the judiciary's Public Access to Court Electronic Records (PACER) website.⁷² All federal district, bankruptcy, and appellate courts are included.⁷³ Each court codes its own data for PACER.⁷⁴ Of the ninety-four federal district courts in the United States, only four districts code their dockets for sexual harassment.⁷⁵ Of those four, the Eastern District of Pennsylvania provides more information regarding its sexual harassment filings than the other three districts in this faction. Accordingly, we limited our review to Eastern District of Pennsylvania District Court filings that the district court coded for sexual harassment.⁷⁶

Our PACER search covered Eastern District of Pennsylvania District Court filings from January 2000 to June 2011.⁷⁷ We independently analyzed

finds that workers at greater risk of sexual harassment are paid a premium for exposure to such heinous working conditions, in a manner similar to the premium workers are paid for risk of job fatality or injury. *Id.* at 633–34.

⁷¹ Federal statutes authorize individual courts, by local rule, to permit or require electronic filing. *See, e.g.*, FED. R. APP. P. 25(a)(2)(d); FED. R. BANKR. P. 5005(a)(2); FED. R. CIV. P. 5(d)(3); FED. R. CRIM. P. 49(d). Filers to the CM/ECF system are required to redact certain "personal identifier" information from their filings, such as social security or taxpayer identification numbers, dates of birth, names of minor children, financial account numbers, and, in criminal cases, home addresses. *See* FED. R. APP. P. 25(a)(5); FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; FED. R. CRIM. P. 49.1. When an attorney logs in to CM/ECF to file, a message appears pointing out this responsibility to redact such private information before filing.

⁷² *See generally* Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855 (2008) (presenting the history and development of what the Administrative Office of the U.S. Courts and Judicial Conference of the United States have built and examining why state courts, in general, are approaching the same issues differently).

⁷³ *See* PACER, *supra* note 8.

⁷⁴ *See PACER User Manual for ECF Courts*, PACER 7 (June 2012), <http://www.pacccr.gov/documents/pacermanual.pdf>.

⁷⁵ These four districts are the Northern District of Oklahoma, the Eastern District of Pennsylvania, the Eastern District of Virginia, and the Western District of Arkansas.

⁷⁶ *See Electronic Court Filing (ECF)*, *supra* note 8.

⁷⁷ The sexual harassment filing data were compiled from the Eastern District of Pennsylvania complaints and dispositions filed under the cause of action titled "sexual harassment." If a complaint was not provided by PACER, then the names provided in the

over 300 complaints and coded detailed information about each case. The complaints provided information including the charges filed, the statutes the charges were filed under, and the outcome of the charge. In addition, we coded detailed information about the harassment, such as the supervisor status and sex of the harasser, the number of harassers, and the type of harassment. Finally, we coded personal demographic information about the victim and harasser, such as sex and race.

D. Newspaper Articles

To complete our review of news articles on sexual harassment in the workplace, we reviewed sixty-seven incidents from 2006 to 2012. These news articles were captured exclusively from the *New York Times* (*NYT*) and the *Wall Street Journal* (*WSJ*).⁷⁸ The reason for limiting ourselves to these periodicals was to gain an understanding of how national media portrays a national problem. These newspapers reach the largest number of people, as they (along with *USA Today*) are the only newspapers with a circulation of at least one million subscribers.⁷⁹ As discussed in more depth later, what we found is that the “national press,” at least as represented by the *NYT* and the *WSJ*, take a decidedly local view of sexual harassment. To illustrate, the vast majority of the articles are from the *NYT* because, apparently, sexual harassment in the workplace is not of particular interest to the *WSJ*, a newspaper that focuses on business issues and the business community. Further, the *NYT* articles show a decided preference for stories from the Boston to Washington, D.C., corridor thereby undercutting that

disposition were used to search Westlaw or Lexis for the judicial opinion of the case. From the PACER dispositions, the sex of the plaintiff could be discerned from the plaintiff's name and then reaffirmed if a complaint or opinion was available for the case. If a complaint or an opinion or both were available, then any additional demographic information provided was coded. In addition, the types of harassment that the plaintiff claimed occurred, the resulting work decision, and the employment status of the harasser were each coded when available. Other information not included in the above summary statistics but included in the sexual harassment filing data set includes the race of the harasser, the disposition of the case, and the type of claims filed.

⁷⁸ Articles from official *NYT* blogs were also included in our review. See *infra* app. A (including articles from *NYT* blogs *The Caucus*, *FiveThirtyEight*, and *Bits*).

⁷⁹ The *WSJ* is circulated Monday through Friday to approximately 2,293,798 subscribers and to approximately 2,280,059 subscribers on the weekend; the *NYT* is circulated Monday through Friday to approximately 1,613,865 subscribers, to 1,618,465 subscribers on Saturday, and to 2,100,893 subscribers on Sunday; *USA Today* is circulated to approximately 1,713,833 subscribers Monday through Friday. *Total Circ for US Newspapers*, ALLIANCE FOR AUDITED MEDIA, <http://abcas3.auditedmedia.com/ecirc/newstitlesearchus.asp> (last visited Mar. 28, 2013) (reporting circulation averages for each of these newspapers during a six-month period ending Sept. 30, 2012).

newspaper's national presence at least with regard to reporting on sexual harassment.⁸⁰

To fully analyze the media's representation of sexual harassment in the workplace, we conducted a Lexis search of the *WSJ* and *NYT* files and reviewed every article regarding sexual harassment that was published during the 2006 to 2012 time period.⁸¹ We then determined that these articles surrounded sixty-seven independent instances of harassment and collected information about each of these instances. We gathered all of the available demographic information about the victim and harasser, as well as detailed information about the type of harassment that was alleged to have occurred. In addition, if any information about a lawsuit was provided, we recorded that information as well.

V. COMPARING THE USMSPB SURVEY DATA, THE EEOC CHARGE DATA, AND THE DISTRICT COURT COMPLAINTS TO NATIONAL NEWS MEDIA REPORTS OF SEXUAL HARASSMENT

A. *Who Claims Sexual Harassment?*

Our sources confirm that sexual harassment is most often a charge made by women against men and that the media accurately reports this fact. The 36,746 observations in the EEOC charge data for sexual harassment from 2006 to 2010 with sex of complainant reported show males filing charges in 16.34% of all actions. Our PACER search of Eastern District of Pennsylvania District Court filings from January 2000 to June 2011 returned less than 13% (12.58%) of 302 sexual harassment plaintiffs as male. The articles we collected for the media review are in accord. They show males complaining of sexual harassment only 11.86% of the time. A larger number of males (approximately 24% of the 2,148 individuals who reported experiencing harassment and reported their sex) reported experiencing sexual harassment in the USMSPB survey; this is likely because males are less likely to make

⁸⁰ See *infra* app. A.

⁸¹ We conducted a Lexis news search in *NYT* and *WSJ* databases for stories, not opinions, regarding sexual harassment in the workplace that did not involve minors: ATLEAST3(sex! Haras!) AND NOT opinion. Our search resulted in sixty-seven incidents. Each incident may provide more than one article. If an article repeated almost word-for-word another news article or if the article does not add any information about the incident, that article was excluded. An article was also excluded if it involves a topic that is not a focus of this study, such as child abuse. Articles dealing with sexual harassment among employees and employers (but not students) at K–12 schools were included, along with articles about sexual harassment at universities; of those concerning universities, incidents involving professors and students were included since university students are no longer considered minors. In our search, *WSJ* Coverage was coded from 2006 to 2012, *NYT* Coverage from 2006 to 2012. We note that the same search of *USA Today* did not provide information on sexual harassment charges that did not also appear in the *WSJ* or *NYT*.

formal reports of sexual harassment, although they evidently are willing to report sexual harassment in an anonymous survey.

The PACER complaints show that of the 207 complaints that described the sex of the defendant (or harasser), only 11% were women. In addition, of the 2,049 individuals who reported being harassed and reported the sex of the harasser in the USMSPB survey, only 16.15% reported that their harasser was a woman. Again, the number from the anonymous USMSPB survey is most likely larger than that from the PACER data because men who are harassed are less likely to report harassment. The media articles are again relatively in accord: only 3% of the sixty instances described in the articles we reviewed which also included discernible information about the harasser's sex described a female harasser.⁸²

	Media Reports	EEOC	PACER	USMSPB
Female	83.05%	83.66%	86.09%	76.44%
Male	11.86%	16.34%	12.58%	23.56%
Both	5.08%	0%	1.32%	0%
Number of Observations	59	36,746	302	2,148

Note that the observations are limited to articles, charges, complaints, and responses that included information about the sex of the victim. Media reports, EEOC charges, and PACER complaints that did not include information about the sex of the victim were excluded from this analysis. In addition, USMSPB respondents who did not report their sex were excluded.

The relationship between the complainant's race and other factors is

	Media Reports	PACER	USMSPB
Female	3.33%	11.11%	16.15%
Male	93.33%	85.02%	78.09%
Both	3.33%	3.86%	5.76%
Number of Observations	60	207	2,049

Note that the observations are limited to articles, complaints, and responses that included information about the sex of the harasser. Media reports and PACER complaints that did not include information about the sex of the harasser were excluded from this analysis. In addition, USMSPB respondents who did not report the sex of the harasser were excluded. The EEOC charges did not include any information about the harasser's sex.

harder to trace through the three data sets. Other authors have shown that black and Hispanic women are overrepresented among employees making EEOC charges given their numbers in the population of working women.⁸³

⁸² If an article did not explicitly state or depict the sex of the parties involved, research assistants were able to discern the sex of the victims and harassers through Internet searches.

⁸³ For an analysis of EEOC sexual harassment charge statistics along with Lexis-Nexis and Westlaw electronic reports of sexual harassment complaints, see Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 185-94 (2001) (providing a statistical analysis of women's experiences of sexual harassment by race, and finding that women of color are overrepresented and white

Our data confirm these findings. For example, according to the Bureau of Labor Statistics, black females make up 17% of the civilian labor force.⁸⁴ Yet, the EEOC charge data show black females comprising 21.87% of all female complaints.

In addition, 29.69% of all EEOC complainants are black. Further, our media data show black complainants as 22.86% of the whole. There are only twelve indications of race among the 302 observations regarding Eastern District of Pennsylvania plaintiffs in the PACER data; this is far too small a number to draw conclusions, although the statistics are reported below.

	Female	Male
Black	21.87%	27.78%
White	46.96%	46.04%
Other Race	7.41%	6.59%
Race Missing	23.76%	19.58%
Number of Observations	30,741	6,005

Note that the observations are limited to charges that included information about the sex and race of the victim. Note that the observations are limited to charges that include information about sex of the complainant.

	Media Reports	EEOC	PACER
Black	22.86%	29.69%	58.33%
White	54.28%	60.85%	33.33%
Asian	8.57%	1.99%	8.33%
Hispanic	5.71%		
Other	8.58%	7.46%	
Number of Observations	35	28,265	12

Note that the observations are limited to articles, charges, and complaints that included information about the race of the victim. Media reports, EEOC charges, and PACER complaints that did not include information about the race of the victim were excluded from this analysis. The USMSPB survey did not ask respondents to report their race.

women are underrepresented when compared with their demographic presence in the female labor force); cf. Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1240–46 (2006) (referencing studies that dispute the premise that women of color are more likely to file charges of sexual harassment than white women who experience the same victimization).

⁸⁴ Total females reported in the civilian labor force = 105,214 (in thousands); total number of black females within that population = 17,862, or 17% of total female civilian workforce. U.S. BUREAU OF LABOR & STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 10 tbl.13 (2011), available at <http://bls.gov/cps/wlf-databook-2011.pdf> (providing status by race, age, sex, and Hispanic or Latino ethnicity).

	Media Reports	PACER
Black	26%	22.22%
White	50%	77.78%
Asian	2%	
Hispanic	6%	
Other	16%	
Number of Observations	50	9

Note that the observations are limited to articles and complaints that included information about the race of the harasser. Media reports and PACER complaints that did not include information about the race of the harasser were excluded from this analysis. The EEOC charges did not include any information about the harasser's race. In addition, the USMSPB survey did not ask respondents to report the race of the harasser.

B. What Behaviors Result in Charges?

We were able to compare the types of behavior complained of in the sixty-seven incidents recorded in the newspaper articles to both the conduct recited in the federal district court complaints and the self-reported incidents of harassment in the USMSPB survey. Depending on the data set, there was a marked difference in the types of activities complained of. The district court data showed more complaints of touching and teasing than the newspaper reports. In fact, there were only two categories where the media data showed more activity than the PACER data: calls and assault were reported in the media data more than in the federal district court complaints. In addition, favors and assault showed much more activity than the self-reported instances of harassment in the USMSPB survey. We were unable to make a similar comparison with the EEOC data, as the data represent formal categories of charges; however, we have reported that information below.

	Media Reports	PACER	1994 USMSPB
Favors	25%	43.75%	9.92%
Dates	2.27%	12.5%	17.31%
Teasing	52.27%	82.21%	64.97%
Calls	15.91%	12.98%	15.23%
Assault	15.91%	5.29%	1.52%
Touching	45.45%	57.21%	42.78%
Stalking	6.82%	14.42%	8.95%
Looks	0%	23.56%	43.84%
Number of Observations	44	208	2,167

Note that the observations are limited to articles, complaints, and responses that reported information about the type of harassment that occurred. Media reports and PACER complaints that did not include information about the type of harassment were excluded from this analysis. USMSPB respondents who did not answer the question which addressed the type of harassment that occurred were also excluded from this analysis. The percentages do not add up to 100 because a USMSPB respondent can report experiencing multiples types of harassment, and the articles and complaints can also report multiple types.

Adverse actions as a result of the harassment differed depending on whether the reports came from the newspaper articles, PACER statistics, or from the USMSPB. The Eastern District of Pennsylvania data show terminations involved in 51.47% of filings, and 40.53% of the EEOC charging parties were discharged (either terminated or constructively discharged), compared to 26.67% in the media data. However, the media data show almost twice as high a percentage of demotions (26.67%) when compared to the district court complaints (14.71%) and over ten times as high a percentage of demotions compared to EEOC charges (2.39%). Alternatively, perhaps because the individuals did not actually report the information, a much smaller percentage of employees who reported experiencing harassment in the USMSPB survey reported experiencing an adverse employment action. Furthermore, the media statistics may not be truly comparable to those of the PACER complaints, EEOC charges, or USMSPB responses because only fifteen of the sixty-seven articles mentioned the victim's employment.

Table 7: Adverse Action Statistics

	Media Reports	EEOC	PACER	1994 USMSPB
Terminated	26.67%	40.53%	51.47%	0.02%
Resigned	0%	0%	34.31%	3.49%
Demoted	26.67%	2.39%	14.71%	0%
Other Action	73.33%	3.02%	0%	8.66%
Number of Observations	15	95,209	204	2,032

Note that the observations are limited to articles, charges, complaints, and responses that reported information about adverse actions. Media reports, EEOC charges, and PACER complaints that did not include information about adverse actions were excluded from this analysis. USMSPB respondents who did not answer the question which addressed whether an adverse action occurred were also excluded from this analysis. The percentages do not add up to 100 because a USMSPB respondent can report experiencing multiple types of harassment, and the articles, charges, and complaints can also report multiple types.

VI. MEDIA REVIEW

This article was inspired by a desire to learn if our national portrait of sexual harassment comports with what we know about harassment through social science. We used the *NYT* and the *WSJ* as proxies for the national media because we fully expected each newspaper to provide perspectives on workplace sexual harassment that shape public awareness.

Within these two national newspapers we searched for news articles (as opposed to opinion pieces or theatre reviews) regarding sexual harassment in the workplace. In an attempt to match the information we gathered from EEOC charges, PACER, and the USMSPB survey data, we limited our content analysis to articles that appeared in the *NYT* and the *WSJ* from 2006 to 2012.

What follows is an exposition of what we found—compared to what we expected to find—when we started our study.

A. The New York Times is Far More Likely to Cover Sexual Harassment Than the Wall Street Journal

We expected that the *WSJ* would cover sexual harassment in the same way and to the same extent as the *NYT*. We were mistaken. Of the ninety-two news articles covering sixty-seven different incidents of claimed workplace harassment, only ten reports come from the *WSJ*. The eighty-two other articles originate in the *NYT*.⁸⁵

B. News Articles are Far More Likely to Focus on the Accused Than the Accuser

One critique of the national news media concerns the practice of reporting all sides with equal regard.⁸⁶ Combining the sense of “he said, she said” that clouds sex-based claims and the news media’s drive towards “neutrality” between opposing parties, we expected neutrality between accuser and accused throughout the news articles.

Instead we found an emphasis on the accused in most articles, as measured by such things as numbers of lines of text and who is featured in the lead paragraph. For example, the lead paragraph generally refers to the accused by name, giving information about his position within a company and his community. The emphasis on the accused tends to continue throughout the article, particularly in the shorter pieces. As the length and number of stories increases, the emphasis on the accused tends to shift toward more neutral or positive coverage of the accuser.⁸⁷

⁸⁵ These counts do not include repetitive reports on the same incident that did not add new information. In fact, there were 390 newspaper articles in total when these repetitive reports are included. For example, there were close to fifty articles about Herman Cain alone, but most of those articles did not provide new information.

⁸⁶ See, e.g., DAVID MINDICH, *JUST THE FACTS: HOW “OBJECTIVITY” CAME TO DEFINE AMERICAN JOURNALISM* (1998) (presenting a comprehensive historical view of objectivity by researching the origins and foundations of its principle elements, namely: detachment, nonpartisanship, the inverted pyramid, facticity, and balance). Mindich’s main focus ranges from the end of the partisan press in the 1830s, to the emergence of objectivity as a goal for magazines and newspapers of the 1890s. *Id.* The author uses *NYT* coverage of lynching to illustrate the wrong-headedness of a balanced approach in all situations. *Id.*

⁸⁷ For events with little coverage (one or two articles), the tone was either plaintiff/victim friendly, or neutral with no strong language or apparent bias. For events with substantial coverage, articles’ tones were plaintiff/victim-friendly, defendant/harasser-friendly, or neutral tone. The more detail of the harassment that the article includes, the more plaintiff/victim friendly it is. Although other factors did influence whether the article had a more plaintiff/victim-friendly or defendant/harasser-friendly tone, the amount of detail of the harassment seems to be the most determinative factor of tone. Typically, the articles with few details of the harassment were the cases handled quickly by the respective companies involved.

C. The Newspaper Articles Correctly Reflect the Number of Male Accusers and the Overrepresentation of Black Accusers

Based on the EEOC charge data discussed above and our PACER search of Eastern District of Pennsylvania District Court complaints, males do pursue sexual harassment charges, albeit in fewer than one-sixth of all actions. The articles we collected for the media review are in accord. They show males complaining of sexual harassment approximately 12% of the time.

Further, according to the Bureau of Labor Statistics, black females make up 17% of the civilian labor force. Yet, among females in the EEOC charge data, black females comprise 22% of accusers. Although we expected newspapers to underreport black complainants, the media coverage matched the EEOC charge data.

D. Overrepresentation of Particular Industries and Geographic Areas

Because there is evidence that sexual harassment is more prevalent in single sex work settings,⁸⁸ we expected sexual harassment claims to cluster in certain settings and in particular industries. However, we expected that the news articles would not cluster by industry and location. We thought that editors would select story lines that illustrated sexual harassment throughout the country and in every industry. We were mistaken.

The media data did cluster around government and sports, especially within the Boston to Washington, D.C. corridor. We speculate that both the emphasis on these industries and on these locations reflect an emphasis on New York City at the *NYT* that we did not expect to find. As discussed earlier, our expectation was that both the *WSJ* and the *NYT* would cover sexual harassment as national stories. The emphasis on New York City sports teams and New York City government reflected in our industry statistics suggests that the *NYT* is much more locally-focused than we suspected and that the *WSJ* does not consider sexual harassment in the workplace part of its standard scope of coverage.

Government	35.82%	24
Sports	11.94%	8
Education	10.45%	7
Food	8.96%	6
Media	8.96%	6
Clothing	2.99%	2
Housing	2.99%	2
Other	14.93%	10
Observations		67

⁸⁸ Hersch, *supra* note 69, at 633.

E. News Stories' Emphasis on Litigation

As the USMSPB survey and the EEOC charge data show, litigation is a very small slice of the very large problem of sexual harassment. Nevertheless, the *NYT* stories are often triggered by an announcement of litigation or some other step in the litigation process. If one relied solely on the newspaper reports to gain an understanding of sexual harassment in the workplace, one would conclude that sexual harassment leads to litigation much more often than is actually the case. This then reflects another finding: lawyers are featured more often in news reports of sexual harassment than are litigants.

Statements quoted in the *NYT* stories often come from the parties' lawyers. Especially in the shorter articles, the accuser and the accused are silent except through their lawyers' statements to the press. It is hard to know what to make of this phenomenon. Does it connote shame? Or perhaps simply the point in the legal process that captures press attention? If reporters interviewed women the way that surveys do—before there is any formal complaint—the voices reflected in news articles would come from employees and employers themselves, rather than as statements through legal representatives.

F. No Attempt is Made to Connect Any Particular Story to a Larger Social, Economic, or Political Trend

Stories are presented as separate incidents without any relation to a larger trend in the company, industry, region, or country. There is no indication in the reportage that sexual harassment represents a labor trend in the way that a story on unemployment might focus on a particular local family but would also include some information connecting the family's plight to larger social, political, and economic trends.

VII. COMPARISON OF MEDIA REPORTS AND SEXUAL HARASSMENT COMPLAINTS

We hypothesized that our study of media reports would reveal a large disparity between the way the media portrays sexual harassment in the workplace and reality. The newspaper accounts did not support our hypotheses since they are generally in accord with the sexual harassment data. However, newspaper accounts standing alone obscure the type of behavior that leads to sexual harassment complaints. The newspaper accounts are filled with phrases like "sexual harassment," "repeated unwanted sexual advances," and "crude comments." In contrast, the behaviors relayed in court documents are considerably more graphic. Compare, for example, the *NYT* recitation of International Profit Associates' (IPA) conflict with the

EEOC⁸⁹ and Judge Joan B. Gottschall's description of the same behavior in the context of a motion for summary judgment.⁹⁰

In the *NYT* we learn that: “[IPA’s] troubles extend beyond client complaints. For almost five years, the firm has been battling a lawsuit filed by the federal Equal Employment Opportunity Commission, which asserts that its executives had routinely harassed female subordinates with crude comments, groping and demands for sex.”⁹¹

In contrast, Judge Gottschall addresses the motion for summary judgment by first recounting the specific claims contained in the plaintiff's complaint. For example, consider these excerpts from the court's discussion of the allegations:

Claimant No. 9

Tony Jones was the head of the department, and No. 9's direct supervisor was Scott Hanson. No. 9 claims that both of these men told her repeatedly that she had “nice legs” or a “nice ass.” Hanson would comment on her legs while eyeing her up and down. Other male colleagues also commented on No. 9's legs or whistled at her. No. 9 states that she was subjected to this conduct on a daily basis.

In addition, No. 9 claims that Scott Hanson touched her on multiple occasions. Three or four times, Hanson told No. 9, “ooh, you're tense” and rubbed her shoulders, touching down to the tops of her breasts where her bra was. On these occasions, No. 9 would pull away immediately, but Hanson continued to touch her. At some point during No. 9's short tenure at IPA, Hanson moved his workspace next to hers. Thereafter, on three occasions, while No. 9 and Hanson were seated in their chairs, Hanson pulled No. 9's chair close to him, so that the two were facing each other, with her legs between his, close to his groin.

⁸⁹ Mike McIntire, *Rubbing Shoulders with Trouble, and Presidents*, N.Y. TIMES, May 7, 2006, § 1, at 1.

⁹⁰ EEOC v. Int'l Profit Assocs., 647 F. Supp. 2d 951 (N.D. Ill. 2009).

⁹¹ McIntire, *supra* note 89, at 1. The focus of this article is John R. Burgess, owner of International Profit Associates. Mr. Burgess, as noted in the article, is a “disbarred New York lawyer with a criminal record for attempted larceny and patronizing a sixteen year old prostitute.” *Id.* The article also notes that “[f]ederal authorities are pressing a sexual harassment suit against the company on behalf of 113 former female employees.” *Id.* Noted too is that “the Illinois attorney general is investigating accusations of deceptive marketing tactics.” *Id.* But the whole of the article addresses Mr. Burgess' campaign contributions to prominent politicians, as well as speaking fees given to prominent political figures by Mr. Burgess and his company.

Hanson then rubbed No. 9's thighs and asked her out for drinks or dinner. The first time it happened, No. 9 said, "no, Scott. I'm engaged. You're engaged. What are you doing?" Hanson replied that although they were both engaged, they belonged together. No. 9 quit her job on the day Hanson rubbed her thighs for the third time. . . .

. . . .

. . . *Claimant Number 10*

Claimant No. 10 worked as an administrative assistant at IPA from September 14, 1999 to January 7, 2000. No. 10 worked in the mergers and acquisitions department, and her supervisor for the duration of her employment was Scott Wood. No. 10 makes the following allegations in support of her claim:

On one occasion shortly before No. 10 quit her job, she witnessed Tony Jones, the director of the inside sales department, grab a female employee and push her backwards over a desk, then lift his leg over her and simulate having sex with her. No. 10 saw the woman try to push Jones off of her, screaming, "get the hell off me." Jones then pulled the woman from the desk onto the floor, where he kneeled on top of her and further simulated sex, while the woman continued to scream at him and try to push him off. No. 10 described the incident as follows: "Tony had grabbed the girl, and she was by a desk, and pushed her on the desk and pretty much humped her as a dog would go to the bathroom, and then pulled her down to the floor and as she was screaming, he jumped on her and started humping her again."⁹²

CONCLUSION

The national news media, at least as represented by the *NYT* and the *WSJ*, does not focus on workplace sexual harassment as a national issue. Stories are reported as separate incidents without any relation to larger political, social, or economic trends.

The two newspapers tend to focus on sexual harassment at the point that a federal lawsuit is filed. This emphasis on litigation misrepresents the actual course of sexual harassment complaints. As far as researchers can tell,

⁹² *Int'l Profit Assocs.*, 647 F. Supp. 2d at 957-58.

very little sexual harassment is ever reported, much less cited as the basis for official complaint.

The *WSJ* spends significantly less space on sexual harassment than the *NYT*. Given how widespread sexual harassment is in the workplace, its editors may want to rethink their orientation away from coverage.

Nevertheless, in terms of who sues and why, the national media comports with the social science evidence. Women are more likely to complain of sexual harassment than men. Women are also more likely to pursue claims through the EEOC and the courts. Blacks are overrepresented as complainants in sexual harassment actions based on their population within the work force. What is missing is a sense of what happens before litigation and what sexual harassment means to victims in terms of their economic, professional, and emotional lives.

Appendix A—Newspaper Articles

1. Lynn Zinser, *Skeleton Group Accepts Reorganization*, N.Y. TIMES, Apr. 26, 2006, at D2.
2. *Harassment Suit is Filed Against Toyota*, N.Y. TIMES, May 3, 2006, at C9.
3. Mike McIntire, *Rubbing Shoulders with Trouble, and Presidents*, N.Y. TIMES, May 7, 2006, § 1, at 1.
4. James Baron, *City Settles Workfare Harassment Lawsuit*, N.Y. TIMES, May 13, 2006, at B3.
5. John Sullivan, *Manhattan: Candidate Fired From State Job*, N.Y. TIMES, May 19, 2006, at B6.
6. Katie Zezima, *Archdiocese Hospital Chief Quits After Harassment Accusations*, N.Y. TIMES, May 26, 2006, at A16.
7. Shaila Dewan, *Forklift Driver's Stand Leads to Broad Rule Protecting Workers who Fear Retaliation*, N.Y. TIMES, June 24, 2006, at A12.
8. Lawrence Van Gelder, *Actress Sues Over 'Movin' Out,'* N.Y. TIMES, June 30, 2006, at E5.
9. Micheline Maynard, *Automaker Reaches Settlement in Sexual Harassment Suit*, N.Y. TIMES, Aug. 5, 2006, at C4.
10. Frank Litsky, *Thomas Asks District Court to Deny Suit*, N.Y. TIMES, Aug. 11, 2006, at D6.
11. Andrew Jacobs, *Aide McGreevey Cited Says They Never Had an Affair*, N.Y. TIMES, Sept. 18, 2006, at B5.
12. *Washington: Soldier to Face Court-Martial*, N.Y. TIMES, Oct. 5, 2006, at A23.
13. *Minnesota: Fire Chief's Dismissal Urged*, N.Y. TIMES, Nov. 29, 2006, at A25.
14. *Player Files Sexual Harassment Suit*, N.Y. TIMES, Jan. 20, 2007, at D6.

15. Greg Myre, *Israel to Indict President on Sex Charges, Justice Ministry Says*, N.Y. TIMES, Jan. 24, 2007, at A3.
16. Greg Myre, *Former Israeli Official Guilty of Sexual Misconduct*, N.Y. TIMES, Feb. 1, 2007, at A10.
17. Isabel Kershner, *Israel Drops Rape Charges as President Agrees to Quit*, N.Y. TIMES, June 29, 2007, at A16.
18. Richard Sandomir, *Harold Reynolds Says Race Played a Role in His Firing*, N.Y. TIMES, Sept. 8, 2007, at D4.
19. Richard Sandomir, *Accusations Made by Browne Sanders are Contradicted by Witnesses*, N.Y. TIMES, Sept. 25, 2007, at D3.
20. Steven Greenhouse, *Suit Claims Restaurant Looked Past Harassment*, N.Y. TIMES, Sept. 25, 2007, at B5.
21. Richard Sandomir, *In Garden Lawsuit, Stories Differ to the End*, N.Y. TIMES, Sept. 28, 2007, at D1.
22. *Ruling in Harassment Case*, N.Y. TIMES, Oct. 2, 2007, at D6.
23. Selena Robert, *Dolan Has Not Used the Garden as Directed*, N.Y. TIMES, Oct. 3, 2007, at D1.
24. Richard Sandomir, *Jury Finds Knicks and Coach Harassed a Former Executive*, N.Y. TIMES, Oct. 3, 2007, at A1.
25. Stephanie Rosenbloom, *Boss's Memo: Go Ahead, Date (with My Blessing)*, N.Y. TIMES, Oct. 11, 2007, at G1.
26. David Chen, *Ex-Governor is Accused of Harassing a Colleague*, N.Y. TIMES, Oct. 25, 2007, at B5.
27. Richard Sandomir, *Garden Settles Sex Harassment Case*, N.Y. TIMES, Dec. 11, 2007, at D1.
28. *Kansas: Attorney General Admits Affair*, N.Y. TIMES, Dec. 11, 2007, at A31.
29. Richard Sandomir, *Garden Settles a Lawsuit Filed by a Former Rangers Cheerleader*, N.Y. TIMES, Dec. 27, 2007, at D5.

30. *U.N.C. Harassment Suit Settled*, N.Y. TIMES, Jan. 15, 2008, at D6.
31. Agence France–Presse, *Finland: Sexual Harassment in Parliament*, N.Y. TIMES, Jan. 25, 2008, at A13.
32. Brenda Goodman, *Scandals and a Shake–Up in a Georgia Department*, N.Y. TIMES, Apr. 23, 2008, at A13.
33. Christopher Maag, *Ohio Official Caught Up in Scandal Quits Post*, N.Y. TIMES, May 15, 2008, at A23.
34. Kate Murphy, *Complaint at Jack Daniels*, N.Y. TIMES, June 29, 2008, at BU2.
35. Danny Hakim, *Two Accusers of an Ex–Aide Join an Effort to Oust Silver*, N.Y. TIMES, July 14, 2008, at B1.
36. *Nascar Defends Firing Official*, N.Y. TIMES, Aug. 9, 2008, at D7.
37. Dirk Johnson, *Chain of Grief for a Flagship University*, N.Y. TIMES, Nov. 23, 2008, at A35.
38. Gregory Beyer, *Backed by the Neighbors, but Not by His Bosses*, N.Y. TIMES, Dec. 7, 2008, at CY6.
39. David W. Chen, *Sexual Harassment Claim Arises After Official Quits*, N.Y. TIMES, Dec. 21, 2008, at A50.
40. Trymaine Lee, *City Settles Sex Harassment Case at Department for Aging*, N.Y. TIMES, Jan. 1, 2009, at A21.
41. *Ohio: Sexual Harassment Settlement*, N.Y. TIMES, Jan. 22, 2009, at A18.
42. James C. McKinley, Jr., *Judge Sentenced to Prison for Lying About Harassment*, N.Y. TIMES, May 12, 2009, at A15.
43. Sarah Lyall, *Facing Anonymous Charges, Poet Departs Race for Post at Oxford*, N.Y. TIMES, May 13, 2009, at C1.
44. Steve Stecklow, *Sexual–Harassment Cases Plague UN*, WALL ST. J., May 21, 2009, at A1.
45. Howard Beck, *Foreclosure is Latest Challenge for Curry*, N.Y. TIMES, July 1, 2009, at B12.

46. Bill Carter & Brian Stelter, *Extortion Case Raises Questions for Letterman and his Network*, N.Y. TIMES, Oct. 3, 2009, at A1.
47. John Eligon, *Motion Says Letterman Fostered Harassment*, N.Y. TIMES, Nov. 11, 2009, at A26.
48. Steven Lee Myers, *Another Peril in War Zones: Sexual Abuse by Fellow G.I.'s*, N.Y. TIMES, Dec. 28, 2009, at A1.
49. Greg Hitt, *Pelosi Aides Knew of Massa Concerns*, WALL ST. J., Mar. 11, 2010, at A5.
50. Robert A. Guth et al., *Accuser Said Hurd Leaked an H–P Deal—EO Lost Out as Board Lost Faith*, WALL ST. J., Nov. 6, 2010, at A1.
51. Greg Bishop, *Favre and Jets are Hit with Lawsuit*, N.Y. TIMES, Jan. 4, 2011, at B11.
52. Katie Thomas & Mark Viera, *N.F.L. Declined to View Favre Texts, Lawyer Says*, N.Y. TIMES, Jan. 5, 2011, at B13.
53. Ben Worthen et al., *H–P Shakes Up Board in Scandal's Wake*, WALL ST. J., Jan. 21, 2011, at B1.
54. Ashley Park, *Lawsuit Says the Military is Rife with Sexual Abuse*, N.Y. TIMES, Feb. 16, 2011, at A18.
55. Laura M. Holson, *Chief of American Apparel Faces 2nd Harassment Suit*, N.Y. TIMES, Mar. 24, 2011, at B2.
56. Laura M. Holson, *He's Only Just Begun to Fight*, N.Y. TIMES, Apr. 14, 2011, at E1.
57. Daniel Gilbert, *KBR Alleged Rape Trial Begins*, WALL ST. J., June 15, 2011, at B3.
58. Gary Fields & Brody Mullins, *Florida Lawmaker Faces Ethics Review in Congress*, WALL ST. J., June 21, 2011, <http://online.wsj.com/article/SB10001424052702304887904576400053258305010.html>.
59. David W. Chen & Jo Craven McGinty, *City Workers' Bias Suits Rise, Despite Softer Bloomberg Tone*, N.Y. TIMES, July 6, 2011, at A15.

60. Jim Rutenberg & Jeff Zeleny, *Woman Said to Have Felt Hostility at Work After Complaining About Cain*, N.Y. TIMES, Nov. 4, 2011, at A16.
61. Michael D. Shear & Trip Gabriel, *Woman Accuses Cain of Lewd Behavior; He Denies It*, THE CAUCUS, Nov. 7, 2011, <http://thecaucus.blogs.nytimes.com/2011/11/07/accuser-details-lewd-behavior-by-cain/>.
62. Jim Rutenberg & Michael D. Shear, *A Second Accuser Goes Public Against Cain*, THE CAUCUS, Nov. 8, 2011, <http://thecaucus.blogs.nytimes.com/2011/11/08/a-second-accuser-goes-public-against-cain/>.
63. Jim Rutenberg & Michael D. Shear, *Woman Accuses Cain of Groping; He Denies Charge*, N.Y. TIMES, Nov. 8, 2011, at A1.
64. Neil King, Jr., & Andrew Morse, *Cain: No Memory of Latest Accuser-Defiant GOP Candidate Says He Never Acted Inappropriately; a Second Woman Speaks Publicly*, WALL ST. J., Nov. 9, 2011, at A5.
65. Jim Rutenberg, *Cain Lawyer Warns any Accusers: 'Think Twice,'* N.Y. TIMES, Nov. 10, 2011, at A1.
66. Susan Saulny, *Even Cain's Old Jokes Face Extra Scrutiny Now*, N.Y. TIMES, Nov. 11, 2011, at A20.
67. Michael D. Shear & Jim Rutenberg, *One of Cain's Accusers is Waiting for Others to Come Forward, Her Lawyer Says*, N.Y. TIMES, Nov. 11, 2011, at A20.
68. Michael D. Shear, *Cain Accuser's Ex-Boyfriend Supports Harassment Claims*, THE CAUCUS, Nov. 14, 2011, <http://thecaucus.blogs.nytimes.com/2011/11/14/cain-accusers-ex-boyfriend-supports-harassment-claims/>.
69. Sarah Maslin Nir, *Wife Defends Cain as a Man Who 'Totally Respects Women,'* N.Y. TIMES, Nov. 14, 2011, at A19.
70. Trip Gabriel, *Cain's Wife Takes on Role She Has Long Avoided*, N.Y. TIMES, Nov. 15, 2011, at A19.
71. Douglas A. Blackmon & Neil King, *Herman Cain's Political Education*, N.Y. TIMES, Nov. 25, 2011, at A1.
72. Susan Saulny, *Woman Claims Affair with Cain, and He Denies It*, N.Y. TIMES, Nov. 29, 2011, at A19.

73. Jeff Zeleny & Susan Saulny, *Cain Support Eroding Amid Scandal, Weighs Dropping His Bid*, N.Y. TIMES, Nov. 30, 2011, at A1.
74. Marc Lacey & Dan Frosch, *Ex-Governor is Said to be Focal Point of Inquiry*, N.Y. TIMES, Dec. 2, 2011, at A16.
75. Nate Silver, *Other Than That, Mr. Cain, How Was the Campaign?*, FIVETHIRTYEIGHT, Dec. 6, 2011, <http://fivethirtyeight.blogs.nytimes.com/2011/12/06/other-than-that-mr-cain-how-was-the-campaign/>.
76. Howard Beck, *N.B.A. Ignored Sex Harassment, Suit Says*, N.Y. TIMES, Dec. 16, 2011, at B14.
77. Quentin Hardy, *Coming Soon: The Letter That Sank Mark Hurd*, BITS, Dec. 29, 2011, <http://bits.blogs.nytimes.com/2011/12/29/coming-soon-the-letter-that-sank-mark-hurd/>.
78. Arik Hesseldahl & Ben Worthen, *Court Frees Up Hurd Letter-Former H-P Chief Loses Bid to Keep Sealed Allegations That Led to His Ouster*, WALL ST. J., Dec. 30, 2011, at B5.
79. James Stewart, *In H.P. Tale, a Question of Truth or Titillation*, N.Y. TIMES, Jan. 7, 2012, at B1.
80. Gary Fields, *Harassment Case Moves to Ethics Committee*, WALL ST. J., Jan. 12, 2012, at A7.
81. Howard Beck, *The Disappearance of James L. Dolan*, N.Y. TIMES, Mar. 13, 2012, at B13.
82. Robin Finn, *The Battle for . . . Archie*, N.Y. TIMES, Apr. 15, 2012, at MB1.
83. Robin Finn, *Two in Dispute Over Control of Archie Comic Company Reach a Settlement*, N.Y. TIMES, June 7, 2012, at A22.
84. Jennifer Preston, *\$2 Million Penalty for Sexually Harassing West Side Tenants*, N.Y. TIMES, May 9, 2012, at A20.
85. Nicole Perlroth, *Venture Capital Partner Claims Sexual Harassment*, N.Y. TIMES, May 23, 2012, at B1.

86. David Streitfeld, *Kleiner Perkins Fires Back in Sex Discrimination Case*, BITS, May 30, 2012, <http://bits.blogs.nytimes.com/2012/05/30/kleiner-fires-back-in-sex-discrimination-case/>.

87. Jennifer Medina, *Sex-Harassment Settlement by School District in Dispute*, N.Y. TIMES, May 31, 2012, at A20.

88. David Streitfeld, *A Lawsuit Shakes Foundation of a Man's World of Tech*, N.Y. TIMES, June 3, 2012, at BU1.

89. Michael Powell, *Suit Claims UConn Women's Coach Retaliated After His Sexual Advance was Rebuffed*, N.Y. TIMES, June 12, 2012, at A18.

90. David Streitfeld, *Venture Firm Fires Back in Discrimination Case*, BITS, June 13, 2012, <http://bits.blogs.nytimes.com/2012/06/13/venture-firm-fires-back-in-discrimination-case/>.

91. David Streitfeld, *Kleiner Perkins Denies Sex Bias in Response to a Lawsuit*, N.Y. TIMES, June 14, 2012, at B4.