

§ 25.08 An Overview of the #MeToo Movement and Its Impacts on Employers¹²⁹

[1] Introduction

Recently, Catherine MacKinnon, the Elizabeth A. Long Professor of Law at the University of Michigan and pioneer of prosecuting sexual harassment claims, wrote:

Just because something is legally prohibited doesn't mean it stops. Maybe exceptional acts don't, but not pervasive structural practices. Equal pay has been the law for decades and still does not exist. . . . The #MeToo movement is finally breaking this paralyzing logjam. Structural misogyny, with sexualized racism and class inequities, is being challenged by women's voices. No longer liars, no longer worthless, today's survivors are initiating consequences few could have gotten through any lawsuit—in part because the laws do not permit relief against individual perpetrators, more because the survivors are being believed and valued as the law seldom has.¹³⁰

The #MeToo movement is not new. In fact, it is depressingly old. It was called something different in different eras—women's liberation for example—but the underpinnings of it have been constant. It is a constant battle to gain equality and equity in the workplace without being subject to harassing, discriminatory and retaliatory behavior by those in power. As Ms. MacKinnon artfully states above, harassment has been unlawful for a long time, but it doesn't mean that it no longer happens. It happens with frightening frequency and at varying levels of severity. Perhaps the outcome of this iteration of the movement will have a different, more progressive and positive result because—as Ms. MacKinnon says—survivors are being believed and valued.

This section examines the historical origins of the #MeToo movement, its impact on federal and state law, its impact on workplace culture, and provides guidance to employers on how it can effectively manage and investigate complaints of workplace harassment in the #MeToo era. This is by no means an exhaustive treatment of the subject matter, but provides context and practical advice for employers.¹³¹

[2] #MeToo is Repurposed for Sexual Harassment and Sexual Assault for a Wider Community

#MeToo was a viral phenomenon that gained traction in our collective social conscience in the Fall of 2017 when it emerged that former Miramax and The Weinstein Company

¹²⁹ Section 25.08 was written by Genevieve Ng, a partner in SLOAN SAKAI YEUNG & WONG LLP in Berkeley, California.

¹³⁰ Catharine A. MacKinnon *Where #MeToo Came From, and Where It's Going* THE ATLANTIC March 24, 2019, <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>.

¹³¹ It must be noted that this pamphlet refers to alleged perpetrators of harassment (or assault in some cases) as "harassers" and does not qualify the term with "alleged." This is not to pass judgment on whether or not the alleged misconduct happened, but rather as shorthand. Otherwise, to write "alleged harasser" each time would likely double the page length of this pamphlet.

founder and film producer Harvey Weinstein was accused of rape and sexual assault.¹³² More than 50 women, including actresses Mira Sorvino, Rose McGowan, Annabella Sciorra and Gwyneth Paltrow alleged that Weinstein raped, sexually assaulted or engaged in inappropriate sexual conduct with them over the last two decades.¹³³ As actress Alyssa Milano observed other actresses speak out about their own sexual assault experiences, she encouraged her Twitter followers to respond with #MeToo as a way of showing the “magnitude of the problem.”¹³⁴ By that following Monday, “more than a quarter-million people were discussing #MeToo on Facebook” and almost 350,000 posts were tagged with #MeToo on Instagram.¹³⁵ It was a moment when victims of sexual assault and harassment collectively—and electronically—stood up to say “You are not alone.”

The #MeToo movement actually began as a grassroots movement in 2007, when Tarana Burke first used it to reach out to sexual assault survivors in communities of color. Ms. Burke, an African American activist from New York and Time Person of the Year in 2017, used the catchphrase “Me Too” as a signal from survivor to survivor, to spread the message that survivors were not alone and that “radical healing was happening and possible.”¹³⁶ The phrase had power because someone had said it to Ms. Burke and “it changed the trajectory of [her] process.”¹³⁷

In 2017, the voices who shouted #MeToo came not only from communities of color and were not limited to sexual assault. The voices of survivors come from all parts of society, from cisgender people to transgender people, to all members of the LGBTQ community. And the perpetrators of the assaults and harassment, likewise, come from all parts of society. And #MeToo was not limited to the United States. It became a global movement. In France, it is called the “rat on your pig” movement.¹³⁸

It is telling that in traditional patriarchal societies, survivors were telling their stories. In Egypt, where a 2013 United Nations study found that 93% of the women interviewed experienced some form of sexual harassment, harassment and assault are “a daily part of

¹³² Ryan Gilbey *Rose McGowan: ‘I Miss Performing. My Career was Stolen.’* THE GUARDIAN July 1, 2019, <https://www.theguardian.com/stage/2019/jul/01/rose-mcgowan-edinburgh-harvey-weinstein-me-too>.

¹³³ Caroline Davis and Nadia Khomami *Harvey Weinstein: the Women who Have Accused Him* THE GUARDIAN May 25, 2018, <https://www.theguardian.com/film/2017/oct/11/the-allegations-against-harvey-weinstein-what-we-know-so-far>.

¹³⁴ Christie D’Zurilla *In Saying #MeToo, Alyssa Milano Pushes Awareness Campaign About Sexual Assault and Harassment* THE MORNING CALL October 31, 2017 at <https://www.mcall.com/la-et-entertainment-news-updates-metoo-campaign-me-too-alyssa-milano-1508173882-htmlstory.html>.

¹³⁵ Christie D’Zurilla *In Saying #MeToo, Alyssa Milano Pushes Awareness Campaign About Sexual Assault and Harassment* THE MORNING CALL October 31, 2017 at <https://www.mcall.com/la-et-entertainment-news-updates-metoo-campaign-me-too-alyssa-milano-1508173882-htmlstory.html>.

¹³⁶ Zahara Hill *A Black Woman Created the ‘Me Too’ Campaign Against Sexual Assault 10 Years Ago* EBONY October 16, 2017 at <https://web.archive.org/web/20171018155029/http://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano#axzz4vuEf5omw>.

¹³⁷ Zahara Hill *A Black Woman Created the ‘Me Too’ Campaign Against Sexual Assault 10 Years Ago* EBONY October 16, 2017 at <https://web.archive.org/web/20171018155029/http://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano#axzz4vuEf5omw>.

¹³⁸ Noga Tarnopolsky and Melissa Etehad *A Global Primal Scream: #MeToo* L.A. TIMES October 18, 2017 at <https://web.archive.org/web/20171019053548/http://www.latimes.com/world/middleeast/la-fg-global-me-too-20171018-story.html>.

a woman's life."¹³⁹ Jermeen Nasr tweeted: "Girls and women of Egypt face sexual harassment everyday. . . . They are forced to keep silent. . . . no we won't. #MeToo."¹⁴⁰ In China, where there are much stricter controls on social media, citizens have had to use clever run arounds to avoid censorship. #MeToo as pronounced in Mandarin sounds like "rice bunny" so users hashtag posts with #RiceBunny. Zhou Ziaoxuan, a screenwriter, wrote about her personal experience with Zhu Jun, a famous news anchor for China Central Television.¹⁴¹ It is alleged that Mr. Zhu forcibly kissed and groped Ms. Zhou in 2014. Ms. Zhou's lengthy plea that exhorted—in part—for the need of women in China to "speak up" about their experiences spread and "inspired women to come forward with their own stories of abuse."¹⁴² Ms. Zhou became China's leading hero of the #MeToo movement—a beacon for women, and the target of trolls and death threats.¹⁴³ She was told by the police not to bother as Mr. Zhu was television royalty in China. Mr. Zhu even went so far as to sue Ms. Zhou for harm to his reputation and emotional distress totaling \$95,000 in damages. Instead of capitulating, Ms. Zhou sued Mr. Zhu alleging damage to her dignity.¹⁴⁴ Her suit presses on.

These stories are a few examples of the courage of survivors who have come forward and taken action against their aggressors. It feels like a real movement. It feels like perpetrators are being held accountable. It feels like there is a seed change afoot. But is this change real? And if it is real, will it take?

[a] The Origins and Historical Prevalence of Workplace Harassment

*For years, many women accepted it as a job hazard. Now, with raised consciousness and increased self-assurance, they are speaking out against the indignities of work-related sexual advances and intimidation, both verbal and physical.*¹⁴⁵

Without looking at the footnote, it would be easy to guess that this quote came from an article written about workplace harassment in late 2017, during the advent of the

¹³⁹ Noga Tamopolosky and Melissa Etehad *A Global Primal Scream: #MeToo* L.A. TIMES October 18, 2017 at <https://web.archive.org/web/20171019053548/http://www.latimes.com/world/middleeast/la-fg-global-me-too-20171018-story.html>.

¹⁴⁰ Noga Tamopolosky and Melissa Etehad *A Global Primal Scream: #MeToo* L.A. TIMES October 18, 2017 at <https://web.archive.org/web/20171019053548/http://www.latimes.com/world/middleeast/la-fg-global-me-too-20171018-story.html>.

¹⁴¹ Javier C. Hernandez *She's on a #MeToo Mission in China, Battling Censors and Lawsuits* NEW YORK TIMES January 4, 2019 at <https://www.nytimes.com/2019/01/04/world/asia/china-zhou-xiaoxuan-metoo.html>.

¹⁴² Javier C. Hernandez *She's on a #MeToo Mission in China, Battling Censors and Lawsuits* NEW YORK TIMES January 4, 2019 at <https://www.nytimes.com/2019/01/04/world/asia/china-zhou-xiaoxuan-metoo.html>.

¹⁴³ Javier C. Hernandez *She's on a #MeToo Mission in China, Battling Censors and Lawsuits* NEW YORK TIMES January 4, 2019 at <https://www.nytimes.com/2019/01/04/world/asia/china-zhou-xiaoxuan-metoo.html>.

¹⁴⁴ Javier C. Hernandez *She's on a #MeToo Mission in China, Battling Censors and Lawsuits* NEW YORK TIMES January 4, 2019 at <https://www.nytimes.com/2019/01/04/world/asia/china-zhou-xiaoxuan-metoo.html>.

¹⁴⁵ Enid Lemy *Women Begin to Speak Out Against Sexual Harassment* NEW YORK TIMES August 19, 1975 at p. 38; see also Lydia Dishman *The Frustratingly Familiar History of Workplace Sexual Harassment* FAST COMPANY August 16, 2018 at <https://www.fastcompany.com/90217353/the-frustratingly-familiar-history-of-workplace-sexual-harassment>.

#MeToo era. However, this quote comes from a 1975 article by Enid Lemy, written for the New York Times. It is safe to say that harassment has been around since there were two people in close proximity to one another on this earth. And sexual harassment in the workplace has been present since they began working together.

Title VII of the Civil Rights Act of 1964 states that discrimination in employment on the *basis of race, color, religion, national origin, and sex is illegal*. While the text of Title VII does not explicitly forbid workplace harassment, the EEOC and the federal courts consider workplace harassment to be a form of unlawful employment discrimination. In 1979, Catherine MacKinnon, a Yale law school graduate, wrote *SEXUAL HARASSMENT OF THE WORKING WOMEN: A CASE OF SEX DISCRIMINATION* as a form of discrimination under Title VII. In her book, MacKinnon asserts that harassment is discriminatory because it creates inequity as between men who—at the time—were not victims of sexual harassment and women—who were the victims of sexual harassment.¹⁴⁶

Working seemingly in concert to bring about this pivotal moment, in the late 1970s, she shared with students at Yale the notion that sexual harassment is a form of discrimination under Title IX. In *Alexander v. Yale*, five women sued Yale alleging that their professors were propositioning them for sex in exchange for better grades.¹⁴⁷ The Second Circuit Court of Appeals agreed with Alexander—and by extension MacKinnon—and held that, under Title IX, schools must address sexual harassment as a form of discrimination.¹⁴⁸

In the 1980s, the Equal Employment Opportunity Commission (“EEOC”) essentially adopted MacKinnon’s framework on sexual harassment in the workplace. The EEOC recognized that harassment on the basis of sex violates Title VII, and “[u]nwelcome 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 the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”¹⁴⁹

Then in 1986, the Supreme Court recognized that sexual harassment may violate laws prohibiting discrimination on the basis of sex. In *Meritor Savings Bank v. Vinsons*, where Ms. MacKinnon served as co-counsel to Ms. Vinson, the Court held that Title VII of the Civil Rights Act of 1964 was not limited to economic or tangible discrimination; rather, it found that Congress’ intent was to “strike the entire spectrum of disparate treatment of men and women in employment.”¹⁵⁰

¹⁴⁶ Catherine MacKinnon *SEXUAL HARASSMENT OF THE WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

¹⁴⁷ *Alexander v. Yale University* 631 F.2d 178 (1980).

¹⁴⁸ Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (2018).

¹⁴⁹ Sexual Harassment 29 C.F.R. § 1604.11 (a).

¹⁵⁰ *Meritor Savings Bank v. Vinsons* (1986) 477 U.S. 57.

Riding that wave, several public controversies such as the Clarence Thomas' confirmation hearings for the United States Supreme Court, Tailhook, and the President Clinton and Paula Jones lawsuit, shed additional light on the problem of sexual harassment. Dr. Anita Hill testified in 1991 during Clarence Thomas' confirmation hearing that he, then the head of the EEOC (in what must be the dictionary's definition of irony) persistently asked her out on dates and then talked about sex and sexual topics in front of Dr. Hill during work. She testified that "he spoke about . . . such matters as women having sex with animals and films showing group sex or rape scenes."¹⁵¹ She stated that Thomas also described his genitalia and his "sexual prowess."¹⁵² Most infamously, she recounted an incident where Thomas looked at a can of Coca Cola on his desk and asked "[w]ho has put pubic hair on my Coke?" Thomas called the proceedings a "high tech lynching."¹⁵³

This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree.¹⁵⁴

Senators castigated Dr. Hill with Senator Orrin Hatch going so far as to say that Dr. Hill was working with special interest groups to harm Judge Thomas.¹⁵⁵ Women were prepared to testify as witnesses in support of Dr. Hill's account, but they were never called. Then Senator Joe Biden, the Chair of the Senate Judiciary Committee, reached a deal with the Senate Republicans to bring the matter for a vote without additional testimony.¹⁵⁶ Judge Thomas was confirmed by 52-48 vote.

1992 was declared the "Year of the Woman" after Dr. Hill's testimony spurred women in record numbers to run for public office. Congress passed a law allowing harassment victims the ability to seek federal damage awards, back pay and reinstatement.

¹⁵¹ "Hearings Before the Senate Committee on the Judiciary on The Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hill, Anita F. Testimony and prepared statement" U.S. Government Printing Office. October 11-13, 1991.

¹⁵² "Hearings Before the Senate Committee on the Judiciary on The Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, Hill, Anita F. Testimony and prepared statement" U.S. Government Printing Office. October 11-13, 1991.

¹⁵³ Hearing of the Senate Judiciary Committee on the Nomination of Clarence Thomas to the Supreme Court Archived September 13, 2013, at the Wayback Machine, *Electronic Text Center, University of Virginia Library*, October 11, 1991.

¹⁵⁴ Hearing of the Senate Judiciary Committee on the Nomination of Clarence Thomas to the Supreme Court Archived September 13, 2013, at the Wayback Machine, *Electronic Text Center, University of Virginia Library*, October 11, 1991.

¹⁵⁵ Associated Press *Anger Flaring, Sen. Hatch Threatens to Quit* L.A. TIMES October 12, 1991 at <https://www.latimes.com/archives/la-xpm-1991-10-12-mn-157-story.html>.

¹⁵⁶ Douglas Frantz and Sam Fulwood III *Senators' Private Deal Kept 2nd Woman Off TV* L.A. TIMES October 17, 1991 at <https://www.latimes.com/archives/la-xpm-1991-10-17-mn-911-story.html>.