

“HUN, I WANT *YOU* FOR DESSERT”: WHY ELIMINATING THE SUB-MINIMUM WAGE FOR RESTAURANT SERVERS WILL EMPOWER WOMEN

SUZANNE SPECKER*

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INTRODUCTION

During my first shift at a fast-paced, upscale Dallas restaurant, I followed Jeremy, my trainer and fellow server, to our third table of the night. Jeremy congenially asked the two middle-aged male customers whether they had decided on dessert. One of the men gestured to me, stating loudly, “Hun, I want you for dessert.” I responded with the most professional server smile that I could muster in an attempt to hide my shame. Jeremy, too, tried a light-hearted chuckle and again asked if they might like to try tonight’s special. This time, the other man piped up, “Is she the special? I want her for dessert!” The first man laughed loudly, chiming in again, “Yeah, I want her on one of those silver platters. I want her ‘to-go,’ to take home with me. ‘To-go.’” The customers continued until Jeremy instructed me to leave the table and meet him at the bar. Having previously worked as a server in two other restaurants, I knew that I was expected to laugh it off. I did.

* B.A. Anthropology, Washington University in St. Louis, 2010; J.D. Candidate, University of Missouri School of Law, 2016; former server at three restaurants, 2005-2011.

Unfortunately, as a woman server employed in a sub-minimum wage state, my experience was in no way unique. Rather, it is an experience that millions of women servers find themselves tolerating every day at the hands of customers, co-workers, and management. Employing nearly eleven million workers, the restaurant industry is not only one of the fastest-growing sectors of the U.S. economy, but it is also the single largest source of sexual harassment claims in the U.S.¹ Although only seven percent of all women work in the restaurant industry, women restaurant workers suffer more than one third of all sexual harassment claims filed with the Equal Employment Opportunity Commission (“E.E.O.C.”).² As this Article argues, restaurant workers’ dependence on tips as wages is largely to blame for the industry’s high rate of sexual harassment.³

According to an extensive 2014 study by the Restaurant Opportunities Centers United (“ROC”), women servers in states where the sub-minimum wage for tipped workers is \$2.13 per hour are twice as likely to experience sexual harassment as women servers in states that pay the same minimum wage to all employees.⁴ Regardless of the state’s pay structure, the study reveals that women servers in all states experience high rates of sexual harassment from three groups: management, co-workers, and customers.⁵

Because federal law permits employers to pay their tipped workers a sub-minimum wage of \$2.13 per hour, tipped restaurant workers must collect the remainder of their wages from customer tips.⁶ This two-tiered wage system creates a unique employment relationship in which servers depend on their customers’ whims for income.⁷ As a result, servers are incentivized to silently tolerate harassment for fear of repercussions, such as lost tip income, unfavorable shifts, public humiliation, and even termination.⁸ Comprising two-thirds of all tipped restaurant workers, women are especially impacted, making the sub-minimum wage pay structure a clear women’s issue.⁹

This Article contends that the current two-tiered wage system encourages sexual harassment within the restaurant industry, creating a toxic environment for all restaurant employees, especially women. Part II explores the history of the sub-minimum wage, this pay structure’s negative impact on women in the restaurant industry, and the legal climate surrounding restaurant sexual harassment claims. In Part III, this Article examines the various power imbalances at play within the restaurant workplace in order to analyze precisely why the sub-

¹ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *The Glass Floor* (Oct. 7, 2014) at 5, available at http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

² THE RESTAURANT OPPORTUNITIES CENTERS UNITED, *Recipe for Success: Abolish the Subminimum Wage to Strengthen the Restaurant Industry* at 2, available at http://rocunited.org/wp-content/uploads/2014/03/ROCUnited_Recipe-for-Success.pdf.

³ *Id.* at 7.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.*

⁸ *Id.* at 3.

⁹ Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, ECONOMIC POLICY INSTITUTE, at 2 (July 10, 2014), available at <http://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

minimum wage perpetuates sexual harassment. This Article concludes that replacing the sub-minimum wage with one fair wage would serve as an effective first step in reducing sexual harassment within this industry.

I. LEGAL & HISTORICAL BACKGROUND

A. *The History of the Sub-Minimum Wage*

The practice of tipping has unfortunate classist and discriminatory origins.¹⁰ The custom stems from the aristocratic homes of feudal Europe.¹¹ During the nineteenth century, tipping made its way to the United States when Americans, upon returning home from travel abroad in Europe, began tipping workers in an attempt to emulate the Europeans.¹² As this practice caught on, tipping quickly enmeshed itself within American culture and employment practices.¹³

Toward the end of the nineteenth century, however, a powerful anti-tipping movement arose in both Europe and the United States.¹⁴ In response, American restaurant owners and railway companies fought vehemently to preserve the tipping system.¹⁵ Proponents of tipping argued that the practice was a legitimate alternative to wages, especially because recently freed slaves comprised the majority of tipped occupations.¹⁶

The two countries responded to this movement quite differently.¹⁷ While European labor unions embraced the anti-tipping movement, the United States took the opposite approach by further integrating tipping into American custom and law.¹⁸ First, Congress passed the Fair Labor Standards Act of 1938 (“FLSA”) under the New Deal, establishing the first national minimum wage for both tipped and non-tipped workers.¹⁹ Then, in 1966, Congress amended the FLSA to create a separate “sub-minimum wage” for tipped workers, such as restaurant servers.²⁰ These amendments set the sub-minimum wage at fifty percent of the regular national minimum wage, requiring tipped workers to recoup the other fifty percent of their wages from tips.²¹ As a result, this new pay structure saddled customers with the responsibility of subsidizing workers’ incomes.²²

¹⁰ See Saru Jayaraman, *Why Tipping is Wrong*, N.Y. TIMES, Oct. 15, 2015, available at http://www.nytimes.com/2015/10/16/opinion/why-tipping-is-wrong.html?_r=0.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ ALLEGRETTO & COOPER, *supra* note 10.

²⁰ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 7.

²¹ *Id.*

²² *Id.*

In 1996, Congress again succumbed to pressure from the National Restaurant Association.²³ When Congress voted to increase the regular minimum wage, it simultaneously froze the sub-minimum wage at \$2.13 per hour.²⁴ This decision decoupled the sub-minimum wage from the regular minimum wage.

B. The Sub-Minimum Wage in Practice Today

Today's sub-minimum wage remains set at \$2.13 per hour, an amount that has not increased since 1991.²⁵ This tipped minimum wage constitutes a mere twenty-nine percent of the current regular minimum wage, and its purchasing power has fallen by forty percent since 1991.²⁶ Although federal law requires employers to "top up" their tipped employees' wages—compensating them if their tipped wages fall below the regular minimum wage of \$7.25 per hour—this requirement is rarely followed and is difficult to enforce.²⁷ In reality, more than one out of every ten tipped workers report earning less than the federal minimum wage, even with tips.²⁸ Moreover, between 2010 and 2011, a Department of Labor investigation revealed a mere twenty-six percent compliance rate with the "topping off" requirement.²⁹

Tipped workers' wages vary drastically by state.³⁰ For instance, seven states, including California, Nevada, Washington, Oregon, Minnesota, and Alaska, require that tipped workers be paid the same minimum wage as non-tipped workers.³¹ Meanwhile, another twenty-six states (plus the District of Columbia) require employers to pay a sub-minimum wage higher than the \$2.13 per hour minimum.³² Finally, seventeen states do not require employers to pay any more than the \$2.13 federal sub-minimum wage for tipped workers.³³

²³ *Id.*

²⁴ *Id.*

²⁵ ALLEGRETTO & COOPER, *supra* note 10.

²⁶ *The Impact of Raising the Minimum Wage on Women*, WHITE HOUSE REPORT (March 2014), at 2, available at <https://www.whitehouse.gov/sites/default/files/docs/20140325minimumwageandwomenreportfinal.pdf>.

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 7.

³⁰ *Minimum Wages for Tipped Employees*, WAGE AND HOUR DIVISION (Jan. 1, 2016), available at <http://www.dol.gov/whd/state/tipped.htm>.

³¹ *Id.*

³² *Id.* The twenty-six states that require employers to pay a sub-minimum wage higher than \$2.13 per hour to tipped workers include Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and West Virginia. *Id.*

³³ *Id.* The seventeen states that do *not* require employers to pay any more than the federal sub-minimum wage of \$2.13 per hour to tipped workers include Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, Nebraska, New Jersey, New Mexico, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. *Id.*

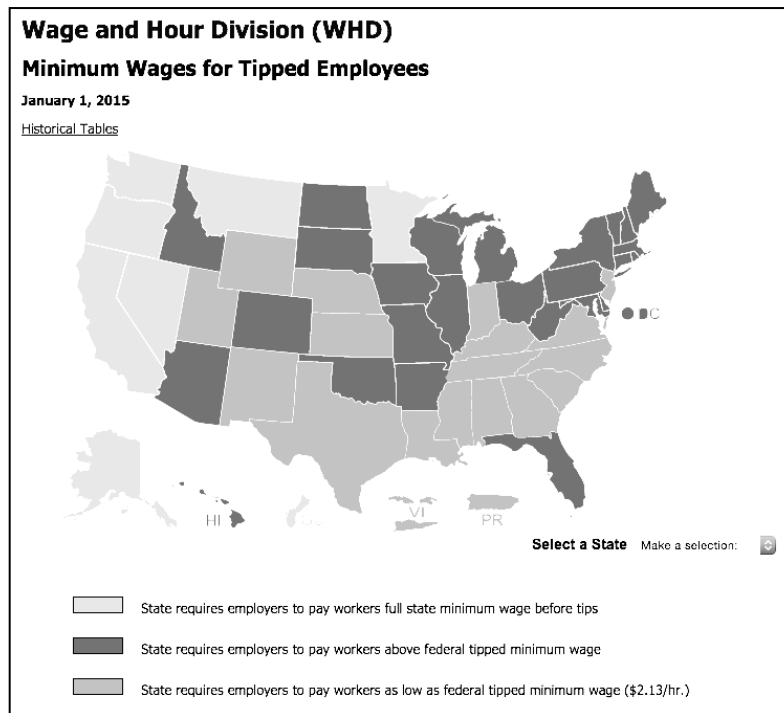


Figure 1: WAGE AND HOUR DIVISION, (JAN. 1, 2015), available at <http://www.dol.gov/whd/state/tipped.htm>.

C. The Sub-Minimum Wage's Disproportionate Impact on Women

Because women workers comprise seventy-two percent of all tipped workers and sixty-six percent of all tipped restaurant workers, women are disproportionately impacted by the sub-minimum wage pay structure.³⁴ In addition, women servers make approximately \$0.50 per hour less than their male server co-workers.³⁵ Although women are the primary breadwinners in more than forty-one percent of families with children, almost forty-six percent of female restaurant workers struggle to make ends meet at the “twice-poverty rate.”^{36,37}

³⁴ *The Impact of Raising the Minimum Wage on Women*, WHITE HOUSE REPORT (March 2014), at 1, available at <https://www.whitehouse.gov/sites/default/files/docs/20140325minimumwageandwomenreportfinal.pdf>; THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 1.

³⁵ Heidi Shierholz, *Low Wages and Few Benefits Mean Many Restaurant Workers Can't Make Ends Meet*, ECONOMIC POLICY INSTITUTE (Aug. 21, 2014) at Table 5, available at <http://www.epi.org/publication/restaurant-workers>.

³⁶ The “twice-poverty rate” is defined as “the share of people whose income is below twice the official poverty line,” a measure that is “often used as a more meaningful metric for determining what share of workers do not earn enough to make ends meet.” *Id.*

³⁷ *Testimony of Fatima Goss Graves at the E.E.O.C. on Preventing and Addressing Workplace Sexual Harassment*, NAT'L WOMEN'S L. CENTER (Feb. 20, 2015), available at <http://nwlc.org/resources/fatima-goss-graves-testifies-eeoc-preventing-and-addressing-workplace-sexual-harassment/>; SHIERHOLZ, *supra* note 36, at Table 7.

Worse still is the correlation between tipped occupations and sexual harassment.³⁸ ROC's 2014 study revealed that, within the restaurant industry, tipped workers experience higher rates of sexual harassment than non-tipped workers.³⁹ The study also discovered that workers in sub-minimum wage states, where pay is \$2.13 per hour, experience higher rates of sexual harassment than workers in states with a higher tipped wage.⁴⁰ For instance, tipped women restaurant workers in states that pay the sub-minimum wage of \$2.13 per hour are twice as likely to be sexually harassed as women in states that pay the same minimum wage to both tipped and non-tipped workers.⁴¹ Moreover, the restaurant industry is the "single largest source" of sexual harassment claims in the U.S., and it generates approximately thirty-seven percent of all sexual harassment claims filed with the E.E.O.C.⁴²

Women are especially impacted because they are the victims of the vast majority of sexual harassment charges.⁴³ In 2014, for instance, women brought more than eighty-two percent of all sexual harassment charges filed with the E.E.O.C.⁴⁴ Unfortunately, these are likely conservative estimates because sexual harassment among women restaurant servers is underreported.⁴⁵

D. The Legal Climate Surrounding Restaurant Sexual Harassment Claims

The restaurant industry's unfortunate status as the leader in sexual harassment claims is not the only evidence of its rampant sexual harassment problem.⁴⁶ In addition, the problem's pervasiveness is evidenced by the E.E.O.C.'s numerous consent decrees against restaurants and the large number of litigated sexual harassment claims brought by women servers.⁴⁷

1. E.E.O.C. Consent Decrees for Sexual Harassment

Over the last ten years, the E.E.O.C. has ordered restaurant employers to pay out more than \$10 million in settlements and damages for employee sexual harassment claims.⁴⁸ These restaurant employers range from independent restaurants to major companies, including Cracker

³⁸ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2.

⁴² *Id.* at 5.

⁴³ *See Charges Alleging Sexual Harassment FY 2010-FY2014*, U.S. E.E.O.C., available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

⁴⁴ *Id.*

⁴⁵ *See, e.g.*, Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (August 28, 2013), available at http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (stating that a poll of 1,000 adults found that seventy percent of respondents who said that they had experienced sexual harassment never reported it).

⁴⁶ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 5.

⁴⁷ *See infra* notes 50-58 and accompanying text.

⁴⁸ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 15.

Barrel, The Cheesecake Factory, Applebee's, Sonic, and Outback Steakhouse.⁴⁹

2. Litigated Sexual Harassment Claims

For many years, U.S. employment law failed to recognize sexual harassment as a legal cause of action.⁵⁰ As a result, women servers who were sexually harassed lacked any judicial recourse.⁵¹ Then, in the 1986 decision of *Meritor Savings Bank v. Vinson*, the Supreme Court first recognized sexual harassment as a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.⁵²

Today, this decision enables women restaurant servers to pursue claims for workplace sexual harassment.⁵³ Recently litigated claims not only provide examples of sexual harassment by restaurant co-workers,⁵⁴ management,⁵⁵ and customers,⁵⁶ but they also offer a glimpse into the

⁴⁹ *Id.*

⁵⁰ *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

⁵¹ *Id.* at 63.

⁵² *See* Marc Spindelman, *Sexuality's Law*, 24 COLUM. J. GENDER & L. 87, 215 (2013); *But see Meritor Sav. Bank*, 477 U.S. at 65 (noting that the E.E.O.C. had been recognizing sexual harassment under E.E.O.C. guidelines since 1980).

⁵³ *See id.*

⁵⁴ For examples in which co-workers sexually harassed women servers, *see, e.g.*, *Raifsnider v. Lonz Winery, Inc.*, 2015 WL 5254979, *1-*2 (N.D. Ohio Sept. 9, 2015) (granting defendant-employer's motion for summary judgment on plaintiff-server's hostile environment and retaliation claims. The server alleged that a co-worker continually harassed her, even after she reported the harassment to a supervisor. The alleged harassment included the co-worker "pushing up on her," saying "he was horny," and "kissing her neck," even after the server told him to "knock it off" and that she was married); *Moncel v. Sullivan's of Indiana, Inc.*, 2014 WL 1905485, *1 (D. Indiana May 13, 2014) (granting defendant's motion for summary judgment on plaintiff-server's hostile environment and retaliation claims. The alleged harassment included co-workers regularly groping her breasts and buttocks, simulating sexual acts by rubbing their pelvic areas against hers, making unwanted sexual comments, including "I want to taste you," throwing food and objects down women servers' shirts, massaging their shoulders, and laying their heads on women servers' breasts); *D'Annunzio v. Ayken, Inc.*, 25 F. Supp.3d 281, 283 (E.D.N.Y. 2014) (granting in part and denying in part plaintiffs' and defendants' cross-motions for summary judgment on three plaintiff-servers' sexual harassment claims. A co-worker sexually assaulted one of the servers in the restaurant's basement. Following the assault, the management allowed the server to continue working there until he was later deported for the assault. During this time, the three servers endured repeated harassment by the perpetrator and other co-workers, including having their buttocks slapped, their breasts touched, their bras exposed, and receiving unwanted sexual comments and vulgar sexual motions).

⁵⁵ For examples in which management sexually harassed women servers, *see, e.g.*, *Williams v. Barnhill's Buffet, Inc.*, 290 Fed. Appx. 759, 760 (5th Cir. 2008) (affirming the District Court's granting of summary judgment for defendant-employer in plaintiff-server's sexual harassment claim. The server alleged that her immediate supervisor repeatedly made inappropriate sexual comments, forced her head onto his lap, and assaulted her by forcing his legs between hers and attempting to kiss her); *Pickens v. Munzert's Steak House, LLC*, 326 F. Supp. 2d 987, 988-9 (E.D. Mo. 2004) (denying defendant-employer's motion for summary judgment on high school-aged plaintiff-server's sexual harassment claim. The server alleged that one manager told her that he was going to "screw her to see if she was good and tight," another manager repeatedly followed her into the freezer, turned off the lights, and then encouraged her to stand next to him because he was 'afraid of the dark,' pinned her to the wall, and licked her lips, and the managers regularly touched her belly button and other body parts while she was working); *Hughes v. Texas Keg Steakhouse & Bar, Inc.*, 2006 WL 708158, *1 (N.D. Tex. 2006) (denying employer-defendant's motion for summary judgment on nineteen-year-old plaintiff-server's sexual harassment claim. After the server rejected her manager's repeated advances, the

seemingly pervasive “culture” of sexual harassment found in many restaurants.

Unfortunately for servers, however, today’s legal climate is somewhat hostile toward workplace sexual harassment claims.⁵⁷ Today, these claims are significantly more difficult to bring than before because of the Supreme Court’s 2013 decision in *Vance v. Ball State University*.⁵⁸ In *Vance*, the Court narrowed the definition of a “supervisor” for harassment purposes to someone who has the power to hire, fire, promote, or otherwise tangibly impact an employee’s employment.⁵⁹ Not surprisingly, *Vance* has inspired a great deal of criticism about its harmful impact on plaintiffs’ sexual harassment claims.⁶⁰ For example, a 2014 National Women’s Law Center analysis for Think Progress revealed that, within one year of the *Vance* decision, a full forty-three sexual harassment cases had been dismissed because of *Vance*’s restricted “supervisor” definition.⁶¹ In other words, women servers’ sexual harassment claims today are much more likely to be dismissed because of a mere technicality without ever reaching the merits of their cases.⁶² In addition, *Vance* has allowed courts to “largely ignore” factors that indicate whether an employer was negligent in preventing co-worker harassment, a particularly important issue for women servers.⁶³ Finally, plaintiffs attorneys are also “more reluctant to take these cases on” because of this decision.⁶⁴ Due to the many obstacles posed by *Vance*, today’s legal landscape effectively discourages women servers from pursuing sexual harassment claims within the legal system meant to protect them.

manager assigned her to a “bad section” of the restaurant, changed her schedule, and required her to work as a cocktail waitress. After reporting the harassment, the server was terminated. The server alleged that her manager told her every day “how good looking [she] was and how he wanted to sleep with [her].” He tried to hug her and convince her to date him, and stated that he was going to close down the restaurant, take her into the jazz room, and have sex with her on the tables).

⁵⁶ For an example in which a customer sexually harassed a woman server, *see, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1066-7 (10th Cir. 1998) (reversing in part and affirming in part plaintiff-server’s hostile work environment judgment against defendants. The server’s claims were based on her manager’s failure to respond properly to two male customers’ inappropriate conduct. One customer pulled the server by the hair and made sexually offensive comments, such as, “I would like to get into your pants.” When the server asked her manager to find another server for the table, he refused, stating, “You wait on them. You were hired to be a waitress.” When she returned to their table, one of them grabbed her by the breast and put his mouth on it).

⁵⁷ *See Bryce Covert, Exclusive: 43 Sexual Harassment Cases That Were Thrown Out Because of One Supreme Court Decision*, THINK PROGRESS (Nov. 24, 2014), available at <http://thinkprogress.org/economy/2014/11/24/3596287/vance-sexual-harassment/>.

⁵⁸ *Id.*

⁵⁹ *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013).

⁶⁰ *See, e.g., COVERT, supra note 58.*

⁶¹ *Id.*

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

II. ANALYSIS

A. How the Sub-Minimum Wage Perpetuates the Sexual Harassment-Friendly "Culture" in the Restaurant Workplace

As Part II illustrates, both the sub-minimum wage and the practice of tipping, generally, appear to exacerbate the hyper-sexualized environment in which women servers work.⁶⁵ But why is sexual harassment more of a problem for sub-minimum wage tipped servers than for fair wage tipped servers? The answer to this question lies in the various power imbalances worsened by the sub-minimum wage. This Section explores these power imbalances and the means through which they devalue, objectify, and immobilize servers,⁶⁶ including by defining "good service" as sexualized and submissive⁶⁷ and by promoting a workplace culture in which sexual harassment is wholly acceptable.⁶⁸ This Section begins with a brief explanation of the restaurant employment context and then analyzes the sexual harassment-friendly restaurant culture within the framework of the power imbalances at play between (1) customer and server, (2) manager and server, and (3) co-worker and server.

⁶⁵ See, e.g., THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2 (finding that tipped women workers experience higher rates of sexual harassment than non-tipped women workers); *Id.* at 2 (finding that women restaurant workers in sub-minimum wage states are twice as likely to experience sexual harassment as women in one fair wage states).

⁶⁶ See, e.g., *Gaines v. MKKM, Inc.*, 2015 WL 3917160, *2-3 (D. S.C. June 15, 2015) (affirming magistrate's denial of defendant's motion to dismiss plaintiff-server's hostile work environment, gender discrimination, sexual harassment, and retaliation claims. A co-worker attacked the server twice, forcibly kissing her, attempting to unzip his pants, and ordering her to perform oral sex. After reporting the incidents to her supervisor and expressing that she felt unsafe with the co-worker, the supervisor denied her a shift change and refused to discuss the incident. After pressing charges against the co-worker, the supervisor called her a "bitch" and terminated her); *Moncel v. Sullivan's of Indiana, Inc.*, 2014 WL 1905485, *1 (D. Indiana May 13, 2014) (granting defendant's motion for summary judgment on plaintiff-server's hostile environment and retaliation claims. Server alleged that the restaurant's uniform requirement contributed to the sexually-charged atmosphere because it required women servers to wear V-neck shirts, above-the-knee skirts, and two-inch heels. Server also alleged that co-workers regularly groped her breasts and buttocks, simulated sexual acts by rubbing their pelvic areas against hers, made unwanted sexual comments, including "I want to taste you," threw food and objects down women servers' shirts, massaged their shoulders, and lay their heads on their breasts.).

⁶⁷ See, e.g., *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1066-8 (10th Cir. 1998) (reversing in part and affirming in part plaintiff-server's hostile work environment judgment against defendants. After a customer pulled the server by the hair and made sexually offensive comments, such as "I would like to get into your pants," she asked her manager to find another server for the table. He refused, stating, "You were hired to be a waitress. You waitress." When she returned to their table, one of them grabbed her by the breast and put his mouth on it).

⁶⁸ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 18 (noting that discourses suggest that sexual harassment is "just part of the job" in the restaurant industry and quoting a Houston bartender as stating, "Unfortunately, [sexual harassment has] just become the societal norm, and we have all accepted it and we all hate it."). See also, e.g., *Smith v. Castaways Family Diner*, 453 F.3d 971, 973 (7th Cir. 2006) (reversing and remanding the District Court's judgment for defendant on plaintiff-server's sexual harassment claim. Server alleged that she reported to her supervisor that two male co-workers repeatedly made lewd remarks to her and inappropriately touched her. The server's supervisor allegedly responded that she was easier to replace than a cook and that he was "not going to do a lot about this.").

1. The Restaurant Employment Context

In order to understand how the sub-minimum wage pay structure perpetuates sexual harassment, it is important to understand the restaurant employment context in which a tipped server works. Everything from a server's income level to her hiring and firing depends upon her interactions and relationships with customers, management, and co-workers.⁶⁹ Note too that for a restaurant server, certain shifts and tables are more lucrative than others. For example, a Friday dinner shift in a more desirable area of the restaurant where people request to be seated will deliver significantly greater tips than a Tuesday lunch shift with less desirable tables.

In turn, the extent of a server's control over her assigned tables and shifts—and thus her income—greatly depends on pleasing customers, management, and co-workers.⁷⁰ Each of these power imbalances further perpetuates sexual harassment's status as acceptable within the restaurant industry by effectively coercing the server into accepting it as just “part of the job.”⁷¹

2. The Power Imbalance Between Customers and Servers

A sub-minimum wage server depends on pleasing her customers because customers provide the vast majority of her income, in the form of discretionary tips.⁷² However, fifty-nine percent of women servers report experiencing sexual harassment from their customers on a monthly basis.⁷³ This clear power imbalance likely encourages servers to tolerate customers' sexual harassment. As one New York server explained, “There is a lot of sexual harassment [but] you just kind of brush it off. . . I just want my tip, I don't want anything to mess up my tip.”⁷⁴

Interestingly, this concern also suggests servers' awareness that providing good service has little impact on tipping behavior. In fact, studies show that the relationship between a customer's service rating and tip size are “so weak as to be meaningless.”⁷⁵ Instead, as the New York server quoted above suggests, servers recognize that tolerating a customer's sexual harassment may mean the difference between a good tip and a bad tip.

In many ways, the customer's substantial control over his server's income allows him to impose his own definition of what constitutes “good service” deserving of a tip.⁷⁶ As a result, servers often struggle to differentiate between providing “good service” and tolerating customer harassment.⁷⁷ This blurring of boundaries is evident in a server's description of her manager's response to customer harassment:

⁶⁹ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 7-8.

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 6.

⁷² *Id.* at 8.

⁷³ *Id.* at 13.

⁷⁴ *Id.* at 7.

⁷⁵ For a discussion of what factors influence customers' tips and the history of tipping, see Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL'Y & L. 101, 110 (2014).

⁷⁶ See THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 8.

⁷⁷ *Id.*

“I said to myself, I can’t be putting up with this, let me talk to my boss about it. . . he said, ‘Well, those people pay a lot of money for our services and, I mean, would it hurt to smile a little bit, be a little bit more friendly to them?’ And I was blown away.”⁷⁸

This server’s description also illustrates that managers are in a similar bind to that of servers. Because restaurant managers are ultimately accountable for their restaurant’s profitability, they are bound by the reality that happy customers mean more business. As a result, managers’ need to appease customers means that they are often unresponsive to, or even encouraging of, inappropriate customer behavior, including sexual harassment.⁷⁹

The customer-server power imbalance also promotes gendered cultural expectations, which further encourage sexual harassment.⁸⁰ Customers often expect servers’ appearance and behavior to be “‘sexy,’ deferential and available.”⁸¹ As a result, women servers often feel pressure from customers to dress or act in a sexualized manner to obtain larger customer tips.⁸² Such pressures only further perpetuate restaurants’ culture of sexual harassment.

3. The Power Imbalance Between Managers and Servers

The power imbalance created by the sub-minimum wage environment also exists between servers and management. A server depends on being well-liked by management in order to receive the best shifts and tables, which are connected with greater income and job stability.⁸³ Studies show that the sub-minimum wage system influences how managers supervise their tipped employees as well.⁸⁴ For instance, ROC’s research suggests that, across the restaurant industry, sexual harassment policies and training “are widely unenforced or absent.”⁸⁵ Further, the ROC data reveals that restaurant managers regularly instruct their women servers to alter their appearance and “look sexy,” while also deliberately touching them, pressuring them for dates, and

⁷⁸ *Id.* at 28.

⁷⁹ *Id.* at 8, 19. *See also*, *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1066-8 (10th Cir. 1998) (discussing a manager who told his employee to tolerate sexual harassment); *Moncel v. Sullivan’s of Indiana, Inc.*, 2014 WL 1905485, *1 (D. Indiana May 13, 2014) (granting defendant’s motion for summary judgment on plaintiff-server’s hostile environment and retaliation claims. Server alleged that restaurant’s uniform requirement contributed to the sexually-charged atmosphere because it required women servers to wear V-neck shirts, above-the-knee skirts, and two-inch heels).

⁸⁰ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 7, 21.

⁸¹ *Id.* at 7.

⁸² *See id.* at 8.

⁸³ For instances in which being disliked by management led to bad table assignments, *see, e.g.*, *Williams v. Barnhill’s Buffet Inc.*, 290 Fed. Appx. 759, 760 (5th Cir. 2008) (discussing how, after a server repeatedly rejected her supervisor’s sexual advances, the supervisor began assigning server to the “bad sections” of the restaurant where she would earn less tips); *Hughes v. Texas Keg Steakhouse & Bar, Inc.*, 2006 WL 708158, *1 (N.D. Tex. Mar. 21, 2006) (recounting a server’s allegations that when she rejected her manager’s repeated advances, the manager assigned her to a “bad section” of the restaurant, changed her schedule, and required her to work as a cocktail waitress).

⁸⁴ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 8.

⁸⁵ *Id.* at 19.

making sexually suggestive gestures toward them.⁸⁶

ROC's study contends that, in many ways, restaurant management uses sexual harassment as a means to exert physical and financial control in order to maintain a compliant, dependent workforce.⁸⁷ The resulting power imbalance further encourages servers to "brush off" sexual harassment, even when it is perpetrated by management.⁸⁸ A full sixty-six percent of women restaurant workers reported experiencing sexual harassment from management on a monthly basis,⁸⁹ and the same percentage of women restaurant workers felt that they would face negative repercussions for complaining about or reporting sexual harassment by their managers.⁹⁰

4. The Power Imbalance Between Co-Workers and Servers

Finally, a server also depends on being well-liked by her co-workers in order to achieve assistance on the floor, higher table turnover, and a reputation as a team player. Research suggests that co-workers "observe and internalize" the vulnerable, subservient role occupied by women servers, further contributing to and shaping women's experiences of sexual harassment in the workplace.⁹¹ Seventy-four percent of women servers reported experiencing sexual harassment by their co-workers on a monthly basis.⁹² The widespread culture of co-worker sexual harassment is further evidenced by the fact that over fifty percent of women restaurant workers found sexual harassment to be "a routine aspect of their workplace environment."⁹³

B. Why the Sub-Minimum Wage Should Be Eliminated

Because of the widespread nature of sexual harassment within the restaurant industry coupled with the precarious position held by women servers in sub-minimum wage states, eliminating the sub-minimum wage is the first step toward empowering women servers.

First, eliminating the sub-minimum wage would correct the toxic power imbalances⁹⁴ present in the restaurant industry because women servers would be less dependent on tips for

⁸⁶ *Id.* at 21.

⁸⁷ *Id.* at 19.

⁸⁸ *See id.*

⁸⁹ *Id.* at 13.

⁹⁰ *Id.* at 27. For examples in which a woman server suffered negative repercussions for reporting sexual harassment, *see, e.g.,* *Gaines v. MKKM, Inc.*, 2015 WL 3917160, *2 (D. S.C. June 15, 2015) (discussing a server's allegations that after the server pressed charges against a co-worker who repeatedly sexually harassed and assaulted her, her supervisor called the server a "bitch" and terminated her); *Williams v. Barnhill's Buffet Inc.*, 290 Fed. Appx. 759, 760 (5th Cir. 2008) (recounting a server's claim that after the server repeatedly rejected her supervisor's sexual advances, the supervisor began assigning her to the "bad sections" of the restaurant where she would earn less tips); *Smith v. Castaways Family Diner*, 453 F.3d 971, 973 (7th Cir. 2006) (discussing how after a server reported to her supervisor that she was being repeatedly sexually harassed by two co-workers, her supervisor responded that she was easier to replace than a cook and that he was "not going to do a lot about this.").

⁹¹ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 8.

⁹² *Id.* at 13; *See also supra* note 55 for examples of co-worker harassment.

⁹³ *Id.* at 8.

⁹⁴ *See supra* Part III.A.

income. A guaranteed steady wage, regardless of customer whims or bad shifts, would empower women to stand up to sexual harassment, rather than tolerate it. In contrast to the current system of virtually free server labor, paying servers normal wages would also encourage managers to value their servers as paid employees. This greater valuing would only lead to a more respectful, equal relationship between servers and managers. Co-workers would likely observe and internalize this greater valuing of servers, as well as sexual harassment's renewed status as unacceptable, and adjust their behavior.

Because servers would both be valued as paid employees and less likely to tolerate sexual harassment, the rate of sexual harassment in the restaurant industry would decrease. This improvement would lead to better futures for women servers, even outside of the restaurant context. For example, the restaurant industry is often the gateway for young women to enter the workplace, providing them with their first employment experiences and their first experiences with institutionalized sexual harassment.⁹⁵ These experiences often shape both men and women's perceptions about what is and is not acceptable behavior in the workplace, further perpetuating the rates of workplace sexual harassment and women's likelihoods of tolerating it.⁹⁶ Unfortunately, women who encounter sexual harassment in the restaurant industry are more likely to tolerate sexual harassment in future environments as well.⁹⁷ Therefore, eliminating the sub-minimum wage would help to break this cycle: women would not only experience less sexual harassment than they experience now, but they would also be less likely to tolerate it in either the restaurant workplace or their future workplaces.

In addition to having a positive impact on sexual harassment, eliminating the sub-minimum wage would help to bridge the gender wage gap.⁹⁸ More women than men work as tipped restaurant servers, and thus more women than men are impacted by the current sub-minimum wage system.⁹⁹ Furthermore, women servers make approximately \$0.50 per hour less than their male server co-workers.¹⁰⁰ A study of gender differences in tipping found that female servers receive smaller tips than male servers for comparably rated service, except when they were rated as providing service of exceptional quality.¹⁰¹ This result indicates that "female servers are being held to a very high standard, [and] [i]f this standard is not met, female servers are treated unfavorably in comparison to male servers who produce the same level of service quality."¹⁰² By paying women restaurant servers one fair wage, the gender wage gap would decrease, and women would be less likely to live in poverty.¹⁰³

⁹⁵ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 29.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *The Impact of Raising the Minimum Wage on Women*, *supra* note 27, at 11.

⁹⁹ SHIERHOLZ, *supra* note 36, at Table 5.

¹⁰⁰ *Id.*

¹⁰¹ Matthew Parrett, *Customer Discrimination in Restaurants: Dining Frequency Matters*, 32 J. LAB. RES. 87, 98 (2011).

¹⁰² *Id.*

¹⁰³ See SHIERHOLZ, *supra* note 36.

C. Common Arguments Against Eliminating the Sub-Minimum Wage

Many critics are skeptical of eliminating the sub-minimum wage. Some contend that this move would harm the restaurant industry and stifle employment growth. However, these concerns are unfounded. States with tipped minimum wages higher than seventy percent of the minimum wage, including seven states with one fair wage, still have thriving restaurant industries.¹⁰⁴ In fact, restaurant sales per capita are actually higher in states that have a higher tipped minimum wage.¹⁰⁵ Further, the seven states that provide one fair wage to tipped workers have over one million tipped workers and continue to experience above average employment growth.¹⁰⁶ California, for instance, has the largest restaurant industry in the country, despite paying its tipped workers the same \$8 per hour that all other hourly workers receive.¹⁰⁷

Additionally, sexual harassment—and correspondingly, the sub-minimum wage—may be a strong contributor to the restaurant industry’s high turnover rates.¹⁰⁸ Twenty-five percent of surveyed women servers reported seeking out new work because of unwanted sexual attention in the workplace.¹⁰⁹ Restaurant owners could benefit from lower turnover rates, as well as financial savings from reduced training costs, if the sub-minimum wage were eliminated.

Over the last few years, several savvy restaurateurs around the country have started offering a full hourly wage or salary to their workers in lieu of tipping.¹¹⁰ This trend only further demonstrates that eliminating the sub-minimum wage is unlikely to result in the alleged financial disaster for the restaurant industry that so many critics fear.

Members of the public are also increasingly speaking out about their own restaurant harassment experiences while calling for the elimination of the sub-minimum wage.¹¹¹ The public’s growing awareness and concern about the current state of affairs in the restaurant

¹⁰⁴ THE RESTAURANT OPPORTUNITIES CENTERS UNITED, *Fact Sheet: Raising the Sub-Minimum Wage Strengthens Restaurant Industry*, available at <http://rocunited.org/wp-content/uploads/2014/03/FACT-SHEET-Abolish-Subminimum-Wage.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 28

¹⁰⁹ *Id.*; *See, e.g.*, Williams v. Bamhill’s Buffet, Inc., 290 Fed. Appx. 759, 760 (5th Cir. 2008) (recounting how, after repeated sexual harassment incidents and retaliation by management, a server decided to find another job “and just leave it alone.”).

¹¹⁰ *See, e.g.*, Bryce Covert, *New Restaurant Gets Rid of Tipping, Pays Every Employee \$15 Per Hour*, THINK PROGRESS (Mar. 11, 2015), available at <http://thinkprogress.org/economy/2015/03/11/3632153/william-street-common-wage-tipping/>; Khushbu Shah, *Restaurant Eliminates Tips, Gives Employees \$35,000 a Year*, THE EATER (Jan. 6, 2015), available at <http://www.eater.com/2015/1/6/7504725/restaurant-eliminates-tips-gives-employees-35000-salary>; JAYARAMAN, *supra* note 11.

¹¹¹ *See, e.g.*, Amber Piatt, *Life as a Waitress Too Often Means Low Pay and Sexual Harassment*, THE GUARDIAN, (Sept. 22, 2015), available at <http://www.theguardian.com/commentisfree/2015/sep/22/life-waitress-low-pay-sexual-harassment>; Brittany Bronson, *Can You Be a Waitress and a Feminist?*, N.Y. TIMES, Apr. 15, 2015, available at http://www.nytimes.com/2015/04/19/opinion/sunday/can-you-be-a-waitress-and-a-feminist.html?_r=0; JAYARAMAN, *supra* note 11; Ginia Bellafante, *When Living on Tips Means Putting Up With Harassment*, N.Y. TIMES, Oct. 17, 2014, available at <http://www.nytimes.com/2014/10/19/nyregion/when-living-on-tips-means-putting-up-with-harassment.html>.

industry has gained national attention.¹¹² Political figures, including presidential candidate Hillary Clinton, have publicly announced their support for eliminating the sub-minimum wage.¹¹³ Both the restaurant industry and Congress must listen to and act upon constituents' concerns.

In addition to fearing the financial implications of eliminating the sub-minimum wage, critics of this proposal voice concerns that one fair wage will produce bad customer service in restaurants. This criticism is weak. Although servers will be less likely to tolerate sexual harassment from customers, tolerating mistreatment is not and should never be part of good customer service. Studies show that a customer's choice of tip amount is largely unrelated to service quality. The relationship between customers' ratings of service and tip size are "so weak as to be meaningless."¹¹⁴ Finally, like any at-will employee who is paid in wages rather than tips, servers are subject to termination for poor performance.

In light of opponents' unfounded criticisms and the proposal's significant benefits for women servers, the answer is simple. Eliminating the current two-tiered wage system—one that has deep economic and social consequences for millions of women—is a step in the right direction. With the elimination of the sub-minimum wage, the restaurant industry will move toward a sexual harassment-free workplace, gender equality, a reduction in women's poverty rates, and a lessening of the gender wage gap.

III. CONCLUSION

The restaurant industry remains the single largest source of sexual harassment claims in the United States, and women restaurant workers are the victims of more than one-third of all sexual harassment claims filed with the E.E.O.C.¹¹⁵ The sub-minimum wage and the practice of tipping are largely to blame for the prevalence of sexual harassment in the restaurant workplace.¹¹⁶ America's current two-tiered wage system both encourages sexual harassment within the restaurant industry and encourages servers to stay silent about harassment, creating a toxic environment for all restaurant employees, especially women.¹¹⁷ Replacing the sub-minimum wage with one fair wage for both tipped and non-tipped workers would be an effective first step in reducing sexual harassment within the restaurant industry.¹¹⁸ The restaurant industries in states that have implemented this proposal continue to thrive.¹¹⁹

Although this Article focuses on the sub-minimum wage's negative impact on female

¹¹² See, e.g., Betsey Stevenson and Lily Batchelder, *The Minimum Wage and Tipped Minimum Wage*, THE WHITEHOUSE BLOG (Mar. 26, 2014), available at <https://www.whitehouse.gov/blog/2014/03/26/minimum-wage-and-tipped-minimum-wage-important-tools-lift-wages-and-reduce-poverty-p>.

¹¹³ See, e.g., Chuck Ross, *Hillary Clinton Calls for Raise in 'Tipped' Minimum Wage, Despite History of Stiffing Service Workers*, THE DAILY CALLER (Sept. 10, 2015), available at <http://dailycaller.com/2015/09/10/hillary-calls-for-raise-in-tipped-minimum-wage-despite-history-of-stiffing-service-workers/>.

¹¹⁴ For a discussion on what factors influence customers' tips and the history of tipping, see WANG, *supra* note 76, at 110-2.

¹¹⁵ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 1.

¹¹⁶ See *supra* Parts II.C.-III.A.

¹¹⁷ See *supra* Part III.A.

¹¹⁸ See *supra* Part III.B.

¹¹⁹ THE RESTAURANT OPPORTUNITIES CENTERS UNITED, *supra* note 105.

servers, much of this discussion has broader applications to other tipped industries and employees.¹²⁰ Eliminating the sub-minimum wage would likely have a positive impact on other restaurant employees' harassment experiences related to race, ethnicity, sexual orientation, and gender identity.¹²¹

Finally, it is important to emphasize that eliminating the sub-minimum wage is only one of many steps that must be taken to improve the institutionalized, widespread nature of sexual harassment in restaurants. For instance, protecting service industry employees from exploitation and abuse also requires stronger employment law protections. Scholar Noah Zatz proposes that employment law should expand its focus from the employer-employee relationship to the employee's relationship with third parties, such as customers.¹²² Zatz also argues for the creation of an employee civil remedy that does not require a disparate impact showing.¹²³ Employees need case law that protects them from harassment, rather than case law that encourages dismissals for mere technicalities.¹²⁴

Legislation is another tool that should work to eliminate sexual harassment in the restaurant industry. For example, legislation that incentivizes or mandates employers to provide regular, on-going sexual harassment training to all of their employees, including managers, could be an effective solution. Finally, implementing a worker-led, worksite-based advocate program in restaurants would likely empower women servers, increase sexual harassment awareness, and decrease its prevalence.¹²⁵ These advocates could help standardize policies and procedures around sexual harassment by educating workers about their legal rights, identifying the appropriate agency for particular claims, and helping to coach workers about documentation needed for litigation.¹²⁶

Eradicating sexual harassment in the restaurant workplace requires exploration and research on each of these proposed solutions. Replacing the sub-minimum wage with one fair wage constitutes an effective first step in the fight toward empowering women servers and extinguishing the sexual harassment-friendly culture within the restaurant industry.

¹²⁰ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 20, 23.

¹²¹ *Id.*

¹²² See Noah Zatz, *MCLE Self-Study: Putting Intent in Its Place: A New Direction for Title VII*, 28 CAL. LAB. & EMP. L. REV. 8-9 (2014).

¹²³ *Id.*

¹²⁴ See *supra* Part II.D.2.

¹²⁵ THE RESTAURANT OPPORTUNITIES CENTERS UNITED & FORWARD TOGETHER, *supra* note 2, at 31.

¹²⁶ *Id.*