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2018 SYMPOSIUM KEYNOTE ADDRESS

Sharyn Tejani

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2018 SYMPOSIUM KEYNOTE ADDRESS

*Sharyn Tejani**

*Sharyn Tejani is director of the TIME'S UP Legal Defense Fund. Immediately prior to starting that role in April 2018 she served as a Deputy Chief at the Employment Litigation Section of the Civil Rights Division of the Department of Justice. In that role, she supervised the investigation and litigation of cases on behalf of workers facing sexual harassment, pregnancy discrimination, and employment barriers that unjustly screened out women and people of color. Ms. Tejani has devoted her legal career to working on issues of civil rights and women's rights. Prior to joining the Department of Justice, Ms. Tejani was the Director of the Workplace Fairness Program at the National Partnership for Women and Family and the Legal Director of Feminist Majority Foundation. She's also worked at the Equal Employment Opportunity Commission as attorney advisor with Commissioner Stuart Ishimaru. Ms. Tejani began her legal career as an honors attorney at the Civil Rights Division of the U.S. Department of Justice. She attended Yale University and Georgetown University Law Center.

INTRODUCTION

Good morning everyone. My name is Wendy Perdue, and I am Dean of the University of Richmond School of Law. It is my honor to welcome you all this morning. It's great to have you all here. Of course, a special welcome to our alum who are here, we always get a good turnout for our symposium events and we're delighted to have you back again. This is a fabulous program, and a special thanks goes to our students who put it together. As you heard from MaryAnn Grover and call out as well to Riley Henry and Rachel Lugay. They are fabulous students who pay attention to what's going on in the world out there and focus on, on that, as they thought about what to do their symposium on. And I have to say it does feel like a topic, as they say, torn from the pages of the current newspaper. It's certainly timely, and we appreciate the opportunity to explore the issues with an academic focus and in detail. I will say as someone revealing of my age I looked over at the sign that said "Lawyering in the Era of" and I saw era and what immediately popped out at me was ERA, [laughing] and it used to be a thing, maybe it will be again. On this topic, it's, it's heartening to see the role that lawyers can play on this very important issue, particularly, when it comes to sexual harassment in the workplace. Lawyers have been the first responders and we are proud of the effort and the impact that they've have.

One of those important first responders is our keynote speaker and I'm delighted to have the opportunity to introduce to you, Ms. Sharyn Tejani. Ms. Tejani is director of the TIME'S UP Legal Defense Fund. Immediately prior to starting that role in April 2018 she served as a Deputy Chief at the Employment Litigation Section of the Civil Rights Division of the Department of Justice. In that role, she supervised the investigation and litigation of cases on behalf of workers facing sexual harassment, pregnancy discrimination, and employment barriers that unjustly screened out women and people of color. Ms. Tejani has devoted her legal career to working on issues of civil rights and women's rights. Prior to joining the Department of Justice, Ms. Tejani was the Director of the Workplace Fairness Program at the National Partnership for Women and Family and the Legal Director of Feminist Majority Foundation. She's also worked at the Equal Employment Opportunity Commission as attorney advisor with Commissioner Stuart Ishimaru. Ms. Tejani began her legal career as an honors attorney at the Civil Rights Division of the U.S. Department of Justice. She attended Yale University and Georgetown University Law Center. Please join me in welcoming the keynote speaker Ms. Tejani.

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Thank you very much everyone and good morning. My name is Sharyn Tejani, and I'm director of the TIME'S UP Legal Defense Fund. The TIME'S UP Legal Defense Fund is housed and administered by the National Women's Law Center Fund. We have four major projects. First, we match people seeking assistance after they been sexually harassed or discriminated against at work with attorneys in our network. As the Dean mentioned, one thing about the #MeToo Movement that's been very heartening to see how lawyers come forward. We have over 700 lawyers who've volunteered to join our network. As network lawyers, what they agree to do is give a first free consultation to anyone coming through our network. In that consultation, they walk the workers through their legal choices. We get a request for help from workers all over the country, and we give them the names of three attorneys that they can reach out to, to talk about what their legal choices are.

The second thing we do is fund cases. We fund sex harassment cases and retaliation cases, mainly for low-wage workers. We've funded cases against Wal-Mart, against McDonalds, against Dollar Stores, and on behalf of farm workers. The way this works is attorneys apply to us for funding, we review the funding application, and if we can, we help them with their case.

The third thing we do is provide media assistance and story-telling assistance for people who are coming forward. Because sometimes when someone comes forward about sex harassment at work it's simply too late; they can't bring a lawsuit. What they can do is they can talk about it publicly. People need help doing that in a way that is safe, so we help provide PR assistance.

And then finally, in August, we announced the first of 18 outreach grants to groups that work on the ground with low-wage workers to help them learn about their rights regarding sex harassment in the workplace, where they can go to complain, and what resources are available for them.

Since January of 2018 when we started, we've responded to over 3,500 requests for assistance with the names of attorneys and how people can get more help. The focus of all the work that we do at TIME'S UP Legal Defense Fund is low-wage workers because while sexual harassment happens in all industries and to all types of workers, low-wage workers have a more difficulty coming forward and being able to find and afford assistance.

Looking at who reaches out to us, about one-third of the people who send us requests for help are people of color, about nine percent are LGBTQ individuals, and about 67 percent identify as low-wage workers. As this slide shows, we receive intakes from literally every industry you can think of. We've also received them from every state in the union.

As I said, our focus is low wage workers. The reason for that is because sex harassment, at its base, is about power. And low-wage workers have less power than other workers. They live paycheck to paycheck, and they don't have savings. They don't have easy access to transportation. They often live in communities where there is one big employer and if you aren't able to get a job there, you aren't able to get a job period. For all these reasons, they are less likely to complain, and they are less like to report sex harassment. In addition, certain industries are set up in a way that it makes it much more dangerous or difficult to complain. For example, if you are somebody who is a domestic worker, frequently your housing is tied to your job. So, if you complain about sex harassment and are fired or told that your job no longer exists for you, then you've also lost your housing. Similarly, restaurant workers are paid below the minimum wage. They are paid what's called the tipped minimum wage which is two dollars and thirteen cents an hour. The theory being that tips will make up for whatever they don't make, to get them to minimum wage or beyond. But the tips come from customers. As you can imagine, if your customer is sexually harassing you but you need the money, you're clearly not going to complain about the sexual harassment. So that is another reason why low-wage workers are our focus: sometimes the harassment is built into the job situation that they're in.

One of the things we do at the TIME'S UP Legal Defense Fund is fund cases of sex harassment and retaliation. The kinds of cases we fund include a case involving two postal workers who have been working at the same place for fifteen years and have been harassed by the same supervisor for fifteen years. These women described how they were terrified to go to work, terrified that he was going to follow them into a room, terrified of what he was going to do to them. But they couldn't speak up because they were afraid of losing their jobs. They found an attorney, and we're helping the attorney to bring their case. We're also funding a case of a low wage worker who worked at a Dollar Store. She was being harassed by her supervisor and then she got pregnant. He was angry that she got pregnant because it showed that she was having sex with someone other than him. He cut her hours and she eventually left her job. We're also funding a case of a college student who was a musician and who spoke out about the sexual harassment she encountered when she was trying to pursue her music ca-

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reer. When she spoke out she allegedly violated the non-disclosure agreement she had signed. Her recording company is suing her, and we're funding that case as well.

Because of the work that we do, the requests for assistance that we receive and the cases we fund, we've had the chance to look at how the law is working. The rest of my speech is going to be about changes we think should be happening in the law.

Before we talk about the changes, I want to talk a little bit about the basis of Title VII, so that we all have the same understanding. Title VII is the federal civil rights law that prohibits employment discrimination on the basis of race, sex, national origin, color, and religion. Title VII covers employers that have fifteen or more employees, and it only covers employees and applicants. That means, in most states, if you're an independent contractor, you are not covered. And in most states, if you work for an employer that has less than fifteen people, you are not covered.

In order to bring a Title VII case, the first thing a worker has to do is file a charge with the EEOC, or the Equal Employment Opportunity Commission. That charge has to be filed within a certain timeframe. Depending on the state you live in, it's either 180 days or 300 days. Once you file with the EEOC, the EEOC conducts an investigation. That investigation can take anywhere from a few months to a few years. Once the EEOC finishes its investigation, if it decides not to act on behalf of the employee, which is in vast majority of cases, it sends the employee a letter. The employee has ninety days after that to file a lawsuit or the employee loses their right to bring a lawsuit under Title VII.

In Virginia, you have 300 days to bring your charge to the EEOC. In Virginia, like everywhere else in the country, you have ninety days after your right to sue notice to bring your case. For sex harassment, one of the good things about the law as it stands right now, is that that 300 days doesn't start until the last incident of sex harassment. Many times when you're talking about verbal or physical sex harassment what you have is a pattern of comment after comment after comment, or grabbing or groping or assault, one after another after another. If the rule were that you had to file after the very first incident more people would be out of time. But the way the law works, one incidence of sex harassment has to have occurred within that 300 days for the case to be considered timely.

Even with that slightly generous rule so many people who come to us are out of time. We hear from many, many people asking for help, telling us "this happened to me two years ago," "this happened to be five years ago,"

“you are the first people I’ve ever told.” Why is that? As the Dean alluded to, and as we saw in the last month, people who have been sexually harassed and sexually assaulted frequently do not come forward and they do not come forward for very valid reasons. People rightfully fear that they won’t be believed. They hope that it will stop if they comply, and they’re afraid that they will be blamed. In addition to what anyone would feel in the situation, low-wage workers face even higher barriers. They have to know where to go, they have to be able to find the office or get on a computer to fill in the EEOC forms. They need a time to actually talk to the EEOC investigator. When you have a job that doesn’t have an office, where you have a 15-minute break, and you have no privacy, how exactly are you going to do that? How are you going to take time off to go to the EEOC office to get interviewed? All of these things make it so much more difficult for low-wage workers to access the system. And for any worker, of course, you’re worried about what’s going to happen when your employer finds out and you’re worried about what’s going to happen if your family finds out. These are all the reasons why telling someone you have to report within 180 days or 300 days or you have to file a lawsuit within ninety days, can be very difficult. But courts don’t recognize this.

A good example of this is a Virginia case from 2014 named *Martin v. Pulaski School Board*, which refused to toll the filing deadlines. In that case, Toni Elitharp-Martin was the director of special education at the school system. Starting in March 2009, she was sexually harassed by one of the school board members. He asked her for sex, he commented on her appearance, and he told her she would never become a superintendent unless she had sex with him. And indeed she was turned down for the superintendent job in 2010 and again in 2012. She filed her EEOC charge in 2013. The case doesn’t tell us exactly when she filed the charge but we know she did not get the job in 2012 and she filed the charge in 2013. The Judge said she was too late. At most it would have been 365 days instead of 300 days, but the judge said that’s too late. One argument in this case was that one of the reasons she filed late is that she had post-traumatic stress disorder because she was a survivor of childhood sexual abuse and obviously, this man harassing her brought that all up again. The court said no. The court cited Virginia law correctly to say tolling could only happen in exceptional circumstances and that the mental incapacity must be shown to have prevented the person from understanding or maintaining affairs generally. The court then turned around and held the fact that this plaintiff was actually competent in holding down a job and wanting to be a superintendent against her argument for tolling the time. The court said that she clearly was capable as

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she thought she was capable of being a superintendent of the school system. Given this, the court found she clearly couldn't have been harmed that much and so she should have been able to meet the filing deadline. If you're well-suited to overseeing a whole school district, the court said, it cannot be that you're incapable of understanding or maintaining your affairs generally. That woman was out of luck and out of time. These are some other instances of why people don't report.

Another thing we see from our work is the need to improve the remedies under Title VII. For sex harassment cases, the majority of the remedy is compensatory damages or punitive damages. Under Title VII the compensatory damages and punitive damages are capped. These caps were set up in 1991 and they have not changed since then, and they are set based on the size of the employer. In some states, the state law is more generous and a worker can get higher compensatory damages and higher punitive damages. In Virginia, however, a worker cannot. The federal cap is the highest you can possibly get. Virginia's state civil rights law actually says under state law, you cannot get compensatory damages, you cannot get punitive damages, and you cannot get reinstatement. Thus, if you're in Virginia, the better thing to do, obviously, is to go under federal law. This chart shows you just what happens if you increase the caps based on inflation.

Employer Size	Current Cap	Adjusted for Inflation
15-100	\$50,000	\$92,500
101-200	\$100,000	\$185,000
201-500	\$200,000	\$370,000
>500	\$300,000	\$550,000

And as you can see, it's significantly higher. But that's not even where we should start. The point of compensatory damages is to compensate the person for what happened to them. When you're assaulted, if you're employer has fifty employees or 500 employees, the effect on you is the same. But if you work for a smaller employer, you're going to be able to get less money than if you work for a larger employer.

Same thing with punitive damages, the point is to stop employers from doing something. If you're a smaller employer, the cost will be less, even if you are a small employer that is financially well off. It also creates very strange incentives for large employers because the \$300,000 cap for some large employers simply doesn't mean very much. In 2005, there was a case

where a judge gave the maximum amount - \$300,000 - against Wal-Mart in an Americans with Disabilities case. The judge said “I am giving you the maximum amount - \$300,000,” and figured out that, in 2005, it took Wal-Mart 37 seconds to earn the \$300,000 it had to pay. As this example shows, for some large employers, this is just simply the cost of doing business, which is another reason to raise the caps.

Another thing we see is that juries regularly give plaintiffs much more than the caps, but then the amount is reduced because of the caps. For example, there is a Sixth Circuit case about a woman who was an electrical worker, the only woman working with this group of men. Her work space was filled with explicit sexual magazines, explicit sexual talk, and explicit playing cards. She was called a bitch. She was called a dyke. She was made to work alone in places that were not safe. The jury awarded her \$400,000 in compensatory damages and \$7,500,000 in punitive damages. The court reduced the award to \$300,000, because that’s the cap under Title VII.

The issue of caps is important for low-wage workers because it’s difficult to find attorneys to take their cases to begin with. But if all you can get is this small amount of damages, it is much less likely that attorneys are going to take these cases. So the caps make it much more difficult for low-wage workers to find representation.

Another place where we see that workers have a tough time bringing their cases is because of the standard of what counts as sex harassment. There are different kinds of sex harassment, but for the most part, it has to do with whether or not the harassment is considered severe or pervasive enough. This is not a standard that’s in the statute. It’s not a standard that Congress had anything to do with. This is a court-made standard. And courts keep ratcheting up what it means and what you need to make something severe or pervasive.

For example, a case from 2016 in the District of Maryland illustrates through what that District and the Fourth Circuit have found to be severe or pervasive. For example, a court found that twenty-four ongoing incidences for a period of a year, including statements by the defendant that he wouldn’t mind getting into the plaintiff’s pants, giving the plaintiff condom was not severe and not pervasive. In another case, the court granted the defendant’s motion for summary judgment when the plaintiff said she was sexually propositioned while discussing her salary and benefits with her supervisor. She was asking “What am I going to earn?” “What is my job going to be like?” And the response was, “well, it’s going to be like this if you sleep with me.” Still not severe. Still not pervasive. In another case, a su-

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pervisor closed the office door and asked her to take off all her clothes. Not severe, not pervasive.

What was considered severe or pervasive enough was twelve incidences in four months that included fondling, kissing, and propositioning, or something where the plaintiff said the sex harassment was an almost daily occurrence, including requests about oral sex, and being grabbed, and groped. What happens here is when you have a case that says “almost daily,” and there’s also physical harassment involved - that becomes a floor. Anybody who can’t meet that floor - well, then it’s not severe or pervasive. Through the years, what’s happened is it’s getting ratcheted higher and higher and higher. Things that may have been considered severe or pervasive at one point are no longer considered severe or pervasive, and people can’t bring their claims.

The next thing we see that we think needs to be changed is the work around non-disclosure agreements. There are two kinds of non-disclosure agreements. One is when an employee signs one as they start their first day at work. It’s a condition of employment. If you want this job, you have to sign this agreement, and you agree not to disclose anything that happens to you on the job, including claims of sex harassment. The second type is the type that the worker signs after they settle a case.

One notorious example of the first kind that happened recently was a DC restaurateur, Mike Isabella, made all of his employees sign a non-disclosure agreement when they started work, including the wait-staff. The wait-staff is earning the tipped minimum wage an hour. They have to sign a non-disclosure agreement that says if they talk about what happens to them at work, they owe \$500,000 and the attorney’s fees for the employer. People were sexually harassed at his restaurants, and they actually did speak up. The court refused to enforce the agreement and did not make the employees follow it.

Both types of agreements - the ones that are a condition of employment and the ones that happen after you settle a case - usually have stiff penalties against the worker. As a result, workers are very frightened and worried about speaking out. Beyond the danger to the individual employee though, what these agreements do is they allow serial sexual harassers to keep sexually harassing because nobody knows what’s going on. They also stop workers from coming together - both to bring law suits, but also simply to support each other - because they are not allowed to talk about what happened to them at work.

Some states have started to change the law around non-disclosure agreements. For example, in Washington state, it's no longer legal to have a non-disclosure agreement as a condition of employment. Washington State's statutes also now say that non-disclosure agreements - both as a condition of employment and as part of a settlement - should not be enforced if your testimony is needed for a civil case. In this way, you can actually get at the person who is the serial sexual harasser because the worker can break this non-disclosure agreement if they need to be deposed in another case.

In New York, a new statute limits the use of non-disclosure agreements - even in settlement agreements. In New York, the requirement is that non-disclosure agreement be at the behest of the plaintiff. If the plaintiff wants to have a non-disclosure agreement, which happens sometimes because plaintiffs don't want this information out, then it is acceptable. If only the defendant wants it, then you can't. The New York statute also says that the plaintiff has about 21 days to consider whether or not she wants to have a non-disclosure agreement. Even after she signs it, she gets 7 days to decide to revoke it. Tennessee's statute is more general and says that you cannot have non-disclosure agreements about sexual harassment as a condition of employment.

In Virginia, it is perfectly legal to have non-disclosure agreements both as a condition of employment and as part of a settlement in a case. In fact, for most attorneys, it's a pretty normal part of a settlement of a case to have that kind of non-disclosure agreement. But it does lead to these dramatically difficult effects for other people coming forward and for the women themselves.

The next issue I want to talk about is retaliation. Retaliation is important to us at the TIME'S UP Legal Defense Fund because pretty much every single request for help we receive includes an allegation of retaliation. The retaliation takes many forms. It takes the form of your shifts being cut. It takes the form of being told there's no work for you. It takes the form of people being told "this project no longer has space for you. We don't need you here." Or just simply being fired.

We are funding a case where the woman was working at a construction company and she was being harassed by the father of the owner of the company, who also worked there. She faced lots of verbal harassment and some touching. She finally got up her courage and she went to the EEOC and complained. She told her employer what she had done, and, two hours later, she was fired after working there for ten years. This is just part of what

happens regularly when employees complain. The EEOC sees the same thing, about half of the charges they get include allegations of retaliation.

Retaliation obviously is harder on low-wage workers. They don't have any funds to carry them through. They probably don't have any savings. So when you lose your job, you lose the thing that's keeping you in your house. You lose the thing that's keeping food on your table. And, as I said before, for domestic workers, sometimes that means losing where you live entirely. Low-wage workers are also more easy to replace, and so it's easier for an employer to get rid of them.

The way retaliation law works under Title VII, the first thing you have to prove is that you either participated in an investigation about Title VII or employment discrimination, or you opposed something that is illegal under Title VII. One positive piece of the law is that whatever you participate in or whatever you oppose doesn't itself have to be illegal. It has to be that you had a good faith belief that what you were opposing was actually illegal under Title VII. For a retaliation case, a plaintiff shows that they either opposed or participated, and that there was an adverse action. And, again, here the law is better than one would expect.

Under Title VII generally, in order to bring a case, you have to show that something happened to you that was so bad that it affected your pay, so something like losing a promotion or losing a job. Under retaliation standards, it has to be something that would chill somebody from coming forward. There's good law here about how that is very employee-specific. There's a great case from the Supreme Court where the justices talk about retaliation could be, for example, if you're a parent and you need to leave work at a certain time to pick up your child and your employer knows this and changes your schedule on purpose after you've complained, that that could be an instance of retaliation. You have to show opposition or participation, you have to show something bad happened to you, and then you have to show connection between those two things.

Once an employee meets this burden, the employer has the burden of production to explain what happened. That's simply an employer standing up and saying, "no, I didn't do it because of that, I did it because of this." There's no proof that has to be there; it's simply the burden of production. Given how prevalent retaliation is, what I would recommend is that the burdens be changed so that it's not the burden of production, but rather the burden of proof on the defendant. I know employers will say that that's more than they should have to carry and that's not fair, but given how prevalent retaliation is, it's important that employees get more protection. So if

the employer has to prove, “I didn’t retaliate against them because of this reason,” rather than just coming up with the burden of production, that might stem some of the retaliation that we’re seeing.

Our website is www.nwlc.org, and you can go there to learn more about the TIME’S UP Legal Defense Fund. For the attorneys in the room, we would love to have you volunteer with us. It’s a very simple form that you fill out, and then you’d join our Network. We will send your name along with some other attorneys once someone comes through who has a claim in Virginia. We also offer webinars and more training about sex harassment and retaliation cases.