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## 2018 SYMPOSIUM PANEL DISCUSSION: SEXUAL HARASSMENT IN THE WORKPLACE IN THE #METOO ERA

*Moderator: Kevin Woodson\**

*Panelists: Janice Craft, Kati Dean, Patty Gill, Rebecca Royals*

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## EDITOR'S NOTE &amp; DISCLAIMER

The following is a minimally-edited transcript of the discussion panel from the 2018 *Richmond Public Interest Law Review* Symposium, *Lawyering in the Era of #MeToo*, held on October 19, 2018. Short biographies of the speakers are included in the introductory remarks by the moderator. The panel discussion, along with the remainder of the symposium, can be viewed at

<https://www.youtube.com/watch?v=uHwOSt1WSBA&feature=youtu.be>.

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## PANEL QUESTION &amp; ANSWER

PROFESSOR KEVIN WOODSON: Thank you very much. We have a great panel here today, and they have a lot more to say than I do about these very important topics. So I am not going to waste too much of your time with a lengthy intro, but I would like to say that it's great to have this panel today in light of the recent developments. We have attorneys who have extensive experience addressing issues of sexual harassment and misconduct in a number of capacities and professional roles both representing employers and representing employees, and also advocating more broadly with respect to these issues. And they're well-situated to offer us compelling insights into the realities of sexual harassment law, and also to discuss what impact, if any, the #MeToo Movement has had in this realm. And so I'd like to introduce our wonderful panelists.

We have Janice Craft, who is an attorney with the Virginia Sexual and Domestic Violence Action Alliance. The Action Alliance is a direct services, advocacy, and membership organization that aims to create a Virginia free from sexual and domestic violence. Prior to her work with the Action Alliance, Janice served as a policy director for NARAL Pro-Choice Virginia and clerked for the Chief Judge of the Court of Appeals of Virginia. Janice is a graduate of William & Mary Law School where she served as editor-in-chief of the *Journal of Women and the Law*. Prior to attending law school Janice worked as a victim advocate for the State's Attorney's Office in Volusia County, Florida.

We also have Kati Dean, who is an associate at the firm of Locke & Quinn. Since joining Locke & Quinn in 2015, Ms. Dean has worked exten-

sively on family formation, personal injury, and employment matters, in both federal and state court. Ms. Dean graduated *cum laude* from the University of Richmond School of Law in 2013, where she was a John Marshall Scholar and a member of the McNeil Law Society and was awarded the Orrell-Brown Award for Clinical Excellence in the Children's Law Center.

Patty Gill is an attorney at Patty Gill, PLC in Glen Allen, Virginia. Ms. Gill and her firm provide labor and employment law services for employers of all sizes, locations, and industries. Patty has exclusively represented employers and management for more than nineteen years. Prior to starting her own firm in 2012 to focus on the counseling client side and compliance side of her practice, Patty was an employment attorney at Hunton & Williams, LLP for nine years.

And Rebecca Royals is a founding member of Butler Royals in Richmond, Virginia. She focuses her practice on employment law, civil rights, and complex civil litigation. Although she primarily represents employees, she has also represented employers ranging from local small business owners to national corporations. Ms. Royals has been listed as a Virginia Super Lawyer's "Rising Star" from 2009-2013 and was selected by her peers for inclusion in the "Best Lawyers in America" in 2013 in the practice area Litigation: Labor and Employment.

So, since first going viral one year ago this week, the #MeToo Movement has brought unprecedented national attention to the prevalence, pervasiveness, and unfortunately, the permanence of sexual harassment in the workplace and beyond. And its impact on women and other workers across the country has been a frequent topic of conversation in social media and in real-world settings. In the year since the accusations against Harvey Weinstein, who gave rise to this iteration of the #MeToo Movement, sexual harassment has received more sustained attention in our national dialogue than ever before. #MeToo has been used by millions of social media users, and has detailed thousands of incidents involving sexual harassment and other forms of misconduct. Therefore, it'd be easy to refer to this panel as timely, but unfortunately, this is going to be a perennially timely topic, as the history of #MeToo itself demonstrates. So #MeToo of course was first coined more than a decade ago, way back in the MySpace era of social media...by an activist who was dealing with other issues of sexual violence. And, so, unfortunately this is just as timely now as it was then and it might well be in the future. Of course, #MeToo has for the most part involved women coming forward with their experiences publicly, but without necessarily pursuing any formal legal or administrative claims to address their situations...and during this panel we are going to focus on those formal and

administrative processes by which attorneys might enable their clients to get relief. And we're also going to look at the impact of #MeToo on this domain, and we're going to think about ways in which some of the rules, policies, practices, and tactics that attorneys, employers, lawmakers, and others pursue can be used to make progress here. So, I've rambled on long enough...I know we're here to hear the insights from our panelists...So I wanted to open up with a very broad question for everyone - and the question is, as attorneys and advocates who are professionally engaged in this space, how do you feel about the #MeToo Movement? What are your thoughts? Has the increased publicity had any impact on the actual conditions that women and others face in the workplace with respect to these issues? So I can call on someone or...

REBECCA ROYALS: Would you like us to go down the line?

PATTY GILL: Sure, I'll go first. And speaking...I'm the attorney who represents employers, and so, I help counsel employers. A company will come to me when, let's say, they get an internal complaint of sexual harassment, and I'll help them with properly dealing with that internally. My advice has not changed. My advice in terms of how my clients should handle a complaint by a female employee *or* a male employee about harassment hasn't changed. They need to do all the things that I've been saying for years, which are immediately separate the alleged - the complaining employee from the alleged harasser, interview her in a compassionate and respectful way, get all of the facts about the inappropriate conduct, and then thoroughly investigate them...And then circle back with her, and communicate with her or him - when I say "her," I mean it both genders, but definitely the most prom - most of my claims are by women. And then circle back, stay in touch with her implement corrective action against the alleged offender if there is - if that's warranted.

What I've seen change the most I would say, in the last year, is that ties - he said, she said situations, you might hear that - are breaking in favor of the complaining employee and not as much in favor of the alleged accuser. And what I mean by that is there's a lot of times where alleged sexual harassment has happened in - behind closed doors, or just walking out to the parking lot. It's a...typically a man and a woman and there's no witnesses, and there might not be text messages, there might not be emails, so there's no corroboration. In years past, companies have kind of...stuck to the criminal standard, which is not applicable in the workplace of course, but we all know it - innocent until proven guilty. And prosecutors don't bring cases

against someone unless there's, you know, a huge burden met - beyond a reasonable doubt, right? So historically, companies have - when there's a tie, and there's not evidence to kind of break the tie and prove the bad conduct occurred, they side with the...they, they don't terminate. They might write a letter to the - to the male employee's file or something like that, but they're very - they've been very reticent to terminate and take that ultimate employment action. So, now what I'm seeing, and what I'm advising - because if, you're weighing risks, right? The risk of not taking action when there's a tie, and not giving the complaining employee the benefit of the doubt is so great, it's greater than getting a wrongful termination claim say, from the male employee who was accused and claims he's innocent. That's the biggest change I've seen is the ties are breaking in favor of the complaining employee.

REBECCA ROYALS: And I represent plaintiff's side ninety-nine percent of the time. The other one percent of the time I'm pretending to be Patty but I think she probably does a better job with that. Probably the primary difference I'm seeing in my practice to-date is a greater willingness to report and a greater willingness to follow through with action. So I tend to get a lot of people coming in on a consultation basis, wanting to say well I've got this situation, what are my rights, what can I do and my answer is always going to be the same: okay we need to report if this is a supervisor that's the problem - you know, is there a reporting procedure internally? Is this something we need to immediately address externally? What's the severity of the situation? What is at stake here? There are practical considerations as well as legal. And a lot of times I will have people who say "okay that's good to know. I don't think I want to do anything," because the practical implications are often so great.

At this point I feel like we have a number of women and men but to a lesser extent I think, who are much more emboldened by the fact that there are others out there. It is in the common discourse now. It is in the media and while we are seeing backlash, I think writ large at the more local level and more organically we are still getting that initial shock wave coursing through - at least what I'm seeing in the workplace. So as Patty said I think employers are being more responsive. Now I'm going to argue sometimes it's band-aid treatment and a lot of window dressing. I'm not sure that anything is always changing. Some employers I'm sure are taking real efforts and real steps, and other times "all right well let's have an HR seminar about not grabbing your coworkers." Right? Good guys, but people do now feel a little more willing. They're less alone, they know it's being discussed, they know at least with some employers, being treated a little more serious-

ly so they're more willing to take either an initial reporting step or sometimes it's more comfortable and more practical and they just need to go ahead and go straight to the EEOC, avail themselves of legal remedies. There are many steps along the way but people certainly are coming forward, and taking those additional steps I would say in greater percentages than they previously were.

KATI DEAN: Yeah absolutely, and just to echo a little bit what Patty and Rebecca said, I think, a big effect that the #MeToo Movement has had for plaintiffs which is who my firm mostly represents - occasionally we will represent employers but usually we're on the employee side of things - really just lessening the evidentiary burden in these cases which can be really, really massive. I think as Patty touched on a lot of times these are he-said, she-said situations, and now that more people are feeling more comfortable coming forward you can turn them into he-said, they-said, which is - really eases that burden on plaintiffs when they're going through what can be sometimes a process of re-traumatizing them, going through the legal process of making a complaint and pursuing any kind of legal remedy.

What I would also like to see happen and hope that this movement would lead to would be employers thinking twice about using the "she's crazy" or "she wanted it" defense because those are defenses that we unfortunately prepare our clients for when they come in, you know, and say this is what happened, you know I'd like to do something about it as plaintiffs' attorneys, you know we really have to set client expectations and say here's what you have to be prepared to go through if you're really going to, you know, take this case to a litigation stage - is that you know if the defense is denying that this happened, you're going to have people calling you a liar. The defense is, you know, a lot of the times going is going to be "you're making this up," or "oh no you invited this conduct," which can be really, really difficult for victims who have already been brave enough to come forward and speak out and be truthful about it to have to go through that, so I would like to see hopefully the #MeToo Movement have that effect. But I think already what we're seeing just in terms of people being more comfortable coming forward is plaintiffs - plaintiffs feeling less isolated when they're the ones coming forward to make a complaint and they might have some support and some cooperation and so this is not a giant uphill battle from an evidentiary standpoint.

JANICE CRAFT: We'll see...In addition to just echoing all the remarks of the other panelist, I would say that certainly an immediate impact that we

saw at our organization was this recognition that the old ways of addressing sexual harassment in the workplace are not really working, like a one-and-done training that somebody takes on a computer when they first start working with an organization is not an effective way to address prevention of sexual harassment in the workplace. It's not an effective way to address sexual harassment in the workplace period. We were almost immediately engaged by an attorney who primarily does defense work on behalf of employers, and she proactively reached out to my organization to say, "what can we be doing here?" "what can we do to address sexual harassment in a far more, holistic way?" And so I think there's been a recognition coming out of the #MeToo Movement...this is a chronic issue that requires chronic treatment. Again, it's not a one-and-done problem.

And another thing that I would say, in addition to just that consciousness-raising and women and men and gender non-conforming folks and others recognizing that they're not alone in this, if they've experienced sexual harassment in the workplace, but there's been kind of a trickle down to where, again we...You know, when #MeToo first exploded, well not first but for the second time exploded onto the scene a couple of years ago...It was a movement that was primarily led by wealthy white women in the entertainment industry, but I think we're seeing as an outgrowth of that - a recognition, an understanding that women, particularly women of color and women engaged in low-wage work, women in the service industry, agriculture, restaurant industry - where we're seeing that this is really such a prevalent problem in those industries as well so we're seeing I think an expanded recognition of the myriad ways and myriad sectors that sexual harassment and violence affect employees and workers.

KEVIN WOODSON: So thank you. All of you have hit upon issues and questions that I hope to raise, so I'm having a hard time figuring out what to go back to and when. But I wanted to ask I guess about that last point you mentioned, Janice, the disconnect between the media coverage of #MeToo. It is focusing on almost exclusively it seems on instances where powerful, wealthy, influential white men are abusing their power to exploit white women, and I wanted to ask how, if at all, does that affect your work in terms of the consciousness raising or the advocacy that you do in this area.

JANICE CRAFT: I think that in our work as advocates and attorneys, we just have to be very mindful of basically intersectionality, and multiple intersecting forms of oppression and discrimination that occur in the workplace as well as in society as a whole. You know it's one thing for a white-



collar professional, sort of economically advantaged white woman to experience sexual harassment. That's not to diminish her experience, but that's one type of experience. It's a far different experience for, for example, a woman of color who is engaged in low-wage work, living paycheck to paycheck perhaps a single parent supporting children, on one income, perhaps, a non-citizen, perhaps, not an English speaker, or at least doesn't speak English as her primary language. So again, I think that we just have to be mindful in our work that there is no, sort of, one-size-fits-all approach to addressing sexual harassment in the workplace. Again, depending on the individual experiencing that harassment and what his or her workplace happens to be just as we wouldn't approach an intimate partner violence situation as a one-size-fits-all approach, and just as we wouldn't counsel a person in every situation. We have to be sensitive in an intimate partner violence situation - there may be myriad reasons why a person might not leave, or can't leave that situation. It's very similar in the employment field. There may be myriad reasons that a person is more or less forced to remain in an unsafe working environment and we have to figure out ways that... that person can safely navigate that situation. And again we have to be mindful that there's not a one-size-fits-all approach to that.

KEVIN WOODSON: And, for those of you who practice in this area representing clients in actual disputes and litigation, how do these differences affect how you go about representing clients? Are there any, I guess, general patterns, or pointers that you could share with us?

KATI DEAN: I'm trying to think of the best way to answer that question. I think there is a discrepancy, and this is maybe going a slightly different direction from what Janice had talked about. But between the, sort of, Hollywood representation of this movement and, you know, how great it's been, and the effects that it's having, and the clients who come to my office and sit down and, you know, have a complaint or maybe want to bring a case, and well, I think we all...I just talked...In response to your last question, all the positive, effects that we're seeing, the #MeToo Movement had I think there's also an element of reality check for a lot of the clients who come into our office who have, you know, felt empowered by this Movement and come in, you know, and say: "Alright, you know I've seen all of those ladies on Fox News got million-dollar settlements, so, like...it's time to hold my employer accountable." And really just explaining: "That's very nice, we're still in the Fourth Circuit with Title VII - still has the standards that it has, so let's set some expectations about what this is going to be like." So, I

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do think there's a discrepancy between, sort of, the Movement as portrayed on TV versus the reality of clients who actually might be litigating these issues. So...which is, slightly different, I think, than what you talked about, but...

KEVIN WOODSON: Very important.

REBECCA ROYALS: Yeah and I'd add, kind of piggy-backing on what Janice said...it's kind of difficult to deal with, you know, it's really about meeting the client where they are. And so your client's options, as you said, are not always going to be ideal. They're not going to be able to have the result or even the welcome, warm reception that, you know, Gwyneth Paltrow has. Or whoever comes out and says something. And a lot of times you've got someone who has no...either didn't speak up because they had no concept of what their rights were. And so sometimes that can be very liberating when you get somebody who's been in the position and they just finally say: "I need to do something." And when they find out what their rights are, it can be really crushing when you take that a couple of steps down the line and then they realize what that is ultimately, probably, going to mean. And I say that meaning that in a lot of these circumstances, and I'm sure Patty has seen something that's different from that, but in a lot of circumstances, at least when you get to the litigation or pre-litigation level you're talking about a separation, where somebody's not going to be employed any more, and some people can't afford to roll those dice to start with. So it's very much case-by-case.

KEVIN WOODSON: And would you like to add anything to that?

PATTY GILL: No, go ahead.

KEVIN WOODSON: I want to follow up on the last point. The #MeToo Movement has largely centered around claims of incidents that in many instances occurred years and years ago. And I know that that presents special challenges in the legal context, statute of limitations, of course, but even other different evidentiary difficulties. So, I wondered if any of you could talk about how you manage those types of situations, and how you go about advocating in that context.

KATI DEAN: Yeah, that's a really tricky one...is when you have someone who has not felt empowered to speak up previously, and then, now they do, and they come to your office and they're, you know, telling the truth about what happened to them for the first time. And as the attorney you have to say: "I'm so sorry that happened to you. You are outside of the statute of limitations. You don't have a legal remedy at this point." Because our statutes of limitations, you know, haven't really changed. We've got...have a tort claim, they've got two years in Virginia. If it's Title VII they've got that 300 days to file the EEOC charge and then you wait for six months while the EEOC investigates...And then you have to really quickly file your claim and then you're looking at getting on a federal court docket if you are even getting that far. So, we still have these same pretty quick statutes of limitations, which are preventing, you know, claims from women who were victimized earlier and just didn't feel comfortable coming forward. We do have a couple of odd exceptions for people who were abused as children in Virginia. Not - good exceptions. I didn't mean to characterize them negatively by saying "odd exceptions." But I just think exceptions...that maybe not everyone knows about. Of course, if you're the victim of a tort when you're under eighteen in Virginia, generally your clock doesn't start running until you turn eighteen. But if you're the victim of sexual abuse, you actually have...and I don't want to misquote the statute so I wrote it down...But we have a statute that says: "Every action for injury to a person whatever the theory of recovery resulting from sexual abuse," so this would be in an abuse situation, not just a harassment situation, necessarily, "occurring during the infancy or incapacity of the person...shall be brought within twenty years of the cause of action accrues." And then we also have another exception which is much longer and I'm not going to bore you by reading the whole statute, but it discusses cases where the fact of the injury and its causal connection to the sexual abuse first communicated by a licensed physician or a psychologist...so this is maybe people who have repressed memories. So we do have a couple of extensions on our statutes of limitations in Virginia in somewhat unique cases. That being said, if someone is trying to bring a cause of action nineteen years after it happened your source of recovery at that point, that you're looking at, may be greatly diminished or completely gone. Your evidence of what happened after nineteen years...It's likely going to be very hard to recover. So even with extended statutes of limitations I think you're running into very big problems with people who, unfortunately, didn't feel able to come forward earlier. But...

PATTY GILL: Well, I mean, from my perspective... What I look at, and of course it's... I'm torn, but... As a practitioner for employers it would be very difficult to investigate a comment case. And what I mean by that is a claim of sexual harassment that didn't involve a touching. I just distinguish those in my mind in that, when it's a tort, and what we're referring to is a tort, it just means, you know, you can also sue for assault, for battery, intentional infliction. You can... You do have other avenues of bringing claims that do have a little bit of a longer statute of limitations than that short 300 days. But the comment cases, I mean, my clients won't be able to do anything to stop it if someone doesn't come forward and tell them in real time... so that they... before the individual either resigns or gets terminated or whatever the case may be. So, I mean, from a practitioner for employers, I... favor the quicker statute of limitations for the comment. Again, just comment cases, cases where someone is making comments that doesn't result in any physical touching, there's no nudity, there's no Harvey Weinstein, those are obviously very different.

KEVIN WOODSON: And so do any of you who represent employees disagree? Or is this... is having a tight statute of limitations on balance necessary for the orderly resolution of these matters?

REBECCA ROYAL: I mean... I think that in one sense, yes. I mean for me to do my job, for Patty to do her job, it... we have to have some, some line in the sand otherwise memory becomes faulty, evidence is gone, and it's, you know, it becomes more traumatic to pursue for someone past a certain point in a lot of cases. However, the fact that there are exceptions, and I think there could be more exceptions than what we presently have available to us. I think we to have loopholes for all sorts of cases where things have occurred. I mean, we've seen on display the difficulty recently with Supreme Court nomination hearings and whatnot... when something has happened so long ago, and you have conflicting testimony and often a dearth of witnesses intentionally or not. So, you know, statute of limitations have a function, I'd like to see them be a little bit longer than they are. Two years or less in the case of a Title VII EEOC Administrative Exhaustion Requirement... really, I think, are not doing some of the victims any favors, particularly again because here we are with #MeToo and some people are just now feeling like they can come out and it's the most crushing thing in the world where somebody has something that happened that would've been specifically under Title VII and it happened a year ago and unfortu-

nately we didn't make it to the EEOC within the 300-day timeline because they just now came out and said something...you know, it's tough.

KEVIN WOODSON: Yeah, I - these are obviously tremendously complicated and complex issues.

KATI DEAN: I also wanted to just make a note on the comment cases. Those I completely understand, I mean, for plaintiff and defense attorneys, being able to investigate it in a timely manner is important. We always encourage our clients, even if they're not moving forward with an EEOC charge at that time, making sure things get reported to the company in a timely manner, if only to build a record. But Title VII also has this severe and pervasive standard that you have to meet, and so you know in comment cases, usually one comment isn't going to do it, but you know you're still on this 300-day timeline, so you kind of have to wait, wait till you meet the standard, make sure it's part of an ongoing violation so all of them count, and it can...it can be a tricky line to walk sometimes. I think when you have a short, you know 300-day window in which you got to catch that violation so it's still within the statute but you also sort of have to have enough bad conduct that you're meeting the Title VII standard, so it is a little bit tricky and I don't know that it's a perfect system the way it is right now.

REBECCA ROYAL: And I'll throw in one more thing, if I may, and this is a little bit farther afield. But you know, it's not that we can always help the person who comes in as a prospective client, that statute may have run, where you have something like an ongoing hostile work-place situation, and perhaps this individual, who might have otherwise had a claim, has been removed from that situation but is still familiar with that workplace, is acquainted with other individuals who may be subjected to that, I mean at that point, sometimes they become a silent standard-bearer. They learn okay, these were my rights, I'm out of time, but they end up going and galvanizing others who are still there, and that is one way of effecting change that's certainly a little more dispersed, but that is something that we do see happening, I think a little more especially once again because people have been encouraged that others are coming forward, and so they say, "Gosh, I really wanted to do something about this, but I know Sandra in accounting is still having to work for this guy, and I think I'm going to reach out and see how she's doing," and gets the ball rolling that way.

KEVIN WOODSON: And so, I believe we were at...Becca and Kati both mentioned that it seems like more employees are coming forward and interested in pursuing their claims, but as the #MeToo Movement is made clear, the vast majority of people who are victimized by this type of employment, this conduct - do not come forward. And I assume that that hasn't changed overnight. Obviously the data's still a little dated now but what can be done, if anything, to help those workers? For those of you who practice here as advocates, or as in the litigation context, why aren't more people coming forward even now, and what can be done about this? And so, Janice, I don't know if you have anything to add?

JANICE CRAFT: Sure, I can start us off. It's kind of a tough question because I think that if we're talking about what can we do to improve conditions so that people feel more empowered to report instances of sexual harassment, we're almost missing the forest for the trees because it strikes me that we're going to have a pretty difficult time creating conditions where people feel empowered to report if we're not widening our lens and saying what're the conditions that we can create in the workplace where we're preventing this kind of behavior from occurring in the first place. So again, I think that we really have to focus both on prevention in the workplace and I think we have to address the fact that we deal with sexual harassment in the workplace and experience sexual harassment in the workplace just as an extension of our culture as a whole, which quite frankly, unfortunately right now, rewards some pretty toxic behaviors. We talk about things like rape culture, we talk about...society as a whole, unfortunately, still teaches men and boys that they're entitled to women's attention, that they're entitled to sex, that they're entitled to all sorts of things, and so I think that we have to sort of examine our culture writ large. And as a whole, in thinking about why we still have...why sexual harassment in the workplace is so commonplace and why people are afraid of reporting.

PATTY GILL: I'll go. On the prevention in the workplace front, I think that it's so important for companies...I know we talk about training and you said it's much more than just showing a module on a computer, right, and having everyone sit at their desk for forty-five minutes and click through. I really favor respect and civility training and really embedding that into my client's cultures in many other ways than having people sit for forty-five minutes and listen. I've done sexual harassment training for a client before, and I had the employee come up to me after and say "Gosh you did such a good job, that was so entertaining, and interesting. It's too bad the compa-

ny's just doing this to cover their butt and we all know why they're doing it." And so if employees feel like it's simply checking a box, it's #MeToo, oh we have that required sexual harassment training, and that's all you talk about, I think employees don't really feel like it's an open environment and it's a culture shift. I think in addition to making it more broad, it's about respect and civility of everyone being inclusive with everyone, age, race, sex, all the protected classes. I wish that more of my clients would either film this CEO doing an introductory part on video, or if it's a small company, have my business owner get up and tell everyone, "This is important and I want y'all to listen, and this is part of our culture and I agree with this training, and I signed the sexual harassment or the respect in the workplace policy, and I want everyone to take this very seriously." I think the tone from the top has to be so strong and supportive of it because employees do it because they think they can get away with it. I mean, simply put, it's human behavior. It's like my nine-year old son, if he knows I'm not looking he just might do it and if he knows I'm not gonna...if there's no repercussions, he might do it again. I think it's the same just core kind of fundamental human behavior that - not that Harvey Weinstein - again that's a level that I'm not even talking about, that's just a different level of completely awful behavior that I'm talking more about the kind of routine comments, again. But I think it has to come from the top. If the CEOs get up, if the executive team would get up and say, "I did this training, I signed off on the policy, I support this, and I want all of-everyone in this company to listen and comply with this," I think it would be more accepted by the employees.

And then another key part...again you do the training, you set the tone, you work it into your core values, and your mission statement at your company, and you have it in different publications, not once a year, forty-five minutes. Again, I think it's really important to handle the investigations right, to look a complaining employee in the eye and listen compassionately and take notes and show respect to him or her. The way HR or outside investigators handle it is so important because employees go back and talk. And they tell their friends and they tell their spouse, "Oh my gosh, they treat - I felt, I feel so much better for coming forward." Whereas in a botched investigation, when I see that come across my desk and I read the notes and no one circled back with her...What? That's definitely going to land in litigation. And man, if you're in California, I've had plaintiff's lawyers tell me, "You can't possibly settle this for less than \$800,000. It's the #MeToo Movement, when are you guys coming to the table?" I mean, it's expressly being thrown in employer's faces, at least in California. Rebecca wouldn't talk like that. But it's so - I just - the investigation and the compassion and the respect for the complaining employee is so important. And then of course, taking the appropriate action. And the employee sees that.

When someone is terminated, employees see that, they know it. It gets embedded in the culture that there's not a tolerance for it. That's kind of just four parts that I think are important to prevention.

REBECCA ROYALS: And I would echo that, I mean, looking in from the other side and looking at what an employer does, you know, a couple of things...Number one, the question, why don't victims report? Once again, we've kind of seen nationally, recently, why that might be. And knowing, feeling that there's an employer that's not going to respond appropriately, you know, not seeing a termination of the problem employee. Seeing questionable responses there. And I have seen in many cases where you talk about where there is a compassionate response, where there is respect. I do get cases and that I don't take, because they don't rise to a level - there may be something happening in the workplace that shouldn't be, that doesn't necessarily mean that it's going to actually constitute a violation of the law. And so then we're at that middle ground area, that sort of gray area. Should it be gray? No. But it is; that's our society. We sometimes have bad actors who may not be intentionally bad actors. And while we want to educate and eradicate that, ultimately at the same time, you do have these sort of one-offs with employees who ought to know better but aren't really trying to be harmful. And so I get people in and they say well, you know, my boss made this remark. And you know, like it's the one comment thing, that's not going to get us anywhere under our standard but a lot of times, if they complain internally about something that may, once again, not be a claim for them, but is a real area of concern in workplace culture. If they complain and are not responded to, I can tell you, their attitude - now I'm not going to take their case, but somebody will. You know? They'll find somebody that tries to make something out of this. Whereas if they are dealt with respectfully, and with appropriate compassion and concern, and the employee, or excuse me - the employer follows up, even if it's just with a counseling session, like, "Look, Jake, you can't tell that joke." And maybe that takes care of the problem. Now if it doesn't, we are talking about a whole new level. But just that that respectful response in the most sort of *de minimis* of cases is huge and could go a long way in changing the culture overall, I think, and encouraging victims to report.

KATI DEAN: Absolutely, I mean I think the reason people don't report work...in workplace situations is because they still have to work there. They have to get up and go to work the next morning and if it's just going to be just as uncomfortable for them after having reported, you know the bad behavior of a colleague that they still maybe have to see and interact



with, with unsupportive bosses, then, you know, what are they getting out of it? So I think exactly what Patty and Rebecca said about just making sure that the workplace environment is one where they can come forward and not be risking putting themselves in a worse position when they have to get up and go to work the next day. It's going to encourage more people to come forward and be honest about things.

KEVIN WOODSON: Thank you. And I wanted to follow up on that a bit too I guess dig even deeper. There are best practices, as I'm sure you're all aware, that tend to look awfully similar. And in this context and in other employer contexts. So training is often referred to as being a critical component of that. "Top-down buy-in" is a buzzword that gets thrown about. And I wanted to get a sense of whether you all, in your professional experiences, have actually seen the impact of maybe a workplace that took these issues seriously and made positive changes. Or if it's just too difficult to measure?

PATTY GILL: I can, being the primarily representing attorneys, sorry - employers. There, I have a great example. It's a law firm client of mine. And a male partner brought forward a complaint to the office manager and the managing partner that a female paralegal was being subjected to some comments by a senior partner. So one thing I've seen is that male employees are complaining more than I've ever seen before. I think that Harvey Weinstein has reduced everyone's tolerance for this kind of behavior. Men and women. Of course, women collectively have had intolerance to it. What I see is that men don't like it either. And they're speaking up about it. Maybe they didn't like it before, but they're vocalizing it. And this male partner brought a complaint forward and said she's fearful - he's obviously senior partner, his name is in the firm - she doesn't know what to do. But I want it investigated, I want it to be investigated and dealt with appropriately. And I was engaged, I was asked for my advice, they followed it to a T. I mean everyone involved, the managing partner, the office manager that I was working with on the investigation, they wanted to do the right thing, they wanted her to feel comfortable. They, you know...despite the fact that this was a founding member of the organization, and action was taken, I feel really good about the way they handled it. It was last December, so it was after Weinstein broke and it was in the forefront of their minds. And some of the conduct had happened outside of the office at a wedding. They weren't sure if that they could even look into that and asked, you know, can-can we consider that? Is that part of the workplace? Is a wedding a part of the workplace where he did something objectionable? Absolutely, it's your

employee, and that's your named partner, and you have an obligation to treat that and look into that as well. And they did, and things are going great now, I think that she's very comfortable, there's been no claim, and it...that was an example for me of one of my clients really handling it, taking it very seriously, having a good faith, effort all around, and then having a good result as well.

KEVIN WOODSON: And are there concerns about employers motivated by the threat of litigation to take steps that - I know one panelist has referred to this as "window dressing." Are there concerns that actually this publicity will enable employers to, I guess, obscure the impact of some of these issues by seeming to do all of the right things without following through or monitoring them? Is that a concern among any - especially for those of you that represent plaintiffs in this, in these matters?

REBECCA ROYALS: I would say that's not a particular concern, because if something has happened, it's happened. I mean, I would...My concern is that yeah, they're going to be putting the band-aid on the bullet wound, right? So, what I want to see is real, lasting, impactful change as opposed to the window dressing we were talking about. But at the same time, if we're just dealing with window dressing by the time it gets on my desk that's pretty obvious, and we're going to do what we need to do with it. So I don't know for purposes of someone who's already got a claim, that makes any real difference. But yeah, sure would be nice to think this is all the real deal and we're seeing some actual change here.

PATTY GILL: Yeah, I mean my clients are terminating offenders, so I know that's a very significant action, that's the ultimate punishment in my world and they're doing it. And they're doing it in ties. Again, the he-said, she-said situations, more and more my clients are erring on the side of terminating and assuming that the employee is telling the truth and not needing that, you know, absolute proof, the email or the text to terminate. So I think that they're doing it. They're taking action. If that's window dressing...I mean people are losing their jobs so it's pretty serious.

KEVIN WOODSON: And I had one last question, and then I wanted to open up the floor for audience questions if there are any. I know we started a bit early so I'm not sure exactly how we're doing on time...

MARYANN GROVER: You're good on time.

KEVIN WOODSON: Okay perfect. So I know that the #MeToo Movement has produced a number of policy reforms. We see this in the federal and state context. There have been efforts to ban non-disclosure agreements especially, and this is something that's had mixed success so far but there have been laws passed in at least some states, and I wanted to get a sense of whether you all thought this was going to be an important positive step toward dismantling the structures that enable this type of behavior in the workplace or might there be unintended consequences that outweigh the good here.

KATI DEAN: As a plaintiff's attorney, I get the thought process. I think...and the potential value of not having non-disclosure agreements in terms of, you know, you are able to have this cooperation and the support. That being said, my duty when I have a plaintiff is to my individual plaintiff, and non-disclosure agreements are a huge bargaining tool and a huge piece of leverage to get my client the biggest recovery possible. I like having them as an option. So...

KEVIN WOODSON: For a strategic...for leveraging during negotiations?

KATI DEAN: And a lot of times I also want to say the plaintiff wants it confidential as well. This is something she wants to put behind her if the case is to be settled and everyone can agree. Alright we're, you know...this is not going to be public knowledge. This is going to be confidential, you know, she doesn't want...if she's going on to another job, she doesn't want to worry about it might be something that's following her. And again, there are cases where you know I have seen the harm. I also had a client come to me and say, "I know that there have been other complaints brought, and they settled all of them. And none of those people will talk to me, but I know it happened." And so she was in a tougher position because she didn't have the corroboration that the, you know...she was like, "I know that the employer knew that this guy was a problem, but none of the people that complained before are going to come forward and support me because they're all - you know, they settled their cases and they signed their non-disclosure agreements." And that was really tough for her so I see the harm-

ful side of it. That being said, the thought of just outlawing non-disclosure agreements to me...it takes a potential tool out of my tool belt as a plaintiff's attorney when I'm fighting for an individual plaintiff.

PATTY GILL: Yeah. I would see a lot fewer of my clients be willing to settle any kind of complaint, and they'd be forced to just fight it to a jury trial. I believe that that would be detrimental on both sides. No plaintiff wants to go through a year and a half to two years of being dragged through the mud and their credibility tested and challenged and then to have to go sit through a jury trial. On the other hand, my clients, the companies, they don't want to spend two years worrying about it and paying lawyers to fight these cases but I think that if a client - if employers can't get confidentiality when they pay a settlement they...I just think that they are going to be forced to say, "Okay our back's against a wall, we're going to have to fight it now. We're going to have to come out and just aggressively fight this thing. And then if a jury tells us we were wrong, then the public will get that but we can...we're going to...our communication has to be 'no this didn't happen; we're going to fight.'" I think the settlements would go down, and we'd have a lot more trials, which again I don't think that helps either side. I always advise my clients to resolve cases unless it's something that they can...they really, really know that it's an untruthful claim brought in bad faith, or there might be some other really extraordinary reason to go to a jury trial. I don't think it helps anyone. I wouldn't want to take a sexual harassment case to a jury right now. I'll tell you that, and I haven't. So I just I don't know who is. They are in California but it's not going well.

KEVIN WOODSON: So any dissenting views or is that pretty much the...that's interesting I thought that this would be a topic on which we'd be more divided but it seems like a difficult issue so I wanted to open up for the floor to audience questions.

AUDIENCE MEMBER: Thank you. I have a question, and I apologize that this is veering a little bit outside of the employment context but I think it's become increasingly relevant. So I think that the #MeToo Movement has certainly emboldened victims to come forward. I also think that recent events in particular have also emboldened perpetrators. And we are definitely dealing with many victims who...and we've discussed all the reasons that victims wait and, you know, sometimes don't bring timely cases, but we're working with a lot of victims who would like to come forward but

who are being threatened or actually sued with defamation. And so it becomes a sort of a challenge where survivors of sexual violence or sexual harassment have enough barriers in coming forward, and I'm wondering what the interplay with that kind of liability is...Let's say that they lose or can't prove their case, you know, how do you advise clients on how to mitigate their risk of other liability for simply bringing the issue forward? And specifically there was a hypothetical mentioned where somebody has actually left the employment and is advising current employees like "well here's how to deal with this known perpetrator." Right? And there's still harassment going on. The person during the lunch time panels suggested, and anecdotally I think this is true, most victims are motivated by trying to prevent future harm, so there may - they may not be going just straight down the line of: file a claim with the employer, they go to the EEOC, then sue. You know, they may not be taking that linear path. They may be doing something sideways like that which I think does expose them to liability. So I don't know if you all have any comments about that but I think it's an increasingly frequent threat that perpetrators are using.

REBECCA ROYALS: I mean I would say sort of the old song about truth being the ultimate defense to a defamation claim. So there's some of that there, and I think if somebody's in that position I'm motivated. I mean you could always have a SLAP suit situation, but I'm not seeing much of that. And of course an actual filing would be protected, so I think it's a real concern especially as we're seeing so much polarization around this issue and so much backlash that I think is going to increase before it gets better. But it's not something I'm encountering a whole lot, and I think you know if somebody is on good footing and acting in good faith, you know, I guess if we're advising someone there are ways to advise around actually exposing yourself to something like a defamation claim.

PATTY GILL: And again, I think like what Rebecca said...the context of where they're making the statements is critical. If they're going to the press and speaking openly and disparagingly about an alleged - an accused offender, that's going to be actionable. If it's in the course of the law suit, it's going to be protected by that immunity, so where they're making the statements they just need to be counseled on: if you make the statements in this venue, you know, if you go down in the grocery store and yell to everyone that this person did this, or if you go to the press or some unprotected venue, that's where those claims are going to get more traction.

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MARYANN GROVER: Are there any other questions?

AUDIENCE MEMBER: You talked about how a lot of the ties - assuming that the complainer is a woman, that the ties are going to the woman now. And so it seems like there's some backlash to that and...you hear things about men now not wanting to be...or trying to protect themselves from...if they think something is perceived. So they won't be in a room with a woman alone or they won't go out to dinner alone with a woman. I think even the Vice President said something - how he doesn't...he won't have meals with women, and so I'm curious what your thought are in terms of women. It's setting women back in a way in terms of maybe losing out on opportunities and companies, if that makes sense.

PATTY GILL: No, it does make sense, and that is...a little bit of a natural consequence. I think men are walking on eggshells a little bit more than they used to be. I just think that it will swing back around eventually. I think that is an initial reaction. You know...I haven't heard a lot of that. Maybe you guys have or... You know, I just think it is better for everyone to be mindful about it and be a little too careful than to be a little too loose. That's my opinion.

JANICE CRAFT: From an attorney and an advocate standpoint, I mean I don't think we're asking a lot of men, particularly just men, people in power generally. I don't think we're asking a lot of people in power generally to just engage in a little bit of self-reflection, and maybe a little bit of self-discipline with respect to how we interact both with our peers and with our subordinates.

KEVIN WOODSON: The advice I've heard is that if you use common sense and you refrain from being a jerk, you will usually be okay, but I haven't read any empirical studies on that. I think we had another question.

AUDIENCE MEMBER: I'd be interested to know how much kind of non-monetary aspects of these settlements...so we've heard about apologies and about maybe corrective action which is where we always have this interesting - this really private litigation mechanism to do that, and I'd be interested to know if that's actually on the table in these cases?

REBECCA ROYALS: I - so, from an individual perspective there are a lot of non-monetary options that can be built in that have to do with...I mean gosh anything from just negotiating about non-disclosure, confidentiality, things like that, all the way to where someone is going to land next and, you know, recommendations and referrals, things like that at the individual level obviously, as far as a broader more hopefully culturally shifting movement. I've had things where we've had employers agree to have basically have to report to the EEOC on some issues, they've agreed to conduct trainings, they've agreed to deal with things on a larger basis. This is not the norm by the way in my world. Employers tend to be reluctant to make sweeping changes when they can just - if they don't feel that they need to in the first place and if they feel they can just sort of deal with this one thing so it's more rare and I would say the more plaintiffs I have with a particular claim in one instance. So if I've got multi-plaintiff litigation happening I'm much more likely to have an actual larger response, but it does happen. And you mentioned apologies, that's probably the thing I can get the least. I can probably get EEOC reporting and stuff like that more easily than I can get an apology, nobody wants to admit liability, and that would probably go the longest way, just, you know, for anyone out there representing employers if want to get this for a better deal why don't you just apologize to my client you'd be amazed at how far that would go.

KEVIN WOODSON: Do we have any other questions? We have one in the front. Sorry to make you...

AUDIENCE MEMBER: This question is actually for Patty. So in my world, as a prosecutor we're still dealing with stereotypes and assumptions that women should handle certain types of cases and not cases. Rebecca, Kati, and Janice are sort of the stereotype in these types of cases of who are going to be the plaintiff's attorneys. They're the women representing women, do you get any backlash...as considered...the you know woman who is now representing the employer against the woman from other women, and then on the flip side do you get backlash from the employers, especially maybe earlier in your career because your advice is incredibly reasonable and it is sound, but, it's not "she's crazy we can fight them to the end and take her out." Did you ever get any backlash of well you're just saying that because I identify with the plaintiff as a woman?

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PATTY GILL: I never got that.

AUDIENCE MEMBER: Awesome.

PATTY GILL: Early in my career or now. I never got that. I, you know, I just haven't gotten that. I've had some clients who didn't want to do the right thing and you know I feel like that's the minority. I feel like my advice on these topics maybe is more respected by my clients because of my gender. I don't know, but I haven't gotten backlash from women for the work that I do. You know my friends who aren't lawyers love what I do because what I do is - I help companies comply with laws and I help companies handle these complaints correctly. I would never - I would not be able to sleep at night if I had to go trial on "she's crazy" unless I had a letter from a doctor, fifteen pages long telling me that she actually doesn't know what she is saying and she made it all up. I would not be able to do my job if I was putting women down. Now have I taken a deposition of a female sexual harassment claimant where I had to get aggressive with her about her criminal background or complaints she had made with other companies? I have. Did I feel a little uneasy about that? I did. I was doing my job and aggressively taking a deposition, but I also feel like I was defending a claim that my client was saying was not true and was not legitimate and we did have reason to doubt her credibility. So...no I haven't gotten backlash on either of those scenarios, and again when I - like tell my kids what I do for a living: "my mom helps companies treat their workers right." I mean that's what I do, I advise them, and I tell them to do the right thing, and hopefully 100% they do, maybe not, maybe 99 out of 100 I can deal with that too.

REBECCA ROYALS: And I actually have a thought on that...just to piggy back on it...which is that I think, and I think it is a result of a cultural bias where we still don't - our default is not to believe the victim, our default is to apply innocent until proven guilty to a non-criminal claim...I think having Patty on the on the other side, if I'm in front of a jury - Patty on the other side is a way of lending a certain credibility to the employer's position...See, a female attorney thinks that this is okay. Likewise a male plaintiff's attorney representing a female lends a certain credibility again in the eyes of the jury perhaps that, "well, no-no really I'm a guy and I believe her." I think that's a little bit unfortunate, but I think that gender shift, or sort of the juxtaposition is probably helpful in both of those situations.



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