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Nine Justices and #MeToo: How the Supreme Court Shaped the Future of Mandatory Arbitration and Sexual Harassment Claims

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NINE JUSTICES AND #METOO: HOW THE SUPREME COURT SHAPED THE FUTURE OF MANDATORY ARBITRATION AND SEXUAL HARASSMENT CLAIMS

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ABSTRACT

When the Federal Arbitration Act was signed into law in 1925, none would have guessed it would be used to perpetuate a system of silence surround workplace sexual harassment. With the Supreme Court's continued stance to liberally applying the Act to uphold arbitration agreements contained within employment agreements over the past decades, it is apparent that any change needed to protect vulnerable workers will need to come from federal legislation. The rise of the #MeToo movement across the nation, and throughout various employment sectors, may be the push needed to bring about the necessary change.

INTRODUCTION

"It's a dream to be an employee there, . . . [a]nd then you find out what it really is, and it's a nightmare."[1] Over the years, with the resurgent wave of feminism and female empowerment across the country, a new issue has surfaced in the workplace and the field of employment law. Sexual harassment in the workplace has always been an issue and litigated in the courts for decades. Its surge to the forefront of American thought stemmed from the 2017 #MeToo movement that had very subtle and soft-spoken beginnings. But what began quietly has grown into an international movement to highlight the prevalence of sexual violence and harassment in the world today, not just in the workplace.

In a broad sweep, the "Me Too" movement highlighted the issues many women, as well as some men, face in the world today. But focusing more specifically, the Me Too movement has revealed an issue within the realm of employment law: the prevalence and effects of workplace sexual harassment. Traditionally, sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964, which outlaws sex-based discrimination in the workplace.[2] Mandatory arbitration agreements have created an issue for employees who look to bring claims. These agreements are found in employment agreements and contracts workers are required to sign in order to gain employment.

This Comment will discuss: (1) the history of arbitration and sexual harassment law; (2) the issues many workers face due to these agreements; (3) the effects of the Me Too movement on the legal field surrounding these issues; and (4) the possibility for legislative solutions to these issues.

In Part I, this Comment will discuss the federal statute governing arbitration agreements, the Federal Arbitration Act, its purpose, and effects. This Part will discuss the evolution of the Supreme Court's decisions interpreting and applying the Federal Arbitration Act ("FAA") in a variety of fields. It will narrow its focus on the Court's growing approval of arbitration and its expansive interpretation of the Act. Even more, it will discuss the Court's application of the Act to employment agreements, where the Court has upheld arbitration agreements that waive employee rights under many different statutes.

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[1] Stephanie Zacharek, Elaina Dockterman, & Haley Sweetland Edwards, *Time Person of the Year 2017: Silence Breakers*, TIME, Dec. 18, 2017, at 14. Included in the Time's Person of the Year cover story, this quote explains the plight of female workers who experience sexual harassment in the workplace.

[2] 42 U.S.C. § 2000e-2 (2018).

Part II of this Comment will discuss the jurisprudence surrounding sexual harassment claims. It will discuss the inception of such claims under *Meritor Saving Bank v. Vinson* and the development of the doctrine in subsequent cases, including the strict framework under which a claim can be brought. Additionally, it will discuss the transformation of employer liability and the creation of an employer affirmative defense.

Part III of this Comment will discuss the impact that arbitration agreements have on employees. It will discuss the statistical findings of scholars and researchers on the increased use of these agreements over the past few decades and their current estimations on how many American employees are covered under such agreements today. Additionally, it will evaluate the effects these agreements have on the number of claims brought, in comparison to federal and state employment claims, as well as the success and outcomes of claims that are forcibly arbitrated.

Part IV of this Comment moves on to the inception and development of the Me Too movement and the effects it has had on the field of employment law. It will discuss studies conducted by the Equal Employment Opportunity Commission ("EEOC") on the prevalence of workplace sexual harassment and the effects such harassment has on employees. Additionally, it will examine the wide impact that sexual harassment has not only on victims, but the harms felt by society as a whole. Furthermore, this section will specifically discuss the impact of the Court's decisions favoring forced arbitration of sexual harassment claims on employees, which peaked with the Court's decision in *Epic Systems v. Lewis*, in May of 2018.

Part V of this Comment will discuss a solution to the issues currently facing employees and employers alike, federal and state legislation. This section will look at the proposed federal legislation, the Ending Forced Arbitration of Sexual Harassment Act of 2017 and the FAIR Act of 2019, as well as a collection of individual state legislative attempts. This Part will discuss the push for these in light of the Me Too movement, and how the Court's favorable precedent will bear on the effectiveness of these attempts.

I. BACKGROUND ON THE FEDERAL ARBITRATION ACT AND THE SUPREME COURT'S DECISIONS

Prior to the passage of the United States Arbitration Act, commonly referred to as the Federal Arbitration Act. American courts, like their English counterparts, had a general aversion to arbitration agreements and routinely refused to enforce such agreements.[3] Arbitration agreements are defined by Black's Law Dictionary as:

> [a]n agreement by which the parties consent to resolve one or more disputes by arbitration. An arbitration agreement can consist of a clause in a contract or a stand-alone agreement and can be entered into either before a dispute has arisen between the parties (a *predispute arbitration agreement*) or after a dispute has arisen between the parties (a *postdispute arbitration agreement* or *submission agreement*).[4]

Understanding the growing need for efficient solutions to contract disputes, Congress enacted the FAA, which was signed into law by President Coolidge on

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[3] *See* H.R.Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

[4] *Arbitration agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

February 12, 1925.[5] This Act displaced much of the Court's precedent and, as desired, "place[d] arbitrations agreements 'upon the same footing as other contracts.'"[6] The language of the statute states:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.[7]

The Supreme Court determined in 1983 that the FAA should be construed as a "liberal federal policy favoring arbitration agreements" and that the "effect of the section [was] to create a body of federal substantive law . . . applicable to any arbitration agreement within the coverage of the Act."[8]

The modern arbitration process consists of six steps, if fully completed. First, cases are initiated by one party bringing a claim, allowing the opposing party to respond, once they become aware.[9] Next, arbitrators are invited to serve on the case, requiring such person to check for any conflicts.[10] Third, the parties are made aware of the selection and are allowed a period of time to object to the appointment before continuing to the next stage.[11] Fourth, the parties together address the preliminary issues and exchange information.[12] Fifth, at the hearing stage, the parties have their chance to present their case to the arbitrator, similar to a trial but without the applicable rules of evidence.[13] And finally, after the hearing the arbitrator releases their written decision, which contains the outcome and any award that may be granted.[14]

Understanding the Act in a wider context of the law is important to understand that the FAA has been applied to many other areas as well. A long and expansive line of precedent grew from this liberal interpretation of the Act. Over the next few decades, the Court held that the FAA allows for expansive congressional power

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[5] JON O. SHIMAIUKURO, CONG. RESEARCH SERV., RL30394, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1-2 (2003).
[6] *Id.* at 2 (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).
[7] 9 U.S.C.A. § 2 (2017) (emphasis added).
[8] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[9] *Stages of the Arbitration Process,* AM. ARBITRATION ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA_Stages_of_the_Arbitration_Process.pdf [https://perma.cc/CJ8Y-UTM6] (last visited Mar. 3, 2018).
[10] *Id.*
[11] *Id.*
[12] *Id.* This is comparable to the discovery stage of a trial.
[13] *Id.*
[14] *Id.*

under the Commerce Clause,[15] and preempts states laws against arbitration.[16] In addition to these holdings, the Court held that an arbitration clause within an employment agreement was valid, even though it involved a statutory claim under the Age Discrimination Employment Act ("ADEA").[17]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the plaintiff, a securities representative, was "subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."[18] Believing he was fired due to age discrimination, Gilmer filed a suit in the District Court for the Western District of North Carolina. The defendant filed a motion to compel arbitration, which was denied by the court because the ADEA was meant to protect from the waiver of a judicial forum.[19] The Fourth Circuit reversed the court's decision, stating that "nothing in the text, legislative history, or underlying purpose of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements."[20]

The Supreme Court, granting *certiorari*, addressed the issue of whether statutory claims under the ADEA could be arbitrated, rather than litigated in court.[21] The Court explained that "the burden is on Gilmer to show that Congress intended to preclude a waiver of judicial forum for ADEA claims."[22] To prove such an intent, Gilmer must have shown that either the text, legislative history, or underlying purpose of the ADEA was in conflict with compulsory arbitration.[23] The Court was unpersuaded with Gilmer's contention that compulsory arbitration was inconsistent with the purpose of the ADEA.[24] Relying on *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, the Court reasoned that the deterrent effect and other broad social purposes of the statute are equally as effective if arbitrated, "so long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum."[25]

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[15] Allied-Bruce Terminix Companies, Inc., v. Dobson, 513 U.S. 265 (1995). In a case concerning a pest removal contract containing an arbitration agreement, the Court reasoned here that the phrase "involving commerce," included in the statutory language, indicates that the Act was meant to apply to all contracts that *affect* commerce. *Id.* at 273. Additionally, the Court reasoned that in combination with the broad language used, its own interpretation of the Act's broad reach supported its holding. *Id*. at 274.

[16] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). The Court determined that that California statute, which made arbitration agreements that required "waiv[ing] compliance with any provision of this law or any rule" void, was in direct conflict with the FAA and therefore violated the Supremacy Clause. *Id*. The Court reasoned that legislative intent of the statute was to favor arbitration, and therefore the Act created federal substantive law that is applicable in both federal and state court. *Id.* at 12.

[17] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

[18] *Id*. at 23.

[19] *Id.* at 23-24.

[20] *Id.* at 24 (quoting Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (W.D.N.C. 1990)).

[21] *Id.* at 26-27.

[22] *Id.* at 26. The Court clearly stated that statutory claims may be subject to arbitration agreements and supports its statement by citing to multiple cases that have applied the FAA to statutory claims including: the Sherman Act, Securities Exchange Act of 1934, RICO, and Securities Act of 1933. *Id.*

[23] *Id.*

[24] *Id.* at 27. Additionally, the Court was unpersuaded by the argument that arbitration would undermine the EEOC's role in enforcement of the statute. *Id.* at 28. It reasoned that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." *Id.*

[25] *Id.* at 28 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

In his final argument, Gilmer asserted that arbitration is in conflict with the ADEA because of the ever-present unequal bargaining power between employers and employees.[26] The Court quickly dismissed this claim, stating that "[m]ere inequity of bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[27]

In his dissent, Justice Stevens contended that the FAA does not cover arbitration agreements contained in employment contracts of any kind.[28] He reasoned that although the issue was waived below, the Court should have reached the issue of coverage because "the resolution of the question is so clearly antecedent to the disposition of this case."[29] To support his claim, Justice Stevens reasoned that few would argue that the main concern of the FAA was to enforce arbitration agreements between business entities, and for the "further extension of the principle of commercial arbitration."[30]

In addition to these arguments, the dissent rejected the majority's reasoning that compulsory arbitration does not directly conflict with the congressional purpose of the ADEA and that unequal bargaining power should not limit the enforceability of an arbitration agreement.[31] Nearly ten years later, Justice Stevens's argument that the FAA does not apply to contracts of employment was explicitly rejected.[32]

In *Circuit City Stores v. Adams*, the Court held that the FAA applied to all contracts of employment, exempting only employment contracts of seamen, railroad workers, and other similar types of transportation workers.[33] In the case below, the Ninth Circuit had ruled that Section 1 of the FAA excluded all employment contracts due to the language of the statute which stated "contracts of employment of . . . any other class of workers engaged in . . . commerce."[34] The Court was unpersuaded, instead reasoning that explicit references to seamen and railroad employees limited the statute's exemption to only those lines of employment.[35] More specifically, the Court reasoned that because Congress used the phrase "engaged in commerce" the language should be understood as previously interpreted, meaning "engaged in the flow of interstate commerce, and . . . not intended to reach all corporations engaged in activities subject to the federal commerce power."[36] To rule otherwise would contradict the liberal interpretation of the statute's reach and favoring of arbitration.[37]

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[26] *Id.* at 32-33.
[27] *Id.* at 33.
[28] *Id.* at 37 (Stevens, J., dissenting). The themes discussed in Justice Stevens's dissent will be echoed in the dissents to come, authored by both him and other Justices.
[29] *Id.*
[30] *Id.* at 39 (Stevens, J., dissenting) (quoting Report of the Forty-third Annual Meeting of the ABA, 45 A.B.A. Rep. 75 (1920)).
[31] *Id.* at 41-43 (Stevens, J., dissenting).
[32] *See* Circuit City Stores v. Adams, 532 U.S. 105 (2001).
[33] *Id.* at 114-15.
[34] *Id.* at 114.
[35] *Id.*
[36] *Id.* at 117 (*quoting* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975)).
[37] The Court also ruled, in *EEOC v. Waffle House, Inc.*, that the enforcement of arbitration agreements under the FAA does not bar the EEOC "from seeking 'victim specific' relief on behalf of the employee." Shimaiukuro, *supra* note 5, at 6. The Court reasoned, although the EEOC was not a party to the agreement, it "has the authority to pursue victim-specific relief regardless of the forum that the

More recently, the Court has addressed the issues of class action and federal preemption under the FAA. In *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempted a California state law that outlawed arbitration agreements that required individualized arbitration because they were deemed to be unconscionable.[38] The Ninth Circuit ruled that Section 2 of the FAA, which permits arbitration clauses to be declared unenforceable "upon such grounds as exists at law or in equity for the revocation of any contract," does not preempt the California state law because unconscionability of a contract is a valid defense that exists at law for all contracts.[39]

In reversing the Ninth Circuit, the Court relied on its growing line of arbitration-friendly precedent. It reasoned that the liberal interpretations favoring arbitration continue when considering state law implications.[40] They stated that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[41] In making their determination the Court discussed the purpose and advantage that underlies the desire for arbitration – efficiency.[42] If consumers were allowed to demand class arbitration *ex post* it may create inverse effects to arbitration including: sacrificing informality, requiring procedural formality, and increasing risk for defendants.[43] These risks are inconsistent with the purpose of the FAA and the growing precedent developed favoring arbitration over litigation.

The dissent in *AT&T Mobility* delivered an opposing position on the interaction of the FAA and California state law concerning the defense of unconscionability for contracts. Justice Stevens explained that "California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration."[44] He continued by arguing that no rational person would bring an individual claim, when potential attorney's fees could be much higher than a possible thirty-dollar award.[45] He reasoned that "nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims."[46] In a final argument, the dissent reminded the Court that "'[t]o immunize an arbitration agreement' . . . on grounds applicable to all other contracts 'would be to elevate it over other forms of contract.'"[47]

Two years later, the Court again addressed the issue of arbitration clauses that limited class actions. In *American Express Co. v. Italian Colors Restaurant*, "[r]espondents brought a class action against [American Express] for violation of the

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employer and employee have chosen to resolve their disputes." EEOC v. Waffle House, Inc., 534 U.S. 279, 295 (2002).

[38] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

[39] *Id.* at 339.

[40] *Id.*

[41] *Id.* at 341.

[42] *Id.* at 348.

[43] *Id.* at 348-9.

[44] *Id.* at 364 (Stevens, J., dissenting).

[45] *Id.* at 365. This is an argument that the dissent in *Epic Systems* will address. It will become relevant to the discussion in Part III of this Comment.

[46] *Id.*

[47] *Id.* at 366 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1929)).

federal antitrust laws."[48] They claimed that "American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards."[49] The Court of Appeals found that the clause could not be enforced due to the prohibitive costs respondents would incur if compelled to arbitrate individually.[50]

In determining that the waiver was enforceable, the Court again cited its precedent favoring the enforceability of arbitration agreements.[51] It further supported this line of reasoning by citing to a 2012 case, *CompuCredit Corp. v. Greenwood*, which held that the FAA's mandate to enforce arbitration should be upheld so long as it has not been "overridden by a contrary congressional command."[52] The Court held that the waiver of class arbitration was enforceable – explaining that neither the anti-trust laws nor Rule 23 of the Federal Rules of Civil Procedure were contrary congressional commands.[53] The Court also reasoned that this waiver was enforceable because, similar to *Mitsubishi Motors*, it did not eliminate a party's right to pursue the statutory remedy provided to them.[54]

Posing similar themes and theories in this dissent as past dissents, Justice Kagan's main argument consisted of the idea that, due to the terms of this arbitration agreement, pursuing an anti-trust claim would be a "fool's errand."[55] The dissent based its argument on the idea that no court would "enforce an exculpatory clause insulating a company from antitrust liability . . . even if that clause were contained in an arbitration agreement."[56] From there the dissent explained that the arbitration agreement, while not baldly exculpatory, had the same effect and therefore should not be held enforceable.[57] Furthermore, the dissent considered this to be consistent with established precedent, reasoning that "an arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves its result."[58]

Most important to this argument is the attempt to explain the repercussions of allowing just agreements to stand. While the right to arbitrate or litigate as a class is not a right, it is a procedure to be used when – even within the arbitration setting – due to the prohibitive costs of litigation, it would be impractical to bring individual claims.

Lower courts are now divided on another issue regarding mandatory arbitration agreements. In a recent decision, the National Labor Relations Board ("NLRB")[59]

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[48] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).
[49] *Id.*
[50] *Id.* at 332.
[51] *Id.* at 233.
[52] *Id.* (quoting CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012)).
[53] *Id.* at 234.
[54] *Id.* at 236.
[55] *Id.* at 240 (Kagan, J., dissenting).
[56] *Id.* at 241.
[57] *Id.*
[58] *Id.* at 242.
[59] "The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private

ruled that an arbitration agreement that waives class or joint actions is unenforceable under the National Labor Relations Act ("NLRA").[60] In response to this, a circuit split occurred, with some ruling that the NLRA protects workers from such clauses,[61] and others finding the FAA mandates that these agreements be upheld.[62]

Circuits that ruled that mandatory arbitration clauses within employment contracts that contain class and joint action waivers are unenforceable reasoned so based on Sections 7 and 8(a)(1) of the NLRA. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,* and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.[63]

Under this section, the Ninth Circuit reasoned that the NLRA established that it is an employee's right to act in concert with his fellow employees, including the right to bring work related claims in concert.[64] The court ruled that these rights cannot be limited by an employer under Section 8(a)(1). Furthermore, the court held that the "FAA does not dictate a contrary result."[65] It reasoned that because the agreement contained the phrase, "separate proceedings," it illegally targeted nonarbitration proceedings, limiting workers' rights to bring collective suits in court as well.[66] When defenses like illegality are applied to arbitration agreements the court held that the agreements should be treated on equal footing with all other contracts, and found unenforceable if law or equity requires such a result.[67]

To the contrary, other circuit courts have relied on the Supreme Court's FAA precedent to uphold class waivers in arbitration agreements. The Fifth Circuit, in *D.R. Horton, Inc. v. NLRB*, held that the class action waivers are enforceable under the FAA rather than the NLRA.[68] The court rejected the NLRB's reasoning that the NRLA is applicable under the "savings clause" of the FAA, and that "when a contract

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sector employers and unions." NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/what-we-do (last visited Mar. 22, 2020).

[60] In re D. R. Horton, Inc., 357 NLRB 2277 (2012).

[61] *See Morris v. Ernst & Young,* 834 F.3d 975, 990 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016); *Murphy Oil, Inc*., 361 N.L.R.B. 774 (2014).

[62] *See* Cellular Sales, L.L.C. v. N.L.R.B., 824 F.3d 772, 779 (8th Cir. 2016); Murphy Oil, Inc. v. N.L.R.B., 808 F.3d 1013, 1021 (5th Cir. 2015); D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 364 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 299 (2d Cir. 2013) (per curiam); *see also* Stephanie Greene & Christine N. O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements - #TimesUp on Workers' Rights*, 15 STAN. J. OF C.R. & C.L. 43, 54 (2019).

[63] 29 U.S.C. § 157 (emphasis added).

[64] *Morris*, 834 F.3d at 982-3.

[65] *Id.* at 984.

[66] *Id.* at 985.

[67] *Id. See generally* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016) (applying the NLRA to an arbitration agreement limiting class and joint actions in an employment context, holding that the FAA does not prove contrary); Murphy Oil, Inc., 361 N.L.R.B. 774 (2014) (same).

[68] D.R. Horton, Inc., 737 F.3d at 362.

interferes with the NRLA, the NRLA prevails."[69] The circuit court reasoned that only a contrary congressional command to override the FAA would be sufficient to find this agreement unenforceable.[70]

On this point, the court held that the NLRA contains no specific language nor was there any congressional intent to override the FAA.[71] Additionally, the court reasoned that like other statutory rights, the FAA still allows for vindication of those rights, even though they cannot be done collectively, and that mere unequal bargaining power is not sufficient to find these types of arbitration agreements unenforceable.[72] This circuit split led the Supreme Court to grant *certiorari* for three case, *Lewis v. Epic Systems Corp.*, *Morris v. Ernst & Young*, and *Murphy Oil v. N.L.R.B.*, and consolidate them into a single case.[73]

During the May 2018 term, the Supreme Court issued its decision in *Epic Systems*, in an opinion authored by the newly appointed Justice Gorsuch. In his debut opinion, Justice Gorsuch, on behalf of the Court, addressed the issue of the enforceability of arbitration agreements that ban class actions, under the "savings clause" of the FAA and the NLRA.[74] All three cases dealt with employees, who in their employment agreements consented to arbitrate any disputes that might arise between them and their employers. More specifically, the employees agreed to individualized arbitration hearings, effectively barring class arbitration.[75]

In this consolidated case, the employees alleged violations of the Fair Labor Standards Act.[76] Rather than bringing their grievances through the agreed upon arbitration process, the employees challenged the validity of their mandatory arbitration agreements in federal court, claiming it violated the NRLA's collective action provision.[77] On appeal, the Ninth Circuit reversed, reasoning that "the [FAA's] 'savings clause' removes this obligation if an arbitration agreement violates some other federal law"; that "other federal law" being the NLRA.[78]

In rejecting their reasoning and reversing the Ninth Circuit, the Court stated that, "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[79] The Court provided two lines of reasoning to support its holding. First, the court addressed the issue of the FAA's savings clause; and second whether or not the NLRA sufficiently overrides the congressional intent of the FAA and commands the Court to "hold [the] agreements unlawful yet."[80]

Discussing the savings clause, the Court rehashed much of the precedent discussed above. Relying on *American Express Co. v. Italian Colors Restaurant*, the Court stated the "Arbitration Act requires courts 'rigorously' to 'enforce arbitration

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[69] *Id.* at 358.
[70] *Id.* at 360.
[71] *Id.* at 360-61.
[72] *Id.* at 361.
[73] Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (2018).
[74] *Id.* at 1619.
[75] *Id.* at 1620.
[76] *Id.*
[77] *Id.*
[78] *Id.* (internal citation omitted).
[79] *Id.* at 1619.
[80] *Id.* at 1624.

agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'"[81] In relying on this reasoning, the Court rejected the proposition that the NLRA is grounds that exists "under law" to find these agreements unenforceable.[82] Furthermore, the Court explained that its established precedent, while allowing invalidation due to "generally applicable contract defenses, such as fraud, duress, or unconscionability," does not save "defenses that target arbitration . . . by . . . 'interfer[ing] with fundamental attributes of arbitration.'"[83]

Moving on, the Court addressed whether, in its text, the NLRA has a "clear and manifest congressional command to displace the Arbitration Act and outlaw [arbitration] agreements like [those at issue in the case]."[84] The employees argued that the NLRA guarantees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and therefore is a clear and manifest congressional command.[85]

The Court held that this was a not a clear and manifest command because not only "does [it] not express approval or disapproval of arbitration agreements," it never mentions "class or collective procedures."[86] The Court explicitly stated that "[i]t does not even hint at a wish to displace the Arbitration Act–let alone accomplish that much clearly and manifestly, as our precedents demand."[87] In its reasoning, the Court depended on its substantial precedent to further push the favorability of arbitration agreements in the employment context as well as many other areas.[88] This holding bolstered the Court's growing precedent on the favorability of arbitration agreements in all contexts, but specifically in the employment context. The dissent in *Epic Systems* takes a different approach, following the arguments previously discussed in each dissent within the established precedent.

The dissent, authored by Justice Ginsburg, emphatically stated, "[t]he Court today subordinates employee-protective labor legislation to the Arbitration Act."[89] To support this contention the dissent addressed: (1) the history and purpose behind

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[81] *Id*. at 1621 (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013)).
[82] *See id*.
[83] *Id*. at 1622 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 344 (2011)). The employees did not purport that the contracts were entered into under duress or fraud, but instead attack them due to one of the "fundamental attributes" of arbitration, individualization. *Id.* The Court rejected this, as an unpersuasive argument, because the demand of class wide proceedings would sacrifice the informality and speed of arbitration, two of its principal attributes and advantages.
[84] *Id*. at 1624. When two Acts of Congress supposedly conflict, the Court must interpret them in a way that gives effect to both. *Id.* When a party purports that they cannot be harmonized, it is that party's burden to show a clear and manifest intent by Congress that one statute should override the other. *Id.*
[85] *Id*. (quoting 29 U.S.C. § 157 (2018)).
[86] *Id*.
[87] *Id*.
[88] The Court favorably cited to the precedent discussed in the previous section. By citing precedent, the Court explained that it has repeatedly rejected the proposition that various other Acts of Congress including; "the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act" have been in conflict with the FAA. *Id.* at 1627.
[89] *Id*. at 1633 (Ginsburg, J., dissenting).

the NLRA; (2) the errors in the majority's reasoning as applied to the case at hand; and (3) attacked the line of precedent the majority cited.

First, the dissent addressed the history and purpose of the NLRA. When enacted, the NLRA and other labor related acts attempted to confront the growing issue of imbalance in the American workplace.[90] The dissent reminded the majority and the reader that the employees in the case at hand are not arguing that the NLRA was violated because they were denied a judicial forum, but rather in the forum provided, they were denied the right to act collectively.[91] It is exactly this type of employer conduct that Congress attempted to thwart with the passage of this Act.[92] In support of this, the dissent offered a collection of cases in which the NLRB had held that the NLRA "safeguards employees from employer interference" when asserting collective or concerted actions.[93]

Disagreeing with the majority's interpretation of the NLRA, the dissent explained that, "joining hands in litigation" is exactly the "similar nature" supported by the statute.[94] Furthermore, the dissent disagrees with the idea that the employees cannot maintain this action under the NLRA because it does not discuss the procedures of class action.[95] Instead, as the employees argued, the NLRA established the right to act in concerted effort under "generally applicable procedures."[96] It is *that* right that the FAA should not overcome.[97]

The dissent raised issues of policy and growing concerns for the American worker and their rights. Prior to the Supreme Court delivering its decision, scholars and commentators alike ruminated on the possible effects this decision could have on workers' rights and employer readiness to adopt mandatory arbitration into employment agreements.[98] In a report on behalf of the Economic Policy Institute, Alexander Colvin argued that

> if the Court sides with the employers' arguments in these cases, this will signal to businesses that the last potential barrier to their ability to opt out of class actions has been removed. This would likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely.[99]

II. A HISTORY OF SEXUAL HARASSMENT CLAIMS

Under Title VII of the Civil Rights Act of 1964, Congress made it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color,

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[90] *Id*.
[91] *Id*. at 1636.
[92] *Id*. at 1637.
[93] *Id*. at 1637-38.
[94] *Id.*
[95] *Id.* at 1638.
[96] *Id.*
[97] *Id.*
[98] *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017).
[99] *Id.* at 4.

religion, *sex*, or national origin."[100] This momentous legislation, meant to protect minorities from unlawful discrimination, nearly did not include the word "sex."[101] The amendment to the bill was a last minute introduction by Congressman Howard Smith of Virginia, who some believe proposed the amendment as a way to torpedo the bill by giving women equal rights.[102] This did not prove true; the bill was enacted and during the first year of enforcement nearly one-third of all claims brought to the newly created Equal Employment Opportunity Commission were sex-based.[103]

Title VII allows for employees to bring claims of workplace discrimination based on a variety of legal theories including race, color, religion, national origin, and sex-based discrimination. Sex-based discrimination during this period was considered actionable in cases where men and women were treated differently regarding issues such as hiring, firing, and other terms of employment.[104] It was not until the 1970s that activists and scholars alike began to address the issue of sexual harassment claims as actionable sex-based discrimination.[105] Following this, the EEOC issued a set of "Guidelines on Discrimination Based on Sex" which included guidance on sexual harassment claims. The EEOC guidelines explained:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[106]

The two types of harassment stated in the statute are more commonly referred to as "quid pro quo," which is characterized as sexual advances or requests in return for favorable employment benefits or promise against unfavorable employment benefits; and "hostile environment," the creation of a work environment permeated with "degrading or sexualized content that had the purpose or effect of causing a hostile, intimidating, or offensive environment that affected the conditions of employment."[107]

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[100] 42 U.S.C. § 2000e-2(a) (2018) (emphasis added).
[101] EQUAL EMP'T OPPORTUNITY COMM'N, SHAPING EMPLOYMENT DISCRIMINATION LAW, https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html [https://perma.cc/8THT-WV8U] (last visited May 20, 2020).
[102] *Id.*
[103] *Id.* The EEOC was the government administrative agency created by the Act to assist in implementing the new legislation and investigating claims of employment discrimination. *Id.*
[104] Craig R. Lareau, *"Because of … Sex": The Historical Development of Workplace Sexual Harassment Law in the USA*, 9 PSYCHOL. INJURY & L. 206, 207-08 (2016).
[105] *Id*. at 208 (discussing the impact that attorney and activist Catherine MacKinnon had on the formation of the conceptual framework of sexual harassment claims).
[106] 29 C.F.R. § 1604.11(a) (1981).
[107] Lareau, *supra* note 104, at 208.

The Framework for Sexual Harassment Claims

Six years after the EEOC released its guidelines on sexual harassment, the Supreme Court decided its first case on the issue of workplace sexual harassment in *Meritor Savings Bank, FSB v. Vinson*. Justice Rehnquist, delivering the opinion for the Court, held that workplace sexual harassment was an actionable claim for sex-based discrimination under Title VII.[108] During her employment at Meritor Savings Bank, Mechelle Vinson was subjected to repeated forms of workplace sexual harassment.[109] Vinson claimed that over the four years of her employment her supervisor Sidney Taylor made repeated demands for sexual favors both during and after business hours, fondled her in front other employees, exposed himself to her, and forcibly raped her on multiple occasions.[110] After notifying Taylor that she planned to take indefinite sick leave, she was fired.[111]

Based on these and other facts, the District Court found that she was not a victim of sexual harassment and did not have a claim for discrimination.[112] Furthermore, the court found that even if there were a claim, the bank could not be held liable for the actions of Taylor without actual notice of his behaviors.[113] The Court of Appeals for the District of Columbia reversed the lower court's decision holding that the claims brought by Vinson were sufficient to constitute a hostile work environment claim for sex-based discrimination.[114]

Upon granting *certiorari*, the Court discussed and adopted the framework in which a claim for workplace sexual harassment can be brought. The Court swiftly rejected the bank's argument that a claim can only be brought where there is tangible economic loss, and instead reasoned that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[115] Next, in adopting the definitions and framework from the EEOC guidelines, the Court addressed the two different types of workplace sexual harassment claims. Beyond adopting both definitions of sexual harassment, the Court established that in order to bring a hostile environment claim, sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive environment.'"[116]

Sexual harassment is actionable when the "alleged sexual advances were 'unwelcome'" and should not be undercut by the inquiry of whether the "actual participation in sexual intercourse was voluntary."[117] This is an important distinction for this and many other cases: where women may "voluntarily" have relations with a supervisor, they can still bring claims of sexual harassment due to the "unwelcome"

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[108] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).
[109] *Id.* at 60.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 61-62.
[113] *Id.* at 62.
[114] *Id.*
[115] *Id.* at 64 (quoting L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
[116] *Id.* at 67.
[117] *Id.* at 68. This remains problematic when considering the ongoing societal changes in understanding regarding consent.

nature of the harassment as a whole. What is still problematic is that other factors beyond the incidents of harassment themselves can be considered when determining the "unwelcome" nature of the conduct. The Court reasoned that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."[118] This type of evidence can be used to understand the "totality of the circumstances" surrounding the harassment to determine the unwelcomed nature.[119]

While this monumental case allowed for victims to bring claims of sexual harassment and established a workable framework for bringing those claims, it left many holes for the lower courts to fill. One significant issue that arose was the standard by which the hostility of a work environment was to be judged.[120] Lower courts understandably adopted the "reasonable person" standard to objectively determine the hostility of the environment.[121] In 1991, the Ninth Circuit adopted the "reasonable woman" standard for sexual harassment claims in *Ellison v. Brady*.[122] In doing so the court held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[123] The court reasoned that the "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women," and that the standard "does not establish a higher level of protection for women than men."[124] In a similar vein, courts were required to adopt frameworks to determine whether, using the reasonable person standard, conduct was severe or pervasive enough to constitute a hostile work environment.

These issues were addressed by the Supreme Court in the 1993 case *Harris v. Forklift Systems, Inc.*.[125] The main issue addressed was "whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury.'"[126] The plaintiff, Teresa Harris, worked as a manager for the equipment rental company, Forklift Systems. During her years of employment, she was "insulted because of her gender and often made the target of unwanted sexual innuendos."[127] The Court held that "concrete psychological harm" is not necessary to bring a claim of sexual harassment under Title VII.[128] In support of its holding, the Court established a two-

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[118] *Id.* at 69.
[119] *Id.*
[120] Lareau, *supra* note 104, at 210.
[121] *Id.* The reasonable person standard it used to determine whether a reasonable person in the plaintiff's shoes would have reacted to or perceived the situation in a similar fashion. It is used to objectively determine the appropriateness of the reaction or perception.
[122] Ellison v. Brady, 924 F.2d 872, 879 (1991).
[123] *Id.* (emphasis added).
[124] *Id.*
[125] Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
[126] *Id.* at 20.
[127] *Id.* at 19. More specifically, she was told "[y]ou're a woman, what do you know," "[w]e need a man as the rental manager," and that she was "a dumb ass woman." *Id.*
[128] *Id.* at 22.

step framework to determine when a hostile work environment claim is actionable. A plaintiff has an actionable claim when, conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile and abusive," and the plaintiff must "subjectively perceive the environment to be abusive."[129]

For years, the focus of sexual harassment claims centered around the sexual nature of the conduct itself.[130] Courts, either explicitly or implicitly, required conduct to "sufficiently resemble sexual advances" or be "sufficiently motivated by sexual interest."[131] It was not until 1998 that the Supreme Court concluded that sexual harassment need not be based in sexual desire or interest to be actionable.[132] In *Oncale v. Sundowner Offshore Services, Inc.*, the Court held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[133] The plaintiff, a male employee on an offshore oil rig, was repeatedly subjected to harassment by supervisors who were also male.[134] He brought his claim of workplace sexual harassment and alleged that he was "subjected to sex-related, humiliating actions against him," was "physically assaulted . . . in a sexual manner," and was threatened with rape.[135]

The Court reasoned that in sexual harassment claims brought under Title VII the "critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[136] The Court explained that:

> A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] . . . because of . . . sex."137

In a likely attempt to curb pushback on the expansion of Title VII claims to include sexual harassment of this nature, the Court stated that this would not turn Title VII into a "general civility code."[138] Additionally, the Court stated some troubling dicta in support of its reasoning for the requirements previously dictated to bring a hostile environment claim. These requirements are, according to the Court, crucial and sufficient to "ensure that courts and juries do not mistake ordinary

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[129] *Id.* at 21. It is important to note that the "reasonable woman" standard adopted by the Ninth Circuit was not adopted by the Court. Instead, the Court adopted the two-part objective and subjective test for determining whether harassing conduct created a hostile work environment.
[130] Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 YALE L.J. 1683, 1716 (1998).
[131] *Id.* at 1719.
[132] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 74, 75 (1998).
[133] *Id.* at 80.
[134] *Id.*
[135] *Id.* at 74.
[136] *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 25 (1993) (Ginsburg, J., concurring)).
[137] *Id.* at 80-81 (emphasis added).
[138] *Id.* at 81.

socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory 'conditions of employment.'"[139]

These cases took great steps to ensure the availability of Title VII protection for employees who experience sexual harassment in the workplace. While each case may not be perfect in its reasoning and rationale, they provide the essential framework by which a victim may bring a claim and establish standards by which harassing conduct can be assessed.

Employer Liability for Workplace Sexual Harassment

Beyond creating a framework for claims and establishing coherent standards for assessing conduct, the Court established when an employer may be held liable for the conduct of its employees. Initially, employer liability was not definitively addressed. In *Meritor Savings Bank v. Vinson*, the Court did not adopt a rule but did discuss the issue.[140] At the trial level the court found that the bank could not be held liable if it did not have notice of the conduct.[141] The appellate court reversed, applying strict liability for claims where a supervisor created a hostile work environment.[142] In rejecting both of these theories of liability while refusing to adopt a rule, the Supreme Court reasoned that "Congress wanted courts to look to agency principles for guidance in this area;" and that it "evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[143]

In a pair of cases decided on the same day, the parameters of employer liability in sexual harassment claims were established. In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Court differentiated liability for employers based on whether a tangible employment action was taken.[144] The facts of the two cases differ, but their main contentions were identical. In *Faragher*, the plaintiff worked as a lifeguard for the City of Boca Raton.[145] During her employment she was repeatedly subjected to "uninvited and offensive touching" and "lewd remarks," and her supervisors often spoke of women in offensive terms.[146] The city had adopted a sexual harassment policy in 1986, and revised it in 1990 – however, the city failed to disseminate the policy to all of its employees, as required, including those in the department where the plaintiff worked.[147] The plaintiff never filed an official complaint with her supervisors.[148]

In *Ellerth*, the plaintiff worked as a sales manager for Burlington Industries in

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[139] *Id.* This dicta has only become more troubling in the wake of the Me Too movement. While the Court attempts to limit the imposition of statutes as general codes of civility, at the same time it reflects a general misunderstanding of the protective purpose of the statute and societal views of sexual harassment.
[140] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69-73 (1986).
[141] *Id.* at 69.
[142] *Id.* at 69-70.
[143] *Id.* at 72.
[144] Lareau, *supra* note 104, at 212.
[145] Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998).
[146] *Id.*
[147] *Id.* at 782.
[148] *Id*.

its Chicago office, which had only one other employee.[149] Ellerth alleged that she was "subjected to constant sexual harassment by her supervisor."[150] Three instances of harassment "could be construed as threats to deny her tangible job benefits," and therefore constituted a *quid pro quo* claim for harassment.[151] In one such instance her supervisor stated, "you know, Kim, I could make your life very hard or very easy at Burlington."[152]

The Court established a framework to determine when an employer can be held liable for the actions of its employees, which included an affirmative defense for employers to escape liability. The first step questions whether or not a tangible employment action was taken.[153] The Court held that "tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer," and the employer is therefore liable.[154] If no such action is taken, an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate . . . authority over the employee."[155] In applying the common-law principles of agency liability the Court reasoned an employer can be held vicariously liable for "some tortious conduct of a supervisor made possible by abuse of his supervisory authority."[156]

The inquiry of liability does not end there. In cases where no tangible employment actions are taken, the employer can assert an affirmative defense against liability.[157] To avoid liability an employer must prove by a preponderance of the evidence that "(a) [] the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) [] the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[158] In *Faragher*, the Court reversed the Court of Appeals and reinstated the District Court ruling, holding that the City could be held vicariously liable for the actions taken by supervisory employees.[159] In *Ellerth*, the Court affirmed the Court of Appeals, and held on remand that Burlington Industries could still be subject to vicarious liability.[160]

III. MANDATORY ARBITRATION TODAY–ITS PREVALENCE AND EFFECT

This part will discuss the landscape of mandatory arbitration agreements in the American workplace. This data analysis sets the background on which the Supreme Court's decisions take place and reflects the real-world effects of those decisions. It will begin with a look at the timeline of the rise in use of mandatory arbitration over

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[149] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 747 (1998).
[150] *Id.*
[151] *Id.* at 747-48. There were also multiple allegations that the plaintiff's supervisor created a hostile work environment.
[152] *Id.* at 748.
[153] *Id.* at 753.
[154] *Id.* at 762.
[155] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
[156] *Id.* at 802.
[157] *Id.* at 807.
[158] *Id.*
[159] *Id.* at 810.
[160] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 766 (1998).

the past few decades. Next, it will discuss the statistical studies of exactly how many millions of Americans are subject to these types of agreements, and of which those agreements consist. And finally, it will discuss the outcomes of private arbitration and the differences between those outcomes and their judicial counterparts.

The Buildup to Mandatory Arbitration

As Part I discussed, the Supreme Court has played a major role in the development of the law around mandatory arbitration agreements, especially those contained in employment agreements. When passed in 1925, no one believed that the FAA was meant to apply to employment agreements.[161] In fact, it was not until the Court's decision in *Gilmer*–although not explicitly an employment decision–that the "floodgates of mandatory employment arbitration" were opened.[162] And as previously discussed, it was the Court's decision in *Circuit City Stores Inc.* that definitively held that employers could force employees to arbitrate claims, and that those clauses would be upheld by the full force of the FAA.[163]

Prior to these decisions, mandatory arbitration clauses were rarely used in the employment context for nearly seventy-five years. After these decisions, starting in the late 1980s to early 1990s, scholars and researchers noticed the trend of increased use of these agreements. The issue for many scholars has been the availability of data to conduct accurate studies on the trend.[164] Studies show a very distinct picture: mandatory arbitration clauses in employment contracts are here to stay and growing by the minute.

Pure Numbers

As one researcher pointed out, "there is no requirement that employers who require their employees to sign mandatory arbitration agreements report this to a government agency such as the Bureau of Labor Statistics."[165] Due to this lack of required reporting, most statistical reports on arbitration in employment contracts have been completed through academic surveys.[166]

In the years immediately following the opening of the floodgates, it was reported that in non-union workplaces, 2.1% of employees were subject to arbitration agreements.[167] Just three years later this statistic more than tripled; as of 1995, the

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[161] Jean R. Sternlight, *Disarming Employees: How Americans Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1316-17 (2015).
[162] *Id.* at 1317.
[163] *Id.* at 1317-18. The main area where arbitration agreements touched the employment field had been in unionized workforces. But, the underlying rationale behind the approval of labor arbitration is not present in the non-unionized employment workforce. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic,* ECON. POL'Y INSTIT., 13 (Dec. 7, 2015). The authors explain that arbitration in the labor context, "has been one of the most enduring and successful features of the American industrial relations system because it has served the interests of both unions and management." *Id.* at 14. And that lasting impact was due to equality between the parties, employers and labor unions, in "establishing and administering the system." *Id.*
[164] Colvin, *supra* note 98, at 4.
[165] Stone & Colvin, *supra* note 161, at 15.
[166] *Id.*
[167] *Id.*

United States General Accounting Office ("GOA") released a report stating that nearly 7.6% of Americans were subject to mandatory arbitration under their employment contracts.[168] A 2003 study by Alexander Colvin of the telecommunications industry concluded that 14.1% of the employers in the industry had adopted mandatory arbitration agreement, which covered "22.7 percent of the nonunion workforce."[169]

Alexander Colvin and the Economic Policy Institute completed a study on the pervasiveness of arbitration agreements.[170] Conducted in 2017, the study reflected the continued rapid growth of the use of these agreements. The study revealed that "53.9 percent of nonunion private sector employers have mandatory arbitration procedures."[171] That number increased to 65.1% when looking solely at employers with a thousand or more employees.[172] For employees, this means that 56.2% of the nonunion private sector workforce is subject to these agreements, totaling 60.1 million American workers. [173] More specifically, 30.1% of those agreements contain class action waivers, limiting the employees right to bring collective action in federal courts.[174]

So, what do all these numbers really mean? First, they show the massive impact that arbitration agreements have on the American worker. Second, they provide a colorful background for the Supreme Court's ever-growing precedent favoring mandatory arbitration. Additionally, there is often little awareness of the sheer amount of people affected by these agreements, and the drastic impact they have on an employee's right to bring employment-related claims.[175] People often do not realize they have effectively lost their ability to bring claims based on "Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act."[176] The next Part will discuss, in relation to the number of workers under arbitration agreement, how these same workers fare when it comes to using those procedures.

The Outcome – Fair or Foul?

While some scholars have attempted to gather information on the prevalence of arbitration agreements within employment contracts, others have looked to the effects of those agreements. This sub-part will first discuss the effects on the number of claims brought under arbitration agreements compared to their judicial

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[168] *Id.* (citing General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS 95-150 (1995)).
[169] Colvin, *supra* note 98, at 4. One recent article points out that some scholars have questioned the accuracy of Colvin's study of the telecommunications industry. *See* Sternlight, *supra* note 159, at 17 n.8 (citing David B. Lipsky et al., *Mandatory Employment Arbitration: Dispelling the Myths*, 32 ALTERNATIVES TO HIGH COST LITIG. 138 (2014)). "[T]he same article also notes that 'Colvin's estimates for the telecommunications industry remain the best empirical estates that we have of the coverage of mandatory arbitration provisions.'" *Id.*
[170] *See* Colvin, *supra* note 98, at 4.
[171] *Id.* at 1-2.
[172] *Id.* at 2.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*

counterparts. Additionally, it will discuss the disparities in outcomes between judicially litigated employment claims and arbitrated claims, and what some scholars believe to be the cause of these disparities, in number and outcome.

Scholars have struggled to gather empirical data on mandatory arbitration due to its private nature. Recent studies have addressed the past issues with collecting data, and in turn have found representative samples to on which to conduct empirical studies.[177] With that, it is essential to remember that much more still needs to be accomplished in this realm when it comes to comparing arbitration to litigation.[178] The recent studies completed by scholars have attempted to breach the surface of these comparisons and have drawn some conclusions that are helpfully applicable to this topic.[179]

A recent study completed by Professor Cynthia Estlund, of New York University School of Law, discussed the comparison between the number of employment claims brought to arbitration and those which are litigated within the judicial system.[180] In 2016, the American Arbitration Association ("AAA"), reported that a total of 2879 employment related claims were brought to arbitration under employer-promulgated procedures.[181] This suggests "that about 5126 cases were filed in arbitration by . . . employees who are covered by MAAs [mandatory arbitration agreements]."[182] In comparison, the relevant and comparable number of claims brought in federal courts for 2016 totaled around 26,300 claims.[183] Calculating the difference, based on proportionality of the workforce covered by MAAs and the downward deviation of federal claims, the author estimated that there were anywhere from 9600 to 28,400 missing arbitration claims in 2016.[184] The author proposed a possible explanation for this large discrepancy throughout the article and the effects those have on individual plaintiffs, but this subject will be discussed later in Part IV.

Beyond the sheer number of "missing" arbitrations, scholars have looked to the differences in outcomes and awards of arbitration compared to traditional litigation.[185] In 2011, a study discussed the disparity between plaintiff win rates and awards in arbitration as opposed to litigation counterparts.[186] This study used data

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[177] *See* Alexander Colvin, *Empirical Study of Employment Arbitration: Case Outcomes and Processes*, J. OF EMPIRICAL LEGAL STUDIES (2018).
[178] *Id.*
[179] *Id.*; *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018).
[180] Estlund, *supra* note 177, at 680.
[181] *Id.* at 690.
[182] *Id.*
[183] *Id.* at 691. In explaining how she came to this number, the author explains that there were actually 31,000 federal employment claims brought in 2016. *Id.* A downward deviation was applied to remove possible claims brought by government employees (15.2% of non-farm workers), who are not covered by arbitration agreements. *Id.* The author additionally discusses that there is a possibility that some claims brought in federal court are by employees covered under MAAs, but due to the lack of data available, an accurate number of claims cannot be discounted from this total. *Id.* at 691-92.
[184] *Id.* at 692.
[185] Colvin, *supra* note 175, at 1-2.
[186] *Id.* at 2. The author of the study does recognize that this type of comparison, due to the difficulty in collecting data on arbitration procedures and outcomes, is like comparing "apples and oranges." *Id.* at 7. But that author does state that "[t]he differences between this win rate and the employee win rate in

collected from the AAA after it was required to disclose a variety of information on its procedures and outcomes in order to comply with changes in the California Code requirements.[187] Due to the comprehensive nature of the disclosures required, the author was able to access data on a national scale.

Breaking down these findings into win rates and award amounts, the study carefully analyzed the differences between arbitration and litigation. First, looking to the win rate, the author found that "the employees won 260 of the 1,213 cases in the AAA-CC filings which terminated in an award, corresponding to an employee win rate of 21.4 percent."[188] This is compared to 33% to 36% win rate in federal employment discrimination cases, and 50% to 60% employee win rate in state courts.[189] While more research must be conducted to determine the different factors that led to this gap in win rates, these number do "indicate[] that there exists an arbitration-litigation gap."[190]

Beyond win rates, the study analyzed the differences in award amounts between litigation and arbitration. In the 260 arbitration outcomes that resulted in monetary damages awards, the study found that the median award amount was $36,500 and the mean award was $109,858.[191] In comparison, the author used previous studies on federal and state employment related litigation to determine the median and mean amount of awards granted.[192] The study found that the median award amount for federal discrimination cases was $150,500.[193] Taking inflation into consideration to properly compare the studies, the author calculated that this median award would have equaled $176,426 in 2005 – the chosen midpoint year of the AAA-CC filings used in the author's study.[194] Again cautioning the comparison of "oranges and apples," the author made a point of the striking differences between median awards.[195] Comparing the outcomes, the "median awards in employment litigation are around 5-10 times greater than median awards in employment arbitration."[196]

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litigation indicates that there exists an arbitration- litigation gap. The task for future research is then to analyze what factors may explain this gap and whether or not it is problematic from a public policy perspective." *Id.* at 8.

[187] *Id.* at 3-4.

[188] *Id.* at 7. Within the article, Colvin discussed past studies performed to determine win rates for arbitration. These studies, the most recently completed in 2003, had employee win rates of as high as 65-75% (1998 study) to as low as 40-45% (2003 study). *Id.* at 6.

[189] *Id.* at 6 (citing Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* 58 DISP. RESOL. J. 44 (2003)); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities,* 37 U.C. DAVIS L. REV. 511 (2003)).

[190] Colvin, *supra* note 175, at 8.

[191] *Id.* at 9. Colvin explained that this difference in the median and mean is due to the "skewed nature of the distribution or arbitration awards, with a small number of larges awards producing a high average outcome." *Id.* He notes that while most average award calculations only use data from outcomes where an award was given, it is "informative to calculate the average outcome over all cases, including those in which zero damages are awarded." *Id.* at 10. Using the total amount of arbitration claims used for the study, the mean award amount was $23,548. *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* at 8 n.5, 10.

[195] *Id.* at 11.

[196] *Id.*

While the causes of these gaps in both win rates and award amounts are still relatively unknown, due to the inherent differences in the resolution methods, it is important to remember that this difference does exists and affects those who must follow these procedures. The author of the above discussed study and others have attempted to suggest possible explanations for these apparent differences. Colvin, and at least one other author, suggested that one explanation may be what is called the "repeat player issue."[197]

This explanation draws a correlation between the win and award rates of employers who are repeat players in the arbitration system. More specifically, this and other studies have looked to repeat pairings of employers and arbitrators.[198] In the data provided by the AAA-CC filings, Colvin found that 15.9% of cases involved repeat pairings of employers and arbitrators.[199] The employee win rate for these pairings was only 12%, with a mean award amount of $7451.[200] The author concludes that "the results indicate that there is a strong repeat employer effect in employment arbitration and a smaller, but significant repeat employer-arbitrator pairing effect."[201]

The differences discovered in this collection of studies should be viewed in a way that also takes into account the Supreme Court's growing precedent favoring arbitration. The Court has continued to hold strong to the idea that under its precedent, so long as arbitration agreements are validly entered into by both parties, they should be upheld under the FAA. With the growing use of mandatory arbitration in employment, it is likely that more employees will begin to see the differences in win rates and awards that have been discussed in these studies. Assuming that a subset of all claims brought through arbitration under discrimination statutes are sexual harassment claims, these results also show that women – and men for that matter – who bring these claims could be encountering a difficult process to receive inadequate vindication for their claims of sexual harassment in the workplace.

IV. #METOO: SEXUAL HARASSMENT IN THE WORKPLACE

The History of #MeToo

Most people believe that the "Me Too" movement began with a simple tweet. On October 15, 2017, actress Alyssa Milano tweeted the following:

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[197] *Id.* at 16-17. It is important to note that some of these studies have come under some criticism. Others have noted that "results showed only that regular participants in arbitration performed better, not that there was a bias by arbitrators seeking future business." *Id.* at 17 (citing Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58(2) DISP. RESOL. J. 8 (2003); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Direction for Empirical Research*, 57 STANFORD L. REV. 1557 (2005)). But for the use of this Comment, the importance of these studies rests in the apparent differences in outcomes between the resolution systems, and not as much on the underlying causes of the differences at the moment. This repeat player theory is just one of many possible causes of the differences.

[198] *Id.* at 20.

[199] *Id.* at 21.

[200] *Id.*

[201] *Id.* at 22-23.

Suggested by a friend: if all the women who have been sexually harassed and assaulted wrote "me too" as a status, we might give people a sense of the magnitude of the problem. If you've been sexually harassed or assaulted write "me too" as a reply to this tweet.[202]

Within twenty-four hours, the hashtag Me Too was shared over five hundred thousand times on Twitter and twelve million times on Facebook.[203] Women across the country and the globe began to tell their stories of sexual harassment and assault and doing so in a way that captured the attention of the world. Over the next year, this movement gained traction throughout most major media outlets. *Time Magazine* named the "Silence Breakers," – a group of women, including actresses, farmworkers, housekeepers, and hospital workers, who spoke out against sexual harassment and assault – "Person of the Year" in 2017.[204]

Interestingly enough, the Me Too Movement began long before October 15th, 2017. The movement was originally started in 2006 by Tarana Burke, who at the time was a youth worker, working predominantly with children of color.[205] She explained that the movement started "in the deepest, darkest place in my soul."[206] After hearing about the devastating incidents of sexual violence one young girl had experienced, Burke explained "I watched her put her mask back on and go back into the world like she was all alone and I couldn't even bring myself to whisper… me too."[207] From there, Burke and other women like her initially started the Me Too movement to help survivors of sexual violence, particularly focusing on women of color and those from low-income communities.[208]

While much different from the scope and aims of the original movement, the most recent iteration of the movement brought a different issue to the forefront: sexual harassment in the workplace. Much of the focus of harassment in the workplace began at the "top," meaning those in high-profile positions such as actresses and news commentators. Gaining the most notoriety, the accusers of Harvey Weinstein have continued to speak out against sexual harassment and

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[202] Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault,* CNN (October 16, 2017), https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html [https://perma.cc/K77D-3FL8].

[203] *Id.*

[204] Zacharek et al., *supra* note 1. A Washington Post article on Time Magazine's decision to name the "Silence Breakers" as Person of the Year, noted that months earlier President Trump had suggested he would be named person of the year. Callum Borchers, The Fix, *Time's Person of the Year Isn't Trump. It's Basically the Opposite of Trump*, THE WASHINGTON POST (Dec. 6, 2017). The author points out, as the title of the article suggests, the "magazine's selection turned out to be, essentially, the opposite of Trump: The women and men speaking out about sexual misconduct." *Id.*

[205] Statement of Tarana Burke, Founder, THE 'ME TOO.' MOVEMENT: THE INCEPTION, https://metoomvmt.org/the-inception/ [https://perma.cc/ESM7-FU7V] (last visited May 20, 2020).

[206] *Id.*

[207] *Id.*

[208] Tarana Burke, *History and Vision*, ME TOO, https://metoomvmt.org/about/#history [https://perma.cc/3A6R-C4F4] (last visited May 20, 2020). On the movement's website, the organization provides a wide variety of materials to assist those who are looking for services, encourage those who are able to participate in advocacy by supplying toolkits and valuable resources, and created a "safety exit" allowing those visiting the site to quickly leave, taking the viewer to the Google homepage.

assault.[209] After an investigative report completed by the *New York Times*, it was revealed that the famous and widely successful film director had been paying off those who had accused him of sexual harassment with large sums of money for over three decades.[210]

Actress Ashley Judd, who was one of the first women to speak out publicly against Harvey Weinstein, recounted her experiences in the *Time Magazine* cover story.[211] She explained that in 1997, Weinstein called her to a Beverly Hills hotel for a meeting. This meeting ended after Ms. Judd refused his sexual advances and "attempt[s] to coerce her into bed."[212] Even more astonishing than Weinstein's actions was the response she received from a screenwriter friend. He explained to her Weinstein's behavior was an "open secret passed around on the whisper network that had been furrowing through Hollywood for years [and that i]t allowed for people to warn others to some degree, but there was no route to stop the abuse."[213] The more women that spoke out, the more people paid attention. This included the board of directors of the Weinstein Company, who eventually fired Weinstein, just days after the allegations began to pile up.[214]

But as the *Time Magazine* article highlights, it is not only those at the top who were experiencing sexual harassment and assault in the workplace.[215] Women from all fields and occupations experience some type of sexual harassment. The article details the plight of seven Plaza Hotel employees, who filed suit against the hotel for sexual harassment.[216] These women are forced to work with their harassers each day because they could not afford to leave their jobs.[217] The article continues to discuss the issue of sexual harassment in the fields of technology, academia, medicine, farming, customer service, and politics.[218]

Sexual Harassment in the Workplace – Studies and Effects

Even without the revelation of sexual harassment in the workplace being spread across the world by the Me Too movement, the world, or at least the United States, could have realized and attacked this issue much sooner. In June of 2016, over a

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[209] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,* N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/74XM-ACW5].

[210] *Id.* Interestingly enough, Weinstein, as the article states, "presents himself as a liberal lion, a champion of women and a winner of not just artistic but humanitarian awards." And while from the outside, due his influence on popular culture and avid activism, it may have seemed this way, the investigation reveals the sad truth of reality.

[211] Time Magazine Person of the Year 2017 *supra* note 1.

[212] *Id.*

[213] *Id.* Ms. Judd properly raised the question: "Were we supposed to call some fantasy attorney general of moviedom?" *Id.*

[214] Kantor & Twohey, *supra* note 209.

[215] Many other high-profile directors, actors, news broadcasters, and celebrities have also been accused of sexual harassment and assault since the investigation into Harvey Weinstein. These include Director James Toback, Bill O'Reilly, and even President Donald Trump. *Time Magazine Person of the Year 2017*, *supra* note 204.

[216] *Id.*

[217] *Id.*

[218] *Id.*

year before the tweet heard across the world, the EEOC released a task force study on sexual harassment in the workplace.[219] This study revealed the staggering extent of harassment in the American workplace.[220] While its focus was on all types of workplace harassment, the study specifically addressed the issue of sexual harassment.[221]

The EEOC realized that addressing the problem of workplace sexual harassment was more difficult than it initially appeared. Looking to testimony and academic articles, the EEOC found that "anywhere from 25% to 85% of women reported experiencing some type of sexual harassment in the workplace."[222] The study drew from the Sexual Experiences Questionnaire ("SEQ"), which is "the most widely used survey of harassment of women at work."[223] This questionnaire breaks down the different types of harassment experienced in the workplace. It asks respondents whether they have experienced sexual harassment in the form of unwanted sexual attention or sexual coercion, and also if they have experienced "gender harassment."[224] The study found that when using this type of breakdown, "almost 60% of women report having experienced sexual harassment" and that gender harassment is the most common form of harassment.[225]

Understanding that a larger portion of the working population experiences some type of sexual harassment in the workplace, one would think that reporting such experiences would be equally as common. This is not the case. One study cited in the EEOC report found that "gender harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it."[226]

More than an awareness of the sheer amount of harassing behaviors that occur in the workplace is needed to understand the impact these actions have on society. Because these incidents occur in the workplace, they have a great effect on the economic security of women. In addition to an economic effect, victims of workplace harassment experience a range of physical and psychological impacts. In comparing these effects to the number of women, it quickly becomes obvious that these behaviors have an adverse effect on society as a whole.

It is increasingly important to understand the economic impact sexual harassment can have on victims. For years, scholars have researched the effects of sexism on women's earning capacities. The male-female wage gap has largely

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[219] U.S. EQUAL OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA A. LIPNIC (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [https://perma.cc/9695-UH77].
[220] *Id.* at 5-6.
[221] *Id.* at 8-10.
[222] *Id.* at 8.
[223] *Id.* at 9.
[224] *Id.* Gender harassment is a type of sexual harassment that consists of "hostile behaviors devoid of sexual interests" including "sexually crude terminology or displays" and "sexist comments." *Id.*
[225] *Id.* at 9-10.
[226] *Id*. at. 16 (citing Written Testimony of Lilia M. Cortina, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm).

remained unchanged for decades, and many have recognized that occupational segregation in the workforce is a "strong contributor to this earnings inequality."[227] With the ever-increasing discussion of workplace sexual harassment, scholars have now begun to research the economic impacts that victims experience.

Three university professors completed a study and analyzed the economic impact that sexual harassment had on women ages twenty-nine to thirty-one.[228] This study discussed the impact that incidences can have on financial stress, usually caused by changes in employment, which can affect the attainment goals of a woman's career.[229] Women who experience sexual harassment in the workplace are far more likely to experience financial stress than those who are not targets.[230] The cause of this financial stress is that targets of these behaviors will, instead of reporting and some after reporting, change employment. The study showed that between 2003 and 2005, targets of sexual harassment are "6.5 times as likely than nontargets to change jobs."[231] In one interview, a woman named Lisa explained, "I had one month off. I quit, and I didn't have a job. That's it, I'm outta here. I'll eat rice and live in the dark if I have to."[232]

Beyond the challenge of having to find new employment, this study looked to the long-term effect those changes had on women's earning capacity and general productivity. Women who leave their employment due to sexual harassment are often forced to accept less-prestigious, lower paying jobs which often supply fewer hours.[233] Women who remain at their employment also experience losses in earning capacity due to workplace culture and limitations. Hannah, an employee at an internet advertising agency explained that over the years, because she refused to participate in the misogynistic culture promoted by her co-worker and supervisor, she was continuously looked over for promotions.[234] Lisa aptly articulated that in her role within a company with a toxic work-culture, "I would *never* become friends with these people, my boss would *never* be a mentor, I would *never*, you know, have any relationship with these people. So that was rough and finally I just quit."[235]

The economic effects of harassment have been noticed by many outside the realm of academia and has been addressed by various news outlets. A *Harvard Business Review* article painted a disturbing picture of the impact harassment can have on the economy as a whole. The author explained:

> as people drop out, opt out, and tune out of their chosen fields, it affects the whole economy. It's the missing female Harvey Weinstein who never got a chance to shape the full range of stories of our society. It's the female Charlie Rose who never

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[227] Heather McLaughlin, et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOCIETY 333, 335 (2017).
[228] *Id.* at 226.
[229] *Id.*
[230] *Id.* at 342-4.
[231] *Id.* at 344.
[232] *Id*.
[233] *Id*. at 346.
[234] *Id*. at 348-49.
[235] *Id*. at 349. What is even more disheartening when looking to this study is that the women interviewed were all in the early stages of their careers, and as the authors point out, "harassment experienced in women's twenties and early thirties knocks many off-course during this formative career stage." *Id.* at 352.

> got a chance to earn the power and influence associated with that role. And moving away from the hypothetical, it's the Susan Fowlers and Ellen Paos who didn't get to build the companies or make the investments that offered the new solutions that society most desperately needs.[236]

While it is difficult to quantify the actual impact that these behaviors are having on the economy, it is not difficult to grasp a general understanding of the impact. When a large portion of the workforce is not able to contribute new and fresh ideas and innovations, the economy as a whole greatly suffers.[237]

Beyond an economic impact, women who experience sexual harassment in the workplace suffer both physically and psychologically. Studies continue to show that women who experience everyday sexist encounters are more likely to be "associated with greater anger, anxiety, and depression."[238] Furthermore, women who experience these behaviors are more likely to find less "satisfaction with one's job and professional relationships, loss of productivity, and increased turnover intentions and behaviors."[239] As far as physical issues, women who suffer sexual harassment can experience "muscle aches, headaches, or even chronic health problems such as high blood pressure and problems with blood sugar."[240]

A more abstract theory of the effects of sexual harassment on society as a whole addresses the idea of missing human capital. The best way to understand this theory is by example. In December of 2017, Heidi Bond accused now former Judge Alex Kozinski of sexual harassment.[241] Judge Kozinski was a prominent judge in the Ninth Circuit Court of Appeals, whose clerkship positions were highly coveted by those dreaming of one day clerking at the Supreme Court.[242] During her year-long clerkship, Heidi Bond was regularly subjected to sexual harassment by the now former judge. In a blog post, Bond explained that during the year, Judge Kozinski had showed her porn saved to his computer, asked if it turned her on, revealed his list of female "conquests," and during her first day in his chambers referred to her as

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[236] Nilofer Merchant, *The Insidious Economic Impact of Sexual Harassment*, HARV. BUS. REV., (Nov. 29, 2017), https://hbr.org/2017/11/the-insidious-economic-impact-of-sexual-harassment [https://perma.cc/Y6LF-YQYZ].

[237] *Id*. In addition, a dated but informative study conducted in 1998 showed that the average Fortune 500 company "lost $6.7 million a year because of absenteeism, low productivity and staff turnover as a result of sexual harassment." Adam Jezard, *Why We Need to Calculate the Economic Cost of Sexual Harassment*, WORLD ECON. FORUM (Oct. 23, 2017), https://www.weforum.org/agenda/2017/10/why-we-need-to-calculate-the-economic-costs-of-sexual-harassment/ [https://perma.cc/VEZ7-JWB5].

[238] Emily Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex Based Harassment at Work*, L. HUM. BEHAV. 4 (2010).

[239] *Id.* Interestingly, this study was conducted on female attorneys within one of the larger federal circuits and was compared to an earlier study conducted by the Department of Defense on women in the military. *Id.* This study showed that female attorneys who experience gender harassment are as likely as women in the military to feel less satisfaction with their jobs, and less productivity than those who were not harassed. *Id.*

[240] Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC NEWS (Oct. 13, 2017), https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416 [https://perma.cc/FT2K-N4MW].

[241] Amanda Taub, *The #MeToo Moment, How One Harasser Can Rob a Generation of Women,* NY TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/us/how-one-harasser-can-rob-a-generation-of-women.html [https://perma.cc/7PLV-NW5A].

[242] *Id.*

his "slave."[243]

Bond also explained the impact this harassment had on her physically, emotionally, and professionally:

> The worry took its toll. I began waking from sleep, heart racing, hearing imaginary double beeps summoning me to his office. I started not being able to sleep at all. By the time I left the clerkship, there were nights I would lie in bed and watch the darkened ceiling until I had to get up and go back to work. I stopped being able to complete even basic tasks—I left the clerkship as one of the most incompetent clerks ever to grace Kozinski's chambers, and I'm fairly certain that when I started I was *not* one of his most incompetent clerks. I gained something like forty pounds over the last six months of the clerkship.[244]

So why stay, you ask? Bond provided a few responses, some quite disturbing. Bond explained that not only did she have a hundred thousand dollars of student loan debt and little savings, she believed that due to judicial confidentiality she would never be able to share her experiences with anyone else.[245]

After her clerkship with Judge Kozinski, Bond went on to clerk for the Supreme Court Justices O'Connor and Kennedy before becoming a law professor.[246] But Heidi Bond is no longer a member of the legal profession; she is a published novelist who writes books where "women win."[247] It is this loss of a great legal mind that Amanda Taub insists is the dire effect of sexual harassment. In her *New York Times* article, she discusses the impact a single harasser can have on a "generation of women."[248] By habitually subjecting female clerks to sexual harassment, Judge Kozinski limited the options of many high-achieving female law graduates. One professor explained that she would not write letters of recommendation for women, fearing they would be subjected to harassing behaviors.[249] Another female attorney explained that "everyone knew, and women didn't apply to clerk for Judge Kozinski despite his prestige and connections to the Supreme Court. I always felt the men who took their places were traitors."[250]

Imagine how many women were denied an opportunity to participate in a career-alerting experience. And furthermore, how many others were not and instead subjected to harassment, poisoning their views about the world around them. As Taub states:

> Conversely, how many of the men who were able to clerk for Judge Kozinski without having to worry about their own safety went on to be role models for other men? And how many concluded that their female colleagues fell behind because they just didn't have what it takes, not because they had been effectively cut off

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[243] Heidi Bond, *Me Too*, COURTNEYMILAN.COM (Dec. 8, 2017), http://www.courtneymilan.com/metoo/kozinski.html [https://perma.cc/9R7W-EBZ5].
[244] *Id.*
[245] *Id.*
[246] Taub, *supra* note 241. Bond explained that the process of applying for teaching positions was difficult because she was constantly reminded of the trauma experienced in Kozinski's chambers. *Id.*
[247] Bond, *supra* note 243.
[248] Taub, *supra* note 241.
[249] *Id.*
[250] *Id.*

from certain opportunities?[251]

This is just one story, out of many, explaining the effects that sexual harassment in the workplace can have on those who experience it. It is important to take a holistic view of the effects of harassment to fully understand its effect on victims and society. A greater understanding of these issues will only help to spread awareness and support.

IV. THE SOLUTIONS: FEDERAL AND STATE LEGISLATION

Mandatory Arbitration's Effect on Sexual Harassment Claims

With a general understanding of the law of both mandatory arbitration and sexual harassment claims, it is essential to comprehend how these two paths lead to a troubling intersection for the victims. As the Supreme Court was gearing up to decide *Epic Systems v. Lewis*, many around the country began to notice that this case could have a damaging effect on the Me Too movement. As one reporter explained,

[m]ost women cite fear of retaliation as the biggest reason for not reporting harassment or assault by superiors in the workplace. Forcing women to litigate each of these cases individually in private arbitration will make retaliation even easier and more likely. Instead of women having strength in numbers and being able to come together to sue, women will be forced to go it alone in private arbitration.[252]

Due to the hushed nature of arbitration, other have noted that "[t]here's no transparency in most binding arbitration agreements and they often include nondisclosure provisions."[253]

An example of this issue played out in front of the country in 2016 when Gretchen Carlson tried to bring a claim in court against her former boss, Roger Ailes.[254] Because of an arbitration clause contained in her Fox News contract, Ailes's attorney argued that Carlson was required to bring her claim to arbitration.[255] The arbitration clause required that "all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence."[256] While Ailes and Fox News eventually settled the case,[257] for a moment the world became aware of the harsh impact arbitration agreements have on employee claims of sexual harassment.

The EEOC in 2016 also released a review of its systemic program, which is

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[251] *Id.*

[252] Najah Farley, *How The US Supreme Court Could Silence #MeToo*, THE GUARDIAN (Apr. 18, 2018), https://www.theguardian.com/commentisfree/2018/apr/18/supreme-court-metoo-arbitration-clauses-decision-sexual-harassment [https://perma.cc/4PHC-VRFS].

[253] Sharon Florentine, *What the Supreme Court Ruling on Arbitration Means for #MeToo*, CIO (May 25, 2018), https://www.cio.com/article/3275956/what-the-supreme-court-ruling-on-arbitration-means-for-metoo.html [https://perma.cc/E3TP-2Z6X].

[254] Noam Schreiber & Jessica Silver-Greenberg, *Gretchen Carlson's Fox News Contract Could Shroud Her Case in Secrecy*, NY TIMES (July 13, 2016), https://www.nytimes.com/2016/07/14/business/media/gretchen-carlsons-contract-could-shroud-her-case-in-secrecy.html [https://perma.cc/E527-G3V3].

[255] *Id.*

[256] *Id.*

[257] *Id.*

charged with attacking systemic discrimination in employment nationwide. In this report, they addressed the issues that mandatory arbitration has on claims of discrimination in the workplace. Not only do these agreements "prevent employees from learning about similar concerns shared by others in their workplace and . . . impede the development of the law," they can also hide these employment practices from the public eye and decrease employer accountability for following the law.[258]

Once in the arbitration system, as already discussed, it can be extremely difficult for plaintiffs to succeed on their claims and recover damages. This difficulty is enhanced by the framework under which victims must bring their claims. As discussed above, to bring a claim of sexual harassment, even in arbitration, a plaintiff must show that they were subjected to sexual harassment that was severe and pervasive enough to create a hostile or abusive work environment.[259] Recent studies show that the type of harassment most women encounter in the workforce is not overtly sexual in nature, but rather gender harassment. This is not the type of harassment likely envisioned when the law surrounding sexual harassment was created. There has been little advancement on how the courts determine what is considered severe and pervasive, and it has proven to be a high standard.[260]

Federal Legislation: "Ending Forced Arbitration of Sexual Harassment Act" and "Forced Arbitration Injustice Repeal Act"

As the Supreme Court and many other courts have made abundantly clear, changes in how we deal with mandatory arbitration of sexual harassment claims are not going to come from changes in the established jurisprudence. Any type of change in how we deal with this massively important issue must come by way of legislative action.

In 2017, four female congresswomen introduced a bill to address this issue. The "Ending Forced Arbitration of Sexual Harassment Act" ("H.R. 4734") if enacted would require that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."[261] The bill defines "predispute arbitration" as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement;" and sex discrimination dispute as "a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under Title VII of the Civil Rights Act of 1964."[262]

One of its sponsors, Pramila Jayapal, after introducing the bill to Congress in December of 2017, was interviewed on what she believes to be the important aspects

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[258] EEOC, A REVIEW OF THE SYSTEMIC PROGRAM OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 35 (2016), https://www.eeoc.gov/eeoc/systemic/review/ [https://perma.cc/KAJ5-9RLS].
[259] *See* Part II.
[260] *See* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, Public Law and Legal Theory Working Paper Series, No. 453, Aug. 21, 2018.
[261] H.R. 4734, 115th Cong. § 402 (2017). Notably the bill does exempt arbitration agreements between an employer and a labor organization or between labor organization. *Id.*
[262] *Id.* at § 401.

of the bill and its fundamental importance as a whole.[263] Representative Jayapal explained that the bill would allow for victims of workplace harassment to have a choice of venue in which to bring their claims, allowing them to file with the EEOC and subsequently a lawsuit.[264] When asked about the Me Too movement she explained that this bill would help facilitate the goals of MeToo:

> MeToo is not just about the final act of assault, and the final big act of harassment, it's about all the ways in which women get discriminated against, or get diminished, or demeaned that frankly are part of a culture that then *lead* to that sexual assault and sexual violence. And so I think that it has been useful in having people start to think about all these things as being connected.[265]

Representative Jayapal explained that it was surprisingly easy to garner support for this bill, which pleasantly surprised her.[266]

Understanding the need for legislation, a letter was sent to the leaders of both the House and the Senate by the National Association of Attorneys General, signed by every state attorney general in the nation, encouraging both to take action.[267] In this letter the Association addressed the major issues with these agreements explaining: their limitation to the fundamental right of access to the judicial system; the lack of employee awareness of such agreements; the increased secrecy such agreements introduce; and the ability for Congress to help change the "culture of silence that protects perpetrators at the cost of their victims."[268] They urged Congress to act promptly to address the issues by passing legislation that has already been introduced.[269] In addition to some issues with support in Congress, a general apathy by the public and a vocal minority disfavoring any change on the topic will likely slow the momentum of these acts.[270]

Although little progress was made with H.R. 4734 in the 115th Congress, in

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[263] Leah Fessler, *You've Probably Signed Away Your Sexual Harassment Civil Rights at Work,* QUARTZ (Apr. 5, 2018), https://qz.com/work/1244779/congresswoman-pramila-jayapal-on-how-mandatory-arbitration-hurts-sexual-harassment-victims/ [https://perma.cc/JP6Z-LLSJ].

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] NAAG, Letter from the Nat'l Ass'n of Att'ys Gen. to Cong. Leadership, *Mandatory Arbitration of Sexual Harassment Disputes*, (Feb. 12, 2018), https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf [https://perma.cc/Q567-53CY].

[268] *Id.*

[269] *Id.*

[270] *Randstad US Study Finds Alarming Ambivalence About Gender Discrimination in the Workplace, Despite Evidence That Compensation Inequality and Harassment Exist*, CISION, PR NEWSWIRE (Mar. 24, 2019), https://www.prnewswire.com/news-releases/randstad-us-study-finds-alarming-ambivalence-about-gender-discrimination-in-the-workplace-despite-evidence-that-compensation-inequality-and-harassment-exist-300806527.html [https://perma.cc/UB2K-QG2L]. Other studies have alarmingly show that there are large partisan gaps in concerns regarding various aspects of sexual harassment in the workplace including; men getting away with sexual harassment, women not being believed, firing accused men before determining all the facts, and false claims of sexual harassment. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (April 4, 2018), https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ [https://perma.cc/HGE7-H8WU]. These partisan concerns will likely contribute to the slow, if not blocked passage of either the House or Senate bills.

2019 the "Ending Forced Arbitration of Sexual Harassment Act" was introduced.[271] The language of the bill tracks that of the original introduced in 2017.[272] Originally sponsored by Representatives Stefankik, Jayapal, and Griffith, the bill is now supported by fifteen representatives from both political parties.[273]

Once passed, this law will likely still need to overcome legal challenges to its enactment and enforcement. As the Supreme Court stated in *Epic Systems v. Lewis*, it will continue to uphold arbitration agreements until Congress makes a "clear and manifest congressional command to displace the Arbitration Act and outlaw [arbitration] agreements like [these]."[274] It is important to note that the Court did provide examples where Congress has made clear and manifest demands within statutes, including whistleblower protection statutes, motor vehicle franchise contracts, and creditor protections for military members.[275]

It would undoubtedly be difficult to argue that this proposed legislation does not make "clear and manifest commands" to displace the Arbitration Act as it applies to the arbitration of sexual harassment claims made by employees. This statute, with direct language prohibiting such agreements, is more akin to the statues reference by the Court in *Epic Systems* which manifested clear commands than the FLSA which was at issue in the case. Using the Courts own reasoning, Congress "does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions – it does not, one might say, hide elephants in mouseholes."[276] On the contrary, this statute does not attempt to "hide elephants in mouseholes." This statute makes a loud and clear demand by Congress that agreements which contain requirements forcing the arbitration of sexual harassment claims brought by employees will no longer be tolerated in this country.

Since H.R. 1443 re-introduced the Ending Forced Arbitration of Sexual Harassment Act, two Democratic senators introduced the Forced Arbitration Injustice Repeal Act ("FAIR Act").[277] While not specifically targeted at sexual harassment, this bill would invalidate arbitration agreements contained in both employment and consumer contracts.[278] As stated in the bill, the purpose of the FAIR

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[271] H.R. 1443, 116th Cong., (2019).

[272] *Id.*

[273] *H.R. 1443-Ending Forced Arbitration of Sexual Harassment Act of 2019*, *Cosponsors*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1443/cosponsors?searchResultViewType=expanded&KWICView=false [https://perma.cc/TLE9-ZYQ6] (last visited Apr. 17, 2020).

[274] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).

[275] *Id.* at 1626. The Court provided these examples:

> Congress has likewise shown that it knows how to override the Arbitration Act when it wishes— by explaining, for example, that, "[n]otwithstanding any other provision of law, ... arbitration may be used . . . only if" certain conditions are met, 15 U.S.C. § 1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U.S.C. § 987(e)(3).

[276] *Id.* at 1626-627 (quoting Whitman v. Am. Trucking Assns., 531 U.S. 457, 468 (2001)).

[277] H.R. 1423, 116th Congress, (2019); Alexia Fernandez Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/ZE48-FWWQ].

[278] Campbell, *supra* note 276.

Act is to

> (1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.[279]

Not only would it prohibit companies and employers from including predispute arbitration agreements in future employment and consumer contracts, it invalidates any pre-existing clauses contained in these contracts.[280] This bill was passed by the House on September 20, 2019, by a 225 to 186 vote.[281] It has since been referred to the Senate Judiciary Committee, where no actions has been taken.[282]

State Legislation

Various states around the country have attempted to eliminate the use of mandatory arbitration for sexual harassment claims. States that already passed legislation include Maryland, New York, Vermont and Washington.[283] After the California State Legislature passed a bill limiting this use of mandatory arbitration clauses, its Governor Jerry Brown vetoed the bill, claiming that it violated federal law.[284]

Governor Brown's concerns are not unfounded. The Court's decision in *Epic Systems* could have an impact on the effectiveness of these bills and could possibly be the grounds for finding them unenforceable.[285] As the Court stated, parroting its holding and reasoning of *AT&T Mobility LLC v. Concepcion*, the FAA preempts state laws which attempt to make arbitration agreements illegal for any other reason other than traditional contractual defense.[286] Because these law attempt to override the FAA in ways beyond which it allows, the *Concepcion* and *Epic Systems* reasonings could prove to be any state legislation's downfall.

CONCLUSION

When considering the reasons why Americans should find the ending of mandatory arbitration of sexual harassment claims to be an important topic in employment policy, remember the numbers. There are currently tens of millions of

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[279] H.R. 1423 § 2.
[280] *Id.* § 402.
[281] *H.R. 1423 - Forced Arbitration Injustice Repeal Act*, *Actions*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1423/actions?q={%22search%22:[%22Fair+Arbitration+injustice%22]}&r=1&s=3&KWICView=false [https://perma.cc/WD6X-369U] (last visited Apr. 17, 2020).
[282] *H.R. 1423- Forced Arbitration Injustice Repeal Act*, *Committees*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1423/committees?q=%7B%22search%22%3A%5B%22Fair+Arbitration+injustice%22%5D%7D&r=1&s=3 [https://perma.cc/M6VJ-7S59] (last visited Apr. 17, 2020).
[283] Porter Wells, *States Take up #MeToo Mantle in Year After Weinstein*, BLOOMBERG LAW (Oct. 3, 2018), https://www.bna.com/states-metoo-mantle-n73014482949/ [https://perma.cc/6UTW-V5FP].
[284] *Id.*
[285] *Id.*
[286] *Epic Systems Corp.*, 138 S. Ct. at 1623.

Americans employed who are subjected to mandatory arbitration through employment agreements and policies. On top of that, as many as eighty percent of women, who make up just about fifty percent of the workforce, have experienced some type of sexual harassment in the workplace. This creates an outstandingly high number of women who, when bringing claims of sexual harassment, are forced to arbitrate these claims individually and cloaked with secrecy. Beyond the number of people who may bring these claims, the results of arbitration, as discussed earlier in both success of claims and amount of rewards, show a strong favoring of employers over employees.

After considering the numbers, it is essential to remember that courts have made it abundantly clear that mandatory arbitration clauses contained in employment agreements are here to stay. This leads to one logical solution of these issues: legislation. From here, it is the job of Congress to ensure protections for employees who are not only subjected to sexual harassment at work, but who are then forced to bring their claims to a system that it likely setting them up for failure. Until Congress fulfils this duty to protect its constituents, it is important for those constituents who feel strongly to show their support. Through perception and awareness this issue can be addressed and solved.