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Prospects and Pitfalls: Confronting Sexual Harassment in the Legal Cannabis Industry

Alexis N. Smith

Griffon Toronjo Pivateau

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PROSPECTS AND PITFALLS: CONFRONTING SEXUAL HARASSMENT IN THE LEGAL CANNABIS INDUSTRY

GRIFFIN TORONJO PIVATEAU, J.D.*

ALEXIS NICOLE SMITH, PHD*

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* Griffin Toronjo Pivateau is the Puterbaugh Professor of Legal Studies and Ethics in Business at Oklahoma State University. Mr. Pivateau received his J.D. from the University of Texas School of Law and his B.A. from McNeese State University. Mr. Pivateau is a member of both the Louisiana and Texas State Bar. The authors thank the Center for Legal Studies and Business Ethics at Oklahoma State University's Spears School of Business and the American Business Law Journal for the opportunity to participate in the 2020 symposium, Legal, Ethical, and Compliance Issues in Emerging Markets: Cannabis in the States.

* Alexis Nicole Smith is an Associate Professor of Management at Oklahoma State University. She earned her PhD in management at Tulane University and her BA from Rice University. Her research interests include gender dynamics, social identity, bias, and workplace diversity.

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I. INTRODUCTION

In the last decade, the legal cannabis industry emerged as a fast-growing and complex new market. Legal cultivation of the cannabis plant promises to create tremendous economic opportunities. Further, the new market hints at significant social consequences. Numerous women have entered the field as entrepreneurs, advocates, and employees. Early reports indicate a much higher percentage of women within the cannabis industry than the agricultural industry in general.¹

Nevertheless, women face challenges and obstacles. The cannabis industry bears the characteristics of a start-up entity, but this entity resides within a market skewed by the federal law banning the cultivation or sale of the product. Federal prohibition has constrained corporate growth, leaving the industry dominated by numerous small, privately held companies. Less than a third of these companies report having adopted policies ensuring the growth and retention of a diverse workforce.²

Sexual discrimination and harassment plague the legal cannabis industry, evidenced by the recent surge of sexual discrimination and harassment lawsuits. The cannabis industry is not immune from the recent surge of sexual discrimination and harassment lawsuits. Women in cannabis may find themselves limited to lower paid positions outside of positions of power. Sexual discrimination and harassment plague the legal cannabis industry. Moreover, the industry’s past illicit nature threatens to perpetuate employer

1. Javier Hasse, *Is The Cannabis Industry As Women-Friendly As It Claims To Be? New Report Says ‘Meh’*, FORBES (Apr. 12, 2019, 9:28 AM), <https://www.forbes.com/sites/javierhasse/2019/04/12/is-the-cannabis-industry-as-women-friendly-as-it-claims-to-be-new-report-says-meh/#4aa8c8b84e1a>.

2. *See id.*; see also *Vangst 2019 Women in Cannabis Report*, VANGST (Apr. 9, 2019), <https://info.vangst.com/hubfs/Vangst-2019-Women-in-Cannabis-Report.pdf>.

misconduct. Cannabis workers have traditionally proved reluctant to report abuse for fear of exposing the enterprise to governmental scrutiny. Because of federal prohibition, access to traditional employment protection statutes has historically been—and may still be—limited.

In recent years, many states adopted a new regulatory framework permitting the growth and sale of cannabis. The creation of a new regulatory environment presents a rare opportunity to incorporate sexual harassment protection provisions at the onset of the industry. In this Article, we propose a regulatory framework that will permit states to ensure the growth of the legal cannabis industry while at the same time providing protection and ensuring opportunity regardless of sex. The proposed framework will utilize the knowledge gained from a half-century of federal anti-discrimination law and judicial interpretation. Adoption of the framework will provide protections that permit female workers to experience an industry that recognizes and rewards their accomplishments. In time, and with positive outcomes, the new framework could lead to change in other industries.

II. WOMEN IN THE CANNABIS INDUSTRY

A. *Sexual Harassment in the Cannabis Industry*

In a recent publication, Kelly Schirrmann, a former industry employee, exposed the sex discrimination that occurred regularly in the black market marijuana industry. Schirrmann reported her personal observations of the mistreatment suffered by female employees.³ This mistreatment stems from several sources - sex discrimination and harassment typically arise out of the gender imbalance in the industry, the large amount of money in the industry, and the traditionally illegal nature of the industry. Schirrmann indicated that absent changes, the abuse will continue fostering a culture of oppression that will harm the legal cannabis industry as well.⁴

As part of a regulated industry, the legal cannabis industry will likely face a higher standard of behavior than the black market industry. Nevertheless, mere legalization is not enough to ensure against harassment and abuse. According to an article in Forbes, sexism remains a problem even in the legal cannabis industry.⁵ Many women report that “unwelcome sexual overtures, dismissive behavior on account of gender, or salacious marketing that

3. NowThis News, *Sexism & Discrimination in the Cannabis Industry Exposed*, YOUTUBE (May 31, 2019), https://youtu.be/eRDNG_brYa8.

4. *See id.*

5. *See* Iris Dorbian, *Sexism Is Alive and Well In The Cannabis Industry*, FORBES (Mar. 13, 2019, 8:41 AM), <https://www.forbes.com/sites/irisdorbian/2019/03/13/pot-biz-may-be-booming-but-sexism-is-apparently-alive-and-well/#41fdaf1a4996>.

objectifies women” contribute to an oppressive environment.⁶ Some report “feeling under siege.”⁷

Cannabis companies regularly utilize sex-based marketing practices. Vice has reported on how one such company, Ignite, uses sexual images of women as billboard advertising. The head of Ignite, Dan Bilzerian, has shrugged at the complaints, relying on the defense that “sex sells.”⁸ Some women in the cannabis industry report that sexism has reached such a toxic level that they will ask a trusted male friend to “accompany them at meetings or events that could benefit their company rather than deal exclusively with men who have had a history of sexually harassing them.”⁹

Leadership issues exacerbate the problem. The legal cannabis industry lacks women in leadership roles. Cannabis news site, Marijuana Business Daily, conducted a survey in 2017 that found that women hold just 27% of executive-level roles in the industry.¹⁰ This number reflects a decrease from the site’s 2015 survey, which found 36% of leadership roles were filled by women.¹¹

Recently, Amy Margolis, the founder of one of the largest state cannabis trade groups in the United States, launched The Initiative, a Portland, Oregon-based accelerator intended to attract more female entrepreneurs to the legal cannabis industry.¹² Margolis reports that men controlled the illicit market in marijuana, and its recent legalization has done little to change that situation. Margolis suggests that newcomers to the marijuana industry bring with them the “same sexist attitudes as those who’ve been in the business for a long time.”¹³

Moreover, like all startup industries, the cannabis industry is heavily dependent upon entrepreneurial and private equity activities. Research has demonstrated that white men are the overwhelming recipients of private equity funding in many similar startup industries, including technology and

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Women to Watch in 2019*, MARIJUANA BUS. MAG. (Jan. 1, 2019), <https://mjbizmagazine.com/women-to-watch-in-2019/>.

11. *Id.*

12. The Initiative is a business accelerator and suite of business services to help women-founded cannabis companies. The Initiative provides mentoring and training of companies selected through a competitive process. The business leaders receive three months of training on everything from financial basics to fundraising to negotiating and planning for strategic growth.

13. Dorbian, *supra* note 5.

biotech.¹⁴ To the extent that women and minorities also have unfettered access to startup capital, they are likely to create the types of organizations that are less beholden to traditional patriarchal, sexist, or racist cultures.

B. Regulation of the Cannabis Market Continues to Evolve

The place of cannabis in society has been reassessed. In the last decade, legislative discussion and debate, in both municipalities and states, escalated. Public support is growing, putting pressure on even the most conservative states to adopt some type of legal cannabis regime. Presidential candidates routinely signal their support for federal cannabis policy reform, indicating that the current debate will not cease with the 2020 election. As of now, two-thirds of Americans already support legalization.¹⁵ A recent survey demonstrated that the vast majority of Americans expect federal legalization of marijuana to occur within the next two years.¹⁶

Domestic cannabis consumption continues to increase. A recent report from the cannabis research organization, New Frontier Data, suggests that total sales of cannabis in states where it is currently legal will grow at a rate of 14% over the next six years, reaching nearly \$30 billion by 2025.¹⁷ That figure more than doubles the 2019 expected sales of \$13.6 billion. The report considers the probability that other states will legalize the cultivation and sale of cannabis. As of 2019, thirty-three states and Washington, D.C. have legal medical marijuana markets while ten states (plus Washington, D.C.) have legal recreational markets.¹⁸

The report reveals that medical use of cannabis will continue to increase, and it projects that annual sales of medical cannabis will increase at a rate of 17% through 2025, growing to an estimated \$13.1 billion by 2025.¹⁹ The report further estimates that 38.4 million U.S. adults consume cannabis at least once annually, from either a legal or illicit source. Another 6% of cannabis consumers report using cannabis daily, and 59% use cannabis at

14. See Dora Gicheva and Albert N. Link, *The Gender Gap in Federal and Private Support for Entrepreneurship*, *Small Bus. Econ.* 45, 729-733 (2015).

15. See Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, *GALLUP* (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx>.

16. See *id.*

17. See Iris Dorbian, *New Cannabis Report Predicts Legal Sales To Reach Nearly \$30 Billion By 2025*, *FORBES* (Sept. 24, 2019, 8:21 AM), <https://www.forbes.com/sites/irisdorbian/2019/09/24/new-cannabis-report-predicts-legal-sales-to-reach-nearly-30-billion-by-2025/#254f8cc71121>.

18. *Id.*

19. *Id.*

least once a week.²⁰

State and local governments have embraced the idea of a new tax base. Recently, New York's governor released a proposed budget that included plans to legalize and tax the recreational use of cannabis. The proposal creates an Office of Cannabis Management for medical, recreational, and hemp use and also provides a program of cannabis research by the state's university system. Medical sales of cannabis in New York are already expected to exceed \$500 million by 2025. If the state legalizes cannabis for recreational use in 2020, annual sales of recreational cannabis are projected to surpass \$2.4 billion by the same year.²¹

Nevertheless, the legal market continues to face challenges for the illegal market, which some suggest will continue to dominate the cannabis industry.²² Some individuals attribute the continued success of the black market to extensive regulations and taxes in the legal industry.²³

The legal cannabis industry remains clouded by the continued prohibition under federal law. Pursuant to the Controlled Substances Act (CSA), cannabis has no currently accepted medical use.²⁴ The CSA remains controlling law throughout the United States.²⁵ In *Gonzales v. Raich*, the Supreme Court supported the constitutionality of the federal prohibition, finding that the CSA lies within Congress' commerce clause powers.²⁶ Thus, the federal government retains the right to enforce marijuana regulations, even when consumed for medical use.²⁷

Today, the federal government has the ability to prosecute anyone associated with cannabis for a variety of crimes other than cultivation, e.g., money laundering statutes, the unlicensed money transmitter statute, and the

20. *Id.*

21. See Chris Hudock, *New York State Potential Legal Adult-Use Cannabis Sales*, NEW FRONTIER DATA (Jan. 26, 2020), <https://newfrontierdata.com/marijuana-insights/new-york-state-potential-legal-adult-use-cannabis-sales/>.

22. See David Jagielski, *The Legal Cannabis Market Is Still Losing to the Black Market -- by a Wide Margin*, MOTLEY FOOL (Dec. 6, 2019, 6:00 AM), <https://www.fool.com/investing/2019/12/06/the-legal-cannabis-market-is-still-losing-to-the-b.aspx>.

23. *See id.*

24. 21 U.S.C. § 812b)(1)(B) (2012).

25. See Emily Pyclik, *Obstacles to Obtaining and Enforcing Intellectual Property Rights in the Marijuana Industry*, 9 AM. U. INTELL. PROP. BRIEF 26, 28 (2018); *Haeberle v. Lowden*, No. 2011CV709, 2012 WL 7149098, at *5 (Colo. Dist. Ct. Aug. 8, 2012).); *see also* Judgment of Dismissal, *Hammer v. Today's Health Care II*, CV2011-051310, at *2, *3 (Ariz. Apr. 12, 2012).

26. *See Gonzales v. Raich*, 545 U.S. 1, 26-27 (2005).

27. *See id.* at 27-28.

Bank Secrecy Act.²⁸ The Department of Justice has expressly stated that state law cannot change the illegal status of the cannabis industry.²⁹ The availability of federal statutes protecting employees remains undecided.

III. SEXUAL HARASSMENT IN THE WORKPLACE

A. *A Legal History of Sexual Harassment*

Nationwide civil unrest protesting racial discrimination and segregation led to the passage of Title VII of the Civil Rights Act of 1964.³⁰ The Act forbids discrimination on the basis of race, color, religion, sex, or national origin within the employment context.³¹ Title VII prohibits discrimination on the basis of sex and race in employment practices, including hiring, promotion, and firing.³² The Act specifically forbids discrimination regarding “compensation, terms, conditions, or privileges of employment.”³³ Further, Title VII created the Equal Employment Opportunity Commission (EEOC).³⁴

Categorization in this way, however, was never intended to limit the reach of Title VII to only those areas. Instead, the broad language of the statute prohibited the entire spectrum of unequal treatment towards people in the workplace. The statute has been widely viewed by the judiciary, the legislature, and the EEOC as a broad instrument intended to ensure workplaces and employment opportunities free of discrimination.

In 1980, the EEOC issued the first guidelines describing sexual harassment in the workplace.³⁵ The EEOC defined workplace sexual

28. See 18 U.S.C. § 1960(a) (2012); see also Pyclik, *supra* note 25, at 48.

29. Memorandum from James M. Cole, U.S. Deputy Attn’y Gen., to U.S. Att’ys, on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> (“Persons who are in the business of cultivating, selling, or distributing marijuana . . . are in violation of the CSA, regardless of state law.”).

30. See *Pre 1965: Events Leading to the Creation of the EEOC*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html>, (last visited Apr. 3, 2020).

31. *Id.*

32. See *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/civil-rights-act> (last visited Apr. 3, 2020).

33. 42 U.S.C. § 2000e-2(a)(1) (2012).

34. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(a) (1964).

35. See Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 462-63 (2002); see also 29 C.F.R. § 1604.11 (2018).

harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”³⁶

In 1986, the United States Supreme Court defined harassment as a form of discrimination in *Meritor Savings Bank v. Vinson*.³⁷ In *Meritor*, the Court found that harassment consisted of severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff’s employment.³⁸ The Court noted that the phrase “terms, conditions, or privileges of employment” indicated a congressional intent “to strike at the entire spectrum of disparate treatment of men and women” in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.³⁹ The Court construed Title VII broadly, noting that the drafters of Title VII did not intend to limit the statute to economic or tangible discrimination. Instead, Title VII “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women in employment.’”⁴⁰ The *Meritor* definition of sexual harassment continues to influence and shape harassment law.

Subsequently, the Supreme Court expanded and clarified the *Meritor* definition. In 1993, in *Harris v. Forklift Systems*,⁴¹ the Court ruled that the law did not require plaintiffs to prove “concrete psychological harm.”⁴² Instead, the court set a standard that “takes a middle path between . . . conduct that is merely offensive” and that which results in “a tangible psychological injury.” The Court further found that sex-based misconduct must be subjectively and objectively offensive to qualify as harassment.⁴³ First, the conduct must be “severe or pervasive enough to create an objectively hostile or abusive work environment.”⁴⁴ Second, a victim must “subjectively perceive the environment to be abusive.”⁴⁵ The complainant must establish that the conduct offended her and that it would have offended

36. 29 C.F.R. § 1604.11(a).

37. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

38. *Id.* at 67.

39. *Id.* at 64 (citing *Los Angeles Dept’ of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978)).

40. *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

41. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

42. *Id.* at 22.

43. *Id.* at 21-22.

44. *Id.* at 21.

45. *Id.*

a reasonable person.⁴⁶ Because of the lack of a precise test for determining the presence of a hostile environment, the Court noted that context was important: “the frequency of the conduct, its severity, whether it was physically threatening or was merely an offensive comment, and whether it unreasonably interfered with an employee’s work performance.”⁴⁷

In a subsequent case, *Oncale v. Sundowner*, the court presented a broader picture of harassment and expanded the scope of the law’s protections.⁴⁸ The *Oncale* Court confronted facts in which the plaintiff complained of same-sex sexual harassment. At the time, courts differed as to whether a plaintiff could bring a same-sex sexual harassment case.⁴⁹ In *Oncale*, the Court held that sexual harassment complaints need not involve claims of sexual misconduct.⁵⁰ Instead, the complainant must only establish that the complainant’s membership in a protected category motivated the conduct. “Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”⁵¹ The *Oncale* Court fortified the status of sexual harassment claims as a type of discrimination claim. “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.”⁵²

Nevertheless, the Court cautioned lower courts from construing Title VII’s ban on harassment as a “civility code.”⁵³ Instead, it urged those courts to consider the context of the conduct,⁵⁴ as the objective severity of misconduct should be viewed from “the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”⁵⁵

B. *Two Bases of Sexual Harassment Litigation*

The law recognizes two types of sexual harassment: “quid pro quo” and “hostile environment.” Our proposed framework seeks to eliminate both types.

46. *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993).

47. *Id.* at 23.

48. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

49. *See Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev’d*, *Oncale*, 523 U.S. 75.

50. *Oncale*, 523 U.S. at 80.

51. *Id.*

52. *Id.*

53. *Id.* at 81.

54. *Id.*

55. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

Quid pro quo refers to employer conduct that takes a tangible job action that occurs in reaction to sexually harassing conduct. For instance, quid pro quo sexual harassment occurs when a promotion is granted or withheld depending on acquiescence to a demand for sexual favors. Quid pro quo sexual harassment may force women out of the workplace if their reaction is not what the harasser wants. The refusal or acceptance of illegal sexual demands should not harm a person's career. The United States Supreme Court has found that voluntary acceptance of sexual demands does not invalidate a sexual harassment claim.⁵⁶ The victim is only required to establish that the behavior was unwelcome.⁵⁷

A hostile environment arises when the workplace becomes aggressive and intimidating. The Supreme Court in *Meritor Savings Bank v. Vinson* found that sexual harassment creating a hostile environment discriminates with respect to "terms, conditions, or privileges,"⁵⁸ a phrase that the court construed as designed "to strike at the entire spectrum of disparate treatment of men and women in employment."⁵⁹ In this environment, discriminatory sex-based intimidation, ridicule, and insult is severe or pervasive enough to make the environment abusive.

C. Employer Liability for Sexual Harassment

In 1998, the question of employer liability remained unanswered. Courts differed on the question of employer liability for the sexually harassing acts of its employees. In *Meritor*, the Court did not create an employer liability standard. Instead, the *Meritor* Court instructed lower courts to use agency law principles to establish liability for supervisor-created hostile work environments. Because *Meritor* failed to establish sufficient guidelines for employer liability, lower courts differed on the circumstances which would hold an employer liable for the harassing acts of its employees.⁶⁰ Some courts urged a negligence standard, holding that courts should measure the responsibility of the employer as with any negligence claim.⁶¹ Other courts urged a vicarious liability standard, making employers liable for the

56. See Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1035 (2015).

57. See generally Vicki Schultz, Essay, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 35 (2018).

58. *Meritor Sav. Bank v. Vinson*, 477 U.S. at 64.

59. *Id.*

60. Grossman, *supra* note 56, at 1035-36.

61. Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 254 (2012).

wrongful acts of their employees.⁶²

The Supreme Court created a standard for employer liability in two cases, *Burlington Industries v. Ellerth*⁶³ and *Faragher v. City of Boca Raton*.⁶⁴ The Court found that an employer's vicarious liability depended on whether the harasser was a supervisor or coworker. The Court stated that an employer can be subject to vicarious liability for a supervisor's sexual misconduct and harassment.⁶⁵ This standard of liability has its roots in two main principles: "1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment."⁶⁶

If the plaintiff alleges harassment by a coworker, the plaintiff must show that the employer acted negligently in its handling of harassment.⁶⁷ In other words, the plaintiff must establish that the employer knew or should have known about the harassment and failed to act.

An employer has strict liability for the acts of the supervisor when the supervisor took some form of tangible employment action against the plaintiff, such as a demotion, termination, or pay cut.⁶⁸ A supervisor is an employee empowered by the employer to take tangible employment actions against the victim.⁶⁹ Classification as a supervisor requires "the power to hire, fire, demote, promote, transfer, or discipline an employee."⁷⁰ A supervisor must have formal authority over the harassment victim. A person without such authority is not a supervisor, even though he may have informal power to direct the activities of the complainant.

An employer is presumed liable for sexual harassment by a supervisor even without a tangible job action. The employer can, however, overcome this presumption. To balance the differing interests of employers and employees, the Court created an affirmative defense that employers could assert if no tangible job action resulted from the harassment. The affirmative defense, now known as the *Faragher* defense, contains two elements. The

62. *Id.*

63. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-56 (1998).

64. *Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

65. *Ellerth*, 524 U.S. at 763-65; *Faragher*, 524 U.S. at 807.

66. U.S. Equal Emp't Opportunity Comm'n, *Enf't Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, (June 18, 1999), <http://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>.

67. *Faragher*, 524 U.S. at 799-800.

68. *Id.* at 807.

69. *Vance v. Ball State Univ.*, 570 U.S. 421, 424-26 (2013).

70. *Vance*, 570 U.S. at 424-26.

assertion of the defense requires the employer to prove that (a) the employer took reasonable measures to prevent or correct the harassment, and (b) the complainant employee failed to take advantage of those measures.⁷¹ Both elements must be satisfied for the defendant employer to avoid liability, and the defendant bears the burden of proof on both elements.⁷²

The first element of the affirmative defense requires employers to take reasonable measures designed to prevent or correct harassment. Employers often seek to meet this standard by creating and disseminating an adequate sexual harassment policy to employees. The law, however, does not require the existence of an anti-harassment policy. The Supreme Court stated that “proof that an employer has promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law.”⁷³ Thus, an employer does not have to prove the existence of a formal sexual harassment policy to meet its burden of proof on this first element of the affirmative defense.⁷⁴

The first element of the affirmative defense also requires an employer to respond to the complaint in a reasonably prompt manner.⁷⁵

An employer can establish the second element of the affirmative defense by demonstrating that the complainant failed to follow complaint procedures.⁷⁶ A complainant may rebut this element by establishing that non-compliance was reasonable, thereby preventing a defendant from establishing the defense.⁷⁷

IV. PROBLEMATIC ASPECTS OF TRADITIONAL SEXUAL HARASSMENT

71. Faragher, 524 U.S. at 807.

72. *Id.*; Ellerth, 524 U.S. at 765.

73. Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

74. *See* Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 183 (4th Cir. 1998) (recognizing that small employers may show that they exercised reasonable care to prevent and correct sexual harassment through more informal complaint mechanisms); Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1314 (11th Cir. 2001) (suggesting that an adequate sexual harassment policy requires that the policy “was effectively published, that it contained reasonable complaint procedures, and that it contained no other fatal defect.”“).

75. Frederick, 246 F.3d at 1314.

76. *See, e.g.*, Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1302 (11th Cir. 2000) (explaining that amorphous complaints to persons not authorized to accept complaints constituted evidence that the employee unreasonably failed to take advantage of her employer’s complaint procedures).

77. Frederick, 246 F.3d at 1314.

ANALYSIS

A. Modern Sexual Harassment Theory Conflicts with Traditional Analysis

The traditional approach to sexual harassment views harassment as unwanted sexual advances, often by powerful male employees toward their female subordinates.⁷⁸ Sexual harassment, according to this dated approach, originates out of sexual desire. “It has little to do with work or workplace conditions; it is about predatory sexuality.”⁷⁹ Work becomes a tool used by men to assert their sexual dominance over women.

The earliest cases construing Title VII sexual harassment focused on a “sexual-desire-based notion of causation.”⁸⁰ According to this theory, sexual desire motivated the male harasser to act on his “heterosexual impulses.”⁸¹ This understanding that harassment arose out of sexual desire “dominated early judicial thinking and continues to be a prevailing component of sexual harassment doctrine.”⁸²

Women who enter a field that is traditionally male-dominated will likely face more sex-based harassment than other women.⁸³ Research found that women who work in traditionally masculine jobs experience more harassment in male-dominated job settings. Equally, women who present as “masculine,” as opposed to traditionally feminine ways, will also experience more sex-based harassment. Women who seek to enter high-paying and traditionally male fields experience more harassment in mostly male job settings.⁸⁴ Female supervisors also suffer higher rates of harassment.⁸⁵

Sexual harassment means more than misconduct driven by sexual desire. Two decades ago, scholars propounded a revised theory of sexual

78. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 27 (2018).

79. *Id.*

80. David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1719 (2002).

81. *Id.*

82. *Id.* at 1720.

83. Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context*, 38 L. & HUM. BEHAV. 58, 67-68 (2014).

84. See Anne Maass et al., *Sexual Harassment Under Social Identity Threat: The Computer Harassment Paradigm*, 85 J. PERSONALITY & SOC. PSYCH. 853, 854 (2003).

85. Laurie A. Rudman & Julie E. Phelan, *Backlash Effects for Disconfirming Gender Stereotypes in Organizations*, 28 RES. ORG. BEHAV. 61, 71 (2008); see also Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RES. ORG. BEHAV. 113, 125 (2012); Laurie A. Rudman et al., *in Reactions to Vanguard: Advances in Backlash Theory*, 45 ADVANCES EXPERIMENTAL SOC. PSYCH. 167, 181 (2012).

harassment reflecting this fact.⁸⁶ Modern sexual harassment theory states that the root cause of harassment lies not with sexuality or sexual desire, but workplace sexism instead.⁸⁷ Harassment permits men to designate women as inferior, allowing the masculinized workplace to remain undisturbed by societal changes.⁸⁸ According to modern theory, harassment is grounded in broader determinations of sex discrimination. Harassment is not so much about sexuality or sexual advances, but instead originates from the desire of men to maintain their dominant workplace situation. Sexualized behavior may be an instrument of harassment, but it is not the objective.

In the context of employment, sexuality in itself is not “degrading or discriminatory.”⁸⁹ In fact, some scholars have suggested the opposite: that consensual workplace sexuality can be a source of energy or camaraderie at work.⁹⁰ Organizational research has long engaged in understanding and mitigating workplace sexual harassment.⁹¹ In line with legal shifts in managing unwanted workplace sexuality, organizational scholars moved from initially examining the prevalence of sexual harassment⁹² to identifying the underlying causes of sexual harassment.⁹³ This literature coalesces on the assertion that sexual harassment is a means to preserve a workplace environment that reinforces traditional notions of male work to reinforce “mainstream masculine status and selfhood.”⁹⁴

Over two decades ago, the United States Supreme Court expressly noted that harassment in the workplace need not be sexual in content or motivation.⁹⁵ It follows, too, that conduct involving sexual content or connotations does not automatically constitute discrimination because of

86. See Schultz, *supra* note 78, at 1 1738.

87. *Id.* at 1688.

88. Schultz, *supra* note 78, at 24. See also Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCH. 425, 426 (2007).

89. Schultz, *supra* note 78, at 27.

90. Karl Aquino et al., *Social Sexual Behavior at Work*, 34 RESRSCH. ORG. BEHAV. (2014).

91. See, e.g., Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 HANDBOOK ORG. BEHAV. 469 (1990); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152 (1988); John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 SEX ROLES 26 (1987).

92. See, e.g., Fitzgerald, *supra* note 91, at 153.

93. See e.g., Cortina, *supra* note 91.

94. Schultz, *supra* note 78, at 27-28.

95. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 US 75, 80 (1998). (quoting “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

sex.⁹⁶ Nevertheless, courts today continue to focus on the sexual aspects of sexual harassment.

Harassment includes a range of hostile and demeaning conduct that has little to do with sexual overtures. The EEOC defines harassment broadly: “Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex.”⁹⁷ Workplace conduct that denigrates people because of sex constitutes harassment, whether or not the conduct is sexual in nature.⁹⁸ Some courts of appeal have echoed the argument that a harassment cause of action need not be rooted in the sexual nature of the conduct.⁹⁹

Some have criticized the #MeToo movement as reviving an “older understanding of sexual harassment.”¹⁰⁰ Much of the media coverage of #MeToo focused on explicitly sexual misconduct, whether verbal or physical. Coverage of the movement seemed overly concerned with unwanted sexual advances and sexual assault. Notably, the New York Times defined sexual harassment in sexual terms: “The Times uses the terms ‘sexual harassment’ and ‘sexual misconduct’ to refer to a range of behaviors that are sexual in nature and nonconsensual. The term ‘sexual assault’ usually signifies a felony sexual offense, like rape.”¹⁰¹

Several scholars have criticized the tendency for courts to frame harassment in terms of sexual conduct.¹⁰² According to one study, cases

96. *Id.*

97. *Sexual Harassment*, EEOC, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Apr. 3, 2020).

98. *Id.*

99. *See, e.g.*, *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001).

100. Schultz, *supra* note 78, at 30.

101. Natalie Proulx, Christopher Pepper & Katherine Schulten, *The Reckoning: Teaching About the #MeToo Movement and Sexual Harassment with Resources*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/learning/lesson-plans/the-reckoning-teaching-about-the-metoo-moment-and-sexual-harassment-with-resources-from-the-new-york-times.html> (“Sexual harassment in the workplace is an umbrella term that encompasses a range of unwanted behaviors. This includes nonphysical harassment, including suggestive remarks and gestures, or requests for sexual favors. Physical harassment includes touches, hugs, kisses, and coerced sex acts.”).

102. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2001) (discussing how cases that involve “sexualized conduct directed at individual victims” are more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general”); Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 5 (2006); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065 (2003).

involving “sexualized conduct directed at individual victims” prove more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general.”¹⁰³ The focus on one narrow aspect of harassment is absent from cases alleging other theories of harassment. Some scholars have argued that “courts tolerate conduct in sexual harassment cases that would not be tolerated in racial harassment cases that are analogously offensive.”¹⁰⁴

Modern sexual harassment theory does not view sexual conduct, or a desire for sexual domination, as the primary cause of sexual harassment. In most cases, the problem does not lie with male employees who abuse their status to get sex.¹⁰⁵ Instead, harassers use sex to reinforce their positions, both within the organization and within society. It is a matter of perspective: a demand for sex is essentially the same as other sexist demands. A demand for sexual favors represents yet another sex-based demand that will preserve a traditional, male-dominated workplace. Sexual harassment is a component of patriarchy, and to the extent that our society is systemically patriarchal, men have behaved with impunity in that system.¹⁰⁶ To change the prevalence of sexual harassment, we must first change the system of patriarchy that empowers perpetrators to victimize others.¹⁰⁷ Harassers seek to retain a sense of masculine prerogative and status. Furthermore, it is not just the harassment that confirms traditional status arrangements, but also an environment of organizational tolerance that reinforces their workplace status.¹⁰⁸

103. Juliano & Schwab, *supra* note 102, at 549; Schultz, *supra* note 78, at 16-17.

104. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 119-23 (2003).

105. See, e.g., Mike Fleming, Jr., *How Male-Dominated Hollywood Contributes to Sexual Harassment Culture: Oscar-Winning Producer Cathy Schulman Explains*, DEADLINE (Mar. 2, 2018, 11:18 AM), <http://deadline.com/2018/03/hollywood-male-dominated-cathy-schulman-interview-metoo-times-up-women-in-film-progress-1202308160>.

106. R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 846-47 (2005).

107. John Braithwaite, *Doing Justice Intelligently in Civil Society*, 62 J. SOC. ISSUES, 393, 395 (2006).

108. Fleming, Jr., *supra* note 105 (reporting on connections between Hollywood’s entrenched sexism, the number of powerful men harassing women, and “bullying tactics, payouts, and non-disclosure agreements”).

B. The #MeToo Movement Spurred Regulation but not Enough Re-assessment

Allegations by actor Ashley Judd against Harvey Weinstein ignited the #MeToo movement in 2017.¹⁰⁹ The original New York Times story addressed years of sexual harassment and sexual assault committed by Harvey Weinstein, a well-known and influential movie producer.¹¹⁰ The New York Times story provoked a flood of similar stories from women from all aspects of society. However, sexual harassment was not something unique to the world of Hollywood. Throughout the United States, people started to discuss personal experiences with sexism, sexual harassment, and sexual assault.¹¹¹ Fed by social media, the discussion overflowed into America's living rooms and workplaces.

Activist Tarana Burke invented the phrase #MeToo, coining the phrase as a way to assist sexual violence victims.¹¹² The phrase entered into common parlance when actress Alyssa Milano took to Twitter to encourage women to tell their stories of sexual harassment. The hashtag exploded on Twitter, illustrating the pervasiveness of the issue. Across the world, people shared their stories.¹¹³ Google's search engine metrics indicate that searches for the term "me too" in the US reached their peak in early October 2017, coinciding with the harassment and rape accusations of Harvey Weinstein.¹¹⁴ "Sexual harassment" peaked in mid-November of the same year and has remained high since October 2017.¹¹⁵ Further, internet searches for both terms hit peak popularity between the last quarter of 2017, and the first quarter of 2018, on every continent in the world except Antarctica. Since 2017, over 260 CEOs,

109. Elena Nicolaou & Courtney Smith, *A #MeToo Timeline To Show How Far We've Come — & How Far We Need To Go*, REFINERY29, <https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein> (last updated Oct. 5, 2019, 12:11:55 PM).

110. 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>.

111. Nicolaou & Smith-Nicolau, *supra* note 109.

112. *#MeToo: A timeline of events*, CHICAGOCHI. TRIB. (Sept. 17, 2020, 1:52 P28 M), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmistory.html>.

113. Nicolaou & Smith-Nicolau, *supra* note 109.

114. Google searches for "me too," GOOGLE TRENDS, <https://trends.google.com/trends/explore?geo=US&q=%22me%20too%22>.

115. Google searches for "sexual harassment," GOOGLE TRENDS, <https://trends.google.com/trends/explore?q=%22sexual%20harassment%22&geo=US>.

celebrities, and politicians have been targeted for sexual misconduct.¹¹⁶

In 2018, a group of 300 women launched the TimesUp initiative. In contrast to the #MeToo movement's impetus, which was to give voice and solidarity to the usually silenced targets of sexual harassment, the TimesUp initiative aimed to reduce the incidence of sexual harassment by creating and/or improving procedures and policies to ensure reporting and prosecution thereof. The TimesUp movement, which initiated in the media industry, has had its most significant influence amongst the entertainment industry.

C. *The Need for a New Regulatory Framework*

The employment at will doctrine skews employment law because it presumes that employers and employees may terminate their relationship at any time for any reason—good reason, bad reason, or no reason at all.¹¹⁷ Because of the limited regulation over employment relationships, private agreements dictate employment terms. The employment at will doctrine means that, other than for a few at the top of the workplace hierarchy, most employees have little control over the conditions of their employment.¹¹⁸ Employees remain vulnerable not just to harassment, but a host of other negative outcomes: loss of work, demotions, relocations, transfers, pay cuts, reductions in hours, mandatory overtime, and oppressive schedules.¹¹⁹ Employers can utilize these outcomes not only in perpetrating harassment, but also to retaliate against those who complain. This may be particularly true in industries that operate outside of federal legal and regulatory oversight, such as the cannabis industry.

Anti-discrimination law provides a counterbalance to the power disparity between men and women. The law provides workers with a cause of action for sexual harassment, sex discrimination, and retaliation. But, in reality, the

116. VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> (last visited January 12, 2021).

117. *Employment at Will*, LAW DICTIONARY.ORG, <https://thelawdictionary.org/employment-at-will/> (last visited Apr. 3, 2020).

118. Cynthia Estlund, *Truth, Lies, and Power at Work*, 101 MINN L. REV. HEADNOTES 349, 360 (2017) (noting that “both exit and voice are costly and constrained for workers,” resulting in employers maintaining significant power over employees).

119. See generally Elizabeth Anderson, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37-41 (Princeton Univ. Press 2017) (analogizing the at-will workplace to a communist dictatorship); Nantiya Ruan, *Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty*, 24 WASH. & LEE J. CIV. RTS. & SOC. JUST. 103, 136-47 (2017) (describing the precariousness of low-wage work and employees' vulnerability to objectionable working conditions).

past decades have taught that the distant prospect of a future lawsuit will not change “the pre-existing dynamics that have left high-level harassment underreported and the laws against it underenforced.”¹²⁰

V. CREATING A REGULATORY FRAMEWORK FOR THE CANNABIS INDUSTRY

A. *State Governments Have Led the Effort to Prevent and Address Sexual Harassment*

In creating a regulatory framework for the cannabis industry, we look first to the efforts of states that have modified or enacted laws aimed at sexual harassment. After an eventful 2017 and 2018, many state governments realized they needed to address the continuing problem of workplace sexual harassment and passed legislation aimed at addressing this problem. Many states increased training requirements, and some states focused on substantive changes to the law, including broadening its scope. In other areas, states passed laws aimed at ensuring transparency and protecting employees from retaliation.¹²¹

Under the approach suggested in this article, the regulatory environment for the cannabis industry will now include the most important aspects of these state laws. A review of recent legislation indicates three areas where the law should be strong: training requirements, expanded scope, and encouraging transparency.

B. *Training Requirements*

Title VII contains no provisions requiring employers to conduct training on sexual harassment prevention. Several states, however, implemented measures to mandate such training. As noted above, the Supreme Court’s decisions in *Ellerth* and *Faragher* permit employers to establish an affirmative defense to a Title VII claim by showing that “(1) the employer had communicated and established an effective procedure for employees to seek redress from sexual harassment and (2) the harassed employee failed to take advantage of this procedure.”¹²² In fact, some would argue that states design mandatory programs to permit employers to develop programs that

120. Rachel Arnov-Richman, *Of Power And Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 89-90 (2018).

121. Helene Wasserman & Littler, *From Settlement Disclosures to Retaliation: A Summary of Sexual Harassment Legislation in 2018*, JD SUPRA (May 21, 2018), <https://www.jdsupra.com/legalnews/from-settlement-disclosures-to-24275/>.

122. See *Burlington Inds., Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998) (referencing a supporting decision in *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998)).

will meet the affirmative defense standard.¹²³

In the years since the inception of the #MeToo movement, employers require large numbers of American workers to undergo mandatory sexual harassment trainings. Many of these workers receive trainings because of state-led initiatives designed to make workplaces safer. Twenty percent of American workers reside in a state that requires employers to provide sexual harassment trainings.¹²⁴

Several states provide a model for increasing training requirements as a sexual harassment prevention measure. California, Connecticut, and Maine have amended their sexual harassment statutes to require businesses to create and implement a comprehensive training program. These programs should raise awareness and help to prevent harassment.

Connecticut mandates sexual harassment trainings for all supervisors within six months of starting work. California, too, requires trainings, both for supervisory personnel as well as non-supervisory employees. Maine law requires sexual harassment trainings for all employers, including special trainings for supervisors and managers. Employers in all three states must follow state requirements regarding the content of their training programs, record keeping, refreshment courses, and question and answer sessions.¹²⁵

In 2018, California joined other states to strengthen sexual harassment training requirements for employers. The state now requires employers with five or more employees to provide sexual harassment trainings to both supervisors and non-supervisory employees.¹²⁶ Previously, the state training requirement was limited to employers with more than fifty employees. Moreover, the requirement of mandatory training was directed solely to supervisory employees.¹²⁷ The new law requires at least two hours of training in sexual harassment prevention to supervisors. Nonsupervisory employees must complete at least one hour of sexual harassment prevention

123. *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 440 (2019).

124. Jeff Green, *Sexual Harassment Training Now Required for 20% of U.S. Workers*, BLOOMBERG (Oct. 10, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-10-10/sexual-harassment-training-now-required-for-20-of-u-s-workers>.

125. CONN. GEN. STAT. ANN. § 46a-54(15)(B) (West, Westlaw through Gen. Stat. of Conn.); ME. REV. STAT. ANN. tit. 26, § 807(3) (West, Westlaw through 2019 Legis. Sess.); CAL. CODE REGS. tit. 2, § 11024 (2018); CAL. GOV'T CODE § 12950.1 (West 2020)..

126. See Jennifer Nutter & David Prager, *California Enacts Numerous Changes to Sexual Harassment and Other Laws Affecting the Workplace*, JD SUPRA (Oct. 18, 2018), <https://www.jdsupra.com/legalnews/california-enacts-numerous-changes-to-39823/>.

127. *Id.*

and education.¹²⁸ Even temporary workers must receive prevention trainings.¹²⁹ Employers must provide trainings once every two years.¹³⁰ The law further strengthens sexual harassment training by encouraging employers to provide bystander intervention trainings.¹³¹

New York and Delaware enacted similar provisions in their state statutes. For instance, New York now requires employers to conduct trainings that consist of more than simply placing employees in front of a video player.¹³² The law also requires obtaining feedback from the workers on their thoughts regarding the training. New York law does not require the state to monitor compliance with the statute, but permits the state to audit or investigate an employer's non-compliance with the statute.¹³³

Maryland has enacted one of the strongest training programs, but thus far has restricted it only to employers with fifty or more employees.¹³⁴ For these large employers, Maryland now requires employers to: provide two hours of in-person or virtual training (with specified components) to every employee within six months of beginning employment and subsequently at least once every two years, designate an employee as a training representative, and provide annual reports regarding sexual harassment settlements to the state's Civil Rights Commission.¹³⁵ An employer that fails to comply may face an audit of the office or organization.¹³⁶

Under a recent amendment to the Delaware Discrimination in Employment Act, Delaware employers with four or more employees must distribute the Delaware Sexual Harassment Notice to employees within six months of hiring. Further, Delaware employers with fifty or more employees

128. *Id.*

129. *Id.*

130. *Id.*

131. CAL. GOV'T CODE §12950.1 (West, 2020).

132. N.Y. LAB. LAW § 201-g (West, Westlaw through L.2019, ch. 758 and L.2020, chs. 1-198); NY LAB. Yuki Noguchi & Shane McKeon, *Amid #MeToo, New York Employers Face Strict New Sexual Harassment Laws*, NPR (Oct. 9, 2018 4:38 PM), <https://www.npr.org/2018/10/09/654537942/amid-metoo-new-york-employers-face-strict-new-sexual-harassment-laws>.

133. Noguchi & McKeon, *supra* note 133.

134. Patricia Ambrose, *Maryland's New Sexual Harassment Law*, HOGAN LOVELLS BLOG (June 13, 2018), <https://www.jdsupra.com/legalnews/maryland-s-new-sexual-harassment-law-31116/> (noting that this number is much higher than the fifteen employee minimum for Title VII employer coverage).

135. MD. CODE ANN., STATE PERS. & PENS. § 2-203.1 (West, Westlaw through 2018 Reg. Sess. of Gen. Assemb.).

136. MD. CODE ANN., STATE PERS. & PENS. § 2-203.1; *Id.*(f)(2).

must provide interactive trainings and educations on the prevention of sexual harassment to all existing employees by January 1, 2020, and to all new employees within one year of the start of their employment.¹³⁷

Hawaii does not mandate training, but instead encourages employers to become proactive in their approach to sexual harassment training. According to the Hawaii Administrative rules:

“Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapprovals, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.”¹³⁸

Other states have adopted similar provisions, focusing on prevention and encouraging means to achieve that goal, without requiring the employer to take positive actions to reduce or eliminate sexual harassment.

In any event, regardless of state mandates, courts will consider an employer’s proactive measures aimed at the prevention of sexual harassment. The measure of employer liability is often based on the quality and content of the employer’s countermeasures. An employer that lacks a policy will face a harsher review than one who does, even if there is no standard policy.¹³⁹ In fact, the New Jersey Supreme Court held that, in the absence of training for all supervisory and managerial positions, courts may consider such absence relevant in determining vicarious liability for supervisor misconducts.¹⁴⁰ Thus, the New Jersey court has effectively mandated such training, even in the absence of litigation.

C. *Expanding the Scope of Protections*

New York revised its sexual harassment statute in a way that changes much of the substantive law of sexual harassment.¹⁴¹ First, the scope of the

137. Shennan Harris, Melissa Legault, & Squire Patton Boggs (US) LLP, *State Law Round-Up: Developments in Wage and Hour (CO, MA, ME, WA), Non-Compete (WA), Commuter Benefits (NJ), Sexual Harassment (DE), and Sick Leave (Dallas and Minneapolis) Laws. (US)*, NAT’L L. REV. (May 20, 2019 7:40 PM), <https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:5W58-7FF1-F03R-N3F9-00000-00&context=1516831>.

138. HAW. CODE R. § 12-46-109(g).

139. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 11 (2003).

140. See generally *Gaines v. Bellino*, 801 A.2d 322, 329-330 (N.J. 2002).

141. See Joseph Spector, *Workplace harassment protections: 10 new changes to New York law*, <https://www.democratandchronicle.com/story/news/politics/albany/2019/08/12/workplace-harassment-protections-10-new-changes-new-york-law/1986772001/> (last updated Aug. 12, 2019, 1:37 PM).

law now encompasses more than employees, protecting independent contractors, domestic workers, and consultants as well.¹⁴² Second, the law redefines unlawful harassment to include any activity that “subjects an individual to inferior terms, conditions or privileges of employment because of the individual’s membership in one or more of these protected categories.”¹⁴³ Third, the law changes the burden of proof for harassment claims, eliminating the need for the behavior to be severe or pervasive.¹⁴⁴

Finally, the new statute also changes the nature of the affirmative defense for employer liability for harassment claims, eliminating the need for employees to make a workplace complaint against employers before recovering. Employers will be liable for harassment even if the employee did not utilize the employer-provided complaint procedure to address such issues.¹⁴⁵

Vermont expanded the scope of its sexual harassment statute. The revised law requires that a working relationship with a person hired “to perform work or services” be free from sexual harassment.¹⁴⁶ This new language expands the statute beyond protecting employees. The revised statute should now include independent contractors and unpaid interns.

The California legislature adopted a similar provision by amending Section 51.9 of the California Civil Code, which provides a statutory cause of action for sexual harassment.¹⁴⁷ The statute now states that where a plaintiff and defendant are in a business, service, or professional relationship, damages may be recoverable for sexual harassment committed by the defendant.¹⁴⁸ Thus, sexual harassment law will expand to include independent contractors, but will also include relationships, such as theatrical agents.

142. Jeremy Mittman & Gregory J. Hessinger, *New York State Enacts Broad New Sexual Harassment & Discrimination Legislation*, NAT’L L. REV. (Aug. 19, 2019), <https://www.natlawreview.com/article/new-york-state-enacts-broad-new-sexual-harassment-discrimination-legislation>.

143. *Id.*

144. *Id.*

145. *Id.*

146. 21 V.S.A. § 495h.

147. CAL. CIV. CODE § 51.9. (West 2018).

148. *Id.* (“The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.”).

D. Transparency Requirements

Many states, especially California, have focused on adding protections for transparency. The California legislature passed new legislation aimed at settlement agreements. Concerned that sexual harassment victims felt silenced by such agreements, the new law prohibits employers from including a non-disclosure provision relating to the underlying claims. The new law declares such provisions a violation of public policy and deems them void as a matter of law.¹⁴⁹ Furthermore, the law prohibits employers from requiring employees to sign a non-disparagement agreement to release the employer from claims as a condition for a raise or bonus, or as a condition of employment.¹⁵⁰

California also amended its defamation laws by protecting people from the threat of a defamation lawsuit when a sexual harassment claim of an employer is “based on credible evidence” and without malice.¹⁵¹ Legislators acted after allegations that employers sometimes used the state’s defamation laws to deter victims and witnesses from making complaints or communicating information about harassers to others. The new law also protects companies that have knowledge of the harassing activity by permitting them to warn other potential employers without the threat of a defamation lawsuit.¹⁵²

Yet, another California statute prohibits secret settlements or non-disclosure agreements of factual information in cases involving allegations of sexual assault, harassment, or discrimination.¹⁵³ The new law applies to both private and public employers in California, and it grants claimants in sexual abuse or sex discrimination cases the option to keep their names private.¹⁵⁴

149. CAL. GOV’T CODE § 12964.5.

150. § 12964.5; SB 1300 added a new section to the California Government Code. The new Section 12964.5, which took effect on January 1 of this year, states that it is an “unlawful employment practice” for an employer to offer employment in exchange for signing a “release or claim” that would prevent the employee from publicly disclosing “information about unlawful acts in the workplace.” The law also bans the use of such releases in exchange for offering an existing employee a “raise or bonus.” An unlawful act in this context may refer to sexual harassment or any other “potentially unlawful conduct.”

151. See Allen Matkins, *2019 Labor & Employment Law Update for California Employers* (Dec. 11, 2018), <https://www.allenmatkins.com/real-ideas/2019-labor-and-employment-law-update-for-california-employers.html>.

152. See *id.*

153. See *id.*

154. See *id.*

Similarly, in New York, the law bans the use of non-disclosure agreements unless they meet very specific requirements: (1) the agreement represents the complainant's preference; (2) the agreement is provided in plain English and, if applicable, in the complainant's primary language; (3) the complainant is given twenty-one (21) days to consider the agreement; (4) if after the twenty-one (21) days, the complainant still prefers to enter into the agreement, such preference must be memorialized in an agreement signed by all parties; and (5) the complainant must be given seven days after execution of such agreement to revoke the agreement.¹⁵⁵ Moreover, it invalidates any term that prevents the employee from initiating in or participating in an administrative investigation.¹⁵⁶

Vermont also enacted new legislation aimed at sexual harassment.¹⁵⁷ The new law states that a working relationship with a person hired to perform work or services must be free from sexual harassment.¹⁵⁸ The breadth of this language indicates that the statute includes independent contractors and unpaid interns.

Furthermore, Vermont now prohibits employment agreements from containing provisions that prevent an employee from disclosing sexual harassment, or waiving an employee's rights or remedies concerning a claim of sexual harassment.¹⁵⁹ The law also prohibits settlement agreements regarding claims of sexual harassment from including provisions that prevent an employee from working for the employer, or working for an affiliate of the employer, in the future.¹⁶⁰ Further, the law requires settlement agreements to include provisions stating the agreement does not prevent the employee from reporting sexual harassment to an appropriate government agency, complying with a discovery request or testifying at a hearing or a trial related to a claim of sexual harassment, or exercising his or her right under state or federal labor law to engage in concerted activities for mutual aid and protection.¹⁶¹

155. *Combating Sexual Harassment: Frequently Asked Questions*, NY.gov, <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions> (last visited Apr. 3, 2020).

156. *Combating Sexual Harassment*, *supra* note 153.

157. See Samuel Maxwell, Martha Van Oot & Jackson Lewis P.C., *Vermont Passes Law Aimed At Sexual Harassment Prevention*, JD SUPRA (June 28, 2018), <https://www.jdsupra.com/legalnews/vermont-passes-law-aimed-at-sexual-65057/>.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

VI. GOALS OF THE PROPOSED SEXUAL HARASSMENT FRAMEWORK

A. *Incorporating Modern Sexual Harassment Theory*

The proposed sexual harassment framework must incorporate modern sexual harassment theories. A sexual harassment framework will require that the law holds people across the legal cannabis industry accountable for their actions. Workplace inequality associated with sexual harassment remains an ongoing issue almost fifty years after the passage of Title VII. A proposed framework should limit hostile work environments by establishing boundaries that individuals and employers should not cross. The framework gives notice to even those in powerful positions that sexually harassing behavior may create liabilities, and that incidents of sexual harassment that create a hostile environment should be reported. People making reports, even those not directly affected by the behavior, should be equally protected.

A focus on unwanted sexual advances, typically in the male-to-female situation, obscures the non-sexual forms of harassment that women experience. Harassment is more than unwanted advances. There exist numerous nonsexual actions used to humiliate, defame, or denigrate women. Each of these nonsexual actions establishes the “otherness” of women.

Unwanted sexual advances comprise a much smaller percentage of sex-based harassment than nonsexual forms. One sees harassment in a range of behaviors: physical assault, exclusion, marginalization, ridicule, patronizing treatment, and a host of other hostile behaviors directed at people because of their sex. “Research suggests that most harassment aims to shore up masculine workplace superiority, not to secure sexual gratification.”¹⁶²

A recent survey of women, many of them employed in Silicon Valley tech firms, revealed that 90% of the respondents reported witnessing sexist behaviors.¹⁶³ The survey also reported on other types of nonsexual harassing behaviors.¹⁶⁴ According to that same survey, 88% of women reported that questions that should have been directed at men were instead aimed at them.¹⁶⁵ Of the surveyed women, 84% stated that they had been criticized for being too aggressive, 75% reported that interview questions were regarding their family, marital status, or children, and 59% felt that they had not received the same opportunities as their male colleagues.¹⁶⁶ Many of the

162. Schultz, *supra* note 78, at 41.

163. Elephant in The Valley, <https://www.elephantinthevalley.com> (last visited Apr. 3, 2020).

164. *Id.*

165. *Id.*

166. *Id.*

women surveyed stated that they were asked to do menial tasks that were not asked of men.¹⁶⁷ These statistics are not much higher than reports citing the incidence of experiencing sexual harassment in American workplaces at 81%.¹⁶⁸

The focus on sexual overtures minimizes the nonsexual but equally sexist forms of harassment that continue to occur.¹⁶⁹ Employment discrimination law forbids nonsexual as well as sexual misconducts. Focusing too intently on sexual advances can send the wrong message by obscuring the nonsexual acts of harassment. Sexual acts must be seen in the context of the broader sex-based patterns of discriminatory behavior.¹⁷⁰

B. *Recognizing Changed Norms*

A proposed regulatory framework should embrace the changed norms that the United States has experienced in the last decade.¹⁷¹ In the past, social norms took time to change, but this is not the case with sexual harassment. In the 1990s, only 34% of the population believed that sexual harassment was problematic.¹⁷² By the end of 2017, however, approximately 75% of people believed that sexual harassment and assault were “very important.”¹⁷³

Moreover, the belief that sexual harassment primarily reflects individual misconduct has diminished. 6% of Americans now believe that sexual harassment represents “widespread problems in the society.”¹⁷⁴ The perspective that sexual harassment results from a “climate of permission

167. *Id.*

168. See Rihitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>.

169. See M. Sandy Hershcovis & Julian Barling, *Comparing Victim Attributions and Outcomes for Workplace Aggression and Sexual Harassment*, 95 J. APPLIED PSYCH. 874, 874 (2010) (“Negative outcomes of workplace aggression were stronger in magnitude than those of sexual harassment for 6 of the 8 outcome variables.”).

170. See Schultz, *supra* note 57, at 20-21 (2018) (citing continuing problems); see also Eleanor Frisch, Note, *State Sexual Harassment Definitions and Disaggregation of Sex Discrimination Claims*, 98 MINN. L. REV. 1943 (2014); David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 463 (2009).

171. See Joan C. Williams et al., *What’s Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139 (2019).

172. See *id.* at 142.

173. *Id.*

174. *Id.*

created or tolerated by an employer, formerly confined feminist theorists, suddenly seems mainstream.”¹⁷⁵

The norms that the regulatory framework should encompass are these: sexual harassment is a serious problem, the behaviors that constitute sexual harassment are widely accepted, and employers must not tolerate sexual harassment. To help ensure these normative changes, actors in this industry should take heed of contemporary organizational research, which shows that patriarchy creates an oppressive and self-perpetuating hierarchy of status that empowers some at the expense of others. We assert that actors in the emerging cannabis industry not only integrate women and minorities into all levels of employment, but also that advancement and promotion procedures be regularly assessed for hidden and overt biases against protected groups.

The new framework should echo the society’s changing norms. Courts interpreting the “severe or pervasive” standard too often rely on older decisions rather than modern notions of normative behavior.¹⁷⁶ Hostile work environment cases require juries to determine whether the conduct was severe or pervasive enough to create a hostile work environment. In *Harris*, the Supreme Court stated that to be actionable, a reasonable person in the plaintiff’s position would find the behavior hostile.¹⁷⁷ The plaintiff must prove that the harassing conduct was sufficiently severe or pervasive that a reasonable person would feel it altered the conditions of employment, considering the evidence as a whole and with due consideration to social context.¹⁷⁸ Courts must analyze this question from the perspective of a reasonable person in the plaintiff’s position, considering all circumstances.¹⁷⁹

Courts should incorporate modern notions of reasonableness into their analysis of the *Farragher* defense. The employer proves the affirmative defense by establishing the reasonableness of its efforts to prevent and address harassment. The #MeToo movement illustrated how often an employer fails to take sufficient precautions to reduce or eliminate harassment. A revised regulatory environment would consider arguments that employers’ conduct was unreasonable.

Furthermore, a proposed regulatory framework must, at a minimum,

175. *Id.* at 142-43.

176. See Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>.

177. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

178. *Id.*

179. *Id.*

provide mandatory trainings for both supervisors and non-supervisors. We suggest one hour of training for non-supervisory employees and two hours for all supervisory employees. Training must occur within the first six months of hire and then repeat every two years. Ideally, trainers would be required to be certified, though legislators could make an exception for employers that are developing their own programs.

A proposed regulatory framework should be gender-neutral. Although most of the discussion surrounding sexual harassment has focused on women, we know that sexual harassment need not only occur in this manner. The EEOC reports that men file almost twenty percent of sexual harassment claims.¹⁸⁰ Men likely report sexual harassment at a lower rate than women.¹⁸¹

C. Ensuring Equal Opportunity

Ending sexual harassment will require changes on a large scale. Small, individualized solutions are not enough to combat the phenomenon. It is time for all stakeholders—employers, employees, and society as a whole—to eliminate the behaviors and procedures that perpetuate harassment. Stakeholders must seek more inclusive, open, and accountable organizations.

It is probably not enough to expect the typical solutions seen today, such as workplace behavior or sensitivity trainings, to produce widespread changes. Harassers know the effect of their behavior on their victims. They are indifferent to the emotions of their victims, focusing instead on the reinforcement of status and power. Research has shown that heavy-handed training regimens can actually hinder efforts to eliminate discrimination.¹⁸² Nor can one expect to simply outlaw bias. It is evident that “decades of social science research point to a simple truth: You won’t get managers on board by blaming and shaming them with rules and reeducations.”¹⁸³

How then to end sex-based harassment? First, we should strive to end inequality and sex segregation at work.¹⁸⁴ Many anti-harassment advocates recognize that it is necessary “to integrate male-dominated jobs, occupations,

180. See Michael A. Chandler, *Men account for nearly 1 in 5 complaints of workplace sexual harassment with the EEOC*, WASH. POST (Apr. 8, 2018, 7:32 PM), https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa-32d48460b955_story.html.

181. See *id.*

182. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

183. See *id.*

184. Schultz, *supra* note 78, at 61.

and industries.”¹⁸⁵ Harassment policies and training should include all demeaning or intimidating conducts based on differences in sex, and not just focus on unwanted sexual advance and behaviors. Employers should provide examples that cover a wide range of conduct, noting that both sexual and nonsexual harassment can lead to a hostile work environment.

The effort of employers to implement harassment policies and prevent harassment should constitute part of a larger goal to foster inclusion and fairness. Perhaps the original TimesUp movement statement provides the best remedy. In its Open Letter published in the New York Times, the movement’s leaders sought “a significant increase of women in positions of leadership and power across industries” and “equal representations, opportunities, benefits and pay for all women workers, not to mention greater representation of women of color, immigrant women, and lesbian, bisexual, and transgender women in all industries.”¹⁸⁶

We must also retain the principles and ideas that decades of sexual discrimination law have provided. First, we must recognize that sexual harassment is about power, not sex. According to proponents of restorative systems of justice, perpetrators of injustice in an unjust system are also victims of that system.¹⁸⁷ To change the prevalence of sexual harassment, we must first change the system of patriarchy that empowers perpetrators to victimize others.¹⁸⁸ Second, the incidence of sexual harassment will not recede until unpunished reporting and prosecution end. It will require serious efforts of both employers and the public. The fight is not new. In the decade following the passage of Title VII, the federal government has challenged racial and sex segregation on many fronts: the steel, trucking, construction, telecommunications, manufacturing, law enforcement, firefighting, and motion picture industries.¹⁸⁹ Through regulations of the legal cannabis industry, state governments have the power to create a model for other industries to follow.

D. Requiring More Than Policies

Some organizational leaders might prefer to continue developing workplace policies rather than accept new legislations. We assert that the

185. *Id.*

186. *Open Letter from Time’s Up*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html>.

187. *See* Braithwaite, *supra* note 107.

188. *See* Braithwaite, *supra* note 107.

189. Schultz, *supra* note 78, at 62. *See, e.g.*, Int’l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (trucking); United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 834 (5th Cir. 1976) (steel).

path of stronger employer policy is folly. One could argue, in fact, that harassment policies may have played a role in the sexual harassment phenomenon revealed by the #MeToo movement. Employers used broadly drafted harassment policies to selectively enforce those policies, depending on the context.¹⁹⁰ A lack of transparency about the enforcement of these policies caused employee distrust, causing many to question their effectiveness.¹⁹¹

Legal scholar Vicki Schultz has criticized the policies and pointed out that such policies contributed to an environment that failed to stem harassment. Schultz has complained that employers focus primarily on defining harassment primarily as sexual misconduct.¹⁹² Schultz analyzed numerous employer harassment policies and discovered that the EEOC's guidelines promulgated in 1980 provided the basis for many of these policies, which focused on sexual misconducts. Even though the Supreme Court has expanded the nature of harassment laws, employers' policies often remain mired in the past.¹⁹³ Schultz maintains that employers have a vested interest in portraying harassment as male misbehaviors.¹⁹⁴ Doing so gives employers the ability to neglect the greater challenge of failing to provide a workplace that allows meaningful equal employment opportunities.¹⁹⁵

Anti-harassment policies should align with the latest definitions of sexual harassment, especially those of the Supreme Court, and not decades-old standards.

E. Providing Open and Transparent Hiring Processes

People seeking opportunities in the cannabis industry should have the benefit of hiring processes that are open and transparent. These processes should rely on the use of objective credentials to create a rational system. In the proposed framework for the cannabis industry, it will be important to provide for objectivity, openness, and accountability. Accomplishment of these comes from ensuring transparent recruitment, structured information gathering, and a standardized process of making decisions. Together, these

190. Schultz, *supra* note 78, at 43 (“Highlighting sexual harms . . . can also lead victims to underreport nonsexual acts of sex - and gender-based hostility”).

191. See Allen Smith, *#MeToo Postings About Bosses Merit Discussions with HR*, SOC'Y FOR HUM. RES. MGMT. (Nov. 20, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/metoo-postings-about-managers.aspx> (referencing “zero-tolerance sexual harassment policies”).

192. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065 (2003).

193. *Id.*

194. *Id.*

195. *Id.*

measures will reduce highly subjective selection processes and ensure fewer abuses. Reforms will benefit not only women but all employees and job candidates.

Five decades of employment discrimination law has taught that someone must reign in subjective authority. Courts have recognized the need to foreclose the use of highly subjective selection systems that, either intentionally or inadvertently, reinforce bias in favor of those employees already in the workplace.¹⁹⁶ Both the federal government and civil rights attorneys fought to ensure that jobs were advertised equally to all persons, those job advertisements conveyed the specified relevant skills in advance, and that employers objectively evaluated applicants.

The battle against race discrimination restricted subjective employment decisions was often based on closed social networks and permitted the growth of open, neutral processes. These improved processes opened up the hiring process beyond simply racial minorities. Job candidates no longer faced a future limited by inaccessible social networks.

VII. CONCLUSION

The cannabis industry is an emergent arena, primed for rapid growth in a receptive consumer marketplace. Along with having all of the hallmarks of a traditional startup industry, the cannabis industry has all of the opportunity to grow a unique and vibrant place for women, minorities, and indeed, all, to find business growth and prosperity. To enable that bright future, we submit this modest proposal on how to create a less patriarchal and more equitable industry more effectively.

196. *See, e.g.*, *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973) (invalidating as racially discriminatory an employer's use of word-of-mouth recruiting because it would exclude Blacks from the "web of information" regarding job opportunities); *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (invalidating as racially discriminatory promotion and transfer procedures that rely on the subjective evaluation of foremen as a "ready mechanism for discrimination"); *Local 53 of Int'l Assoc. of Heat & Front Insulators v. Vogler*, 407 F.2d 1047, 1053-54 (5th Cir. 1969) (invalidating as racially discriminatory a union requirement restricting helpers to sons or close household relatives of a current union member).