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U.S. Lawyers Abroad

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#MeToo - Time for Whistleblower Protections That Work

This article examines the impact of the #MeToo movement in relation to the United Nations and its peacekeeping operations and international institutions in 2018.

I. Introduction

Citizens from around the world were riveted as Dr. Christine Blasey Ford brought #MeToo to the U.S. Senate during the high-profile hearings on the suitability of now-Justice Brett Kavanaugh for appointment to the highest court in the United States. The testimony of Dr. Ford included allegations that she had been sexually assaulted by the nominee. In the legal arena, the exposure of sexual harassment and sexual assault, including unwanted sexual advances in both the federal and state judiciaries, has been a significant recent legal and political development in the United States. But the issue extends beyond U.S. national borders and has also commanded attention within the United Nations (U.N.), including its peacekeeping operations and international institutions.

II. Background

Sexual harassment in the U.S. federal judiciary had surfaced as a pressing issue before the Kavanaugh hearings. In December 2017, Chief Justice John G. Roberts, Jr. of the United States Supreme Court convened a working group following several reports of harassment levied against a prominent federal judge, Alex Kozinski.¹ “The Working Group included in its review

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1. See FED. JUDICARY WORKPLACE CONDUCT WORKING GRP., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE

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the entire federal Judiciary, including judges, court unit executives, managers, supervisors and others serving in supervisory roles, as well as employees, law clerks, interns, externs, and other volunteers.”²

In its *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (“Working Group Report”), issued on June 1, 2018, the Working Group made recommendations designed to ensure a workplace environment that would reduce the prevalence of sexual harassment and sexual assault and provide a healthier environment for those working in courthouses throughout the United States.³

In July 2018, Law Clerks for Workplace Accountability sent a letter of concern to Chief Justice Roberts responding to the Working Group Report. In its letter, the Law Clerks for Workplace Accountability noted that the Working Group’s recommendations did not adequately address retaliation. Both within and outside the legal arena, the lack of protection for those who report sexual assault and harassment often leads to late reporting, non-reporting, ineffective investigation, and ineffective prosecution of perpetrators. This lack of protection was evident during the testimony of Dr. Ford. In its response, the Law Clerks for Workplace Accountability authors urged that the Working Group’s recommendations include a section on “[c]rafting concrete solutions to address the risk of retaliation.”⁴

Specifically, the authors noted:

Possibly the largest barrier to the reporting of harassment is the victim’s fear of retaliation. The [Working Group] Report correctly recognizes this problem, noting that every employee should be able to ‘seek and receive remedial action free from retaliation.’ It also says that retaliation ‘will not be tolerated’ and ‘constitutes misconduct.’ But the Report does not specify how the Judiciary should go about determining whether retaliation has occurred and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending judge. We recommend that the Judicial Conference craft specific proposals to address retaliation. . . .⁵

While this inquiry into the U.S. judiciary was underway, the U.N. announced that “[m]ore than 50 allegations of sexual exploitation and abuse

UNITED STATES 1 (2018), available at https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf; see also Niraj Chokshi, Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations, *The N.Y. Times* (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

2. FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 1, at 3.

3. *Id.* at 5.

4. Memorandum from Law Clerks for Workplace Accountability, Response to the Federal Judiciary Workplace Conduct Working Group’s June 1, 2018, Report, at 10 (July 20, 2018), available at <http://clerkforaccountability.org/response-to-working-group-report?v2>.

5. *Id.* at 15.

involving personnel serving with the United Nations and its partners in the field were received in the first three months” of 2018.⁶

III. The Need for Meaningful Whistleblower Protections—the U.N. Bulletin

While the Working Group Report and the Law Clerks for Judicial Accountability letter touch on this critical issue, fear of retaliation is perhaps the single greatest reason that many people who have experienced sexual harassment or sexual assault begin reporting their experiences by asking that no one be told.

Within the U.N., the Secretary General’s Bulletin, ST/SGB/2017/2/Rev.1, purports to establish whistleblower protections for individuals who report misconduct and or cooperate with investigations into misconduct, and who find themselves subject to retaliation as a result of their reporting or cooperation.⁷ That bulletin begins by obliging U.N. staff members both to report misconduct and to cooperate with investigations, stating: “It is the duty of staff members to report any breach of the Organization’s regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.”⁸

The Bulletin fails, however, to detail that protection does not attach automatically from the moment a staff member reports misconduct or cooperates in an investigation. The U.N. Secretariat’s Ethics Office receives requests for protection from staff members, which means that a staff member must proactively seek protection. Furthermore, protection is not automatically afforded upon the request of a reporter. Rather a staff member only becomes eligible for protection once retaliation has occurred.⁹ Once a staff member is eligible, meaning the staff member believes that retaliation has already taken place, the Ethics Office then undertakes a review of whether there is prima facie evidence that the alleged retaliation has in fact occurred.¹⁰ This shifts the burden to the staff member who is seeking protection. Often, such burden-shifting means that retaliation has already inflicted irreparable harm on the staff member, such as through the

6. UN Affairs, *Combating ‘Scourge’ of Sexual Abuse Allegations Remains ‘Key’ UN Priority, as 54 New Allegations Emerge*, UN NEWS (May 1, 2018), <https://news.un.org/en/story/2018/05/1008712>.

7. U.N. Secretary-General, *Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, ¶¶ 1.1–1.3, U.N. Doc. ST/SGB/2017/2/Rev.1 (Nov. 28, 2017).

8. *Id.* ¶ 1.1.

9. ETHICS OFFICE, *Requesting Protection Against Retaliation*, UNITED NATIONS, <http://www.un.org/en/ethics/retaliation.shtml> (last visited Mar. 30, 2019).

10. UNDP, POLICY FOR PROTECTION AGAINST RETALIATION: FOR REPORTING MISCONDUCT OR COOPERATING WITH A DULY AUTHORIZED AUDIT OR INVESTIGATION ¶¶ 6.4, 6.6 (2015), available at <http://www.undp.org/content/dam/undp/img/corporate/ethics/PaR%202015%20Final.pdf>.

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non-renewal of an employment contract or the loss of a promotion, before any protection attaches. On other occasions, retaliation takes the form of verbal abuse or reputational harm, making it difficult for a staff member to produce prima facie evidence to the Ethics Office. As a result, a staff member reporting misconduct may be left vulnerable to retaliatory acts for a considerable period of time. Victims of sexual harassment by a supervisor, for example, may continue to work under the supervisor for the duration of the underlying misconduct investigation.

Investigations into misconduct take, on average, one to three years, and during that time the reporting staff member may be left without protection. The risk of continuing abuse during that time is high. Additionally, in order to prevail with a complaint of sexual harassment or assault, the evidence must meet the “clear and convincing evidence” standard.¹¹ Most harassment tends to be verbal and occur privately in the absence of witnesses. It is common for victims to fear that they lack sufficient evidence to meet the heightened standard, which leads to underreporting of harassment and assault.¹² In reality, the rules governing retaliation result in a lack of protection for individuals who dutifully report allegations of sexual harassment, sexual assault, sextortion, and like conduct, particularly with respect to superiors.

When the alleged perpetrator of the misconduct serves as a member of the international judiciary, the circumstances are even more difficult for a staff member. Judges are not U.N. staff members but rather hold the status of appointees. Judges are therefore not subject to the U.N.’s internal investigation authority; when a staff member reports an abuse, the Judge is not investigated by the U.N. system. This leaves a staff member without a clear investigative path to follow.

In the rare instance when there is an actual judicial code of conduct, enforcement of that code of conduct is undertaken internally by judicial peers of the internationally-appointed judges.¹³ This is true within the U.N., as U.N. staff members may be subject to U.N. staff rules, but achieving investigation of the alleged misconduct is a challenge, particularly

11. “Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.” *Molari v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 164, ¶ 30, U.N. Doc. AT/OCT/21 (2011); *see also* *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgments U.N. Admin. Trib., No. 040, ¶ 27, U.N. Doc. AT/JULY/1 (2010).

12. Misconduct of this nature may warrant termination and thus in turn requires the heightened standard of “clear and convincing evidence,” whereas other types of misconduct only warrant the “preponderance of evidence” standard. Thus, staff members complaining of sexual harassment must meet a heightened standard of proof when the very nature of such misconduct is often “he said, she said,” done in secrecy, and thus often won’t meet the clear and convincing standard.

13. *See, e.g.*, Code of Judicial Ethics, ICC-BD/02-01-05, at 3 (Sept. 3, 2005), *available at* https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.

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where the reporter bears the burden of establishing a prima facie case. The General Assembly did not adopt a reporting mechanism for complaints against Administration of Justice judges until December 31, 2015.¹⁴ It requires that complaints levied against a Judge be sent to the President Judge. “If the President or receiving judge is of the view that there are sufficient grounds to warrant a formal investigation, he or she shall establish a panel of outside experts to investigate the allegations and report its conclusions and recommendations to the President.”¹⁵ From the establishment of the Administration of Justice in 2009 until the reporting mechanism was adopted in late 2015, there was no clear procedure available to a staff member who had been abused by a judge.

When a staff member reports harassment or assault to a member of the court staff in a U.S. court or to a U.N. staff member, the absence of meaningful and prompt whistleblower protections places the person receiving the report of misconduct in the difficult and compromising position of either maintaining the confidence of the initial reporter or violating that confidence and taking further action. When there is no meaningful protection for the job opportunity of the initial reporter, the consequences for that reporter may be lifelong. For example, where the person reporting the behavior is a law clerk to a judge, the probability of a positive reference for future employment is at risk. Leaving before the end of a clerkship is a significant detriment to future employment. Within the U.N. system, failing to report is sometimes far preferable to being reassigned to work outside the preferred area. When the alleged offender is a U.N. judge, the possibility of any meaningful recourse is virtually non-existent.

Sexual harassment, like sexual assault, is most often found in situations in which the balance of power between the perpetrator and the victim favors the former. When a judge or a superior makes continuous unwanted advances, the person in the subordinate position is already vulnerable—at risk of losing employment, of not being believed, and of long-term professional implications.

For that reason, any plan to change the workplace to ensure reporting of and accountability for misconduct related to sexual assault, sextortion, and sexual harassment requires effective whistleblower protections, which are immediate and do not require the reporter to establish a prima facie case.

In 2018, Secretary General Guterres announced the formation of a “Circle of Leadership” and appointed a Victim Rights Advocate as steps toward affirming the U.N.’s commitment to “zero tolerance” for sexual harassment and sexual assault as a priority this year.¹⁶

14. G.A. Res. 70/112 (XI), at 1, 6 (Dec. 31, 2015).

15. *Id.* ¶ 15.

16. UN NEWS, *Combating ‘Scourge’ of Sexual Abuse Allegations Remains ‘Key’ UN Priority, as 54 New Allegations Emerge*, UN AFFAIRS (May 1, 2018), <https://news.un.org/en/story/2018/05/1008712/>.

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While other measures—such as greater specificity within judicial codes of conduct, independent reporting mechanisms, regular reporting on these issues, and meaningful discipline for those perpetrators found to have committed the misconduct—are also needed, an important first step is meaningful whistleblower protections that make it safe to report the misconduct and ensure that the allegations will be investigated.

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