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## Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harrassment Law

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# Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law

Kate Webber Nuñez\*

## ABSTRACT

Fox News has been disrupted by a series of sexual harassment scandals that caused the departure of some of its top executives and anchors. The upheaval at Fox News came from public disclosure and social pressure after the actual laws prohibiting harassment failed to deter or stop the rampant abuse at the network. Legal scholars have previously identified the problems with federal harassment law that could explain why widespread sexual harassment occurred at the highest levels of Fox News. Specifically, the existing literature details how women are forced to report harassment nearly immediately, despite the many career-related reasons not to, and yet they are not fully protected against retaliation when they do report the harassment. Scholars have also documented that if a victim's claims do make it to court, the standard for proving harassment is a nearly insurmountable burden to overcome. These identified weaknesses in the law would seem to explain why the law failed to act as a stronger deterrent to Fox News. Fox News, however, is headquartered in New York City, which has a more strongly worded local anti-harassment law: the New York City Human Rights Law. This law removes each of the identified problems in federal harassment law. The example of Fox News therefore demonstrates that, with entrenched harassing cultures, stronger anti-discrimination statutes that "fix" the identified weaknesses of current law are not enough. This article explains and advocates for two alternative means of strengthening harassment law: expanded use of systemic harassment claims and limits on the use of confidential settlements and mandatory arbitration agreements.

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### I. INTRODUCTION

I knew the reality of the situation: if I caused a stink, my career would likely be over. Sure they might investigate, but I felt certain there was no way they would get rid of him, and I would be left on the wrong side of the one man who had power at Fox. I'd get labeled a troublemaker, someone who is overly sensitive—all the things we too often hear

about women who don't tolerate harassment. I didn't want any of that. I just wanted to do my job.<sup>1</sup>

In the last year, dozens of women at Fox News, a popular television news network, (Fox News or “the network”) have reported their experiences of sexual harassment at the network.<sup>2</sup> The culprits include some of the network's most prominent executives and stars, such as Roger Ailes and Bill O'Reilly, and a number of the accusers are high-profile anchors, including Gretchen Carlson, Megyn Kelly, and Alisyn Camerota.<sup>3</sup> After significant negative press coverage, Fox News was forced to hire outside investigators and, ultimately, fire many of the accused, costing the network over \$80 million in pay-outs to the departing executives and settlements to the targets of the executives' harassment.<sup>4</sup> Despite these dramatic outcomes, the sexual harassment of many women at Fox News, for such a long period of time, demonstrates a serious failure of the law. The legal prohibitions against sexual harassment in the workplace did not deter Fox News from turning a blind eye to rampant harassment for years. This article seeks to explain this failure of the law and offer a prescription for more effective legal incentives to deter even recalcitrant companies such as Fox News.

Scholars have previously offered detailed analyses of the problems with sexual harassment law;<sup>5</sup> however, these existing critiques fail to fully explain the events at Fox News. According to these analyses, the federal law prohibiting sexual harassment, Title VII of the Civil Rights Act of 1964 (Title VII),<sup>6</sup> encourages superficial compliance with the law

1. MEGYN KELLY, SETTLE FOR MORE 302 (2016) (describing Kelly's decision not to pursue formal action in response to Roger Ailes's sexual harassment).

2. See, e.g., Michael M. Grynbaum & John Koblin, *Anchor Ousted at Fox News Accuses Chief of Harassment*, N.Y. TIMES, July 7, 2016, at A1; Jim Rutenberg & Ben Protess, *Fox News Harassment Inquiry Is Said to Look at What Others Knew*, N.Y. TIMES, Aug. 4, 2016, at B1; Emily Steel & Michael Schmidt, *Fox News Ousts O'Reilly, A Host Central to Its Rise*, N.Y. TIMES, Apr. 20, 2017, at A1.

3. See KELLY, *supra* note 1, at 302; Grynbaum & Koblin, *supra* note 2, at A1; Liam Stack, *Another Ex-Anchor Accuses Ailes of Harassment*, N.Y. TIMES, Apr. 24, 2017, at B5; Steel & Schmidt, *supra* note 2, at A1.

4. See Michael M. Grynbaum & John Koblin, *Fox Settles Sex Harassment Suit as Another Host Abruptly Exits*, N.Y. TIMES, Sept. 7, 2016, at A1; John Koblin, Emily Steel & Jim Rutenberg, *As Accusations Build, Murdoch Ushers Ailes Out at Fox News*, N.Y. TIMES, July 22, 2016, at A1; Rutenberg & Protess, *supra* note 2, at B1; Emily Steel & Michael Schmidt, *O'Reilly Thrives as Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017, at A1 [hereinafter Steel & Schmidt, *O'Reilly Thrives*]; Emily Steel & Michael Schmidt, *O'Reilly May Cost Fox \$25 Million*, N.Y. TIMES, Apr. 21, 2017, at B1 [hereinafter Steel & Schmidt, *O'Reilly May Cost*].

5. See, e.g., 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, 49–64 (2003).

6. 42 U.S.C. § 2000e-2 (2012).

without actually stopping or punishing harassment; makes it too difficult for harassed employees to prove their claims; and fails to adequately protect employees who report harassment.<sup>7</sup> If Title VII were the only law applicable to sexual harassment cases at Fox News, the previously-identified weaknesses of Title VII could have explained why harassment law failed to deter harassment at Fox News. Fox News, however, is located in New York City and is therefore also governed by a far more liberal law prohibiting harassment in the workplace, the New York City Human Rights Law (NYCHRL).<sup>8</sup> The NYCHRL removes the problematic aspects of Title VII:<sup>9</sup> it has no defenses encouraging superficial compliance; has a significantly less stringent standard for proving harassment; and offers greater protection against retaliation.<sup>10</sup> Nonetheless, this stronger law failed to deter decades-long harassment of female employees by the highest-level executives at Fox News. The events at Fox News therefore suggest the importance of re-examining the existing critiques of harassment law to identify reforms beyond merely strengthening a plaintiff's individual claims as the NYCHRL has done.

This article delves into the legal and sociological literature on sexual harassment to analyze the interaction between the law and the harassing culture of Fox News. This analysis reveals that although bolstering individual claims with laws like the NYCHRL may be part of the solution to sexual harassment in the workplace, broader reform is required, particularly for companies with negative corporate cultures such as Fox News.<sup>11</sup> Specifically, this article embraces the proposed solution of systemic theories of relief, using the example of Fox News to highlight how this approach is effective.<sup>12</sup> Second, this article details the role of confidential settlements and arbitration in perpetuating the harassing culture at Fox News and explores multiple avenues for remedying this problem.<sup>13</sup>

Part II sets out the events at Fox News, beginning with Gretchen Carlson, whose case acted as a catalyst to a series of sexual harassment claims at the network. Part III explores the existing critiques of sexual

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7. See *infra* Part III.

8. N.Y.C., N.Y., ADMIN. CODE § 8-107 (2017); see *Hoffman v. Parade Publ'ns*, 933 N.E.2d 744, 745–47 (N.Y. 2010) (finding that the NYCHRL applies as long as the alleged discriminatory conduct had an impact within the boundaries of New York City); *Corporate Information*, FOX NEWS, <http://press.foxnews.com/corporate-info/> (last visited June 26, 2017) (identifying New York City as the headquarters for Fox News).

9. See *infra* Part IV.

10. See *infra* Sections IV.B–D.

11. See Jim Rutenberg, Emily Steel & John Koblin, *Kisses and Fear for the Women From Fox News*, N.Y. TIMES, July 24, 2016, at A1; see also *infra* Part V.

12. See *infra* Section V.A.

13. See *infra* Section V.B.

harassment law. Part IV details the provisions of the NYCHRL and how these statutory prohibitions actually address the identified weaknesses set forth in Part III. Part V draws conclusions and makes suggestions to address the fact that a stronger statute failed to incentivize Fox News's compliance with anti-harassment law.

## II. BACKGROUND: RAMPANT SEXUAL HARASSMENT BY HIGH-LEVEL EXECUTIVES AT FOX NEWS

Since August 2016, dozens of women have reported that they were sexually harassed by Roger Ailes, former Chairman and CEO of Fox News, and Bill O'Reilly, former top celebrity anchor at the network.<sup>14</sup> The women reported that this harassment occurred for over a decade.<sup>15</sup> As the press reported these cases of harassment, it became clear that Fox News had completely failed to stop the abuse.<sup>16</sup> Instead, Fox News settled case after case, generally hiding the harassment problem behind confidential settlements and arbitration.<sup>17</sup> The cascading disclosures ultimately led to the departure of Ailes, O'Reilly, and most recently, Bill Shine, a network executive who was not accused of harassment himself, but rather was implicated in the long-standing cover-up.<sup>18</sup> These dramatic events all began with a lawsuit by Gretchen Carlson, a former anchor at the network.<sup>19</sup>

Gretchen Carlson joined Fox News in 2005.<sup>20</sup> A former Miss America, accomplished violinist, and graduate of Stanford University, Carlson had previously worked as co-host for *The Saturday Early Show* on CBS News.<sup>21</sup> From 2006 to 2013, she appeared as a co-host of the *Fox & Friends* morning show, a number-one-ranked cable news program.<sup>22</sup> During her tenure on this program, Carlson alleges she

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14. See Grynbaum & Koblin, *supra* note 2, at A1; Rutenberg & Protes, *supra* note 2, at B1; Steel & Schmidt, *supra* note 2, at A1.

15. See John Koblin, *Former Anchor Speaks Out About Harassment Suit*, N.Y. TIMES, July 13, 2016, at B1; Emily Steel & Michael Schmidt, *Fox News Paid O'Reilly Accuser to Keep Quiet*, N.Y. TIMES, Jan. 11, 2017, at A1.

16. See Koblin, *supra* note 15, at B1; Steel & Schmidt, *supra* note 15, at A1.

17. Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

18. See Michael M. Grynbaum & Emily Steel, *Fox News, Pledging New Culture, Ousts Another Symbol of Old One*, N.Y. TIMES, May 2, 2017, at A1; Koblin, Steel & Rutenberg, *supra* note 4, at A1; Steel & Schmidt, *supra* note 2, at A1.

19. See Kelly Couturier, *The Nine and a Half Months That Shook Fox News*, N.Y. TIMES, Apr. 20, 2017, at B6.

20. Complaint and Jury Demand at para. 8, *Carlson v. Ailes*, No. L00501616 (N.J. Super. Ct. Law. Div. July 6, 2016).

21. *Id.*; *About Gretchen Carlson*, GRETCHEN CARLSON, <https://www.gretchen-carlson.com/about> (last visited Aug. 1, 2017).

22. Complaint and Jury Demand, *supra* note 20, at para. 10; Koblin, *supra* note 15, at B1; *About Gretchen Carlson*, *supra* note 21.

experienced sexist and condescending behavior by her co-host, Steve Doocy, including him pulling her arm down on live television in order to quiet her.<sup>23</sup> Carlson complained to her supervisor about Doocy's behavior in September 2009.<sup>24</sup>

In response to this complaint, Carlson alleged that Ailes called her a "man hater" and "killer" who "needed to learn to 'get along with the boys.'"<sup>25</sup> Carlson further alleged that Ailes retaliated against her for reporting Doocy's conduct by, among other consequences, assigning her fewer interviews, ending her regular appearances on *The O'Reilly Factor*, and failing to showcase her to the public.<sup>26</sup> According to Carlson, Ailes's retaliatory conduct toward Carlson culminated in Ailes removing Carlson from the *Fox & Friends* program altogether and re-assigning her to an afternoon time slot, a less desirable position, as well as reducing her compensation.<sup>27</sup>

Carlson further alleged that, in addition to retaliating against her for the 2009 Doocy complaint, Ailes affirmatively contributed to a harassing, hostile work environment through his own comments, innuendos, and sexual advances.<sup>28</sup> As her Complaint filed in 2016 in New Jersey Superior Court ("2016 Complaint") alleged, Ailes's conduct included:

- a. Claiming that Carlson saw everything as if it "only rains on women" and admonishing her to stop worrying about being treated equally and getting "offended so God damn easy about everything."
- b. Describing Carlson as a "man hater" and "killer" who tried to "show up the boys" on *Fox & Friends*.
- c. Ogling Carlson in his office and asking her to turn around so he could view her posterior.
- d. Commenting that certain outfits enhanced Carlson's figure and urging her to wear them every day.
- e. Commenting repeatedly about Carlson's legs.
- f. Lamenting that marriage was "boring," "hard[,] and "not much fun."
- g. Wondering aloud how anyone could be married to Carlson, while making sexual advances by various means, including by stating that if he could choose one person to be stranded with on a desert island, she would be that person.

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23. Complaint and Jury Demand, *supra* note 20, at para. 11; Koblin, *supra* note 15, at B1.

24. Complaint and Jury Demand, *supra* note 20, at para. 11.

25. *Id.* at para. 13.

26. *Id.* at para. 14.

27. *Id.* at paras. 16–17.

28. *See id.* at paras. 20–22.

- h. Stating “I’m sure you [Carlson] can do sweet nothings when you want to.”
- i. Asking Carlson how she felt about him, followed by: “Do you understand what I’m saying to you?”
- j. Boasting to other attendees (at an event where Carlson walked over to greet him) that he always stays seated when a woman walks over to him so she has to “bend over” to say hello.
- k. Embarrassing Carlson by stating to others in her presence that he had “slept” with three former Miss Americas but not with her.
- l. Telling Carlson that she was “sexy,” but “too much hard work.”<sup>29</sup>

According to her 2016 Complaint, in September 2015, Carlson met with Ailes to seek an end to the retaliation and discrimination she had been experiencing.<sup>30</sup> Carlson alleged that during this meeting, Ailes stated: “I think you and I should have had a sexual relationship a long time ago and then you’d be good and better and I’d be good and better’ . . . ‘sometimes problems are easier to solve’ that way.”<sup>31</sup> On June 23, 2016, Fox News refused to renew Carlson’s contract, which she alleged was the capstone retaliatory act after a string of repercussions she suffered due to her initial and subsequent complaints of harassment.<sup>32</sup> On July 6, 2016, Carlson filed the 2016 Complaint, initiating a lawsuit against Ailes individually and asserting claims of harassment and retaliation under the NYCHRL.<sup>33</sup> In an unusual move, Carlson did not sue under the federal anti-discrimination law, Title VII, and did not sue her employer, Fox News.<sup>34</sup> It is likely that Carlson took this step because Carlson had an agreement with Fox News that required mandatory, confidential arbitration of any claims against the network.<sup>35</sup> Ailes

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29. *Id.* at para. 20 (second alteration in original) (emphasis added).

30. *Id.* at para. 21.

31. *Id.* at para. 22.

32. *Id.* at para. 25.

33. *Id.* at para. 4.

34. See Plaintiff’s Brief in Opposition to Defendant’s Motion to Compel Arbitration and Stay Judicial Proceedings at 1, *Carlson v. Ailes*, No. 2:16-cv-04138 (D.N.J. July 15, 2016) [hereinafter Plaintiff’s Brief]; Complaint and Jury Demand, *supra* note 20, at para. 4; John Koblin, *Lawyers for Fox News Chairman Want Harassment Suit in Arbitration*, N.Y. TIMES, July 9, 2016, at B6.

35. The employment agreement between Carlson and Fox News states in relevant part:

Any controversy, claim or dispute arising out of or relating to this Agreement or Performer’s employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association then in effect. . . . Such arbitration, all filing, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.



attempted to compel arbitration of the individual case against him, but, because the parties settled the case, the courts never decided the issue.<sup>36</sup>

While Ailes denied the harassment allegations in the 2016 Complaint, Fox News announced it would conduct an internal review, ultimately hiring an outside law firm to investigate.<sup>37</sup> As the investigation proceeded, nearly 20 women reported inappropriate behavior by Ailes, including Fox News star anchor Megyn Kelly, who reported that Ailes had made advances toward her on multiple occasions.<sup>38</sup> Later, Fox News and Ailes negotiated his departure from the company, with Ailes receiving a \$40 million payout as part of the agreement.<sup>39</sup> Soon thereafter, Fox News paid Carlson \$20 million to settle her 2016 case against Ailes individually.<sup>40</sup>

Not long after Carlson filed the 2016 Complaint, another former Fox News host, Andrea Tantaros, filed a complaint in New York state court similarly alleging that Ailes sexually harassed her and that network

Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Exhibit A at 7, *Carlson v. Ailes*, No. 2:16-cv-04138 (D.N.J. July 8, 2016).

36. See generally Order Voluntarily Dismissing Case with Prejudice, *Carlson v. Ailes*, No. 2:16-cv-04138 (D.N.J. Sept. 6, 2016); Notice of Voluntary Dismissal, *Ailes v. Carlson*, No. 1:16-cv-05671 (S.D.N.Y. Aug. 12, 2016); Petition to Compel Arbitration Pursuant to Section 4 of the Federal Arbitration Act, *Ailes v. Carlson*, No. 1:16-cv-05671 (S.D.N.Y. July 15, 2016); Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, *Carlson v. Ailes*, No. 2:16-cv-04138 (D.N.J. July 8, 2016).

37. Koblin, *supra* note 15, at B1; Koblin, *supra* note 34, at B6.

38. See Michael M. Grynbaum, Emily Steel & Sydney Ember, *The Drumbeat of Harassment Allegations at Fox News Is Not Fading*, N.Y. TIMES, Aug. 11, 2016, at B1; Rutenberg & Protess, *supra* note 2, at B1. Carlson's case created a rift among Fox News journalists, with some publicly defending Ailes, and others, including top star Megyn Kelly, confirming similar conduct by Ailes towards them. See Grynbaum, Steel & Ember, *supra*, at B1; John Koblin & Jim Rutenberg, *Ailes in Talks to Step Down at Fox News*, N.Y. TIMES, July 20, 2016, at A1; Koblin, Steel & Rutenberg, *supra* note 4, at A1. According to a *New York Times* article:

Ms. Kelly told investigators that she received repeated, unwanted advances from Mr. Ailes, which she rejected, according to two people briefed on her account. The entreaties, which happened in the early part of her career at Fox, bothered Ms. Kelly to the point that she retained a lawyer because she worried that her rejections would jeopardize her job, though they ultimately did not.

Koblin, Steel & Rutenberg, *supra* note 4, at A1. Not only did the investigation reveal a pattern of harassment by Ailes, but Fox News also learned that Ailes was encouraging some of his on-air stars to criticize those who cooperated with the internal investigation. See *id.* ("Several female staff members . . . feared that campaign was making younger female staff members with their own stories to tell too frightened to speak with investigators . . .") As a result, Fox News banned Ailes from the main building. *Id.*

39. See *id.* Ailes went on to become an advisor to the 2016 presidential campaign of Donald Trump. See Emily Steel, *Ailes's Rise and Fall*, N.Y. TIMES, May 19, 2017, at B1. Ailes passed away on May 18, 2017. Clyde Haberman, *Ailes Turned Rage Into a News Empire*, N.Y. TIMES, May 19, 2017, at A1.

40. Grynbaum & Koblin, *supra* note 4, at A1.

executives retaliated against her when she complained of the harassment.<sup>41</sup> According to Tantaros, Fox News “operates like a sex-fueled, Playboy Mansion-like cult, steeped in intimidation, indecency, and misogyny.”<sup>42</sup> She alleged that on two occasions, Ailes asked Tantaros to “turn around so I can get a good look at you” and that these requests from Ailes were so common they had a name at the network—“the twirl.”<sup>43</sup> Ailes also commented the following to Tantaros: “I bet you look good in a bikini” and “come over here so I can give you a hug.”<sup>44</sup> Tantaros further alleged that Ailes made inappropriate comments to her about other Fox News employees, their relationships, and their sexuality.<sup>45</sup>

Tantaros alleged that after she rebuffed Ailes, he retaliated against her by moving her from her position as the host of a popular evening program to a daytime “graveyard” timeslot and by failing to promote or announce the move.<sup>46</sup> Fox News media relations personnel also allegedly retaliated against Tantaros by failing to provide media support, denying interview requests, crafting and spreading false and negative stories about Tantaros, and posting negative social media comments about Tantaros using fake accounts.<sup>47</sup> According to Tantaros’s complaint, when she complained of the harassment and retaliation to Shine, he warned her that Ailes was a “very powerful man” and Tantaros “needed to let this one go.”<sup>48</sup> Fox News eventually fired Tantaros for purportedly writing a book in violation of her contract with the company.<sup>49</sup> Tantaros’s complaint alleged that the asserted basis for her termination was a mere pretext, and her termination was instead a retaliatory response to her complaints of harassment.<sup>50</sup> According to news reports, Tantaros turned down a settlement offer in excess of a million dollars to keep her claims quiet.<sup>51</sup> Instead, Tantaros filed her complaint in New York state court alleging state and city law claims against Fox News and a number of

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41. Complaint at paras. 87, 95, *Tantaros v. Fox News Network, LLC*, No. 157054/2016 (N.Y. Sup. Ct. Aug. 22, 2016).

42. *Id.* at para. 2.

43. *Id.* at para. 5(a).

44. *Id.* at para. 5(b)–(c).

45. *See id.* at para. 5(d)–(e).

46. *Id.* at para. 6(a).

47. *See id.* at para. 6(b)(i)–(ii), 6(b)(v)–(vi).

48. *Id.* at para. 7.

49. *See* John Koblin, *Fox Wants Harassment Suit by Host Sent to Arbitration*, N.Y. TIMES, Aug. 30, 2016, at B4.

50. *See* Complaint, *supra* note 41, at para. 8.

51. *See* Jim Dwyer, *Ex-Host Charges Fox News with Retaliation for Harassment Complaints*, N.Y. TIMES, Aug. 23, 2016, at B3; Steel & Schmidt, *supra* note 15, at A1.

executives individually, including Ailes.<sup>52</sup> The defendants, however, successfully moved to compel confidential arbitration.<sup>53</sup>

Since the Carlson and Tantaros suits, additional women have come forward, whether in news reports or legal complaints, to accuse Ailes of harassment.<sup>54</sup> For example, Alisyn Camerota, a former Fox News anchor and current CNN star, confirmed that she too had suffered sexual harassment by Ailes.<sup>55</sup> Camerota alleges that in response to her request for more opportunities, Ailes suggested that they spend more time together at a hotel.<sup>56</sup> Moreover, although she did not speak publicly when Carlson first sued, in her later-published book, Megyn Kelly shared some of the ways that Ailes harassed her, including making physical advances and using explicit sexual innuendo.<sup>57</sup> In addition to Camerota and Kelly, reporter Lidia Curanaj sued Fox News's parent company and other defendants, alleging Ailes harassed her when she applied for a job at Fox News.<sup>58</sup> She alleged that during an interview, Ailes asked her "to stand up and 'turn around' so he could 'see [her] from behind.'"<sup>59</sup> Ailes also allegedly asked one of Curanaj's male friends whether she "put out" sexually and asked, "[H]ow's the sex?"<sup>60</sup> Further, Curanaj alleged that upon learning that Curanaj was a "very nice girl" who would not provide sexual favors, Ailes refused to hire her.<sup>61</sup>

Similarly, a former booker at Fox News, Laurie Luhn, described the "psychological torture" she experienced due to harassment by Ailes.<sup>62</sup> Another Fox News employee, Julie Roginsky, also filed a complaint alleging that Ailes harassed her and that when she complained to Shine, he denied her a promotion in retaliation.<sup>63</sup> Overall, Fox News has

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52. See Complaint, *supra* note 41, paras. 75–105.

53. See Order on Motion to Compel Arbitration, *Tantaros v. Fox News Network, LLC*, No. 157054/2016 (N.Y. Sup. Ct. Feb. 15, 2017). Despite the ongoing arbitration, Tantaros subsequently filed a different lawsuit against Fox News and the same individual defendants, alleging violations of the federal Electronic Communications Privacy Act. See Complaint at paras. 10, 92, *Tantaros v. Fox News Network, LLC*, No. 1:17-cv-02958-JGK (S.D.N.Y. Apr. 25, 2017). This action alleges that the defendants hacked and illegally surveilled her phone and computer, then used that content to taunt Tantaros in negative social media comments posted through fake accounts. See *id.*

54. See, e.g., Rutenberg & Protess, *supra* note 2, at B1.

55. See Stack, *supra* note 3, at B5.

56. See *id.*

57. See KELLY, *supra* note 1, at 300.

58. See generally Complaint, *Curanaj v. Twenty-First Century Fox, Inc.*, No. 1:16-cv-09608 (S.D.N.Y. Dec. 13, 2016).

59. *Id.* at para. 28 (alteration in original).

60. *Id.* at paras. 33–34.

61. *Id.* at para. 35.

62. Rutenberg & Protess, *supra* note 2, at B1.

63. See generally Complaint, *Roginsky v. Fox News Network LLC*, No. 153065/2017 (N.Y. Sup. Ct. Apr. 3, 2017).

reportedly reached settlements with at least six women who accused Ailes of sexual harassment.<sup>64</sup>

As Ailes's harassing conduct came to light, another former Fox News journalist, Rudi Bakhtiar, also came forward to report that former Fox News host Brian Wilson had made sexual advances toward her.<sup>65</sup> Echoing the allegations against Ailes, Bakhtiar alleged that when she rebuffed Wilson's advances, she was ostracized and eventually forced out of the network.<sup>66</sup> According to Bakhtiar, she was fired a few weeks after she reported the harassing conduct to human resources.<sup>67</sup>

In April 2017, the culture of harassment at Fox News again became a topic of considerable media coverage and public interest when *The New York Times* revealed that Fox News had paid approximately \$13 million to settle claims that O'Reilly had sexually harassed five women.<sup>68</sup> As an example, Fox News paid approximately \$9 million to Andrea Mackris to settle her 2004 sexual harassment lawsuit against O'Reilly.<sup>69</sup> News reports have recently revealed that in January 2017, Fox News paid \$32 million to settle sexual harassment claims against O'Reilly brought by Fox News analyst Lis Wiehl.<sup>70</sup> According to the news reports, O'Reilly's behavior included unwanted advances, lewd comments, verbal abuse, and phone calls during which O'Reilly appeared to be masturbating.<sup>71</sup> In addition to the women who received settlement payments, other women have publicly reported O'Reilly's harassing behavior.<sup>72</sup> For example, frequent Fox News contributor Wendy Walsh reported that when she refused his sexual advances, O'Reilly failed to follow through on a verbal offer of a position at the network.<sup>73</sup> Tantaros's sexual harassment complaint against Fox News also alleged harassing conduct by O'Reilly.<sup>74</sup> She alleged that in early

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64. See Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

65. See Rutenberg, Steel & Koblin, *supra* note 11, at A1.

66. See *id.*

67. See *id.* ("Once they got my H.R. statement, I was finished, finished . . .").

68. Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

69. See *id.* Mackris was a producer on O'Reilly's show who alleged that O'Reilly made explicit comments to her and threatened to make her "pay so dearly that [she would] wish she'd never been born" if she told anyone about his conduct. *Id.* O'Reilly attacked Mackris in response to her allegations, filing suit against her, alleging extortion, and using a private investigator to find damaging information. *Id.* The case received extensive press coverage before settlement. *Id.*

70. Emily Steel & Michael S. Schmidt, *O'Reilly Settled Claim, Then Got a New Fox Deal*, N.Y. TIMES, Oct. 22, 2017, at A1.

71. See *id.*

72. See Complaint, *supra* note 41, at para. 54; Steel & Schmidt, *supra* note 70, at A1.

73. See Steel & Schmidt, *supra* note 70, at A1.

74. See Complaint, *supra* note 41, at para. 54.

2016, O'Reilly invited her to stay with him in Long Island where they could have privacy, and that he saw her as a "wild girl."<sup>75</sup>

In January 2017, just weeks after settling three sexual harassment claims against him, including the \$32 million settlement with Wiehl, Fox News decided to renew O'Reilly's contract with the network, contradicting the network's assertion in response to the Ailes controversy that it would not tolerate harassing behavior.<sup>76</sup> In April 2017, after *The New York Times* publicized the fact that Fox News was spending millions of dollars to settle claims against O'Reilly, there were calls for Fox News to terminate O'Reilly from the network.<sup>77</sup> The public outcry led advertisers to withdraw their sponsorships during O'Reilly's program.<sup>78</sup> After this public pressure, Fox News finally conducted an internal inquiry and found that O'Reilly had harassed a number of women at the network.<sup>79</sup> Fox News's parent company's stock dropped six percent<sup>80</sup> and the United States Attorney's Office in New York City reportedly began an investigation into whether the company misled investors by failing to report these settlements.<sup>81</sup> It was only after these events that the Fox News leadership decided to terminate O'Reilly's relationship with the company on April 19, 2017.<sup>82</sup> On May 1, 2017, Fox News also removed Shine, a defendant in some of the lawsuits,<sup>83</sup> who allegedly retaliated against women complaining of harassment or otherwise acted to cover up the misconduct.<sup>84</sup>

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75. *Id.*

76. Emily Steel & Michael Schmidt, *O'Reilly May Cost Fox \$25 Million*, N.Y. TIMES, April 21, 2017, at B1; Emily Steel & Michael S. Schmidt, *O'Reilly Settled Claim, Then Got a New Fox Deal*, N.Y. TIMES, Oct. 21, 2017, at A1.

77. See Steel & Schmidt, *supra* note 2, at A1.

78. See *id.*

79. See *id.*

80. Bruce Headlam, *Bill O'Reilly and the Upside of Corporate Cowardice*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/opinion/bill-oreilly-and-the-upside-of-corporate-cowardice.html>.

81. See Emily Steel & John Koblin, *Lawyer Says Fox News Is Under Investigation*, N.Y. TIMES, Feb. 16, 2017, at B5.

82. See Steel & Schmidt, *supra* note 2, at A1.

83. See, e.g., Complaint, *supra* note 41, at para. 7.

84. *Id.* at para. 7; see also Grynbaum & Steel, *supra* note 18, at A1. Other women have filed lawsuits against Fox News alleging various types of discrimination. On May 1, 2017, Diana Falzone, a reporter at Fox News, filed a state suit, alleging that the network discriminated against her by "barr[ing] her from further appearances, after writing an op-ed column for Fox News disclosing that she had endometriosis and was likely to be infertile." Jonah Engel Bromwich, *Citing Bias, Contributor To Fox News Files Lawsuit*, N.Y. TIMES, May 2, 2017, at B2. Her suit asserts that male colleagues who "discussed their personal health issues on air" were not banned from on-air appearances. *Id.* In March 2017, two black Fox News employees filed a state lawsuit alleging they were subjected to racial harassment in the payroll department. See Niraj Chokshi, *Two Black Women Sue Fox News, Claiming Racial Discrimination*, N.Y. TIMES, Mar. 29, 2017, at B4. Fox News has disciplined other high-profile offenders such as longtime anchor Eric

Overall, the combination of Fox News's popularity and the high-profile people involved led to significant press coverage of the harassment allegations, with investigative reporting bringing to light a long history of harassment and corporate cover-up. This press coverage in turn led to significant pressure on Fox News and its parent company from the public, advertisers, and stockholders. These non-legal forces finally caused the network to fire the perpetrators of harassment, an outcome the law had failed to provide despite harassment claims that persisted for many years. After these terminations, an important question remains: why did it take this public outcry to stop harassment already prohibited by law?

### III. EXPLAINING FOX NEWS: THE STANDARDS AND DEFENSES CRITIQUE OF TITLE VII

An established body of scholarship that identifies how Title VII, the federal law prohibiting sexual harassment, fails to deter sexual harassment seems to answer the aforementioned question. According to this critique, the Title VII standards for proving sexual harassment, the available employer defenses, and the interrelated standards for retaliation all combine to deny victims effective relief and to fail to deter workplace harassment.<sup>85</sup> This "standards and defenses critique" explains many of the events at Fox News. What is less clear, however, is whether simply removing these problematic standards by amending Title VII would alleviate the problem of entrenched cultures of harassment.

#### A. Federal Law Prohibiting Sexual Harassment

Title VII prohibits discrimination in employment on the basis of race, color, sex, national origin, or religion.<sup>86</sup> The United States Supreme Court has concluded that discrimination under Title VII includes

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Bolling whom the network dismissed in September 2017 in light of accusations that he sent lewd photographs to female co-workers. See Emily Steel, *Bolling Out At Fox News After Inquiry on Messages*, N.Y. TIMES, Sept. 9, 2017, at B3. A Fox News subsidiary suspended anchor Charles Payne in light of claims he engaged in misconduct toward a former contributor with whom he had an extramarital affair. See Emily Steel, *Fox Network Suspends Anchor Amid Inquiry Into Conduct*, N.Y. TIMES, July 7, 2017, at B4. A sister company of Fox News, Fox Sports, fired host Jamie Horowitz in light of sexual harassment allegations. Kevin Draper, *The Rise and Sudden Fall Of a TV Sports Mastermind*, N.Y. TIMES, July 7, 2017, at B8.

85. See, e.g., SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW COURTS UNDERMINE DISCRIMINATION LAW 32–40 (2017); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 915 (2008); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700–06 (2000).

86. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

harassment on the basis of these protected characteristics, such as sexual harassment.<sup>87</sup> Quid pro quo sexual harassment occurs when a superior conditions employment benefits on submission to sexual requests or punishes an employee for refusing those advances.<sup>88</sup> Hostile work environment harassment occurs when an employee experiences extensive sex-based, and often prurient, mistreatment.<sup>89</sup> To establish actionable sexual harassment under Title VII, a plaintiff-employee must show that (1) the employee experienced harassing conduct based on sex that was sufficiently severe or pervasive so as to create an abusive environment or alter the conditions of employment; (2) the conduct was objectively offensive to a reasonable employee under the circumstances; and (3) the conduct was subjectively offensive.<sup>90</sup>

Under Title VII, the plaintiff-employee cannot sue the harasser individually, but may only sue the employer.<sup>91</sup> In quid pro quo harassment, the employer is automatically liable for the harassing employee's conduct so long as the coercive exchange involved a "tangible employment action," such as a supervisor refusing to promote an employee who rejected the supervisor's sexual advances.<sup>92</sup> However, the employer is only liable for hostile work environment harassment under certain specific circumstances.<sup>93</sup> For example, if the harasser is a co-worker, the plaintiff-employee must show that the employer knew or should have known of the harassment and failed to respond.<sup>94</sup> If the harasser is a supervisor, the employer is automatically vicariously liable for the harasser's conduct, but may assert the affirmative defense established by Supreme Court precedent in *Burlington Industries, Inc. v. Ellerth*<sup>95</sup> and *Faragher v. City of Boca Raton*<sup>96</sup> (the *Faragher-Ellerth* defense).<sup>97</sup>

To assert the *Faragher-Ellerth* defense, the employer must show that (1) it took appropriate internal efforts to prevent and address harassment and (2) the employee unreasonably failed to take advantage

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87. *E.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64–65 (1986).

88. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998).

89. *See id.*; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

90. *E.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

91. 42 U.S.C. § 2000e-2; *see, e.g.*, *Fantini v. Salem State Coll.*, 557 F.3d 22, 31 (1st Cir. 2009); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077–78 (3d Cir. 1996).

92. *Burlington*, 524 U.S. at 762–63.

93. *See id.* at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

94. *See* 29 C.F.R. § 1604.11(d) (2017); *Faragher*, 524 U.S. at 799.

95. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

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

97. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

of these internal avenues.<sup>98</sup> Employers typically meet this first prong by implementing anti-discrimination policies, providing training, and creating avenues for reporting the wrongdoing.<sup>99</sup> The second prong is typically met if the employee fails to avail himself or herself of these avenues, or fails to do so in a sufficient manner.<sup>100</sup> If the employer meets the elements of this defense, the employer's damages will be mitigated, or, most commonly, the employer will avoid liability altogether, no matter how extensive or harmful the harassment.<sup>101</sup> An employer's efforts to meet the first part of the *Faragher-Ellerth* defense are doubly useful under Title VII because an employer can avoid punitive damages if it demonstrates good-faith efforts to comply with Title VII, including by implementing the same policies that are relevant to the *Faragher-Ellerth* defense.<sup>102</sup>

### B. *The Law Requires Nearly Immediate Reporting of Harassment Without Protection from Retaliation*

According to the standards and defenses critique of Title VII, employees who are harassed at work, particularly women harassed by their superiors, are placed in an economic and legal bind.<sup>103</sup> To survive in the workplace, many employees must rely on the goodwill, mentoring, and informal support of their colleagues and superiors. Reporting harassment can risk destroying these crucial informal networks for success.<sup>104</sup> The law regarding sexual harassment, however, leaves no room for this reality; to the contrary, it punishes victims of harassment when they try to avoid career-devastating retaliation.<sup>105</sup>

#### 1. Refraining from Complaints for Good Reason

Research demonstrates that the majority of employees who experience harassment in the workplace fail to use internal mechanisms

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98. See *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

99. See Grossman, *supra* note 85, at 696 (citing 29 C.F.R. § 1604.11(f); *Faragher*, 524 U.S. at 807; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986)).

100. See *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

101. See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013) (finding that this defense may "mitigate or avoid liability" for an employer); Grossman, *supra* note 85, at 708–10 (arguing that the defense is properly applied to mitigate damages and to avoid liability only in limited circumstances, but noting that numerous courts have used *Faragher-Ellerth* to grant summary judgment for the employer).

102. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545–46 (1999).

103. See *infra* Section III.B.1.

104. See *infra* Section III.B.1.

105. See *infra* Section III.B.2.



to report the misconduct.<sup>106</sup> In one study, the common responses to harassment included: enduring the conduct, denying its occurrence, avoiding the harasser, and blaming oneself.<sup>107</sup> Furthermore, “[t]he most infrequent response ‘[was] to seek institutional/organizational relief. Victims apparently turn to such strategies as a last resort when all other efforts have failed.’”<sup>108</sup> Moreover, as Andrew Tae-Hyun Kim explains, citing sociologists James Gruber and Michael Smith, “the more power women possess or [are] perceived to have possessed—be it sociocultural, organizational, or personal—the more likely they were to report harassment.”<sup>109</sup> Consequently, when a supervisor harasses an employee, the employee’s willingness to respond is “especially limited.”<sup>110</sup> Kim further details the related role of threatened retaliation in suppressing employee responses to harassment, noting that fear of retaliation was a commonly cited reason for failing to report harassment and that studies suggest employees’ fear of retaliation is legitimate.<sup>111</sup>

Psychology researchers offer similar insight. For example, Virginia Schein explains that in the context of harassment, “power[-]related systemic qualities of professional and organizational systems become harmful.”<sup>112</sup> She explains that the norms of professional life act to suppress reports of harassing conduct.<sup>113</sup> For example, to ensure employment, most white-collar employees require recommendations and referrals.<sup>114</sup> These types of practices create a dependency and interconnectedness that encourage women to tolerate sexual harassment rather than reporting it in order to preserve the networks and referrals necessary for their career to continue.<sup>115</sup>

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106. See Anne Lawton, *Tipping the Scales of Justice in Sexual Harassment Law*, 27 OHIO N.U. L. REV. 517, 517 (2001).

107. Grossman, *supra* note 5, at 26 (citing Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119–20 (1995)).

108. *Id.* (quoting Fitzgerald et al., *supra* note 107, at 120).

109. Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 431 (2011) (citing James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 558 (1995)).

110. *Id.* at 427 (citing Gruber & Smith, *supra* note 109, at 559).

111. See Kim, *supra* note 109, at 427 (“For example, 62% of state employees in one study reported some form of ‘retaliation for their responses to harassment.’”).

112. Virginia E. Schein, *Power, Sex and Systems*, 9 WOMEN MGMT. REV. 4, 5 (1994).

113. See *id.*

114. See *id.*

115. See *id.* (“Sexually harassing [behaviors] can go unchecked or unchastised in systems in which connections, others’ approval and information networks are vital components of career or work related success. The reward, referral and resource-sharing nature of the system pressures a woman towards tolerance rather than telling.”).

Indeed, women who seek to tell others of the harassment they face experience what Schein describes as a “double risk”: if they report the harassment, their peers and superiors will cut them off from the support network and informal resources necessary for the job; the employees will necessarily fail to perform as well; and the company will have this performance decline to blame for subsequent termination.<sup>116</sup> Gretchen Carlson’s experience exemplifies this phenomenon. Although she apparently did not use formal internal mechanisms,<sup>117</sup> Carlson did report the harassing conduct to some degree, and each time her career suffered.<sup>118</sup> As the 2016 Complaint alleges, Carlson first complained that her co-worker, Doocy, treated her in a sexist and offensive manner.<sup>119</sup> She also resisted the offensive and harassing conduct by Ailes.<sup>120</sup> In response, Ailes assigned her fewer hard-hitting interviews, removed her from a popular segment, reduced her appearances, and refused marketing support.<sup>121</sup> Ultimately, Carlson fell victim to the “double risk” that Schein describes: she complained of harassment, Ailes withdrew organizational support, her ratings dropped, and Fox News refused to renew her contract due to a decline in ratings.<sup>122</sup>

Like most victims of workplace harassment, many of the Fox News accusers failed to pursue internal avenues for filing complaints and tried to navigate their careers despite the offensive conduct.<sup>123</sup> Logically, the fact that one of the harassers, Ailes, was the top executive at Fox News, and another harasser, O’Reilly, was a top star, provides a ready explanation for the harassed employees’ unwillingness to report the misconduct. In fact, the victims of harassment at Fox News consistently tried to avoid career harm by refraining from confronting the harassers or

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116. See *id.* at 6.

117. See Koblin, *supra* note 15, at B1 (“Ms. Briganti, the Fox News spokeswoman, said that Ms. Carlson ‘never filed a formal complaint about sexual harassment to the H.R. department or to the legal department.’”).

118. See Complaint and Jury Demand, *supra* note 20, at paras. 11, 14, 16, 17, 21–22, 25.

119. See *id.* at para. 11.

120. See *id.* at paras. 21, 24.

121. See *id.* at para. 25.

122. See *id.* at paras. 11, 14, 16, 17, 21–22, 24–25; Koblin, *supra* note 15, at B1 (noting Ailes’s assertion that Carlson’s contract was not renewed due to falling ratings).

123. See, e.g., KELLY, *supra* note 1, at 302–03 (describing Kelly’s decision not to pursue formal action in response to Ailes’s sexual harassment out of fear for her career, choosing instead to bring the matter to a trusted supervisor who counseled her to simply avoid Ailes); Koblin, *supra* note 15, at B1 (noting Fox News’s allegation that Carlson never filed a formal complaint about Ailes with human resources or the legal department); Steel & Schmidt, *O’Reilly Thrives*, *supra* note 4, at A1 (stating that according to statements by Fox News, “no current or former Fox News employee ever took advantage of the 21st Century Fox hotline to raise a concern about Bill O’Reilly, even anonymously”).

from reporting the misconduct.<sup>124</sup> For example, after Bill O'Reilly sexually harassed Walsh, a regular guest of the show, she chose not to make any formal complaint "because she did not want to harm her career prospects."<sup>125</sup> Victims of harassment reported that they also refrained from using Fox News's internal complaint mechanism for fear of reprisal.<sup>126</sup> According to news reports, O'Reilly's victims did not report the harassment out of fear of retaliation and the common understanding that human resources would not support or protect them.<sup>127</sup> For example, according to one *New York Times* report, a current female Fox News employee asked her male supervisor for a particular assignment, and he told her she could have it if she performed oral sex.<sup>128</sup> The female employee chose to "laugh[] it off, thinking that she would face retaliation and be demoted if she told him that the comment was inappropriate."<sup>129</sup>

Similarly, during her time at Fox News, Kelly once hired a lawyer out of concern that her repeated rebuffing of Ailes's unwanted advances would cause her to lose her job;<sup>130</sup> Kelly, however, never filed a formal complaint, and publicly praised Ailes on many occasions.<sup>131</sup> As Kelly explains in her recent book, after the worst of Ailes's sexually harassing acts:

I left Roger's office that day and went directly to La Guardia Airport to catch the shuttle home. I hadn't even walked in when I called Willis Goldsmith, then the partner in charge of Jones Day's employment law practice, who agreed to represent me. I paced back and forth outside the terminal as he walked me through my options, most of which I already knew, and none of which was ideal. I realized Roger had crossed a line, but I had handled it without doing anything. I didn't want to sue. I didn't want this to blow up. Like most sexual harassment targets, I just wanted it to stop. I felt better having a lawyer in case Roger retaliated against me for rejecting him, but I knew the reality of the situation: if I caused a stink, my career would likely be over. Sure, they might investigate, but I felt certain there was no way they would get rid of

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124. Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1; *see also* Rutenberg, Steel & Koblin, *supra* note 11, at A1.

125. Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

126. *See* Rutenberg, Steel & Koblin, *supra* note 11, at A1 ("Almost all the women [interviewed] said they were reluctant to go to the human resources department with their complaints for fear that they would be fired."). Similarly, many women at Fox News requested anonymity to speak with journalists, expressing fear that speaking out would lead to retribution and harm their careers. *Id.*

127. *See* Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

128. Rutenberg, Steel & Koblin, *supra* note 11, at A1.

129. *Id.*

130. *See* KELLY, *supra* note 1, at 302; Koblin, Steel & Rutenberg, *supra* note 4, at A1.

131. *See* Koblin & Rutenberg, *supra* note 38, at A1.

him, and I would be left on the wrong side of the one man who had power at Fox. I'd get labeled a troublemaker, someone who is overly sensitive—all the things we too often hear about women who don't tolerate harassment. I didn't want any of that. I just wanted to do my job.<sup>132</sup>

Thus, the experiences of the harassment victims at Fox News are consistent with psychological and sociological studies that find a reluctance to report harassing behavior due to the risk of career harm.<sup>133</sup>

## 2. Law of Vicarious Liability for Sexual Harassment Punishes Employees Who Fail to Report the Misconduct

According to the standards and defenses critique, Title VII sexual harassment jurisprudence is blind to the reality that many sexual harassment victims cannot complain of the harassing behavior without risking the destruction of their careers.<sup>134</sup> Instead, under Title VII law, these victims can lose their claims for relief if they fail to report harassment at its earliest stage and in an aggressive manner.<sup>135</sup> As noted above, where the alleged harasser is a supervisor, employers may assert the *Faragher-Ellerth* affirmative defense to sexual harassment claims if (1) they take reasonable steps to prevent and address harassment, typically through policies and internal reporting mechanisms, and (2) the employee unreasonably fails to take advantage of internal avenues of redress, typically shown when the employee fails to utilize internal mechanisms.<sup>136</sup> Thus, the fact that harassment victims are unwilling to report the misconduct means that the employer can meet the second prong of the defense.<sup>137</sup> Given the common implementation of policies that meet the first prong,<sup>138</sup> employers are frequently able to invoke the

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132. KELLY, *supra* note 1, at 302.

133. See, e.g., Kim, *supra* note 109, at 427 (citing Gruber & Smith, *supra* note 109, at 559) (finding employees are particularly reluctant to complain when the harassers have significant power over them and their careers).

134. See, e.g., Grossman, *supra* note 85, at 700 ("Rarely, if ever, will courts excuse a plaintiff from filing an internal complaint due to fear of retaliation or the perception that such complaints are futile.").

135. See *id.*

136. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

137. See, e.g., Grossman, *supra* note 85, at 700–02.

138. See Lauren B. Edelman, Aaron C. Smyth & Asad Rahim, *Legal Discrimination: Empirical Sociological and Critical Race Perspectives on Antidiscrimination Law*, 12 ANN. REV. L. & SOC. SCI. 395, 407 (2016); see also TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 26 (2017).

defense and defeat harassment claims at the summary judgment stage.<sup>139</sup> As Professor Joanna Grossman explains:

[Courts take] a strict and entirely unrealistic view of how quickly and assertively employees must complain about harassment and how many obstacles they must overcome to do so. Courts' refusals to consider context as a determinant of reasonableness is a thread that runs through contemporary discrimination law more generally, making anti-discrimination rights among the hardest to enforce.<sup>140</sup>

As noted above, many of the victims of harassment at Fox News declined to report harassment through the formal internal mechanisms at the network.<sup>141</sup> In its public statements, Fox News was poised to assert this failure as a legal defense.<sup>142</sup> Had it done so, there would be every reason to expect success. For example, in *Baldwin v. Blue Cross/Blue Shield*,<sup>143</sup> the Eleventh Circuit Court of Appeals affirmed the grant of an employer's motion for summary judgment, finding that an employee who waited three months and two weeks to report abusive conduct failed to act in a timely manner despite the fact that she refrained from reporting "because she feared being fired and felt that silence would best serve her career interests."<sup>144</sup> The court stated that the *Faragher-Ellerth* defense works "only if employees report harassment promptly, earlier instead of later, and the sooner the better."<sup>145</sup>

### 3. Even if the Employee Reports the Misconduct, She is Not Protected from Retaliation

As the standards and defenses critique explains, while the law requires victims of harassment to report the harassing conduct nearly immediately, employees may not be protected from retaliation for their

139. See, e.g., Grossman, *supra* note 85, at 710; Lawton, *supra* note 106, at 532–33.

140. Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U.L. REV. 1029, 1045 (2015) (citations omitted).

141. See, e.g., KELLY, *supra* note 1, at 302–03 (describing Kelly's decision not to pursue formal action in response to Ailes's sexual harassment out of fear for her career, choosing instead to bring the matter to a trusted supervisor who counseled her to simply avoid Ailes); Koblin, *supra* note 15, at B1 (noting Fox News's allegation that Carlson never filed a formal complaint about Ailes with human resources or the legal department).

142. See Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1 (stating that according to statements by Fox News, "no current or former Fox News employee ever took advantage of the 21st Century Fox hotline to raise a concern about Bill O'Reilly, even anonymously").

143. *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287 (11th Cir. 2007).

144. *Id.* at 1307.

145. *Id.*; see also *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009); *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 933 (8th Cir. 2008); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001).

complaints if the harassment has not risen to a sufficiently severe level.<sup>146</sup> Title VII prohibits employers from retaliating against employees who complain either internally within the company or externally through litigation.<sup>147</sup> To establish a *prima facie* case of retaliation, employees must show: (1) protected conduct, (2) materially adverse action, and (3) a causal connection between the two.<sup>148</sup>

In order to prove a retaliation claim based on internal complaints, however, the employee must show that the complaint had a reasonable basis, or else the employee has not engaged in “protected conduct” under Title VII.<sup>149</sup> As Professors Deborah Brake and Joanna Grossman explain, courts have defined “reasonable basis” so strictly that employees who complain of harassment early, before the conduct rises to the level of actionably severe or pervasive harassment, will not be protected from retaliation.<sup>150</sup> They provide the example of the Supreme Court’s decision in *Clark County School District v. Breeden*,<sup>151</sup> where the employee’s complaint of one highly offensive remark did not constitute protected conduct because the Court found that no reasonable person would believe the single incident to constitute sexual harassment.<sup>152</sup> Other courts have determined that an employee who reported harassment could not bring a retaliation complaint because the complaint of harassment was insufficiently severe.<sup>153</sup> As Grossman points out, harassed employees are consequently in a double bind: they must report harassment promptly and aggressively to preserve their legal claims, but they are not protected from retaliation if the report is too early such that the conduct is not yet pervasive or severe.<sup>154</sup>

Relatedly, even if the employee’s internal complaint is deemed reasonable, and the employee thus meets the protected conduct prong of a *prima facie* retaliation case, the employee may still lose if the alleged retaliatory conduct was not sufficiently adverse. To prove retaliation, the employee must show he or she suffered a materially adverse employment

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146. See Brake & Grossman, *supra* note 85, at 915–16.

147. See 42 U.S.C. § 2000e-3(a) (2012); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59–61 (2006) (describing the prohibitions against retaliation and applicable standards).

148. See *Semsroth v. City of Wichita*, 555 F.3d 1182, 1184 (10th Cir. 2009); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001).

149. See *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 24 (D.C. Cir. 2013); *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 322 (3d Cir. 2008).

150. Brake & Grossman, *supra* note 85, at 915–16.

151. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

152. Brake & Grossman, *supra* note 85, at 915 (citing *Breeden*, 532 U.S. at 271).

153. See Grossman, *supra* note 140, at 1046; see also *Grosdidier*, 709 F.3d at 24.

154. Grossman, *supra* note 140, at 1045–46.

action.<sup>155</sup> The Supreme Court first articulated this standard in *Burlington Northern & Santa Fe Railway Co. v. White*<sup>156</sup> and defined “materially adverse” as conduct that would deter a reasonable employee from pursuing a complaint.<sup>157</sup> Lower courts, however, have defined “materially adverse action” narrowly, leaving out significantly harmful action.<sup>158</sup> This narrow definition has allowed employers to inflict real, harmful consequences on employees who report discrimination, without legal consequence.<sup>159</sup> For example, the Eighth Circuit Court of Appeals ruled that withholding mentoring or supervision from an employee was not a materially adverse action.<sup>160</sup> Courts have similarly concluded that job transfers to another city and negative performance reviews do not rise to the level of “materially adverse actions.”<sup>161</sup>

The third prong of a retaliation claim, causal connection between the protected conduct and materially adverse action, is also a major hurdle for plaintiff-employees. A plaintiff alleging retaliation must prove that the retaliatory motive was a “but-for” cause of the materially adverse employment action.<sup>162</sup> This means that retaliation must have been the determinative factor, and if the employer acted with mixed motives—some legitimate reasons, some retaliatory reasons—the plaintiff cannot prove causation.<sup>163</sup> In analyzing this causation standard, courts apply a version of the test derived from *McDonnell Douglas Corp. v. Green*<sup>164</sup> (the *McDonnell Douglas* test): (1) the employee bears the burden of proof to show a prima facie case of retaliation; (2) the employer then has the burden of asserting a legitimate, non-retaliatory basis for the materially adverse employment action; and (3) if the employer is able to assert a legitimate basis for the adverse employment action, the employee must prove that the asserted legitimate reason is mere pretext and that retaliation was the true motive for the adverse action.<sup>165</sup> Scholars

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155. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59–60 (2006).

156. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

157. *Id.* at 68

158. See Grossman, *supra* note 140, at 1046 (citing *Higgins v. Gonzalez*, 481 F.3d 578, 585–86, 590 (8th Cir. 2007)).

159. See Brake & Grossman, *supra* note 85, at 908–09.

160. See Grossman, *supra* note 140, at 1046 (citing *Higgins*, 481 F.3d at 585–86).

161. See Brake & Grossman, *supra* note 85, at 908–09 (citing *Halfacre v. Home Depot, U.S.A., Inc.*, 221 F. App'x 424, 433 (6th Cir. 2007); *Higgins*, 481 F.3d at 590–91)).

162. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

163. See *id.*

164. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–805 (1973). The *McDonnell Douglas* test was originally created for and applied to disparate treatment discrimination claims. See *id.* at 802–04.

165. See, e.g., *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1233–34 (10th Cir. 2015); *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 250 (4th Cir. 2015).

and commentators frequently criticize the causation standard and the *McDonnell Douglas* test as unduly favoring employers.<sup>166</sup>

Many of the women harassed at Fox News also alleged that the network's executives retaliated against them when they either rebuffed sexual advances or complained of harassing conduct.<sup>167</sup> For example, Carlson alleges that shortly after she complained to her supervisor about inappropriate harassing conduct by Doocy, Ailes removed her from higher profile shows and placed her into less desirable time slots, denied her marketing and showcasing support, and ultimately refused to renew her contract.<sup>168</sup> Tantaros alleged similar retaliatory acts when she objected to Ailes's harassing conduct, including transfer to less successful shows, withdrawal of media support, and termination.<sup>169</sup> In another example, Bakhtiar alleges she was fired within weeks of complaining of sexual harassment to Fox News's human resources department.<sup>170</sup>

Under at least some court decisions, however, Fox News may have been able to defend against these potential retaliation claims by arguing that the women's complaints lacked a good faith basis.<sup>171</sup> As set forth below, many of the harassed Fox News employees' claims would face challenges meeting the severe or pervasive standard required for a Title VII sexual harassment claim.<sup>172</sup> This deficiency would also provide a

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166. See SPERINO & THOMAS, *supra* note 85, at 119–23 (describing how the *McDonnell Douglas* framework “can cause judges to improperly dismiss cases where a worker’s protected trait caused a negative employment outcome”); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 492–505 (2013) (describing the effect of the *McDonnell Douglas* framework as “chaotic” and as a failure that moves the court away from analysis of whether discrimination has actually occurred); Barrett S. Moore, *Shifting the Burden: Genuine Disputes and Employment Discrimination Standards of Proof*, 35 U. ARK. LITTLE ROCK L. REV. 113, 136–37 (2012) (noting that discrimination cases fail because courts “get lost” in the shifting burdens of *McDonnell Douglas* and “believe the employer’s legitimate nondiscriminatory reasons”); Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 268–70 (2013) (describing the *McDonnell Douglas* test as complex and distracting courts from “the main discrimination inquiry”).

167. Complaint and Jury Demand, *supra* note 20, at paras. 11–17.

168. *Id.*

169. See Complaint, *supra* note 41, at paras. 6–8.

170. See Rutenberg, Steel & Koblin, *supra* note 11, at A1.

171. See generally Grossman, *supra* note 140, at 1046 (citing *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)) (explaining that some courts have dismissed retaliation cases where the alleged harassment did not meet the legal standard for severe or pervasive).

172. Compare Complaint, *supra* note 41, at paras. 26, 33 (alleging that Ailes said, “Turn around so I can get a good look at you” and “I bet you look good in a bikini”), with *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (dismissing the sexual harassment claim of a plaintiff who alleged her supervisor “told her she had been



potential basis for attacking the retaliation claims for lack of reasonable basis.<sup>173</sup> Moreover, while many of the harassment victims claim their terminations, or Fox News's failure to hire them, were retaliatory<sup>174</sup>—claims that unquestionably allege materially adverse action<sup>175</sup>—other claims, such as reassignment to a less desirable time slot and withdrawal of media and mentoring support, may not rise to the level of materially adverse.<sup>176</sup>

Finally, Fox News would have had a reasonable chance at defending against the retaliation claims for lack of causation. In many of the harassment cases, the clearest materially adverse action, termination, occurred many months after the complaints of harassment.<sup>177</sup> This lack of proximity makes it harder for the women to prove causation.<sup>178</sup> Further,

'voted the "sleekest ass" in the office' and on another occasion 'deliberately touched [her] breasts with some papers that he was holding in his hand"').

173. See Grossman, *supra* note 140, at 1046 (citing *Clover*, 176 F.3d at 1351) (noting that, in some jurisdictions, courts require plaintiffs to show that the underlying complaint would survive the standard for summary judgment in order to establish a reasonable basis for the protected conduct); see also *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 548–49 (8th Cir. 2008) (finding that an employee who reported one relatively tame offensive comment failed to meet reasonable belief standard); *Rickard v. Swedish Match N. Am., Inc.*, No. 3:12-CV-00057 KGB, 2013 WL 12099414, at \*12 (E.D. Ark. Nov. 25, 2013) ("The Court concludes that no reasonable person could have believed that the two isolated incidents of [employee] commenting about [plaintiff's] breasts violated Title VII's standard."), *aff'd*, 773 F.3d 181 (8th Cir. 2014).

174. See, e.g., *Complaint and Jury Demand*, *supra* note 20, at paras. 24–26; *Complaint*, *supra* note 63, at para. 56.

175. See, e.g., *Volling v. Kurtz Paramedic Servs., Inc.*, 840 F.3d 378, 383 (7th Cir. 2016) (concluding that a failure to hire can be a materially adverse action); *Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702, 710 (5th Cir. 2016) (finding that the plaintiff's discharge clearly constituted a materially adverse action).

176. See, e.g., *Hobbs v. City of Chicago*, 573 F.3d 454, 463–64 (7th Cir. 2009) (rejecting the plaintiff's argument that the undesirable assignments within her range of job duties were materially adverse actions and finding that a materially adverse action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities"); *Akers v. Alvey*, 338 F.3d 491, 499 (6th Cir. 2003) (concluding that ignoring the plaintiff, encouraging co-workers to do the same, criticizing the plaintiff's work, and withholding the plaintiff's mail, all of which occurred for a short period of time, did not constitute materially adverse actions).

177. For example, Carlson alleges she met with Ailes in September 2015 to try to bring an end to the discriminatory treatment to which she had been subjected, but her employment at Fox News did not end until June 23, 2016. See *Complaint and Jury Demand*, *supra* note 20, at paras. 21, 25.

178. See, e.g., *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007). The court in *Thomas* noted:

The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action. But mere temporal proximity, without more, must be "very close." A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough.

*Id.* (citations omitted).

based on public statements, Fox News would be able to put forth evidence of legitimate, non-retaliatory reasons for the adverse actions. For example, Fox News claimed that it terminated Tantaros for violating her employment contract's rules regarding outside book publishing<sup>179</sup> and that it did not renew Carlson's contract due to declining ratings.<sup>180</sup> Fox News can easily put forth legitimate reasons for the adverse actions, placing the harassed employees in the difficult position of proving but-for causation.

Thus, according to the standards and defenses critique, Title VII may not have stopped the harassment at Fox News because the law gave the network an unduly strong defense. Under the *Faragher-Ellerth* defense, Fox News's risk of liability was minimized because of the harassed women's natural fear of reporting misconduct and their desire to preserve their careers.<sup>181</sup> The difficult standards for proving retaliation further insulated Fox News from Title VII liability. As a result, federal harassment law did not have as significant an impact on the network's behavior as later public pressure did.

### C. Title VII Jurisprudence Incentivizes Surface Compliance Without Substantive Effect

As the standards and defense critique explains, the *Faragher-Ellerth* defense insulates employers like Fox News from liability in other ways.<sup>182</sup> In addition to punishing women for not immediately reporting harassment, the *Faragher-Ellerth* defense encourages employers to adopt policies and internal procedures for harassment and other discrimination in order to meet the first prong of the defense.<sup>183</sup> As discrimination scholars consistently explain, in doing so, internal procedures became instruments of risk management and liability avoidance rather than true engines of change.<sup>184</sup> Professor Tristin Green details this phenomenon of

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179. See Koblin, *supra* note 49, at B4.

180. See Grynbaum & Koblin, *supra* note 2, at A1.

181. See Grossman, *supra* note 85, at 700.

182. See GREEN, *supra* note 138, at 39; see also Edelman, Smyth & Rahim, *supra* note 138, at 408.

183. See Grossman, *supra* note 5, at 9–12.

184. "The focus on complaint processes as the principal measure for reducing discrimination tends to individualize the problem, and also turns it into a management problem rather than one of discrimination." GREEN, *supra* note 138, at 39; see also Edelman, Smyth & Rahim, *supra* note 138, at 408 ("[C]ivil rights laws are undermined as organizations' symbolic legal structures come to be accepted by courts as constituting compliance with civil rights law."); Grossman, *supra* note 5, at 70 ("[R]ule compliance has become the benchmark by which employers and victims are measured [in a sexual harassment case]. However, social science literature suggests that a near-perfect state of rule compliance can peaceably co-exist with an uncomfortably high level of harassment.").

organizational innocence, which she names "discrimination laundering."<sup>185</sup> Green explains that under the current legal system, organizations need only focus on creating anti-discrimination policies and internal procedures for complaints without considering the ultimate outcome for women and minorities in the workplace.<sup>186</sup> With surface-level, procedural requirements met, discriminatory cultures may nonetheless thrive.<sup>187</sup> Thus, Grossman reports that although an increasing number of employers have enacted anti-harassment policies, surveys show no corresponding reduction in the amount of harassment in workplaces.<sup>188</sup> She explains that only a proactive, concerted, and highly visible effort to deal with the problem—"a true commitment by the employer to actively influence the work environment"—can reduce harassing conduct.<sup>189</sup>

Empirical studies draw similar conclusions. As Edelman, Smyth, and Rahim explain, organizations engage in "symbolic compliance" that leaves in place the practices that promote and maintain discrimination.<sup>190</sup> They cite studies that show anti-discrimination policies do not directly change the behaviors at an organization.<sup>191</sup> Instead, these policies and procedures are part of what these scholars call the "managerialization" of anti-discrimination law, a process that separates compliance from outcome, formally prohibiting conduct that is culturally tolerated in practice.<sup>192</sup> Ultimately, they conclude that organizations' anti-discrimination compliance efforts "become[] a set of managerial rules and procedures that do little to combat . . . informal cultures that promote harassment."<sup>193</sup> Ultimately, they conclude that the laudatory purpose of

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185. See generally GREEN, *supra* note 138.

186. *Id.* at 4.

187. See *id.* Green explains:

[O]rganizations can focus their nondiscrimination efforts almost exclusively on creating systems for individual complaint and on responding to complaints within those systems, investigating discrete incidents and delivering discipline, where appropriate. Organizations have no legal incentive to monitor for patterns of discrimination or to consider whether their structures, practices, or cultures are inciting biases and resulting in disparate outcomes for women and racial minorities.

*Id.*

188. Grossman, *supra* note 5, at 31.

189. *Id.* at 41.

190. See Edelman, Smyth & Rahim, *supra* note 138, at 396–97. "[E]mployers respond to law by implementing a set of 'symbolic structures,' that is, organizational policies or offices that symbolize attention to law but that often serve to perpetuate discriminatory practices." *Id.* at 398 (citation omitted).

191. See *id.* at 407.

192. See *id.* at 408; see also GREEN, *supra* note 138, at 39; Grossman, *supra* note 5, at 70.

193. Edelman, Smyth & Rahim, *supra* note 138, at 409.

*Faragher-Ellerth*, which was to incentivize truly effective internal solutions to discrimination<sup>194</sup> and harassment, has not come to fruition.<sup>195</sup>

Fox News appears to have had all the trappings of this type of surface compliance, yet it did not stop the pervasive sexual harassment at the network. A spokesman for 21st Century Fox, the parent company of Fox News, stated, “The fact is, we have a robust compliance structure and strong controls embedded across our company.”<sup>196</sup> As an example, in Fox News’s answer to the complaint filed by Roginsky, the network alleges a number of affirmative defenses based on its allegation that Fox News “maintained, disseminated and observed equal employment, affirmative action, harassment-free work environment, and anti-retaliation policies.”<sup>197</sup> In another press statement, a spokeswoman for 21st Century Fox said that there was “absolutely no room anywhere at our company for behavior that disrespects women or contributes to an uncomfortable work environment,” citing internal procedures for reporting harassment, such as an anonymous hotline.<sup>198</sup>

These mechanisms acted as mere surface level compliance at Fox News, as evidenced by the number of victims, the duration of sexual harassment, and the failure of leadership to address the problem. As just one example, in response to revelations about Ailes, the Fox News leadership announced its commitment “to maintaining a work environment based on trust and respect.”<sup>199</sup> Shortly after that, however, Fox News confidentially settled two women’s claims of sexual harassment against O’Reilly<sup>200</sup> and then renewed O’Reilly’s contract.<sup>201</sup> Only months later, after significant press coverage led to advertiser and

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194. GREEN, *supra* note 138, at 38.

195. Grossman, *supra* note 140, at 1047. According to Grossman:

[D]espite more than thirty years of doctrinal development and broad proclamations about its interference with equal employment opportunity, sexual harassment remains disturbingly common and unaddressed. Perhaps worse, the law has done little to change the cultural understanding of sexual misconduct and the ways in which it impedes workplace equality. We are left instead with a somewhat confused doctrine that rewards the proliferation of policies and procedures, but never inquires whether they have had the desired effect.

*Id.* (citations omitted).

196. Grynbaum, Steel & Ember, *supra* note 38, at B1.

197. Answer and Affirmative Defenses at 10, *Roginsky v. Fox News Network LLC*, No. 153065/2017 (N.Y. Sup. Ct. May 25, 2017).

198. Rutenberg, Steel & Koblin, *supra* note 11, at A1.

199. Koblin, Steel & Rutenberg, *supra* note 4, at A1.

200. See Steel & Schmidt, *O’Reilly Thrives*, *supra* note 4, at A1.

201. See Steel & Schmidt, *O’Reilly May Cost*, *supra* note 4, at B1.

shareholder pressure, Fox News finally took action against O'Reilly.<sup>202</sup> Therefore, consistent with the theories of organizational innocence, Fox News appeared to engage in surface level compliance, without actual cessation of harassment in its workplace.

*D. Even Where an Employer is Strictly Liable under Title VII, Courts Have Narrowed Plaintiffs' Ability to Obtain Relief*

The standards and defenses critique could potentially explain why even the strongest harassment claims under Title VII, those of quid pro quo harassment, also failed to affect Fox News and its disregard for the sexual harassment of its employees. Quid pro quo harassment occurs when work benefits are conditioned upon submission to sexual requests.<sup>203</sup> A significant portion of the alleged misconduct at Fox News consisted of quid pro quo harassment. Many victims of harassment at Fox News were denied employment benefits when they refused the advances of Ailes, O'Reilly, or others. For example, Walsh alleges that when she declined O'Reilly's invitation to join him in his hotel suite, he told her that she could forget his career advice because she was now without his support.<sup>204</sup> Walsh, once a regular guest on *The O'Reilly Factor*, was no longer invited to appear on the show and was never made an official contributor to the program as O'Reilly once promised.<sup>205</sup> Juliet Huddy, a former Fox News reporter, alleged that O'Reilly made unwelcome sexual advances during a period of time in which he had significant influence over her airtime on the network, and that when she rebuffed him, he hurt her career to such a degree that she moved from national to local network status.<sup>206</sup> Carlson and Tantaros both alleged that Ailes moved them to less desirable time slots and denied them access to more prestigious programs when they refused his advances.<sup>207</sup> Carlson asserts that Ailes made this clear by stating, "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better" . . . 'sometimes problems are easier to solve' that way."<sup>208</sup>

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202. Michael M. Grynbaum & Sapna Maheshwari, *Advertisers' Fears of Revolt Silenced O'Reilly*, N.Y. TIMES, Apr. 21, 2017, at A1; Steel & Schmidt, *supra* note 2, at A1.

203. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–62 (1998).

204. See Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

205. See *id.*

206. See *id.*

207. See Complaint and Jury Demand, *supra* note 20, at paras. 16, 17, 24–25; Complaint, *supra* note 41, at paras. 24, 35.

208. Complaint and Jury Demand, *supra* note 20, at para. 22.

Employers are strictly liable for quid pro quo claims because the harasser is using the employer's power to threaten the targeted employee with an adverse employment action.<sup>209</sup> This liability for quid pro quo harassment applies regardless of notice, the existence of any anti-harassment policy, or responses to harassment.<sup>210</sup> Quid pro quo liability is therefore not subject to the *Faragher-Ellerth* defense and all of its unintended incentives and effects.<sup>211</sup> A plaintiff with a quid pro quo claim also does not need to show severe or pervasive harassment.<sup>212</sup> Arguably, the law of quid pro quo harassment should have posed some incentive and deterrent to Fox News.

Courts' interpretations of quid pro quo harassment, however, undermine this potential for deterrence. To assert a claim for quid pro quo harassment, a plaintiff-employee must prove that the refusal to submit to a supervisor's sexual demands resulted in a "tangible employment action."<sup>213</sup> The Supreme Court defined "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>214</sup> Although economic loss is not required to prove a tangible employment action,<sup>215</sup> in the absence of economic impact, courts require significant and material change to benefits, duties, and prestige.<sup>216</sup>

The women alleging quid pro quo harassment by Ailes and O'Reilly claim that upon rebuffing their sexual advances, the executives transferred the women to different, less favorable on-air time slots and denied them marketing support.<sup>217</sup> These transfers do not appear to have had an economic impact on salary or benefits.<sup>218</sup> Consequently, the women would have to prove that the transfers caused significant and material harm to their prestige and career. The *Carlson v. Ailes*<sup>219</sup> case

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209. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–61 (1998).

210. See Grossman, *supra* note 85, at 679.

211. See *Burlington*, 524 U.S. at 760–62.

212. See *id.* at 754.

213. See *id.* at 760–62.

214. *Id.* at 761.

215. See *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 738–39 (10th Cir. 2014) (citing *Burlington*, 524 U.S. at 762) ("A tangible employment action in most cases inflicts direct economic harm.") (emphasis added).

216. See *Burlington*, 524 U.S. at 761; *Kramer*, 743 F.3d at 738–39; see also Grossman, *supra* note 85, at 683–84 (noting courts' narrow interpretation of "tangible employment action").

217. See, e.g., Complaint and Jury Demand, *supra* note 20, at paras. 16–17, 25; Complaint, *supra* note 41, at paras. 25, 34.

218. See, e.g., Complaint and Jury Demand, *supra* note 20, at paras. 16–17, 25; Complaint, *supra* note 41, at paras. 25, 34.

219. *Carlson v. Ailes*, No. L00501616 (N.J. Super. Ct. Law. Div. filed July 6, 2016).

demonstrates the challenge in meeting this legal standard for tangible employment action. Carlson's complaint alleges, for example, that Ailes removed her from a position as co-host of *Fox & Friends* to an afternoon time slot and assigned her fewer "hard-hitting political interviews."<sup>220</sup> Fox News disputes that the transfer in time slot was a demotion.<sup>221</sup> Therefore, even under the stringent quid pro quo standard, there are too many legal loopholes for Title VII to act as an effective deterrent to quid pro quo harassment.

### *E. The Standard for Proving Sexual Harassment Favors Employers*

Title VII prohibits discrimination in the workplace on the basis of race, color, sex, national origin, and religion.<sup>222</sup> Although the statute itself does not mention harassment, the Supreme Court has recognized that sexual harassment is a form of sex discrimination under Title VII.<sup>223</sup> Similarly, harassing conduct on the basis of any of Title VII's protected characteristics is also recognized as discrimination under Title VII.<sup>224</sup> Title VII is not intended to be a "general civility code" punishing every workplace slight or offense.<sup>225</sup> To assert a claim for sexual harassment, a plaintiff must show the harassment was so severe or pervasive that it altered the conditions of the targeted employee's workplace and created an abusive working environment.<sup>226</sup>

Courts frequently grant summary judgment in favor of employers on the basis of the plaintiff's failure to meet this standard, despite the highly factual nature of the analysis.<sup>227</sup> Professor Anne Lawton examined this phenomenon and found that courts were ignoring the applicable legal

220. Complaint and Jury Demand, *supra* note 20, at paras. 10, 14.

221. See Koblin, *supra* note 15, at B1.

222. 42 U.S.C. § 2000e-2(a)(1) (2012).

223. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

224. See, e.g., *Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 863 (8th Cir. 2010) ("Title VII . . . prohibits an employer from subjecting its employees to a hostile work environment 'because of such individual's race, color, religion, sex, or national origin.'").

225. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2455 (2013) (Ginsburg, J., dissenting).

226. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

227. Lawton, *supra* note 106, at 533. Lawton explains:

In a study published in 1999, Professor Theresa Beiner determined that between the years 1987 and 1998, federal district courts granted employer motions for summary judgment on the grounds that the plaintiff had failed to establish that the complained-of behavior was severe or pervasive in 175 out of 302 cases—a rate of 58%. Moreover, appellate courts are not checking the district court's flagrant abuse of summary judgment. During the same time period (1987 through 1998), the appellate courts upheld district court orders granting summary judgment in 76% of the cases heard.

*Id.* (citing Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 100–01 (1999)).

standard—"totality of the circumstances"—in favor of considering each discrete act of harassment.<sup>228</sup> Based on this isolated viewpoint, courts then find a lack of severity or pervasiveness and grant summary judgment for the employer.<sup>229</sup> As Professor Theresa Beiner states, "the problem lies in the courts granting summary judgment in cases in which it appears that the incidents could well be characterized as severe and/or pervasive."<sup>230</sup> Professors Sperino and Thomas conclude that unduly strict interpretations of the severe and pervasive standard continue to lead to the improper dismissal of meritorious harassment claims.<sup>231</sup> They cite a number of these cases,<sup>232</sup> including a case in which the court found that the conduct was not severe or pervasive despite the following allegations:

Supervisor telling worker the only reason she was there was 'because we needed a skirt in the office'; asking her to go to hotel room and spend the night with him; asking her 'to blow' him; constantly referring to her as 'Babe'; unzipping his pants and moving the zipper up and down in front of her; and referring to women using words like 'bitch,' 'slut,' and 'tramp.'<sup>233</sup>

These narrow interpretations of "severe and pervasive" lower the risk to employers such as Fox News and diminish the legal deterrent effects of Title VII. Indeed, as just one example, Carlson's claims would likely have failed to meet the severe or pervasive standard under federal law. A claimant may succeed by showing severity, which is defined by the degree of offensiveness of the conduct, or pervasiveness, which depends on the frequency of the conduct.<sup>234</sup> The following allegations are likely the most relevant for this analysis: Ailes ogled Carlson, asking her to turn around so he could view her from behind, and commented on her legs; Ailes told Carlson, "I'm sure you can do sweet nothings when you want to"; Ailes bragged that he had slept with three former Miss Americas but not with Carlson; Ailes commented in front of Carlson that he always stays seated when a woman walks over so she had to "bend over" to say hello; and Ailes told Carlson she was "sexy," but "too much hard work."<sup>235</sup> While these comments are offensive and inappropriate,

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228. *Id.*

229. *Id.*

230. Beiner, *supra* note 227, at 100–01.

231. SPERINO & THOMAS, *supra* note 85, at 32–40.

232. *Id.* at 36.

233. *Id.* (citing *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1292, 1294, 1303 (11th Cir. 2007)).

234. See, e.g., *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1096 (9th Cir. 2008); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000).

235. See Complaint and Jury Demand, *supra* note 20, at para. 20.



they are generally not considered severe under the law.<sup>236</sup> Indeed, Carlson's claim includes none of the clearer hallmarks of severity, as it lacks any allegations of assault, physical touching, or explicit remarks or images.<sup>237</sup>

Nor could Carlson alternatively meet the Title VII harassment standard by demonstrating pervasiveness. To be pervasive, harassing conduct must be frequent; stray remarks are not enough, as there must be ongoing conduct infecting the workplace.<sup>238</sup> Carlson's complaint asserts 12 different types of comments, some of which she alleges occurred repeatedly.<sup>239</sup> Carlson's career at Fox News and interactions with Ailes extended over ten years.<sup>240</sup> The time period during which these remarks occurred is so lengthy that it is likely that the comments only occurred infrequently; indeed, the overall allegations suggest they occurred not within a condensed period of time, but over her years at the company.<sup>241</sup>

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236. See, e.g., *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 328 (5th Cir. 2004) (concluding that sexually suggestive comments, slapping plaintiff on the behind with a newspaper, grabbing or brushing up against plaintiff's breasts and behind, and attempting to kiss plaintiff did not qualify as severe); *Jackson v. United Parcel Serv.*, No. 99-2591, 2000 WL 765893, at \*1 (8th Cir. 2000) (determining that offensive comments, allegedly made or repeated on five occasions over a three-month period, did not rise to the level of severe or pervasive harassment necessary to implicate Title VII); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) (concluding that five sexually-oriented, offensive statements over 16 months were insufficient to show a hostile environment, even though one of the harasser's statements occurred while he put his arm around plaintiff, looked down her dress and said, "well, you got to get it when you can").

237. See, e.g., *Singleton v. Dep't of Corr. Educ.*, 115 F. App'x 119, 122 (4th Cir. 2004) (concluding that conduct was not severe or pervasive where plaintiff did not allege that the harasser "ever requested a sexual act, touched her inappropriately, discussed sexual subjects, showed her obscene materials, told her vulgar jokes, or threatened her"); *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1027-28 (8th Cir. 2004) (concluding that the supervisor's frequent requests that plaintiff go out with him did not rise to the level of severe and pervasive because the requests were not lewd or threatening and the supervisor did not touch her); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (concluding that the alleged conduct was not sufficiently severe and pervasive where the defendant never touched plaintiff, never invited plaintiff out on a date, never asked to her have sex with him, never exposed himself, and never showed the plaintiff obscene materials).

238. See *EEOC v. Univ. of Phx., Inc.*, 505 F. Supp. 2d 1045, 1056 (D.N.M. 2007) ("With regard to pervasiveness, 'isolated incidents of harassment, while inappropriate and boorish, do not constitute pervasive conduct.'").

239. See Complaint and Jury Demand, *supra* note 20, at para. 20.

240. See *id.* at paras. 11, 25.

241. For example, the alleged "sexist" remarks and behavior by Doocy occurred in 2009, and comments by Ailes are alleged to have occurred in 2009, 2015, and 2016, with many alleged comments lacking a specified time period, making frequency difficult to establish. *Id.* at paras. 11, 13, 20, 22.

This type of sporadic remark does not occur frequently enough to establish pervasive sexual harassment.<sup>242</sup>

In sum, according to the standards and defenses critique, court interpretations of Title VII favor employers and undermine the ability of Title VII to deter harassment. The events at Fox News seem to exemplify these problems. Under the existing Title VII scheme, which involves the *Faragher-Ellerth* defense, a narrowly construed retaliation standard, a limiting definition of severe or pervasive, and limitations on the reach of quid pro quo harassment, the network had little incentive to make meaningful changes to its harassing culture.

#### IV. EXPLORING SOLUTIONS: LEGISLATIVE AMENDMENT AND ITS LIMITATIONS

The standards and defenses critique, described above, offers an explanation of how Title VII has failed to prevent systemic, long-standing abuse of women at Fox News. At first look, the standards and defenses critique of sexual harassment law would logically suggest a legislative solution to Title VII to remove or ameliorate the identified problematic legal standards, including the *Faragher-Ellerth* defense, the severe or pervasive standard, and the causation standard for retaliation.<sup>243</sup> This potential solution however, falls short in light of the fact that Fox News's headquarters and thousands of its employees are located in New York City.<sup>244</sup> The network therefore must comply with the NYCHRL, which prohibits sexual harassment.<sup>245</sup> The NYCHRL explicitly eliminated the *Faragher-Ellerth* defense and the severe or pervasive standard for sexual harassment liability, and significantly eased the

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242. See, e.g., SPERINO & THOMAS, *supra* note 85, at 36; see also *McCann v. Tillman*, 526 F.3d 1370, 1379 (11th Cir. 2008) (stating that instances of racially derogatory language over a period of two-and-a-half years were “too sporadic and isolated” to qualify as severe or pervasive); *Johnson v. Rumsfeld*, 238 F. App'x 105, 108 (6th Cir. 2007) (finding sporadic use of abusive language over four years not sufficient to create pervasive harassment); *Sprague*, 129 F.3d at 1365–66 (concluding that “five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in her presence in a sixteen month period” were not sufficiently pervasive to support a hostile work environment claim).

243. Grossman, *supra* note 5, at 71; see discussion *infra* Sections III.A, III.B.3, III.E. Professor Grossman further suggests lowering the burden for punitive damages and allowing for individual liability under Title VII. Grossman, *supra* note 5, at 71; see also GREEN, *supra* note 138, at 151 (calling for employers to be held strictly liable for proven discrimination).

244. See *Corporate Information*, *supra* note 8.

245. See N.Y.C., N.Y., ADMIN. CODE § 8-107 (2017). To bring a claim under the NYCHRL, a plaintiff must prove that she either lives within the boundaries of New York City or that the impact of discriminatory conduct occurred within the city boundaries. *Hoffman v. Parade Publ'ns*, 933 N.E.2d 744, 745–47 (N.Y. 2010). Generally, this standard is aimed to cover “those who work in the city.” *Id.* at 747.

causation burden for retaliation.<sup>246</sup> Despite removing the very problems with Title VII that the standards and defenses critique identifies, this local law lacked sufficient deterrent effect, and Fox News's top executives and anchors were therefore able to harass dozens of women employees.

#### A. Background on the NYCHRL

Although the original intent of the NYCHRL was to provide independent, broad protections to employees, in its first decades, courts interpreted the standards of liability under the NYCHRL in an identical manner to Title VII and New York state civil rights law.<sup>247</sup> The New York City Council found that these concurrent interpretations failed to reflect the broader intended reach of the city law, and, consequently, amended the NYCHRL on two different occasions to try to codify the desired breadth and scope.<sup>248</sup> The most recent of such amendments, the Local Civil Rights Restoration Act ("Restoration Act"),<sup>249</sup> instructed courts to interpret the NYCHRL as follows:

[T]he provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. . . . [S]imilarly worded provisions of federal and state civil rights laws [act] as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.<sup>250</sup>

The Restoration Act added further language calling for liberal construction of its provisions in light of "the uniquely broad and remedial purposes" of the NYCHRL, "regardless of whether federal or New York [s]tate civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed."<sup>251</sup> The judiciary accepted this instruction, and, in a series of decisions, concluded that this general guidance had clear effects on specific legal standards, as described below.<sup>252</sup>

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246. See *infra* Sections IV.B–D.

247. See Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 262–63 (2006) (citing *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 n.2 (2d Cir. 2000); *McGrath v. Toys "R" Us, Inc.*, 821 N.E.2d 519, 524–25 (N.Y. 2004)).

248. See *id.* at 262–63 (describing the first amendment to the NYCHRL in 1991); see also N.Y.C. COUNCIL COMM'N ON GEN. WELFARE, REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION 2 (2005) (describing the second amendment to the NYCHRL in 2005).

249. N.Y.C., N.Y., LOCAL LAW 85 (2005).

250. *Id.* § 1.

251. *Id.* § 7.

252. See, e.g., *Zakrzewska v. New Sch.*, 928 N.E.2d 1035, 1039 (N.Y. 2010).

### B. *The NYCHRL Removes the Faragher-Ellerth Defense*

Courts interpreting the Restoration Act declined to apply the problematic *Faragher-Ellerth* defense that is criticized for its failure to incentivize real efforts to stop harassment. In *Zakrzewska v. New School*,<sup>253</sup> the New York Court of Appeals confirmed the broader reach of the NYCHRL, finding that the plain language of the statute precluded the application of the *Faragher-Ellerth* defense in sexual harassment cases.<sup>254</sup> The court reasoned that the NYCHRL has unique statutory language supporting this distinct difference from Title VII and state law.<sup>255</sup> As a result, the contrast between the NYCHRL and Title VII is sharp. When courts apply Title VII, an employer can escape liability for a supervisor's harassment with the *Faragher-Ellerth* defense.<sup>256</sup> The employer can fulfill the elements of this defense in some jurisdictions by maintaining anti-harassment policies and reporting avenues and by promptly addressing complaints, and in others, by also showing that the employee unreasonably failed to take advantage of the policies and internal procedures regarding harassment.<sup>257</sup> Under the NYCHRL, however, an employer is strictly liable for the harassing acts of managers and supervisors.<sup>258</sup> At most, an employer's policies and procedures regarding harassment are mitigating facts in assessing civil penalties or punitive damages.<sup>259</sup>

As explained above, the *Faragher-Ellerth* defense is at the crux of the standards and defenses critique of sexual harassment law.<sup>260</sup> It requires nearly immediate reporting of harassment and disregards the logical delays that come from victims' attempts to preserve crucial work relationships and networks.<sup>261</sup> It encourages surface compliance without

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253. *Zakrzewska v. New Sch.*, 928 N.E.2d 1035 (N.Y. 2010).

254. *Id.* at 479.

255. *Id.* (citing N.Y.C., N.Y., ADMIN. CODE § 8-107(13) (2017)).

256. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

257. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

258. *See Zakrzewska*, 928 N.E.2d at 1039. The contrast continues for co-worker harassment. Under Title VII, an employer is only liable for co-worker harassment if it knew of the harassment and failed to act. *Burlington*, 524 U.S. at 759. Under the NYCHRL, the employer who knows of co-worker harassment is statutorily obliged to take "immediate and appropriate corrective action," or face liability. *Zakrzewska*, 928 N.E.2d at 1039 (citing N.Y.C., N.Y., ADMIN. CODE § 8-107(13)(b)(1)–(3)). The employer will also be liable under the NYCHRL if they should have known of the offensive conduct yet "failed to exercise reasonable diligence to prevent" the harassment. *Id.* (citing N.Y.C., N.Y., ADMIN. CODE § 8-107(13)(b)(1)–(3)).

259. *See Zakrzewska*, 928 N.E.2d at 1039–40.

260. *See supra* Sections III.A, III.B.2, III.C.

261. *See supra* Section III.B.

true substantive change to workplace culture.<sup>262</sup> Thus, the removal of this defense would therefore seem to incentivize companies to take effective preventative steps, as well as to promptly address harassment that might occur.<sup>263</sup> This prevention clearly did not occur at Fox News.

### C. *The NYCHRL Broadens the Scope of Retaliation*

Retaliation claims under Title VII and the NYCHRL have essentially the same three elements: (1) protected conduct, meaning some type of complaint of discriminatory behavior; (2) an adverse employment event that would dissuade a reasonable employee from making a complaint;<sup>264</sup> and (3) a causal relationship between the two.<sup>265</sup> As noted in Part III, plaintiffs bringing retaliation claims under Title VII face a number of hurdles: narrow definitions of “protected conduct” and “materially adverse action,” as well as a strict “but-for” causation standard.<sup>266</sup> The NYCHRL removes each of these problematic standards.

In *Albunio v. City of New York*,<sup>267</sup> the New York Court of Appeals determined that in retaliation cases, courts were also obliged to interpret the NYCHRL more broadly than Title VII.<sup>268</sup> Specifically, the court in *Albunio* created a broader definition of “protected conduct” than is typically found in federal retaliation law.<sup>269</sup> Courts applying the

262. See *supra* Section III.C.

263. Removing *Faragher-Elterth* also lessens the effect of a limited definition of quid pro quo harassment. See *supra* Section II.D. Under Title VII, a quid pro quo claim can be easier for plaintiffs to prove since the employer is strictly liable and cannot assert the *Faragher-Elterth* defense. *Burlington*, 524 U.S. at 762–63. Under the NYCHRL, where the *Faragher-Elterth* defense does not preclude employer liability, this distinction has less significance. Again, however, this did not affect the behavior at Fox News.

264. Under federal law, courts describe the second element as a “materially adverse action,” defined as a negative employment outcome that would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The NYCHRL specifically rejects the term “materially adverse”; however, it similarly defines the underlying negative outcome. N.Y.C., N.Y., ADMIN. CODE § 8-107(7) (2017). According to the NYCHRL:

The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, . . . or in a materially adverse change in the terms and conditions of employment, . . . provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

*Id.*

265. See, e.g., *McGrath v. Clinton*, 666 F.3d 1377, 1380 (D.C. Cir. 2012) (discussing Title VII); *Brightman v. Prison Health Serv., Inc.*, 970 N.Y.S.2d 789, 792 (N.Y. App. Div. 2013) (discussing NYCHRL).

266. See *supra* Section III.B.

267. *Albunio v. City of New York*, 947 N.E.2d 135 (N.Y. 2011).

268. *Id.* at 138.

269. Compare *id.* at 138 (stating that although the employee did not explicitly accuse anyone of discrimination, nor even mention the protected category, the employee’s

NYCHRL have also considered a broader range of conduct to be sufficiently adverse to meet the second element of a retaliation claim: a negative employment outcome that would deter a reasonable person from complaining.<sup>270</sup> Thus, the court in *Williams v. New York City Housing Authority*<sup>271</sup> concluded that no adverse employment outcomes were categorically excluded as too minor to be retaliation.<sup>272</sup> The court went on to state that the assessment of retaliatory conduct should “be made with a keen sense of workplace realities, of the fact that the ‘chilling effect’ of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities.”<sup>273</sup> Finally, and perhaps most significantly, on the causation element, plaintiffs suing under the NYCHRL need only show that retaliation was a motivating factor, or one factor among others, in the employer’s decision to take the negative employment action.<sup>274</sup> This standard is much broader than the “but-for” causation standard mandated under Title VII.<sup>275</sup> These important differences between the NYCHRL and Title VII, however, did not affect Fox News.

*D. The NYCHRL Removes the Severe or Pervasive Standard from Assessment of Sexual Harassment Liability*

As explained above, one of the identified problems with federal harassment law is that federal courts have defined severe or pervasive harassment to exclude significant amounts of reprehensible, harassing

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insistence that a gay man was the better candidate could constitute protected conduct under the broad provisions of the NYCHRL), *with* *Grosdidier v. Broad. Bd. of Governors*, Chairman, 709 F.3d 19, 24 (D.C. Cir. 2013) (stating that the employee’s complaint of sexual harassment based on the circulation of an email with a suggestive image of a well-known musician straddling a cannon, use of terms “Sexy Mama” and “Sexy Papa,” and excessive hugging and kissing between a female coworker and several male coworkers, did not constitute protected conduct).

270. See *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 112, 115–16 (2d Cir. 2013) (reversing the district court’s grant of summary judgment on NYCHRL retaliation claims, noting error in failing to apply the separate, broader standards of the NYCHRL, and concluding that the supervisor’s insulting comments to the plaintiff in front of others and shunning of the plaintiff were sufficiently negative employment outcomes for retaliation claim under NYCHRL).

271. *Williams v. N.Y.C. Housing Auth.*, 872 N.Y.S.2d 27 (N.Y. App. Div. 2009).

272. *Id.* at 34.

273. *Id.*

274. See *Brightman v. Prison Health Serv., Inc.*, 970 N.Y.S.2d 789, 792 (N.Y. App. Div. 2013).

275. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013); see also *Sass v. MTA Bus Co.*, 6 F. Supp. 3d 238, 247–48 (E.D.N.Y. 2014) (citing *Calhoun v. City of Herkimer*, 980 N.Y.S.2d 664, 667–68 (2014)) (finding that the motivating factor standard under the NYCHRL was not altered by the United States Supreme Court’s *Nassar* decision).

conduct. The NYCHRL, as interpreted, directly remedies this issue by removing the severe or pervasive standard from liability altogether. In *Williams v. New York City Housing Authority*, a state appellate court determined that in light of the dictates of the Restoration Act, Title VII's requirement that harassment be severe or pervasive in order to be actionable no longer applies to the NYCHRL.<sup>276</sup> According to the court in *Williams*, under the NYCHRL, a plaintiff need only show that she was treated worse than other employees due to her gender.<sup>277</sup> The severity or pervasiveness of the poor treatment is relevant only to damages, not to the underlying liability.<sup>278</sup>

Thus, the NYCHRL fixes the problematic standards and defenses of Title VII. However, in spite of these changes, the NYCHRL failed to deter workplace sexual harassment in the case of Fox News. Further diagnosis of stubborn cultures of harassment and an alternative prescription are therefore necessary.

V. ALTERNATIVE EXPLANATIONS AND SOLUTIONS: ENTRENCHED  
CULTURES REQUIRE SYSTEMIC CLAIMS AND LEGISLATIVE  
AMENDMENT MUST BE PAIRED WITH ACCESS TO COURTS

The NYCHRL's failure to affect Fox News calls into question the utility of amending Title VII to include similar broad provisions. It does not mean, however, that this type of reform should be rejected altogether. Although the NYCHRL may not have impacted Fox News, it has been successful in aiding other plaintiffs who bring suit under this law.<sup>279</sup> In a number of cases, plaintiffs have survived summary judgment or motions to dismiss on their NYCHRL claims when their Title VII or state law claims failed.<sup>280</sup> What may be required, therefore, is a multi-prong approach to reforming sexual harassment law. Amending Title VII in a manner similar to the NYCHRL could be one prong, but, as the example of Fox News highlights, other strategies are needed to address

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276. *Williams*, 872 N.Y.S.2d at 38.

277. *Id.* at 39.

278. *See id.* at 38. The *Williams* court further concluded that the defendants had an affirmative defense if they could show that a reasonable person would consider the complained-of conduct to be "petty slights and trivial inconveniences." *Id.* at 41.

279. *See, e.g., Kolenovic v. ABM Indus. Inc.*, 361 F. App'x 246, 248 (2d Cir. 2010).

280. For example, in *Gorokhovskiy v. New York City Housing Authority*, the Second Circuit reversed a district court order granting defendant's motion to dismiss NYCHRL claims, while affirming dismissal of all federal and state claims, specifically referencing the NYCHRL's broader definitions of actionable discrimination and retaliation. *Gorokhovskiy v. N.Y.C. Hous. Auth.*, 552 F. App'x 100, 102 (2d Cir. 2014); *see also Kolenovic*, 361 F. App'x at 248 (affirming district court order granting summary judgment on a Title VII claim but vacating district court order granting summary judgment on a NYCHRL claim because the NYCHRL has more lenient standards than Title VII).

entrenched cultures that resist meaningful change. This Part explores two alternative strategies: pursuing systemic harassment claims<sup>281</sup> and restricting the use of confidential alternative dispute resolution.<sup>282</sup>

### A. Cultural Entrenchment and Systemic Solutions

It is possible that Fox News is a workplace with such an unusually misogynistic culture that even the strengthened provisions of the NYCHRL had no effect. Fox News is an organization known for its trademark “female hosts in skirts, sitting behind translucent desks that can highlight their legs” and for “embracing ‘politically incorrect’ themes.”<sup>283</sup> Commentators describe the network as flying under a “pirate flag” with “potentially serious problems in its corporate culture,” showing little sign of real change despite the year-long spotlight on harassment allegations.<sup>284</sup> One commentator described the network as on “the wrong side of patriarchy and male privilege,” and stated that the Ailes and O’Reilly accusations are just one “part of [a] larger, male-centric cultural problem at Fox.”<sup>285</sup> Former newscasters at Fox News have described the culture as “toxic” and a “minefield,” and even Sarah Palin said that the network’s culture of intimidating women needed to change.<sup>286</sup>

The harassing culture has proven to be particularly resistant to change, despite Fox News’s claims to the contrary. For example, in the last year, Fox News has replaced the head of its human resources department, and repeatedly enlisted the help of outside counsel to investigate potential discrimination.<sup>287</sup> Under this new leadership, human resources emailed employees encouraging them to contact the outside firm with any complaints about improper behavior.<sup>288</sup> When Jessica

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281. See GREEN, *supra* note 138, at 151–53; Jason R. Bent, *Systemic Harassment*, 77 TENN. L. REV. 151, 167–68 (2009).

282. See, e.g., Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL’Y REV. 119, 141–42 (2014); Minna Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 930 (2006).

283. Jim Rutenberg, Ben Protess & Emily Steel, *Internal Inquiry Sealed the Fate of Ailes at Fox*, N.Y. TIMES, July 21, 2016, at A1.

284. Jim Rutenberg, *After Ailes, Fox News Still Flies Pirate Flag*, N.Y. TIMES, Apr. 5, 2017, at B1.

285. David Zurawik, *Fox News on the Losing Side of the Gender Wars*, BALT. SUN, May 7, 2017, at E1.

286. Jennifer Konerman, *Female Newscasters Recall “Toxic” Culture While Working at Fox News*, HOLLYWOOD REP. (Apr. 20, 2017, 1:21 PM), <http://www.hollywoodreporter.com/news/bill-oreillys-exit-cnns-alisyn-camerota-recalls-toxic-culture-at-fox-news-995986>.

287. See Emily Steel & Niraj Chokshi, *Bias Lawsuit and Inquiry Besiege Fox*, N.Y. TIMES, May 5, 2017, at B1.

288. See *id.*



Golloher, a Fox News employee, took advantage of this reporting avenue and sent an email detailing discriminatory conduct she experienced at the network, Fox News fired her less than 24 hours later.<sup>289</sup> Further, although Fox News has removed Ailes, O'Reilly, and Shine, a number of top executives remain who allegedly contributed to the retaliation, cover-up, or perpetuation of sexual harassment at the network.<sup>290</sup>

Grossman documents organizational and sociocultural theories that might explain how cultures of harassment such as Fox News's arise.<sup>291</sup> As Grossman notes, according to organizational theory, the climate of a workplace creates the "opportunity structures" for sexual harassment.<sup>292</sup> Beyond these broader structural theories, Grossman further cites empirical studies on workplace norms that support intuitive lay interpretations of the causes behind Fox News's harassment culture.<sup>293</sup> These studies reveal the following about harassment:

Harassment tends to occur more often in highly sexualized work environments, male-dominated work environments, and work environments in which the employers exercise little or no control over behavior. . . . Studies have also found an inverse correlation between perceived equal employment opportunity for women and the level of harassment. The presence of harassing role models may also trigger others . . . to engage in sexually harassing behavior.

. . . Studies [also] show a strong correlations between . . . management effectiveness in reacting to sexual harassment and the occurrence of harassing behavior . . . . If "top management condones sexual harassment by ignoring it, discouraging complaints, or participating in it, then those disposed to sexually harass will be likely to do so."<sup>294</sup>

If Fox News is aberrant, this could explain why the NYCHRL had no impact on this particular employer. It would also suggest two outcomes. First, if Fox News was such a misogynistic environment that no legal standard would have an effect, it still makes sense to improve those legal standards for other employers who would indeed be influenced. Activists could seek amendments to state and local laws to mirror the NYCHRL, such as removing the *Faragher-Ellerth* defense, and someday could seek legislative change at the federal level as well. Although amending Title VII to better help plaintiff-employees is a

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289. See *id.* Golloher has since filed a state lawsuit bringing claims of discrimination and retaliation against the network. See *id.*

290. See Grynbaum & Steel, *supra* note 18, at A1.

291. Grossman, *supra* note 5, at 35–38.

292. *Id.* at 35 (quoting Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 34 (1982)).

293. *Id.* at 37–38.

294. *Id.* at 37–38.

daunting political prospect at present, it is not without precedent. In 1991, Congress amended Title VII to overturn a number of restrictive Supreme Court decisions and significantly advance employee rights under the statute.<sup>295</sup> At the least, this type of statute has the potential to improve outcomes in those cases that are filed in court.<sup>296</sup>

Second, if in fact Fox News failed to respond to the “legislative fixes” of the NYCHRL due to its unusual cultural resistance, plaintiffs could still target the network or similarly entrenched companies by bringing systemic harassment claims. While individual harassment claims may not offer sufficient incentive for change, systemic harassment claims that target the employer more directly may be a better solution. Under Title VII, systemic claims seek company-wide relief from an employer’s pattern and practice of discrimination.<sup>297</sup> Both the Equal Employment Opportunity Commission (EEOC), the agency that enforces Title VII, and individuals may bring systemic claims.<sup>298</sup> Initially, systemic disparate treatment claims challenged policies affecting employment decisions such as hiring, firing, and promotion.<sup>299</sup> More recently, a number of cases have successfully alleged claims of systemic sexual harassment.<sup>300</sup>

As with other systemic claims, systemic sexual harassment cases allege more than individual instances of sexual harassment; they allege the employer had a pattern and practice of tolerating widespread harassment within the workplace.<sup>301</sup> Although neither the Supreme Court

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295. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Kate Webber, *It is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN’S L. REV. 841, 849–51 (2015) (describing the history of Congress amending Title VII in response to Supreme Court decisions narrowing its terms).

296. See *supra* note 280.

297. See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

298. See 42 U.S.C. §§ 2000e-5–2000e-6 (2012). Unlike individuals, the EEOC is not required to obtain Rule 23 certification in order to proceed on behalf of a class of plaintiffs. See Gen. Tel. Co. Nw. v. EEOC, 446 U.S. 318, 323 (1980). The EEOC may alternatively bring a claim challenging company-wide practices in its own right to protect the public’s interest. See Bent, *supra* note 281 at 165; see also 42 U.S.C. 2000e-6.

299. See, e.g., Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977); *Teamsters*, 431 U.S. at 336.

300. See Bent, *supra* note 281, at 160–62.

301. See *id.* at 160. Bent explains:

Private plaintiffs and the EEOC have articulated the systemic harassment theory in several different ways, but their arguments seem to be rooted in the same basic idea: the defendant employer allowed sexual harassment to exist and persist in its workplace to such a degree that it constituted a “pattern or practice” of harassment that affected a class of employees (not just one employee or a few employees) and failed to take remedial action, even after becoming aware of the offensive behavior.

*Id.*

nor any appellate court has addressed the validity of systemic harassment claims, the district courts that have considered the issue have concluded that systemic sexual harassment claims are viable under Title VII.<sup>302</sup>

As Professor Jason Bent explains, systemic harassment claims are “a powerful weapon to combat structural sources of discrimination”<sup>303</sup> that could “spur structural change by otherwise resistant or lagging employers.”<sup>304</sup> Green similarly points to systemic claims as a means to address the problem of organizational innocence described above, in which employers are excused from liability so long as they make surface efforts to treat the “individual” problem of harassment.<sup>305</sup> As Green explains, “[s]ystemic discrimination law is needed to identify those organizations in which discrimination is widespread—and to incentivize structural solutions.”<sup>306</sup> Green specifically asserts that systemic claims are more effective than individual claims at forcing cultural change within institutions.<sup>307</sup> Thus, systemic claims are the answer to the problem of organizational context, which, as explained in Part III, plays a significant role in creating a discriminatory workplace.<sup>308</sup>

To see these benefits, consider the following cases involving systemic harassment, which explicitly emphasize the employer’s culpability and are structured to avoid some of the pitfalls of individual claims. For example, in the seminal case *EEOC v. Mitsubishi Motor*

302. See *id.* at 167–68 (citing *EEOC v. Dial*, 156 F. Supp. 2d 926, 945–46 (N.D. Ill. 2001); *EEOC v. Foster Wheeler Constructors, Inc.*, No. 98 C 1601, 1999 WL 528200, at \*2 (N.D. Ill. July 13, 1999); *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 386–87 (N.D. Ill. 1999); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 875–76 (D. Minn. 1993)). A number of more recent cases also recognize the validity of systemic harassment claims. See *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836, 839 (S.D. Tex. 2014); *EEOC v. Pitre, Inc.*, 908 F. Supp. 2d 1165, 1172 (D.N.M. 2012); *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 958 (N.D. Iowa 2009); *Adorno v. Port Auth.*, 258 F.R.D. 217, 235 (S.D.N.Y. 2009); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659 (E.D. Va. 2008); *EEOC v. Int’l Profit Assocs.*, No. 01 C 4427, 2007 U.S. Dist. LEXIS 78378, at \*11 (N.D. Ill. Oct. 23, 2007); *U.S. EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1143 (D. Nev. 2007); *Wright v. Stern*, 450 F. Supp. 2d 335, 370 n.20 (S.D.N.Y. 2006); *Emps. Committed For Justice v. Eastman Kodak Co.*, 407 F. Supp. 2d 423, 430 (W.D.N.Y. 2005); *EEOC v. Jillian’s of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 983 (S.D. Ind. 2003).

303. Bent, *supra* note 281, at 201.

304. *Id.* at 204. Bent goes on to suggest reforming the current law on systemic harassment to create a unified approach, with the EEOC taking a primary role in bringing systemic claims seeking injunctive relief. *Id.* at 204–05.

305. GREEN, *supra* note 138, at 151–53.

306. *Id.* at 153.

307. *Id.* Green calls for Congress to create a specific class mechanism to better promote such claims. *Id.* at 159.

308. See Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 433–34 (2011); *supra* Part III.

*Manufacturing of America, Inc.*,<sup>309</sup> the court explained that in systemic cases, it must not consider the alleged harassment as a “series of discrete incidents,” but rather must analyze “the landscape of the total work environment” to determine whether the company had a policy of tolerating sexual harassment.<sup>310</sup> The court further determined that if the plaintiff demonstrates such a policy, the company’s response to particular harassment complaints could not alone be a defense to systemic claims.<sup>311</sup> Instead, the company must show “steps to address the problem on a *company-wide* basis” and that the response proved *effective*.<sup>312</sup> In this manner, the analysis moves from a specific employee and the various defenses against her to the company and its overall culpability.

Systemic harassment cases do this structurally as well by separating systemic harassment claims into two phases.<sup>313</sup> In Phase I, the plaintiff can show a pattern or practice of sexual harassment by proving that an objectively reasonable person would find a hostile work environment and a company policy of tolerating this environment.<sup>314</sup> Upon this showing, the plaintiff would be entitled to injunctive relief.<sup>315</sup> Only in Phase II would individual issues, such as the *Faragher-Ellerth* defense, arise as individual plaintiffs sought monetary relief.<sup>316</sup> This division provides a remedy for a company’s failure to prevent broad harassment in its workplace regardless of the vagaries of the individual women’s willingness to report harassment, avoiding the harmful effects of both the *Faragher-Ellerth* defense and weak retaliation protections.<sup>317</sup> Further, although systemic harassment claims must still meet the problematic severe or pervasive standard, a plaintiff with systemic claims has the benefit of meeting this standard with the collective experiences of multiple women<sup>318</sup> and with an unlimited time period, at least according to some courts.<sup>319</sup> Systemic claims can therefore avoid some of the

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309. *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998).

310. *Id.* at 1074.

311. *Id.* at 1075.

312. *Id.* (emphasis added).

313. *See id.* at 1073, 1078–79.

314. *See id.* at 1073.

315. *See id.* at 1077.

316. *See id.* at 1078–79; *see also* *EEOC v. Pitre, Inc.*, 908 F. Supp. 2d 1165, 1176 (D.N.M. 2012).

317. *See* GREEN, *supra* note 138, at 151–53; Bent, *supra* note 281, at 201.

318. *See, e.g.,* *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1130–31 (D. Nev. 2007).

319. *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 967–68 (N.D. Ill. 2001); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1086 (C.D. Ill. 1998). *But see*

weaknesses of the individual claims that proved to be an ineffective deterrent for Fox News.

*B. Blocking the Use of Confidential Settlements and Arbitration*

The particularly entrenched, misogynistic culture of Fox News may explain the failure of the broad NYCHRL to deter harassment. A second potential explanation is that mandatory confidential arbitration or pre-litigation settlements undermined the strong content of the NYCHRL. For example, Fox News paid millions of dollars over many years to settle harassment claims against Bill O'Reilly.<sup>320</sup> Most of these claims were never filed in court, and the full extent of his long pattern of abuse was therefore hidden.<sup>321</sup> When the Carlson case took unusual legal steps to avoid confidential arbitration,<sup>322</sup> harassment at Fox News became a news story, and ultimately the settlements with the O'Reilly accusers were leaked to the press.<sup>323</sup> Only after the public revelations did Fox News fire O'Reilly and other culpable executives.<sup>324</sup> As other scholars have opined, the failure of discrimination law may have occurred due to the shuttling of claims out of the public court system through mandatory confidential arbitration or pre-litigation settlements.<sup>325</sup> If the prevalence of confidential arbitration and settlements is the reason that even strong laws such as the NYCHRL lack deterrent effect, the best solution may be to pursue legislation and activism that counteract the effects of confidential resolution of sexual harassment cases.

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Bent, *supra* note 281, at 180–81 (describing conflicting law on the applicability of statutes of limitations to systemic harassment claims).

320. See Steel & Schmidt, *O'Reilly Thrives*, *supra* note 4, at A1.

321. See *id.*

322. See *supra* notes 33–35 and accompanying text (explaining how Carlson chose to sue only Ailes and not her employer in order to avoid arbitration).

323. See Steel & Schmidt, *supra* note 2, at A1.

324. See Grynbaum & Steel, *supra* note 18, at A1; Steel & Schmidt, *supra* note 2, at A1.

325. See, e.g., Bornstein, *supra* note 282, at 141–42, 173. According to Bornstein: In a series of cases decided between 2007 and 2013, the Court increased pleading standards, strengthened mandatory arbitration, and interpreted the rules of class certification narrowly. As the collective result of these decisions, the ability of employees to bring private enforcement actions in federal court - an ability key to the enforcement scheme of Title VII - appears to be in jeopardy.

*Id.*; see also Kotkin, *supra* note 282, at 930.

## 1. Arbitration

Fox News required a number of its employees to sign confidential arbitration agreements,<sup>326</sup> which many argue inhibit employees' abilities to challenge discriminatory practices.<sup>327</sup> Arbitration agreements are contracts in which a party agrees to not sue the other party in court and to bring any claims in confidential arbitration proceedings.<sup>328</sup> These agreements are presumptively enforceable under the Federal Arbitration Act,<sup>329</sup> even in the employment context.<sup>330</sup> Recent Supreme Court cases have strengthened the use of arbitration agreements<sup>331</sup> by allowing the arbitrator to decide whether an arbitration agreement is enforceable, despite an arbitrator's "unique self-interest" in that question.<sup>332</sup> This line of cases has expanded the reach of arbitration agreements and restricted the ability of employees to challenge their enforcement.

Employees who sign arbitration agreements are usually forced to do so.<sup>333</sup> Many scholars of employment equity argue that these agreements hinder employees' ability to resist and obtain redress for discriminatory treatment.<sup>334</sup> They note, for example, that arbitration has different evidentiary and procedural rules that can make it more difficult for employees to prove their cases.<sup>335</sup> Arbitrators also have financial

326. See, e.g., Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration, Exhibit A, *supra* note 35, at para. 7.

327. See, e.g., Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 877 (2014); Bornstein, *supra* note 282, at 141, 173; Kotkin, *supra* note 282, at 930.

328. See David Seligman, *The National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 59 (2016).

329. 9 U.S.C. § 1 (2012).

330. See *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 457–58 (2016);

Seligman, *supra* note 328, at 59. Seligman explains:

Although Congress's purpose in enacting the FAA was to allow companies, bargaining at arms-length, to settle on an alternative dispute resolution forum, a series of recent Supreme Court decisions has expanded the Act's reach to cover almost all employment and consumer contracts, whether or not the parties actually bargained over the term.

Seligman, *supra* note 328, at 59.

331. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

332. See *Concepcion*, 563 U.S. at 351–52 (citing *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 480–82 (Cal. Ct. App. 2008)); *Jackson*, 561 U.S. at 72.

333. See Horton & Chandrasekher, *supra* note 330, at 458.

334. See, e.g., Bornstein, *supra* note 282, at 141–42, 173; Seligman, *supra* note 328, at 59.

335. See Horton & Chandrasekher, *supra* note 330, at 458.

incentives to favor employers who, unlike employees, are in a position to hire the arbitrator again in the future.<sup>336</sup> Many arbitration agreements require the employee to pay costly arbitration fees, which can be a de facto bar to any relief if the employee cannot afford the fee.<sup>337</sup> Moreover, even when an arbitrator's decision is incorrect as a matter of law or fact, it is nearly impossible to appeal the outcome under federal law.<sup>338</sup>

Some empirical data supports these critiques and demonstrates a distinct lack of success for employees in arbitration. For example, a 2016 study of nearly 6,000 employment cases brought before the American Arbitration Association found that employees were successful in only 18 percent of matters and recovered a median award of \$52,129.<sup>339</sup> In addition to a lack of successful outcomes, there is a lack of public disclosure when discrimination cases are diverted to arbitration. Specifically, many arbitration agreements require confidentiality, which hides the facts of the dispute, the nature of the claims, and the outcome.<sup>340</sup>

Fox News required a number of its employees to agree to confidential binding arbitration, which may have contributed to the harassment's continuity.<sup>341</sup> Carlson, for example, was a party to such an agreement.<sup>342</sup> Consequently, in order to file a lawsuit, she has to sue Ailes individually and argue that her arbitration agreement only applied to the network instead of Ailes.<sup>343</sup> This claim was hotly disputed and unresolved before settlement.<sup>344</sup> In most jurisdictions, arbitration agreements would not be vulnerable to this type of collateral challenge;

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336. See *id.* at 458; Seligman, *supra* note 328, at 59.

337. See Seligman, *supra* note 328, at 59.

338. See *id.*

339. Horton & Chandrasekher, *supra* note 330, at 462, 479; see also Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011) (analyzing arbitration outcomes in employment cases from 2003–2007 and finding employees won in 21% of cases for a median recovery of \$36,500). Other studies, however, found significantly higher employee success rates. See Horton & Chandrasekher, *supra* note 330, at 478–79.

340. See Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 466 (2006).

341. See Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Exhibit A, *supra* note 35, at para. 7 (containing "Standard Terms and Conditions" which include the mandatory arbitration clause).

342. *Id.* at 7–8.

343. See Complaint and Jury Demand, *supra* note 20, at paras. 1–3; Plaintiff's Brief, *supra* note 34, at 1.

344. See Order Voluntary Dismissing Case with Prejudice, *supra* note 36; Notice of Voluntary Dismissal, *supra* note 36; Petition to Compel Arbitration Pursuant to Section 4 of the Federal Arbitration Act, *supra* note 36, at para. 1; Notice of Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, *supra* note 36.

the NYCHRL allowed Carlson to sue Ailes individually, a cause of action that is unavailable under federal law.<sup>345</sup> Moreover, the language of the Fox News arbitration contract at least arguably excluded individual claims against executives from the arbitration mandate, which was a drafting error not typically present in such contracts.<sup>346</sup> Ultimately, it was only these unusual circumstances that prevented the Carlson case, and the cascading series of allegations that followed, from being buried by confidential alternative dispute resolution.

The harms of mandatory arbitration are well known to scholars and have recently received coverage in the media.<sup>347</sup> Legislators and other government actors have taken some steps to try to mitigate the stifling effect of arbitration agreements.<sup>348</sup> For example, in 2014, President Obama signed the Fair Pay and Safe Workplaces Executive Order, prohibiting pre-dispute arbitration agreements covering sexual harassment claims in contracts with employees of federal contractors.<sup>349</sup> The proposed Arbitration Fairness Act (AFA),<sup>350</sup> sponsored by Senator Franken and Representative Johnson, would nullify contract provisions

345. 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer . . .”) (emphasis added); N.Y.C., N.Y., ADMIN. CODE § 8-107(1) (2017) (“It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof . . .”) (emphasis added).

346. See Erik Wemple, *Roger Ailes Opts for Secrecy, Cowardice, in Face of Gretchen Carlson Suit*, WASH. POST: ERIK WEMPLE BLOG (July 9, 2016), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/07/09/roger-ailes-opts-for-secrecy-cowardice-in-face-of-gretchen-carlson-suit/?utm\\_term=.38921bc751d3](https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/07/09/roger-ailes-opts-for-secrecy-cowardice-in-face-of-gretchen-carlson-suit/?utm_term=.38921bc751d3). Quoting Paul Bland, executive director of Public Justice, Wemple states:

Ailes is not named in [the arbitration agreement]. Their argument is that FOX means Ailes. They should have written more broadly, most arbitration clauses name others who work for or with, are associated with, etc. I consider him a non-party under this language. Poor drafting . . . .

*Id.*; see also Certification of Barry Asen in Support of Defendant Roger Ailes’s Motion to Compel Arbitration and to Stay All Further Judicial Proceedings, Exhibit A, *supra* note 35, at para. 7 (identifying Carlson and Fox News Network LLC as the only parties to the contract and omitting any reference to executives, representative, and agents of the network); Plaintiff’s Brief, *supra* note 34, at 6. According to Carlson’s Brief in Opposition to Defendant’s Motion to Compel Arbitration and Stay Judicial Proceedings:

[T]he Employment Contract [containing the arbitration agreement] states that the only “parties” thereto are Carlson and Fox News Network. . . . Section 15 of [Carlson’s arbitration agreement] states: “This Agreement shall inure to the benefit of Fox’s successors, assignees, and Affiliates. . . . Officers or employees are not mentioned.

Plaintiff’s Brief, *supra* note 34, at 6.

347. See Seligman, *supra* note 328, at 59.

348. See *id.* (describing several federal efforts to limit the use of forced arbitration).

349. See *id.* (citing Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014)).

350. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. § 402(a); Arbitration Fairness Act of 2017, S. 537, 115th Cong. § 402(a).



that require arbitration of employment disputes.<sup>351</sup> These provisions have drawn the support of numerous scholars concerned with access to justice.<sup>352</sup> The need for federal action stems not just from a desire for nationwide relief, but also from the power of the Federal Arbitration Act (FAA), which preempts most state laws that would limit forced arbitration.<sup>353</sup>

While the AFA would relieve some of the harms of compulsory arbitration in the employment context, it is unlikely to become law in the current political environment, with a Republican-controlled Presidency and Congress.<sup>354</sup> The National Consumer Law Center has proposed a Model State Consumer and Employee Justice Enforcement Act (the “Model Act”)<sup>355</sup> to offer alternative state solutions in light of this reality.<sup>356</sup> The Model Act contains a number of provisions designed to mitigate the harms of arbitration within the limits of state action available under the FAA.<sup>357</sup> For example, Title I of the Model Act would

351. H.R. 1374, § 402(a); S. 537, § 402(a). It also prohibits compulsory arbitration clauses for consumer, antitrust, and civil rights disputes. H.R. 1374, § 402(a); S. 537, § 402(a).

352. See Horton & Chandrasekher, *supra* note 330, at 460–61 (citing Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 468 (2011); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 726 (2012); Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 55–56 (2014); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 793 (2012)).

353. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011); Seligman, *supra* note 328, at 62.

354. For example, the Arbitration Fairness Act has no Republican co-sponsors in either the House or Senate. *Cosponsors: H.B. 1374—115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1374/cosponsors> (last visited Dec. 7, 2017); *Cosponsors: S.537—115th Congress (2017-2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/537/cosponsors> (last visited Dec. 7, 2017).

355. MODEL STATE CONSUMER & EMP. JUSTICE ACT (NAT’L CONSUMER LAW CTR. 2015).

356. See generally Seligman, *supra* note 328.

357. See Seligman, *supra* note 328, at 62. Although the FAA preempts any state law that limits forced arbitration, the drafters of the Model Act see room for state action in: (1) using the state’s public enforcement and procurement powers to protect its own financial and enforcement interests; (2) regulating the formation of arbitration agreements rather than their enforcement; (3) unconscionability challenges to arbitration agreements “as long as what renders such clauses unfair is not a ‘fundamental’ attribute of arbitration”; (4) limiting enforcement of arbitration agreements in insurance contracts, contracts regarding transportation workers, and contracts that do not involve interstate commerce or, when the parties agree state law applies, areas exempted from FAA preemption; (5) regulating private companies that administer arbitrations; and (6) drafting procedures for litigating questions about arbitration in state court. See Seligman, *supra* note 328, at 62–63.

allow private attorneys general to bring actions on behalf of the state and its interests.<sup>358</sup> Under many state consumer and employment statutes, private actions supplement the underlying state right to bring enforcement proceedings,<sup>359</sup> and an individual's arbitration agreement does not limit this right.<sup>360</sup> States generally lack the budget to play a substantial enforcement role; consequently, Title I of the Model Act would delegate the state enforcement power to private attorneys.<sup>361</sup>

Title II of the Model Act would create a state practice of refusing to contract with companies that use arbitration clauses in employment or consumer contracts, thus tapping a state's market power to discourage compulsory arbitration.<sup>362</sup> Title III of the Model Act is aimed at protecting consumers and employees during the formation of an arbitration agreement by requiring that arbitration contracts "adequately disclose terms and condition[s]."<sup>363</sup> Title IV of the Model Act is based on the proposition that states may still refuse to enforce "arbitration clauses that are unconscionable and unfair, as long as what renders such clauses unfair is not a 'fundamental' attribute of arbitration."<sup>364</sup> Title IV therefore creates rebuttable presumptions that certain provisions are

358. MODEL STATE CONSUMER AND EMP. JUSTICE ACT, tit. I (NAT'L CONSUMER LAW CTR. 2015); *see also* Seligman, *supra* note 328, at 61.

359. *See, e.g.*, CAL. BUS. & PROF. CODE § 17200 (Deering 2017) (providing for state initiated action on behalf of consumers); CAL. CIV. CODE § 1780 (Deering 2017) (allowing consumers to bring individual suits); IOWA CODE § 216.5 (2017) (providing for state injunctive enforcement of anti-discrimination laws); *id.* § 216.16 (providing for a private cause of action to enforce state anti-discrimination laws); N.Y. EXEC. LAW § 63(12) (Consol. 2017) (allowing both state and individual claims for deceptive trade practices towards consumers).

360. *See* Seligman, *supra* note 328, at 60–61.

361. MODEL STATE CONSUMER AND EMP. JUSTICE ACT, tit. I, § 3(a) (NAT'L CONSUMER LAW CTR. 2015) ("A person may initiate on behalf of the State an action alleging violations of [designated State consumer and worker protection statutes] to recover civil penalties on behalf of the State and to seek injunctive, declaratory, or other equitable relief that the State would itself be entitled to seek.").

362. *Id.* at tit. II, § 3(a) ("The State shall not do business with any person or any of its parent entities or subsidiaries if that person includes forced arbitration clauses in any of its contracts with consumers or employees . . .").

363. *Id.* at tit. III, § 1; *see also id.* at tit. III, § 2. According to Title III of the Model Act:

This title applies to contracts [the categories of which are to be determined by each state] formed after this Title's effective date that meet any one of the following three criteria: (a) An employment or consumer contract not written in plain language that an average consumer or employee would understand; (b) An employment or consumer contract not written in the language in which the transaction was conducted, unless it can be proven that fewer than ten percent (10%) of the entity's transactions are conducted in that language; or (c) if a consumer contract, all of the material terms are not found in a single document.

*Id.* at tit. III, § 2.

364. Seligman, *supra* note 328, at 63.

unconscionable, including inconvenient venues, waivers of the right to seek remedies provided by statute, waivers of the right to seek punitive damages, and requirements that individuals pay costs of arbitration that exceed the costs of bringing a state or federal lawsuit, among others.<sup>365</sup> In addition to these provisions, the Model Act offers four other sections aimed at the areas of arbitration law that remain open to state regulation.<sup>366</sup>

## 2. Confidential Settlements

Even when an employee is not required to keep his or her allegations confidential through mandatory arbitration, many employment discrimination cases have a limited impact because they settle before trial with confidential terms and with prohibitions against discussing the case in the future.<sup>367</sup> Fox News used this strategy to hide harassment charges and allow stars like O'Reilly to continue in their roles, despite repeated accusations of harassment.<sup>368</sup> In one example, Huddy alleged that O'Reilly pursued a sexual relationship with her and when she refused, he thwarted her advancement at Fox News.<sup>369</sup> She was paid "high six figures" in exchange for keeping her allegations out of the public sphere and agreeing not to sue.<sup>370</sup> This information only became

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365. MODEL STATE CONSUMER AND EMP. JUSTICE ACT, tit. IV, § 2 (NAT'L CONSUMER LAW CTR. 2015). Title IV of the Model Act states:

There is a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard form contract to which only one of the parties to the contract is an individual and that individual does not draft the contract: (a) A requirement that resolution of legal claims take place in an inconvenient venue. An inconvenient venue is defined for State law claims as a place other than the county where the individual resides or the contract was consummated, and for federal law claims as a place other than the federal judicial district where the individual resides or the contract was consummated; (b) A waiver of the individual's right to assert claims or seek remedies provided by State or federal statute; (c) A waiver of the individual's right to seek punitive damages as provided by law; (d) A requirement that the individual bring an action prior to the expiration of the applicable statute of limitations; (e) A requirement that the individual pay fees and costs to bring a legal claim substantially in excess of the fees and costs that this State's courts require to bring such a State law claim or that federal courts require to bring such a federal law claim.

*Id.*

366. *Id.* at tits. V–VIII.

367. See SPERINO & THOMAS, *supra* note 85, at 16 (noting the frequency of settlement in discrimination cases); Kotkin, *supra* note 282, at 930.

368. See Steel & Schmidt, *supra* note 15, at A1.

369. See *id.*

370. *Id.*

public in the aftermath of the Carlson allegations, when an anonymous tipster leaked a copy of a letter from Huddy's counsel to Fox News.<sup>371</sup>

Scholars have frequently criticized the effect of confidential settlements on discrimination and other cases.<sup>372</sup> For example, Professor Theresa Beiner explains that confidential settlements of employment discrimination cases interfere with the important public function of trials in setting workplace norms.<sup>373</sup> "In the context of employment discrimination cases, [a settlement] relieves employers of an obligation or incentive to examine their workplaces and consider that there may be organizational structural components that permit discrimination to flourish."<sup>374</sup> This is precisely what happened at Fox News. The network settled cases for years without making the systemic and cultural changes necessary to stop sexual harassment. The presence of a strong anti-discrimination law, the NYCHRL, did not prevent this outcome.

Professor Minna Kotkin identifies other ways that confidential settlements undermine employment equity. She explains that secret settlements hinder the ability of plaintiffs' counsel to assess a fair settlement value and the viability of a contingency fee arrangement, reducing access to representation.<sup>375</sup> Kotkin further notes that confidential settlements hinder judges' abilities to facilitate settlements by limiting their access to information on the range of reasonable outcomes.<sup>376</sup> Finally, she emphasizes the serious harm of keeping discrimination claims out of the public eye, creating an inaccurately limited public perception of the extent of discrimination in the workplace.<sup>377</sup> Kotkin's concern for the role of the public eye is now of even greater significance because social media is a new force for changing employment norms.<sup>378</sup> Public revelations of sexual harassment

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371. *See id.*

372. *See, e.g.,* Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & SOC'Y REV. 1, 26 (2012); Kotkin, *supra* note 282, at 930 (2006). *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

373. Beiner, *supra* note 327, at 879–80.

374. *Id.* at 880.

375. Kotkin, *supra* note 282, at 970.

376. *Id.*

377. *Id.* at 970–71.

378. *See* GREEN, *supra* note 138, at 160. Green explains:

[R]esearch suggests that lawsuits in the discrimination area tend to operate indirectly by shifting legal environments and norms as much as directly by threatening sanction and oversight. Making an example of an employer that is violating Title VII, in other words, encourages change by other organizations, even if the directly targeted organization is not especially responsive to the lawsuit brought against it.

*Id.* (citation omitted).

settlements by Fox News led to the forced departure of top performing anchors and the highest-level executives.<sup>379</sup>

One solution to the stifling effects of confidential settlements is immediately accessible because, in the absence of mandatory arbitration agreements, plaintiffs with discrimination claims can refuse to agree to confidentiality provisions.<sup>380</sup> Kotkin suggests this very approach, noting that plaintiffs' counsel could begin to refuse to settle if confidentiality is a term.<sup>381</sup> Further, she notes that some counsel have successfully taken this stand against agreements that included a fee waiver demand, and that retainer agreements could disclose the anti-confidentiality condition up front.<sup>382</sup> The benefit of this solution is that it requires no government action and involves reliance on the plaintiffs' attorneys who would ultimately benefit if it were successful.<sup>383</sup> The challenge of this potential solution is the value employers place on confidentiality.<sup>384</sup> Many plaintiff-employees also value confidentiality out of a desire to avoid a reputation for litigation that could harm their prospects for future employment.<sup>385</sup> This poses a particular obstacle to plaintiffs' counsel who might wish to resist confidentiality, yet would be obliged to follow their clients' interests.<sup>386</sup>

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379. See *supra* Part II.

380. See Beiner, *supra* note 327, at 885–86 (urging “brave” plaintiffs to remain in the federal court system instead of pursuing alternative dispute resolution or settlement).

381. Kotkin, *supra* note 282, at 976.

382. *Id.* “[I]f plaintiffs’ lawyers obtained their clients’ prospective agreement to refuse settlements containing confidentiality clauses, the balance of power in negotiations could shift. Just as defense counsel now claim that they will never settle without confidentiality, the plaintiffs’ bar could become equally assertive.” *Id.* at 976. Kotkin argues that the plaintiffs’ bar in other areas of law has challenged the use of secret settlements. *Id.* (noting that the Association of Trial Lawyers of America has “officially condemned secret settlements”).

383. See *id.* at 970 (noting how settlement secrecy hides a company’s prior settlement outcomes, harming the ability of plaintiffs’ counsel to determine the value of a potential case and negotiate settlements, while giving corporate counsel a distinct advantage).

384. See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878 (2007).

385. As the example of Bakhtiar demonstrates, employees also face pressures that encourage confidential settlement. See Rutenberg, Steel & Koblin, *supra* note 11, at A1. As Bakhtiar explained, she agreed to settle her sexual harassment case against Fox News before filing an action in court in order to protect her public reputation with future employers. *Id.*; see also Kotkin, *supra* note 282, at 947 (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 467–74 (1991)) (noting scholars who argue that confidentiality protects plaintiffs from being harassed by money seekers and protects all parties’ right to privacy and freedom to enter into contracts).

386. See Kotkin, *supra* note 282, at 947 (citing Miller, *supra* note 385, at 467–74) (stating that proponents of confidential settlement contend that plaintiffs’ counsel have an ethical obligation to use confidentiality as a bargaining chip to gain the best outcomes for

An alternative solution to the problems of confidential settlements is a legal prohibition to confidentiality.<sup>387</sup> Professor Scott Moss, although not endorsing a ban on confidentiality,<sup>388</sup> identifies how such a ban could come about.<sup>389</sup> He explains that mandatory disclosure of post-litigation settlements could be effected by amending Federal Rule of Civil Procedure 41 to require publicly filed stipulations of settlement to attach the applicable settlement agreement.<sup>390</sup> Moss further theorizes that pre-filing settlements could be made public by courts either (1) declaring that confidentiality clauses in settlement agreements are unenforceable, which would allow employees to reveal the terms without punishment, or (2) invalidating waivers of claims that include confidentiality provisions, allowing the employee to bring the underlying suit.<sup>391</sup> Moss ultimately concludes that these methods for reaching pre-filing settlements would be ineffective because most plaintiffs would not know how to take advantage of their right of publicity and the mainstream media would not be interested in most settlements.<sup>392</sup> Moss makes a valid point about the effect of disclosure in some cases: not every harassment allegation will receive extensive media coverage. The benefits of prohibiting confidentiality, however, have been highlighted in the recent example of Fox News. The proliferation of both social media and advocates using publicity to combat sexism in corporations since the date of Moss's article suggests that disclosure now has a greater potential for plaintiffs.

Kotkin also discusses potential legal methods for forcing settlement disclosure, suggesting that the law could require mandatory judicial approval of all employment discrimination settlements.<sup>393</sup> She cites the Fair Labor Standards Act<sup>394</sup> (FLSA) as a model for this approach, noting that according to Supreme Court precedent, an FLSA plaintiff cannot privately bargain away her right to wages or damages.<sup>395</sup> To protect the

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their clients); Moss, *supra* note 384, at 871 ("From the legal ethics perspective, parties hire lawyers to resolve *their* disputes on the best terms, not to serve a broader social good by rejecting advantageous money-for-silence offers.").

387. See Moss, *supra* note 384, at 882–83.

388. Moss performed an economic analysis of a ban on confidential settlements and ultimately found no conclusive economic prediction for the overall effect of such a ban. *Id.* at 911. Moss did suggest, however, that individual states or federal districts could experiment with banning confidentiality to see if some of the possible benefits he identified would come to fruition. *Id.*

389. *Id.* at 883.

390. *Id.* at 882.

391. *Id.* at 884–85.

392. *Id.* at 884.

393. Kotkin, *supra* note 282, at 971–72.

394. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

395. Kotkin, *supra* note 282, at 971 (citing *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 115–16 (1946)).

“public purpose of the law,” only stipulated settlements subjected to judicial scrutiny are permissible under the FLSA.<sup>396</sup> As Kotkin acknowledges, however, this or any effort to legally require settlement disclosure would likely face strong resistance in light of the long-standing policies favoring confidentiality.<sup>397</sup>

Kotkin therefore argues that the best option for ending confidential settlements is through agency action.<sup>398</sup> She suggests that the EEOC should issue regulations requiring judicial approval of all negotiated settlements and the inclusion of the settlement terms in the public record.<sup>399</sup> In support of this approach, Kotkin points to a Department of Labor (DOL) regulation that had initially required court or agency approval of settlements under the Family and Medical Leave Act<sup>400</sup> (FMLA), but was later revised to allow private settlements.<sup>401</sup> Although this public approval of FMLA settlements is no longer required by DOL regulations, the prior regulation mandating judicial or agency approval was upheld by at least one circuit court before the revision.<sup>402</sup> Kotkin, drawing parallels between the FMLA and Title VII, argues such regulation is appropriate for Title VII and would be entitled to judicial deference.<sup>403</sup>

The long history of tolerating sexual harassment at Fox News may reflect the network’s use of confidential arbitration and settlements. These alternative dispute resolution methods shielded Fox News from even the broad provisions of the NYCHRL. Solutions are available, however, as more scholars, activists, and politicians recognize the harms of confidential resolutions and the value of public legal forums.<sup>404</sup>

## VI. CONCLUSION

In the last year, sexual harassment in the workplace has been a major news story. Companies such as Fox News have been forced to remove top executives to address public outcry against widespread abuse

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396. *Id.* (citing *D.A. Schulte*, 328 U.S. at 115–16).

397. *Id.* at 972 (“[I]n this era of docket control, it is unlikely that Congress would amend [Title VII] or the courts would adopt a statutory interpretation that would expand the judiciary’s workload.”); see also Doré, *supra* note 340, at 517.

398. Kotkin, *supra* note 282, at 972–73.

399. *Id.* at 972.

400. 29 U.S.C. § 2601 (2012).

401. Kotkin, *supra* note 282, at 973 (citing 29 C.F.R. §§ 1601.22, 1601.26 (2005)). This regulation was revised in 2009 to permit private, confidential FMLA settlements. See 29 C.F.R. § 825.220(d) (2017).

402. See Kotkin, *supra* note 282, at 973–74 (citing *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 365 (4th Cir. 2005)).

403. *Id.*

404. See *supra* Part V.B.

of their female employees.<sup>405</sup> The apparent victory of these departures, however, masks the underlying failure of the law to instigate these changes. The example of Fox News demonstrates that legal prohibitions against harassment did not deter the years of misconduct that were only remedied by significant public, advertiser, and shareholder pressure. This failure of harassment law to incentivize real change within corporate cultures can be attributed to the weaknesses of Title VII.<sup>406</sup> Simply amending Title VII to fix these problems, however, is only one part of the solution. Advocates should consider a multi-pronged approach instead. Amending Title VII to remove some of its more problematic aspects can lead to better outcomes for plaintiffs whose claims do reach court.<sup>407</sup> To address entrenched corporate cultures such as Fox News, advocates should additionally support greater use of systemic harassment claims.<sup>408</sup> Finally, a concerted effort to minimize the use of confidential arbitration and settlements will be a key part of any strategy to reform sexual harassment law and deter harassment in the workplace.<sup>409</sup>

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405. Grynbaum & Steel, *supra* note 18, at A1; Steel & Schmidt, *supra* note 2, at A1.

406. *See supra* Part III.

407. *See supra* Part IV.

408. *See supra* Section V.A.

409. *See supra* Section V.B.



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