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# WHY VICTIMS DESERVE THE RIGHT TO CHOOSE HOW TO RESOLVE THEIR SEXUAL HARASSMENT CLAIMS

By  
Kathryn R. Meyer\*

## I. INTRODUCTION

Beginning in 2017, Americans have seen an onslaught of news coverage regarding powerful men abusing their positions and taking advantage of those who work for them or with them. These men have been Hollywood producers, high-profile executives, musicians, journalists, talk show and radio hosts, and politicians, including the President of the United States. Some of these men have been held accountable for their wrongdoings, while others have not. However, this news coverage has brought renewed attention to the issue of workplace sexual harassment and how to deal with it. For many victims of sexual harassment, mandatory arbitration clauses prevent them from seeking other forms of redress, such as litigation,<sup>1</sup> which takes away a victim's agency to decide what means of resolution they prefer. Following an incident of sexual harassment, victims do not need to have more of their rights taken from them. Rather, victims deserve to proceed in a way that accommodates their needs. Arbitration may be an appropriate avenue, but the forced nature of many of these arbitration clauses is problematic, as it takes away a victim's agency. Because victims of sexual harassment have been subjected to such unpleasant and exploitative situations, their needs must be addressed in a manner that prevents further discomfort. In order for victims to feel safe and in control, it is essential that they have the option to choose how to resolve their sexual harassment claims, whether it be through arbitration or litigation.<sup>1</sup>

## II. WHAT IS SEXUAL HARASSMENT?

### A. *Defining Sexual Harassment*

Despite the recent attention given to sexual harassment claims, there is still some confusion regarding the types of behaviors and actions that constitute sexual harassment.<sup>2</sup>

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<sup>1</sup> The focus of this article will be on the distinction between litigation and arbitration. Mediation will not be discussed as it is a non-adversarial form of conflict resolution, unlike litigation and arbitration, which are both adversarial processes. Robin Hoberman, *Mediation: A Nonadversarial Alternative to a Win-Lose System*, 90 ILL. B.J. 588, 588 (2002).

<sup>2</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016).

According to the U.S. Equal Employment Opportunity Commission (“EEOC”), sexual harassment has a very broad definition.<sup>3</sup> Sexual harassment in the workplace can be anything from a crude joke that would be inappropriate in a professional setting to sexual assault.<sup>4</sup> The EEOC has defined this behavior as “sexually-based behaviors, such as unwanted sexual attention or sexual coercion,” and adds that sex-based discrimination against transgender individuals falls under sexual harassment.<sup>5</sup> Examples of this kind of discrimination often take the form of “unwelcome questions about their transgender or surgical status.”<sup>6</sup> While the definition of sexual harassment is very broad and encompasses a wide variety of behaviors, many people do not realize that certain behaviors constitute sexual harassment.<sup>7</sup> The EEOC stated in their recent study “that many individuals do not label certain forms of unwelcome sexually based behaviors – even if they view them as problematic or offensive – as ‘sexual harassment.’”<sup>8</sup> In fact, the number of women who reported experiencing sexual harassment increased after being given a definition of behavior that constitutes sexual harassment.<sup>9</sup> Because of such uncertainty, it is difficult to gather accurate data on the rates of sexual harassment in the American workplace, as instances of harassment are likely underreported.<sup>10</sup>

### B. Rates of Workplace Sexual Harassment

While data regarding the rates of sexual harassment in the workplace exists, it is not clear how indicative this data is of the broader working population. As the EEOC states in its study, “a significant amount of research on topics such as sexual harassment is based on the experiences of white women.”<sup>11</sup> Male victims of sexual harassment are also frequently excluded from surveys because they are less often the victims of sexual harassment, as they tend to be the abusers.<sup>12</sup> Further, as a potential result of societal ideals about gender, men are

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<sup>3</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, SEXUAL HARASSMENT (defining sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. . . . Both victim and harasser can be either a woman or a man, and the victim and harasser can be the same sex. . . . [H]arassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision”).

<sup>4</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(B).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(B).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Romeo Vitelli, *When Men Face Sexual Harassment*, PSYCHOLOGY TODAY (May 11, 2015); Maria Puente, *Women are Rarely Accused of Sexual Harassment and There’s a Reason Why*, USA TODAY (Dec. 18, 2017) (explaining that men hold more positions of power and can use these positions to abuse those who work below

also less likely than women to report sexual harassment.<sup>13</sup> Because such a significant portion of the workforce is excluded from the narrative of sexual harassment, one must look at the reported numbers as under-representative of the true rates of sexual harassment that take place in professional settings.<sup>14</sup>

Additionally, much of the data regarding sexual harassment is gathered from formal complaints.<sup>15</sup> However, many victims of sexual harassment do not speak out, and thus, their experiences are less likely to contribute to the national narrative of workplace sexual harassment.<sup>16</sup> The EEOC stated that many victims of sexual harassment seek informal methods in order to cope.<sup>17</sup> Some of these methods include: avoiding the perpetrator, “ignor[ing], forget[ing] or endur[ing] the behavior,” or “downplay[ing] the gravity of the situation.”<sup>18</sup> The EEOC reported that most victims who did not formally complain would turn to confidants, such as family or friends, as a means of coping.<sup>19</sup> In truth, the least common action taken is a formal complaint against the perpetrator.<sup>20</sup> Another study stated that roughly 75% of sexual harassment victims did not report the harassment.<sup>21</sup> Because so many victims resort to informal measures, rates of sexual harassment listed in studies are likely to be much lower than actual rates of sexual harassment.<sup>22</sup>

Of the statistics made available to the public, the rates show that there is a sexual harassment problem in the workplace. Because the data is not as thorough as one would like, the EEOC reports that “anywhere from 25% to 85% of women report having experienced

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them, often women, and men are often “socialized” to believe they are “superior” to women and use sexual harassment as a way to exert their power and control over women).

<sup>13</sup> See Puente, *supra* note 12 (stating that men often view sexual harassment as humiliating and something that happens to women and not men, and thus, they are unlikely to report their experiences as victims).

<sup>14</sup> See U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 3, pt. 2(B) (stating that much of the research conducted on sexual harassment focuses on white women, which thus excludes women of color, men, and gender-nonconforming individuals).

<sup>15</sup> Julia Carpenter, *Why the data on sexual harassment is just ‘the tip of the iceberg,’* CNN (Nov. 30, 2017).

<sup>16</sup> Carpenter, *supra* note 15; U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(C)

<sup>17</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(C)

<sup>18</sup> See *Id.* (showing the statistics: “avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%)”).

<sup>19</sup> See *Id.* (stating “the most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others”).

<sup>20</sup> See *Id.* (stating, “one study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it”).

<sup>21</sup> Mona Chalabi, *Sexual Harassment at Work: More than Half of Claims in US Result in no Charge*, THE GUARDIAN (July 22, 2016).

<sup>22</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(C).

sexual harassment” at their jobs.<sup>23</sup> The EEOC surveyed women from “probability samples” and from “convenience samples.”<sup>24</sup> 40% of the women who participated in the probability sample that gave specific examples of sexual harassment stated that they had been victims of sexual harassment.<sup>25</sup> In the convenience sample, with the same questions given as in the probability sample, 75% of women reported that they had been victims of workplace sexual harassment.<sup>26</sup> While these surveys focused solely on female<sup>27</sup> victims of sexual harassment, other surveys have focused on transgender individuals.<sup>28</sup> A survey of transgender individuals conducted in 2003 revealed that “23% reported that they had been victims of sexual harassment.”<sup>29</sup> The reported rates of harassment faced by transgender individuals have increased since 2003, hopefully as a result of more individuals seeking redress for the harassment inflicted upon them, rather than as a result of a spike in harassment. In a more recent EEOC survey of transgender individuals, 50% of those surveyed stated that they had experienced harassment at work, with 7% stating that they had been physically assaulted and 6% stating they had been sexually assaulted.<sup>30</sup> Additionally, 41% of those surveyed “reported having been asked unwelcome questions about their transgender or surgical status,” while 45% of those surveyed “reported having been referred to by the wrong pronouns ‘repeatedly and on purpose’ at work.”<sup>31</sup>

These statistics indicate that sexual harassment in the workplace is pervasive, but they do not show just how inescapable it is. As previously stated, the rates of sexual harassment reported in the various studies and surveys are not indicative of how common workplace sexual harassment truly is.<sup>32</sup> Additionally, it is important to note that most of these reports on workplace sexual harassment surveyed only women.<sup>33</sup> While women account for the majority of workplace sexual harassment victims, men are also subjected to sexual harassment in the

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<sup>23</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(C).

<sup>24</sup> *See Id.*, pt. 2(B) (stating that a “probability samples” are “surveys using a randomly representative sample,” and a “convenience sample” is “not randomly representative because it uses respondents that are convenient to the researcher”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (Whether the female victims were exclusively cisgender females or included transgender females is unknown).

<sup>28</sup> *See generally* Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data, Aggression and Violent Behavior*, (May/June 2009).

<sup>29</sup> *Id.* at 170, 175.

<sup>30</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 2, pt. 2(B).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See Id.* (stating that “a significant amount of research on topics such as sexual harassment is based on the experiences of white women”).

workplace, and their experiences deserve to be reported on and made a part of the narrative of workplace harassment.<sup>34</sup>

### III. HISTORY OF ARBITRATING SEXUAL HARASSMENT CLAIMS

To better understand how sexual harassment claims have been resolved in the past, one must start with Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII makes it illegal for companies or employers to discriminate against employees on the basis of sex, amongst other things.<sup>35</sup> The ban on sex discrimination includes a ban on sexual harassment.<sup>36</sup> However, courts had to be convinced that sexual discrimination included sexual harassment.<sup>37</sup> In 1975, the U.S. District Court for the District of Arizona held that sexual harassment did not constitute sex discrimination under Title VII.<sup>38</sup> A year later, the U.S. District Court for the Northern District of California also refused to label sexual harassment as sex discrimination under Title VII.<sup>39</sup> However, 1976 marked the first time “a federal judge held that sexual advances coupled with retaliation for their refusal constituted actionable sex discrimination.”<sup>40</sup> Soon thereafter, more courts began ruling in favor of female plaintiffs alleging sex discrimination based on acts constituting sexual harassment, and sexual harassment became recognized as sex

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<sup>34</sup> Poll, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS/WASHINGTON POST (Nov. 16, 2011) (stating that 10% of men experience sexual harassment); Chalabi, *supra* note 22 (stating that “the percentage of sexual harassment claims filed by men has risen considerably – 92% of all claims were filed by women in 1990 v 83% in 2015”).

<sup>35</sup> 42 U.S.C. § 2000e-2 (1964).

<sup>36</sup> *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, (last accessed Mar. 24, 2019) <https://www.eeoc.gov/laws/types/sex.cfm>

<sup>37</sup> Reva B. Siegal, *A Short History of Sexual Harassment*, in *Directions in Sexual Harassment Law*, 1-39, 8-9 (Catherine A. MacKinnon and Reva B. Siegal eds., 2012).

<sup>38</sup> Catherine A. MacKinnon, *Sexual Harassment of Working Women* 59 (1979); *Corne v. Bausch & Lomb, Inc.*, 390 F.Supp. 161, 161-63 (D. Ariz. 1975) (stating that the two female plaintiffs who quit their jobs as a result of “verbal and physical sexual advances from” a male co-worker were not subjected to sex discrimination because “there is nothing in [Title VII] which could reasonably be construed to have it apply to ‘verbal and physical sexual advances’ by another employee”).

<sup>39</sup> MacKinnon, *supra* note 38 at 59; *Miller v. Bank of America*, 418 F.Supp. 233, 234-36 (N.D. Cal. 1976) (holding that sex discrimination was not present in this case where a female employee was fired after rebuffing the sexual advances of her male supervisor because this was the behavior of one employee and not the general policy of the company).

<sup>40</sup> MacKinnon, *supra* note 38 at 63; *Williams v. Saxbe*, 413 F.Supp. 654, 654 (D.D.C) (holding that the mistreatment and termination of a female employee based on her rejection of her supervisor’s sexual advances constituted sex discrimination).

discrimination under Title VII.<sup>41</sup> However, the Supreme Court waited until 1986 to label sexual harassment as sex-based discrimination under Title VII.<sup>42</sup>

Furthermore, shortly after the federal courts ruled that sexual harassment constitutes sex-based discrimination, the Supreme Court ruled that discrimination claims could legally be arbitrated. One of the first cases discussing arbitration of a statutory claim of discrimination occurs in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>43</sup> *Gilmer* was an age discrimination case, and the U.S. Supreme Court held that the discrimination claim could be arbitrated, even if it was a statutory claim.<sup>44</sup> The Court reasoned that because the parties agreed to arbitrate, the claims should go to arbitration unless Congress intended “to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>45</sup> The Fifth Circuit Court of Appeals followed the rationale in *Gilmer*, and explicitly stated that Title VII sexual harassment claims are arbitrable.<sup>46</sup> The Sixth and the Ninth Circuits also held that sexual harassment claims were arbitrable as a result of a mandatory arbitration clause.<sup>47</sup> The Eleventh Circuit has also upheld mandatory arbitration as an appropriate means of resolving workplace sexual harassment claims.<sup>48</sup> These cases have reinforced the notion that sexual harassment claims may be resolved in arbitration through the use of a mandatory arbitration clause in an employment contract.<sup>49</sup> This affirmation by the courts further impedes a victim’s ability to choose how best to proceed depending on his or her own needs.

#### IV. WHAT DOES ARBITRATION MEAN FOR THESE DISPUTES?

##### A. *Advantages of Arbitration*

Mandatory arbitration clauses are problematic in that they take away agency from victims of sexual harassment. However, arbitration is not an inherently problematic format for

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<sup>41</sup> MacKinnon, *supra* note 38 at 66-76; Barnes v. Costle, 561 F.2d 983 (1977); Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (1977); Tomkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (1977); Heelan v. Johns-Manville Corp., 451 F.Supp. 1382 (1978).

<sup>42</sup> Meritor Sav. Bank v. Vinson, 477 U.S. 57, 57-58 (1986); Lauren M. Hilsheimer, *But She Spoke in an Un-Ladylike Fashion!: Parsing through the Standards of Evidentiary Admissibility in Civil Lawsuits after the 1994 Amendments to the Rape Shield Law*, 70 OHIO ST. L.J. 661, 674 (2009).

<sup>43</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 26.

<sup>46</sup> Rojas v. TK Communications, Inc., 87 F.3d 745, 747 (5th Cir. 1996).

<sup>47</sup> Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992).

<sup>48</sup> Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992).

<sup>49</sup> *Gilmer*, 500 U.S. at 35; *Rojas*, 87 F.3d at 748; *Willis*, 948 F.2d at 312; *Mago*, 956 F.2d at 935; *Bender*, 971 F.2d at 701.

addressing sexual harassment claims. Victims of sexual harassment may find that the inherent confidentiality, speed, affordability, and lack of discovery of arbitration are actually well-suited to their needs.

One aspect of arbitration that some victims may view as advantageous is the privacy of arbitral proceedings. Unlike court hearings, arbitral proceedings are not open to the public, and often, the decisions are not published.<sup>50</sup> Additionally, arbitrators and those who oversee arbitration proceedings are typically held to confidentiality and not allowed to discuss the matters at hand with anyone not a party to the arbitration.<sup>51</sup> Because of the sensitive nature of sexual harassment claims, a victim of sexual harassment may not want other individuals to know about the incident or for information, such as sexual relationships or other personal details, surrounding the harassment to be made publicly available.

Other potential advantages for victims of sexual harassment include the relatively low costs of arbitration as well as the efficiency of the proceedings.<sup>52</sup> Arbitration may proceed more quickly than litigation in this context,<sup>53</sup> as the victim does not need to first submit a claim to the EEOC before moving forward with proceedings.<sup>54</sup> Additionally, arbitration proceedings tend to move more quickly than litigation because they are informal proceedings.<sup>55</sup> The lack of discovery in arbitration has been credited as speeding up the process.<sup>56</sup> Further, litigation is often delayed as a result of judicial backlogs and full court dockets, whereas arbitration can essentially begin once arbitrators have been appointed.<sup>57</sup>

An expedited arbitral process may reduce the victim's exposure to having to relive the negative experience of harassment. Some studies have found that victims of sexual assault who have had to recall their experiences during trial have relived the ordeal.<sup>58</sup> While not all sexual harassment rises to the level of sexual assault, every person responds to adversity in their own way, and having to provide a detailed account of their harassment in front of a courtroom could be traumatizing for the victim, especially considering that many victims of sexual harassment have an "increased risk of anxiety, depression, and posttraumatic stress disorder."<sup>59</sup> Doctors

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<sup>50</sup> Christopher R. Drahozal *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 30-31 (2015); Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act* § 1028(a) (2015), § 4 at 21.

<sup>51</sup> Drahozal, *supra* note 50, at 39.

<sup>52</sup> Craig M. Borowski, *To Arbitrate or Litigate? That is the Question*, 14 No. 3 IND. EMP. L. LETTER 4.

<sup>53</sup> Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 438 (1988).

<sup>54</sup> Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story, 4 TEX. J. WOMEN & L. 9, 59 (1995).

<sup>55</sup> Borowski, *supra* note 52.

<sup>56</sup> Stipanowich, *supra* note 53, at 438.

<sup>57</sup> *Id.* at 438-39.

<sup>58</sup> *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, NAT'L CRIME VICTIM LAW INST., Sept. 2011, at 1-2, VIOLENCE AGAINST WOMEN BULLETIN.

<sup>59</sup> Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career*, 1(2) SOC'Y AND MENTAL HEALTH 89, 89 (2011).

have labeled sexual harassment as a “chronic stressor” that affects victims’ mental and physical health.<sup>60</sup> Sexual harassment’s effect on mental health is often long-term,<sup>61</sup> and having to recall these experiences through testimony could make it difficult for a victim to overcome the negative mental health effects. Because arbitration can be resolved more quickly than litigation, victims of sexual misconduct would potentially be subjected to reliving their alleged abuse for a less extensive amount of time than those who litigate the issue.

Arbitration typically costs less than litigation, as arbitration does not place as much of the cost on the victim.<sup>62</sup> The lower costs of arbitration can make final resolutions available to an increased number of sexual harassment victims.<sup>63</sup> Arbitration is often a less expensive alternative for those seeking redress following an incident of sexual harassment.<sup>64</sup> By providing a lower cost alternative to litigation, arbitration makes justice more available to victims who may not have the funds to go to court.<sup>65</sup> The efficiency of arbitration, as well as the relatively low costs, make resolution of a victim’s claims more accessible, making arbitration an attractive option for those who have been subjected to sexual harassment in their workplaces.<sup>66</sup>

Finally, as stated previously, there is no formal discovery in arbitration. While the Federal Rules of Evidence, or a state’s equivalent, apply in cases before the court, arbitration does not abide by such formal rules of discovery. This lack of discovery is seen by many as an advantage of arbitration.<sup>67</sup> In litigation, lawyers for companies have used discovery to bring

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<sup>60</sup> Houle et al., *supra* note 59 at 90.

<sup>61</sup> *See id.* at 101 (stating that “quantitative data showed that the effects of harassment are indeed lasting, as harassment experiences early in the career were associated with heightened depressive symptoms nearly 10 years later”).

<sup>62</sup> The Untold Story, *supra* note 54, at 59.

<sup>63</sup> Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840, 833-834 (stating that “empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims” by citing studies that state “[w]e were unable to compare litigation and arbitration results for lower-paid employees due to the lack of data about litigation commenced by employees in this economic group. We believe the absence of cases of this type is likely explained by the fact that lower-paid employees seem to lack ready access to court, as other researchers have reported,” and “[p]laintiffs’ lawyers interviewed by William Howard indicated that they normally required ‘minimum provable damages of \$60,000 to \$65,000’ before they would be willing to bring an employment discrimination case in court. By comparison, several sources find that claimants bring claims in arbitration seeking amounts far less than \$60,000,” and “[t]he Institute looked at all AAA employment arbitrations for the year 2000 for which there was a stated demand. In the majority of these cases (54%), the demand was less than \$75,000. Many cases (26%) involved claims of less than \$25,000. In other words, half of the people whose employment claims were heard by AAA that year would not have been able to bring their claims to court”).

<sup>64</sup> Brief for Epic Systems Corp. et al. as Amici Curiae Supporting Petitioners and Respondent, *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016) (No. 16-285) (stating that the employers often cover the costs of the arbitration proceedings).

<sup>65</sup> *Id.*

<sup>66</sup> Borowski, *supra* note 52.

<sup>67</sup> Stipanowich, *supra* note 53, at 438.

up the victims' sexual histories as a means to discredit them.<sup>68</sup> By forgoing discovery, victims do not run the risk of having their private lives unfairly attacked in an attempt to discredit and further humiliate them. Because, even though courts abide by the Federal Rules of Evidence, there is still a possibility that evidence of a victim's sexual history could be deemed admissible. Even though the 1994 Amendments to Rule 412 of the Federal Rules of Evidence, also referred to as the "Rape Shield Law," extended Rule 412 beyond criminal cases to include civil cases,<sup>69</sup> the advisory committee notes suggest that it is possible for evidence of a victim's sexual history to be admitted if the sexual behavior seeking to be admitted occurred in the workplace.<sup>70</sup> The workplace exception to the Rape Shield Law could be potentially prejudicial to the victim. By using a victim's sexual history to paint them in a negative light, the victim could become less sympathetic to the decision-maker, causing the decision-maker to rule against the victim.<sup>71</sup> Bringing up a victim's sexual history also brings up the issue of victim-blaming, shifting the blame from the perpetrator to the victim.<sup>72</sup> While a lack of formal discovery can prevent intimate and potentially embarrassing details of a victim's life from being unnecessarily exposed, it can also provide an economic advantage.<sup>73</sup> The lack of formal discovery in arbitration is one of the reasons that arbitration can be less costly than litigation.<sup>74</sup> For example, depositions can drive up the cost of litigation, but are typically discouraged in arbitration.<sup>75</sup> While formal discovery is an essential component to litigation, its absence in arbitration may be seen as advantage to a victim of sexual misconduct in the workplace.

#### B. *Disadvantages of Arbitration*

While some individuals looking to settle sexual harassment claims may find arbitration advantageous to their needs, certain aspects may disadvantage others. Although arbitration's privacy can be advantageous to victims of sexual harassment, inherent disadvantages to the

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<sup>68</sup> The Untold Story, *supra* note 54, at 59.

<sup>69</sup> See Hilsheimer, *supra* note 42, at 665; Fed. R. Evid. 412 advisory committee's note (stating that "Rule 412 applies to both civil and criminal proceedings").

<sup>70</sup> Fed. R. Evid. 412 advisory committee's note (stating that "some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant").

<sup>71</sup> Regina A. Schuller & Marc A. Klippenstine, *The Impact of Complainant Sexual History Evidence on Jurors' Decisions: Considerations from a Psychological Perspective*, 10 PSYCHOL., PUB. POL'Y, AND L. 3, 327 (2004).

<sup>72</sup> See Schuller & Klippenstine, *supra* note 72, at 329 (stating that "[c]onsistent with previous research, as the level of intimacy between the victim and the perpetrator increased, perceptions of the seriousness of the assault decreased, and the level of blame that participants attributed to the victim increased"); see also It's On Us Fort Collins, *What is Victim Blaming* (defining victim-blaming as "When the victim of a crime or any wrongful act is held entirely or partially responsible for the harm that befell them").

<sup>73</sup> *Arbitration v. Litigation In Court: Which to Choose If You Have The Choice*, FINDLAW, (last accessed Mar. 24, 2019) <https://corporate.findlaw.com/litigation-disputes/arbitration-v-litigation-in-court-which-to-choose-if-you-have.html>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

arbitral process also exist. Many mandatory arbitration clauses located within employment contracts contain confidentiality provisions.<sup>76</sup> These confidentiality provisions prevent all parties to the arbitration from discussing the details of the arbitration.<sup>77</sup> Gretchen Carlson, the former Fox News host, participated in a confidential arbitration proceeding with her former employer when she sought to resolve her allegations of sexual harassment against former Fox News CEO, Roger Ailes.<sup>78</sup> While Carlson could not sue Fox News, as a result of her contract, she could take Ailes to court.<sup>79</sup> By suing Ailes, Carlson could make her allegations against him public.<sup>80</sup> The attention given to Carlson's allegations forced Fox News to act immediately and punish Ailes for his wrongdoings.<sup>81</sup> While Carlson received a large settlement of \$20 million, her harasser faced no legal or professional repercussions until the information went public.<sup>82</sup> Companies will use confidentiality provisions to keep the victims from speaking out against the company as a means of preventing bad press.<sup>83</sup> When victims are not able to speak out about the discrimination and abuse they have encountered in their workplaces, there is little justice for the victim. Those who harass their employees or co-workers can continue to engage in inappropriate behavior with virtual impunity if details of the harassment are kept confidential.<sup>84</sup> If people are not aware that a company has experienced issues of workplace sexual harassment, people will continue applying for jobs at the company, which can potentially put them in danger of harassment. Additionally, because the victims cannot speak out, each victim may feel isolated, as though he or she is the only person who has been subjected to harassment by a member of the company for which they work.<sup>85</sup> Thus, without the bad press, the company would not have the same incentive to respond to claims appropriately as they would have if they had given the employee the opportunity to speak about the sexual harassment.<sup>86</sup> Confidentiality provisions are great for those who do not want their

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<sup>76</sup> Drahozal, *supra* note 50, at 31.

<sup>77</sup> *Id.*

<sup>78</sup> Elizabeth Dias & Eliana Dockterman, *The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard*, TIME (Oct. 21, 2016).

<sup>79</sup> Emily Martin, *Keeping Sexual Assault Under Wraps*, U.S. NEWS (Sept. 28, 2016).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Martin, *supra* note 79; Dias & Dockterman, *supra* note 78.

<sup>83</sup> Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, THE ATLANTIC (Oct. 18, 2017).

<sup>84</sup> Bryce Covert, *How Corporations Create a Culture of Impunity for Sexual Harassers*, THE NEW REPUBLIC (Nov. 2, 2017) (detailing how Bill O'Reilly and Harvey Weinstein were able to continue harassing women without losing their jobs or facing public outcry and also stating that "a perpetrator knows that future victims won't be forewarned about his record of behavior").

<sup>85</sup> University of Michigan Sexual Assault Prevention and Awareness Center.  
<https://sapac.umich.edu/article/161>.

<sup>86</sup> Gretchen Carlson, *Gretchen Carlson: How Arbitration Clauses Allow Sexual Harassment to Continue*, MOTTO, (Mar. 10, 2017).

misdeeds to be made public, but the provisions do not help change the culture surrounding the harassment.<sup>87</sup>

Another disadvantage of arbitration is the amount of money that victims typically receive. If the victim's hope in resolving his or her claim is to obtain a monetary award, litigation would likely be the better option. One of the reasons that an individual is less likely to receive a substantial financial award through arbitration is based on the fact that employers tend to win the arbitration.<sup>88</sup> Employees who take part in arbitration tend to win against their employers twenty percent of the time, compared to employees who litigate the issue and are roughly twice as likely to win their case.<sup>89</sup> In addition to being more likely to win a discrimination case in a federal or state court, an employee is also more likely to receive a greater award.<sup>90</sup> A study of financial awards found that "median awards in employment litigation are around five to ten times greater than median awards in employment arbitration."<sup>91</sup> Thus, while arbitration may ultimately be a cheaper option for victims, it likely will not garner them as much money as litigation potentially would.

A major issue with arbitration is the lack of diversity within arbitration itself. While men, women, and gender non-conforming individuals can all be victims of sexual harassment, men are less often the victims.<sup>92</sup> However, the majority of arbitrators are white males.<sup>93</sup> At one point, "91.5% of all arbitrators were male, and 96.5% of all arbitrators were white."<sup>94</sup> As shown above, 91.5% of sexual harassment victims are not male, and 96.5% of sexual harassment victims are not white.<sup>95</sup> The individuals deciding these issues are not representative of the individuals who are more commonly sexual harassment victims. Further, the proportion of female judges is larger than the proportion of female labor arbitrators, so female victims would

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<sup>87</sup> Kevin J. Hamilton & Harry H. Schneider, Jr., *Confidential Arbitration Agreements for High Profile Clients and Senior Executives*, *Litigation*, Volume 43, Number 1, Fall 2016.

<sup>88</sup> Bryce Covert, *In Sexual Harassment Cases, What Are We Settling For?*, *THE NEW YORK TIMES*, (April 10, 2017).

<sup>89</sup> *Id.*

<sup>90</sup> Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *JOURNAL OF EMPIRICAL LEGAL STUDIES*, 1, 11 (2011).

<sup>91</sup> Colvin, *supra* note 90, at 11.

<sup>92</sup> Poll, *supra* note 34 (stating that 10% of men experience sexual harassment); Chalabi, *supra* note 22 (stating that "the percentage of sexual harassment claims filed by men has risen considerably – 92% of all claims were filed by women in 1990 v 83% in 2015").

<sup>93</sup> Ashley Winters, *Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Pay and Safe Workplaces Executive Order (2014) Should Not Have a Resounding Impact*, 31 *OHIO ST. J. ON DISP. RESOL.* 179, 202-03 (2016).

<sup>94</sup> *Id.* at 202.

<sup>95</sup> *Id.*

have a better chance of getting a female judge in litigation than a female arbitrator in arbitration.<sup>96</sup>

The arbitrator's gender is important because male arbitrators tend to be less capable of relating to non-male victims' experiences.<sup>97</sup> According to a study, "males tend to view females as more responsible for an incident of harassment than do female judges."<sup>98</sup> Additionally, "male decisionmakers tend to be less punitive and more willing to offer harassers social support."<sup>99</sup> These studies show that rather than remaining impartial adjudicators, male arbitrators of sexual harassment cases sympathize with male harassers.<sup>100</sup> Female and gender non-conforming victims of sexual harassment already enter arbitration at a disadvantage because their identities are rarely reflected in the people deciding their cases. This lack of representation in arbitration could prevent victims of sexual harassment from obtaining justice.

### C. *Arbitration of Sexual Harassment Disputes*

While there are positives and negatives to arbitrating sexual harassment disputes, many employees do not have the opportunity to consider these factors because many are subjected to mandatory arbitration clauses in their employment contracts.<sup>101</sup> One study found that 80% of *Fortune* 100 companies use arbitration clauses in their employment contracts as a means to handle workplace disputes, including sexual harassment.<sup>102</sup> Another study found that roughly 60 million American workers are subjected to mandatory arbitration clauses as a condition of their employment.<sup>103</sup> Mandatory arbitration clauses prevent these workers from seeking redress in another setting, such as the court system.<sup>104</sup> The use of mandatory arbitration clauses

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<sup>96</sup> The Untold Story, *supra* note 54, at 54 (stating that "A disproportionately small percentage of arbitrators are female. Only 4.2 to 6.6% of labor arbitrators are women. This is a lower percentage by gender than that applicable to judges").

<sup>97</sup> Caley Turner, "Old, White, and Male": Increasing Gender Diversity in Arbitration Panels, INT'L INST. FOR CONFLICT PREVENTION & RESOL., 2, 14 (March 3, 2015) (explaining that "[w]hile these 'high profile white men' may be very effective arbitrators in most circumstances, they are not representative of society as a whole, and they cannot be expected to understand and effectively resolve disputes between individuals whose lives are not reflective of the traditional white male experience," and "stressed male arbitrators are likely to have a hard time relating to the claimants before them, and thus more likely to come to a decision that does not satisfy the claimant").

<sup>98</sup> The Untold Story, *supra* note 54, at 53-54.

<sup>99</sup> The Untold Story, *supra* note 54, at 54.

<sup>100</sup> *Id.*

<sup>101</sup> Dias and Dockterman, *supra* note 79 (stating that "as many as a quarter of nonunionized American workers may be subject to" mandatory arbitration agreements).

<sup>102</sup> Professor Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, THE EMP. RIGHTS ADVOCACY INST. FOR L. AND POLICY, 2 (Sept. 27, 2017).

<sup>103</sup> See Press Release, Econ. Policy Inst., *supra* note 1 (stating that "more than half of private sector nonunion workers—or 60 million people—are subject to mandatory arbitration in employment contracts").

<sup>104</sup> Press Release, Econ. Policy Inst., *supra* note 1.

has seen a significant rise, with less than 2% of employees being subjected to such clauses in 1992, to having roughly half of workers subjected to them in 2017.<sup>105</sup> The prevalence of these pre-dispute clauses means that many workers choose not to resolve their disputes with their employers, and those who do choose to arbitrate are less likely to win.<sup>106</sup> Those who do win receive significantly less damages than if they had filed a suit in court.<sup>107</sup> Additionally, as previously stated, many people who arbitrate sexual harassment claims, as required by their employment contracts, are subject to confidentiality provisions, which often means that instances of sexual harassment are unknown to those who were not parties to the arbitration.<sup>108</sup> These mandatory arbitration clauses have the effect of taking away a victim's choice and silencing them, preventing them from receiving any real justice.

## V. CURRENT STATE OF RESOLVING SEXUAL HARASSMENT CLAIMS

### A. *Trump Administration*

Under the Trump presidency, changes have been made with respect to the way certain companies address claims of sexual harassment in the workplace. Previously, President Barack Obama signed the Fair Pay and Safe Workplaces Executive Order, banning corporations that receive over \$1 million in government contracts from using mandatory arbitration clauses for settling sexual harassment claims.<sup>109</sup> President Obama's executive order affected roughly 24,000 businesses with approximately 28 million employees.<sup>110</sup> This executive order had the effect of providing victims with the opportunity to resolve sexual harassment claims as they saw fit.<sup>111</sup> However, upon Trump's election, President Trump overturned President Obama's executive order by signing the Presidential Executive Order on the Revocation of Federal Contracting Executive Orders.<sup>112</sup> As a result of the new executive order, companies that receive over \$1 million in federal money can include mandatory arbitration clauses in employee contracts, which, in turn, would require employees seeking to address an incident of sexual

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<sup>105</sup> Press Release, Econ. Policy Inst., *supra* note 1.

<sup>106</sup> *Id.*.

<sup>107</sup> *Id.*

<sup>108</sup> Gretchen Carlson, *Sexual Assault Is Not a Partisan Issue*, LENNY LETTER (Nov. 7, 2017) <https://www.lennyletter.com/story/gretchen-carlson-sexual-assault-is-not-a-partisan-issue>.

<sup>109</sup> Exec. Order No. 13,673, 79 FR 45309 (Aug. 5, 2014).

<sup>110</sup> Winters, *supra* note 93.

<sup>111</sup> Exec. Order No. 13,673, 79 FR 45309 (Aug. 5, 2014).

<sup>112</sup> Mary Emily O'Hara, *Trump Pulls Back Obama-Era Protections for Women Workers*, NBC NEWS (Apr. 3, 2017); Presidential Executive Order on the Revocation of Federal Contracting Executive Orders (Mar. 27, 2017).

harassment to resolve the issue through arbitration.<sup>113</sup> Therefore, so long as a company includes a mandatory arbitration clause in an employee contract, employees who were made to be victims of sexual harassment only have one choice to resolve their claims, thus taking agency away from victims of sexual harassment.<sup>114</sup>

*B. Effect of Publicizing Sexual Harassment Claims*

Over the past year, sexual harassment claims have become some of the most widely talked about issues in the news, with more and more victims coming forward to detail their own experiences. One of the first to speak out at length about her own experience of workplace sexual harassment was Gretchen Carlson. As previously stated, Gretchen Carlson settled with Fox News for \$20 million as a result of sexual harassment she faced at the hands of former Fox News CEO Roger Ailes.<sup>115</sup> The reason that her experience is known to the public is because she “cleverly navigated” the arbitration clause in her employment contract.<sup>116</sup> Carlson arbitrated the dispute with Fox News, but she sued Ailes individually.<sup>117</sup> Upon filing her suit against Ailes, it became known that she had been the victim of sexual harassment during her time at Fox News.<sup>118</sup> Because of her status, Carlson had the ability to bring attention to the issue of workplace sexual harassment. Using her voice, she and former Senator Al Franken, who subsequently faced accusations of sexual misconduct,<sup>119</sup> worked together to create “anti-arbitration legislation” that would prevent companies from using mandatory arbitration as a means to silence victims and protect their own reputations.<sup>120</sup> Because Carlson had the help of skilled lawyers and the position to speak out, she possessed the ability to do what many victims of sexual harassment cannot – receive justice. Her voice has helped spark a call to action to prevent further abuse of employees, showing how important it is that victims of sexual harassment not be silenced.

In the wake of public allegations of sexual harassment, legislation has been introduced that, if passed, would ban mandatory arbitration clauses for the settlement of sexual harassment claims.<sup>121</sup> Senator Kristen Gillibrand introduced this new legislation, titled Ending Forced

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<sup>113</sup> Guidance for Executive Order 13673, “Fair Pay and Safe Workspaces,” 82 FR 51358 (Nov. 11, 2017).

<sup>114</sup> See generally Presidential Executive Order on the Revocation of Federal Contracting Executive Orders (Mar. 27, 2017).

<sup>115</sup> Dias & Dockterman, *supra* note 78.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Martin, *supra* note 79.

<sup>119</sup> Sheryl Gay Stoldberg, Yamiche Alcindor, & Nicholas Fandos, *Al Franken to Resign from Senate Amid Harassment Allegations*, THE NEW YORK TIMES (Dec. 7, 2017).

<sup>120</sup> Carlson, *supra* note 108.

<sup>121</sup> Alex Swoyer, *New legislation outlaws forced arbitration of sexual harassment*, THE WASHINGTON TIMES (Dec. 6, 2017); Jessica Guynn, *‘Enough is enough’: Gretchen Carlson says bill ending arbitration would break silence in sexual harassment cases*, USA TODAY (Dec. 6, 2017).

Arbitration of Sexual Harassment Act of 2017, in the Senate on December 6, 2017, and it has the support of both Democrats and Republicans.<sup>122</sup> Statistics show that roughly 56% of American workers are subject to mandatory arbitration clauses, and roughly 60 million Americans are subject to these clauses as a condition of their employment contract.<sup>123</sup> If passed, this new legislation would prevent companies from forcing arbitration of sexual harassment claims, and instead victims would be given the agency to choose how they would like to proceed.<sup>124</sup> While this proposed legislation has yet to be voted on, the current climate surrounding sexual harassment, and sexual misconduct more broadly, has already caused Congress to vote in favor of reforming the way sexual harassment is reported on Capitol Hill.<sup>125</sup> This recent vote by Congress suggests that sponsors of the Ending Forced Arbitration of Sexual Harassment Act of 2017 could use this momentum to get Democrats and Republicans to pass this legislation.

Following public outcry surrounding sexual harassment in the workplace and the introduction of the Ending Forced Arbitration of Sexual Harassment Act of 2017, Microsoft announced that it would be ending mandatory arbitration of sexual harassment claims.<sup>126</sup> Microsoft's President stated that forced arbitration clauses silenced victims, thus "perpetuating sexual harassment," and by ending these clauses in employment contracts, Microsoft has returned to victims their right to choose how to proceed and has allowed itself to be held more accountable for the wrongful behavior of its employees and officers.<sup>127</sup> Microsoft's actions show that the victims of sexual harassment who have spoken out have created a change. It is possible that, following public outcry and Microsoft's actions, more companies will take the step and ban mandatory arbitration of sexual harassment claims, which, in turn, would give victims of sexual harassment the choice to proceed in the way that they see best accommodates their needs.

## VI. CONCLUSION

Mandatory arbitration of sexual harassment is problematic in that it takes away agency and choice from the victim. Rather than proceeding in a way that best serves the interests of the victim, the victim must arbitrate, which frequently best serves the interests of the employer. While arbitration is not inherently problematic, the mandatory nature of many of these clauses prevents any real justice from taking place. Rather than silencing victims of sexual harassment, companies have an obligation to take their needs into account. Workplaces are not supposed

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<sup>122</sup> Guynn, *supra* note 121.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Leigh Ann Caldwell & Alex Moe, *House passes major sexual harassment reform bill*, NBC NEWS (Feb. 6, 2018) (stating that "The bipartisan legislation, which would prohibit the accused from using taxpayer dollars for sexual harassment settlements and give victims more rights and resources when they file a complaint, was unanimously approved by voice vote").

<sup>126</sup> Stefanie Fogel, *Microsoft Ends Forced Arbitration For Sexual Harassment Claims*, ROLLING STONE (Dec. 20, 2017).

<sup>127</sup> *Id.*

to be safe havens for abusers. Instead of protecting the reputation of the company and the abusers within the company, companies should focus on the needs of the victims. It is important that victims are given the opportunity to make choices for themselves. The current attention that is finally being given to victims of sexual misconduct has proven just how pervasive this abuse is, and it has revealed how victims of sexual harassment have very little options when it comes to resolving these claims. Rather than continuing to silence victims by forcing them to resolve their claims through arbitration, which often entails forced confidentiality, employers and politicians must work to ensure that victims have the ability to choose the route that is best for them. Victims need to proceed in a way that is most comfortable for them, and the only people who can determine what is most comfortable for the victims are the victims themselves.