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## Adding Sexual Harassment Prevention to the Menu: Sexual Harassment Prevention as a Condition of Food Safety Licensing in the Restaurant Industry

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## Articles

### ADDING SEXUAL HARASSMENT PREVENTION TO THE MENU: SEXUAL HARASSMENT PREVENTION AS A CONDITION OF FOOD SAFETY LICENSING IN THE RESTAURANT INDUSTRY

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“Literally, almost every shift I have worked someone has touched me inappropriately, usually a customer . . . . I’ve been bit, I’ve been grabbed, I’ve been licked. You name it . . . . And you just learn to let it go.”<sup>1</sup>

“I have to say bartending was really demoralizing. I literally felt that I was chattel that they were sending out every day . . . it wasn’t healthy for me to work in that environment.”<sup>2</sup>

#### ABSTRACT

From 2005 through 2015, the food service industry has held the dubious distinction as the industry with the greatest number of EEOC sexual harassment claims. Given the occupational hazard created by sexual harassment, and the emotional and physical toll that such behavior has on its victims, this article argues that comprehensive sexual harassment prevention should be a condition of the food handler’s licensing process for all

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1. REST. OPPORTUNITIES CTRS. UNITED, TAKE US OFF THE MENU: THE IMPACT OF SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 4–5 (2018), <https://rocunited.org/wp-content/uploads/sites/7/2020/02/TakeUsOffTheMenuReport.pdf> [<https://perma.cc/C4QG-F5DC>] [hereinafter TAKE US OFF THE MENU] (internal quotation marks omitted) (recounting story of “Laurie”).

2. *Id.* at 11 (alteration in original) (internal quotation marks omitted) (recounting story of Marlea).

food service establishments. The proposal to incorporate sexual harassment prevention into the business licensing process is not unprecedented. In 2018, the Nevada Gaming Commission (NGC) proposed similar requirements for Nevada gaming establishments. As proposed, the sweeping regulations would have required far-reaching sexual harassment training for all employees.

Although less stringent regulations were ultimately adopted, the Nevada gaming model for addressing sexual harassment can be adapted to the restaurant industry, which is already accustomed to rigorous workplace regulation. The imposition of additional regulatory conditions tied to the food handler's license should lower incidents of sexual harassment and help drive a necessary shift in workplace culture away from endemic sexual harassment and towards civility and respect. From a business perspective, restaurants should embrace the opportunity to improve their tarnished reputations with respect to sexual harassment. In an era of increasing social intolerance for such behavior, the restaurant industry has an opportunity to take the lead in reducing sexual harassment claims, and to serve as a model for other service industries such as grocery, retail and beyond.

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## INTRODUCTION

IT has been four years since the #MeToo movement emerged on social media. Millions of women have added their voices to the growing chorus of those who have been sexually harassed at some point in their lives.<sup>3</sup> The courageous stories that women shared in the wake of the movement described the toll that sexual harassment has had on the mental and physical health of so many lives.<sup>4</sup>

While the #MeToo movement certainly facilitated open dialogue about workplace sexual harassment, it is less clear that there has been a commensurate drop in actual incidents of sexual harassment.<sup>5</sup> Moreover, while many of the #MeToo stories captured in the media focused on celebrities and executive level women, the #MeToo movement has not adequately highlighted the prevalence of sexual harassment in low-wage and service sector jobs, thereby leaving some of the most vulnerable victims out of the spotlight.

Historically, sexual harassment has been endemic in restaurants, holding the dubious distinction as the industry with the largest number of U.S. Equal Employment Opportunity Commission (EEOC) claims filed from 2005–2015.<sup>6</sup> Researchers point to several reasons for this, including, *inter alia*, the prevalence of indifferent managers working with young, low-wage workers, as is the case in fast food restaurants.<sup>7</sup> In dine-in restaurants, the convention of tipping reinforces sexual harassment, whereby a server's wage is directly tied to her<sup>8</sup> relationship with customers, managers

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3. Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 378–79 (2019) (explaining that “Me Too” was used as early as 2006 by Tarana Burke to shed light on sexually abusive behavior, but went viral in 2017 when actress Alyssa Milano tweeted it out in attempt to demonstrate the prevalence of sexual harassment in society).

4. See TAKE US OFF THE MENU, *supra* note 1.

5. *Charges Alleging Sex-Based (Charges Filed with EEOC) Harassment FY 2010-FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020> [https://perma.cc/8C9H-9NX6] (last visited June 22, 2021) [hereinafter EEOC CHARGE REPORT] (showing slight increase in sex-based charges in 2018 and 2019, followed by a slight drop in 2020).

6. Genevieve Carlton, *Workplace Sexual Harassment by Industry*, WORKING: NOW & THEN (Jan. 8, 2019), <https://www.workingnowandthen.com/blog/workplace-sexual-harassment-by-industry/> [https://perma.cc/E6VU-NZ85].

7. See, e.g., REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 3 (2014), <https://forwomen.org/wp-content/uploads/2015/09/The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry.pdf> [https://perma.cc/7SDW-Z4QJ] [hereinafter THE GLASS FLOOR] (asserting that “fast food chains are notorious for low wages . . . and sexual harassment”).

8. The use of “her” and the focus on the impact of sexual harassment of women throughout this Article is intentional. While sexual harassment occurs across genders, it has a greater impact on women, especially those in tipped settings in states with a sub-minimum wage of \$2.13/hour. See *id.* at 30.

and co-workers.<sup>9</sup> Moreover, given the demanding and fast-paced environment that accompanies the food service industry, few restaurants take time to train employees and managers about avoiding sexual harassment; when they do, such training tends to be reactive rather than proactive and designed to meet minimum legal requirements.<sup>10</sup> When all of these factors are added together, it is not surprising that sexual harassment can be a daily occurrence in the restaurant industry.<sup>11</sup> To make matters worse, the restaurant industry is often a woman's introduction into the workplace, "where many women first learn their worth as workers . . . . A negative first experience in the restaurant increases the likelihood that women will come to expect sexual harassment in other work environments."<sup>12</sup>

Notwithstanding the sociable, care-free environment that seems to foster sexual harassment of food service workers, restaurants tend to be highly regulated at the state and local levels.<sup>13</sup> All states require some sort of food safety training for food service establishments, acknowledging that the health and welfare of patrons and workers is a legitimate goal for state regulators. Given the occupational hazard of sexual harassment in the food service industry, and the emotional and physical toll that such behavior has on its victims, this Article argues that proactive sexual harassment prevention should be a condition of the licensing process for all food service establishments. Moreover, such regulations, over time, may help drive a necessary shift in workplace culture away from endemic sexual harassment and towards civility and respect.

Part I of this Article examines the law's response to sexual harassment from its inception under statutory and case law, through recent developments that emerged with the #MeToo Movement and beyond. Part II explores the epidemic of sexual harassment in the food service industry, with a focus on factors that foster sexual harassment in that environment, and the toll that sexual harassment has on the mental health of its workers. In

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9. See Suzanne Specker, "Hun, I Want You for Dessert": Why Eliminating the Sub-Minimum Wage for Restaurant Servers Will Empower Women, 19 U. PA. J.L. & SOC. CHANGE 335, 344-46 (2016).

10. Six states have passed laws in recent years requiring certain private employers to engage in proactive sexual harassment training. These include California, Connecticut, Delaware, Illinois, Maine, and New York. See *50-State Sexual Harassment Training Requirements*, CLEAR LAW INST., <https://clearlawinstitute.com/harassment-training-essential-employees-states-not-just-california-supervisors/> [<https://perma.cc/5L5B-JCYS>] (last visited Aug. 3, 2021). While these laws are a step in the right direction, their reach is limited, often focusing on larger employers only. Requiring training and prevention as a component of restaurant licensing, as proposed in this paper, acknowledges the occupational hazard of sexual harassment in the industry as a whole, from the corner cafés to the large chains.

11. See TAKE US OFF THE MENU, *supra* note 1, at 9.

12. THE GLASS FLOOR, *supra* note 7, at 3.

13. For a list of food safety regulations by state, see *National Registry of Food Safety Professionals, State Regulations*, NAT'L REGISTRY OF FOOD SAFETY PRO., <https://www.nrfsp.com/state-regulations/> [<https://perma.cc/WG5L-UBM6>] (last visited Apr. 1, 2022) (cataloging state food safety regulations by National Registry of Food Safety Professionals).

addition, the efficacy of various sexual harassment prevention strategies is discussed. Part III examines current state and local regulatory requirements for food service establishments and proposes a sexual harassment prevention process whereby all restaurant owners are held accountable for training and remediation of sexual harassment as part of the licensing process. This Article concludes that sexual harassment prevention programming as a condition of licensing in the food service industry would be beneficial in both reducing incidents of sexual harassment, and in promoting good business practice by improving workplace culture, thereby helping the restaurant industry shed its tarnished reputation as the leading industry for sexual harassment claims. Rather than viewing this added regulatory requirement as coercive, restaurants should welcome the opportunity to improve working conditions for servers. In an era of increasing social intolerance for such behavior, the restaurant industry has an opportunity to take the lead in reducing sexual harassment claims and serve as a model for other regulated service industries such as grocery, retail, and beyond.

#### I. EVOLUTION OF SEXUAL HARASSMENT LAW

It is undeniable that employees across all industries have endured sex-based harassment in their workplaces; the food service industry is no exception. Indeed, it is widely known that a culture of sexual harassment has long permeated the restaurant industry across all sectors, from high-end eating establishments to fast food chains.<sup>14</sup> It wasn't until the tail-end of the twentieth century, however, that sexual harassment was explicitly acknowledged and addressed by the Supreme Court in *Meritor Savings Bank v. Vinson*<sup>15</sup> as a form of unlawful sex discrimination within the meaning of federal workplace anti-discrimination laws, specifically Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination "against any individual with respect to . . . terms, conditions or privileges of employment . . . because of such individual's . . . sex."<sup>16</sup> Moreover, the evolution of sexual harassment law reflects anything but a linear path towards a coherent understanding of the nature and scope of the behavior's impact on employees and the myriad ways in which the wrongful conduct can be perpetrated, perpetuated, and prevented. Starting from a very narrow conceptualization, the law of sexual harassment has developed incrementally to recognize a wider range of conduct as constituting unlawful discrimination. Despite these developments, including an affirmative defense to encourage the prevention and resolution of sexual harassment in the workplace, the conduct persists. To provide a perspective on the ne-

14. See TAKE US OFF THE MENU, *supra* note 1; see also *Memorandum of Key Findings from a Survey of Women Fast Food Workers*, HART RSCH. ASSOC. (Oct. 5, 2016), <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf> [<https://perma.cc/Y9P4-DWJ6>].

15. 477 U.S. 57 (1986).

16. 42 U.S.C. § 2000e-2(a)(1) (2018).

cessity for continuing to explore potential solutions to this seemingly intractable problem, a summary of the evolution of sexual harassment law follows.

In her seminal article, *Reconceptualizing Sexual Harassment*, Professor Vicki Schultz offers a comprehensive and insightful discussion of the origin of sexual harassment discrimination law.<sup>17</sup> Significantly, she observes that the earliest cases of sexual harassment were framed and viewed by the courts as predicated on the "sexual desire-dominance paradigm."<sup>18</sup> This paradigm presupposes that the harassing conduct is motivated by a male superior who either desires sexual contact with a female subordinate or desires to reinforce his position in the organization by ensuring "she remains below him in the workplace hierarchy[.]"<sup>19</sup> Providing the foundation for what is now commonly referred to as the quid pro quo theory of sexual harassment, courts have recognized that employers violate Title VII when an employee demonstrates that an employer took a "tangible employment action" against the employee for "refus[ing] to submit to a supervisor's sexual demands[.]"<sup>20</sup> Tangible employment actions include "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>21</sup>

Understanding sexual harassment only through the lens of the sexual desire-dominance paradigm, however, fails to account for the full range of sex-based harassing conduct that interferes with an employee's terms and conditions of employment. Other forms of derogatory, confidence-undermining, and competency-undermining behavior because of sex can equally impact an employee's ability to simply perform her job.<sup>22</sup> Indeed, the Supreme Court acknowledged in *Meritor* that discrimination in the form of harassment can be perpetrated not only through solicitations for sexual favors in exchange for tangible job actions, but also by subjecting an employee to a hostile or abusive work environment because of sex.<sup>23</sup> Analogizing sexual harassment to racial harassment, the Court reasoned that "requir[ing] that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."<sup>24</sup> A few years later in *Harris v. Forklift Systems*,<sup>25</sup> the Court provided some fur-

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17. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

18. *Id.* at 1692–1710.

19. *Id.* at 1692.

20. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–55 (1998).

21. *Id.* at 761.

22. *See* Schultz, *supra* note 17, at 1720–21.

23. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986).

24. *Id.* at 67 (internal quotation marks omitted) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

25. 510 U.S. 17 (1993).



ther guidance for determining whether an employee has established a cognizable claim for a hostile work environment in violation of Title VII. Specifically, the Court required that an aggrieved employee must prove not only that she perceived the environment to be hostile or abusive because of her sex but that a reasonable person would find the same.<sup>26</sup> Courts or juries were directed to consider “all the circumstances,” which “may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>27</sup> Acknowledging the harm that can result from a hostile work environment, the Court observed that “[a] discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”<sup>28</sup> Rejecting a requirement that an employee prove psychological harm, the Court nonetheless concluded that an employee must demonstrate that the harassment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment[.]”<sup>29</sup> Conduct that is “merely offensive” does not create a hostile or abusive workplace.<sup>30</sup>

As explained by Professor Schultz, one of the earliest impediments to a successful hostile work environment claim was the tendency of the courts to disaggregate sexual from non-sexual conduct, considering only behavior with overt sexual connotation to be evidence of sexual harassment based upon a hostile work environment.<sup>31</sup> This approach, which focused on the sexual nature of the conduct, “weaken[ed] the plaintiff’s case and distort[ed] the law’s understanding of the hostile work environment by obscuring a full view of the culture and conditions of the workplace.”<sup>32</sup> Significantly, this approach failed to account for “a wide variety of nonsexual forms [of harassment], including hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage directed at people because of their sex or gender.”<sup>33</sup> Constructing these artificial divides between sexual and non-sexual conduct often resulted in courts finding a lack of “severe or pervasive” conduct needed to sustain a viable hostile work environment claim.<sup>34</sup>

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26. *See id.* at 21–22.

27. *Id.* at 23.

28. *Id.* at 22.

29. *Id.* at 21 (internal quotation marks omitted) (quoting *Meritor*, 477 U.S. at 67).

30. *Id.*

31. *See* Schultz, *supra* note 17, at 1713–14.

32. *Id.* at 1720.

33. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 33–34 (2018).

34. Schultz, *supra* note 17, at 1721.

In recent decades, there have been some noteworthy developments that suggest a more enlightened approach that has moved the courts' understanding of sexual harassment law beyond the bounds of the sexual desire-dominance paradigm. Specifically, in *Oncale v. Sundowner Offshore Services*,<sup>35</sup> the Supreme Court explicitly rejected the limiting principle that sexual harassment derives exclusively from sexual desire, while simultaneously observing that not all conduct with sexual overtones necessarily creates a hostile work environment.<sup>36</sup> Instead, the Court emphasized that the harassing conduct must be because of sex, regardless of whether the harasser's motivation is one of desire or animosity.<sup>37</sup> Shifting its focus thereby allowed the Court to acknowledge the viability of sexual harassment claims even where the harasser and harassed employee are of the same sex.<sup>38</sup>

Additionally, lower courts have increasingly embraced Professor Schultz's argument that non-sexual behaviors must be considered along with sexual conduct when assessing whether an employee is experiencing a discriminatorily hostile or abusive work environment because of sex; otherwise, perverse outcomes result.<sup>39</sup> For example, in *O'Rourke v. City of Providence*,<sup>40</sup> the United States Court of Appeals for the First Circuit offered an insightful explanation of the harm caused by the practice of "dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct,"<sup>41</sup> as follows:

Such an approach defies the [United States Supreme] Court's directive to consider the totality of circumstances in each case and 'robs the incidents of their cumulative effect.' Moreover, such an approach not only ignores the reality that incidents of non-sexual conduct—such as work sabotage, exclusion, denial of support, and humiliation—can in context contribute to a hostile work environment, it also nullifies the harassing nature of that conduct. An employer might escape liability, even if it knew about certain conduct, if that conduct is isolated from a larger pattern of acts that, as a whole, would constitute an actionable hostile work environment. Thus, employers would lack the incentive to correct behavior that, like more overt sexual forms of harassment, works against integrating women into the workforce.<sup>42</sup>

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35. 523 U.S. 75 (1998).

36. *See id.* at 80–81; *see also* Schultz, *supra* note 33, at 28.

37. *See Oncale*, 523 U.S. at 80–81.

38. *See id.*

39. *See* Schultz, *supra* note 33, at 28 n.17.

40. 235 F.3d 713 (1st Cir. 2001).

41. *Id.* at 730.

42. *Id.* (internal citations omitted).

This evolving approach, which takes account of sexual and non-sexual conduct as potential contributors to a hostile work environment, affords employees a greater opportunity to establish a claim under Title VII for sex-based harassment. Of particular relevance, research on the incidence of sexual harassment in the food service industry reveals that many workers experience sex discrimination in the form of a hostile workplace created by a wide range of conduct that includes overt sexualized behavior as well as non-sexual but sex-based harassing conduct perpetrated by managers, co-workers and customers.<sup>43</sup>

Despite these welcome developments, too many claims of sexual harassment still go unremedied because courts have applied the standard of “severe or pervasive” conduct in an overly-restrictive manner, finding that the alleged harassing conduct would not be perceived as “severe or pervasive” to a reasonable person in the employee’s position.<sup>44</sup> There is reason for optimism, however, as social and cultural norms have shifted our collective understanding of the types of behaviors that constitute actionable harassment.<sup>45</sup> As an increasing number of cases reach the courts, judges will have an opportunity to revisit the application of the reasonable person standard as they decide which cases meet the threshold of “severe or pervasive” conduct, with the hope that they will allow more cases to proceed to trial and afford victims of sexual harassment their day in court.<sup>46</sup>

Establishing a claim for sexual harassment, however, does not itself guarantee the imposition of liability on an employer. Subsequent to the Supreme Court’s decision in *Meritor*, lower courts struggled to articulate a consistent standard and rationale for whether and when employers should be held liable for actionable harassment engaged in by supervisory employees.<sup>47</sup> In the companion cases of *Burlington Industries v. Ellerth*<sup>48</sup> and *Faragher v. City of Boca Raton*,<sup>49</sup> the Supreme Court delineated the standard for employer liability in sexual harassment cases, distinguishing conduct engaged in by supervisory employees from non-supervisory employees.<sup>50</sup>

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43. See *Memorandum of Key Findings from a Survey of Women Fast Food Workers*, *supra* note 14, at 1–2 (focusing on sexualized conduct); see also *THE GLASS FLOOR*, *supra* note 7, at 17 (detailing sexualized conduct); *TAKE US OFF THE MENU*, *supra* note 1 (recounting sexual and sex-based conduct).

44. See Joan C. Williams, Jodi Short, Margot Brooks, Hilary Harcastle, Tiffanie Ellis & Rayna Saron, *What’s Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 154–96 (2019); Sarah D. Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 237, 245–55 (2019).

45. See Williams et al., *supra* note 44, at 222–24.

46. See *id.*

47. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 785–86 (1998) (discussing the difficulty faced by lower courts in applying the relevant standard).

48. 524 U.S. 742 (1998).

49. 524 U.S. 775 (1998).

50. There are significant legal distinctions between hostile work environment claims that arise from a supervisor’s actions in contrast with a non-supervisory employee’s actions. In *Vance v. Ball State University*, the Supreme Court held that “an

Drawing upon principles from agency law, the Court held that an employer will be subject to vicarious liability for harassment engaged in by a supervisor with “immediate (or successively higher) authority.”<sup>51</sup> The Court, however, did not impose a standard of strict liability for all harassment perpetrated by a supervisor. Rather, the Court balanced the basic principles of agency law against its desire to effectuate Title VII’s objective of “encouraging forethought by employers and saving action by objecting employees[.]”<sup>52</sup> Specifically, the Court proffered that an employer can avoid liability for sexually harassing conduct committed by a supervisor that does *not* result in a tangible employment action if the employer can demonstrate the affirmative defense that “(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>53</sup> This affirmative defense, the Court made explicit, is not available to an employer “when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”<sup>54</sup>

In *Faragher*, the Supreme Court offered a two-fold rationale for affording an employer the affirmative defense to a supervisor-created hostile work environment claim. First, allowing an employer to prove a defense creates an incentive for an employer to take steps to prevent a hostile workplace from arising in the first place and to correct the situation once it becomes aware.<sup>55</sup> The defense thus credits an employer for its reasonable efforts to fulfill its obligations to its employees.<sup>56</sup> Second, the defense creates an incentive for employees to avail themselves of the opportunities provided by the employer to address the harassing conduct, or to otherwise avoid the harm, thus fulfilling the employee’s duty to mitigate the harm.<sup>57</sup> From a pragmatic perspective, the availability of an affirmative

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employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . *i.e.*, to effect 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.’” *Vance v. Ball State Univ.*, 570 U.S. 421, 429–31 (2013) (internal citations omitted). In a sharp dissent, Justice Ginsburg rebuked the Court’s narrow definition of “supervisor,” which excludes an employee who has the ability to direct subordinates’ daily work activities but lacks the authority to take “tangible employment actions.” *Id.* at 451–70. By directing daily work, Justice Ginsburg reasoned that this employee also has the potential to use his or her position to aid in the harassment and, therefore, this employee likewise should be viewed as a “supervisor” for purposes of imposing Title VII employer liability. *Id.*

51. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

52. *Faragher*, 524 U.S. at 807.

53. *Id.*

54. *Id.* at 808.

55. *Id.* at 806.

56. *Id.*

57. *Id.* at 806–07.

defense to a hostile work environment claim encourages employers and employees to resolve these issues in the workplace itself and to preserve the working relationship in a way that benefits both parties, thereby avoiding potentially protracted litigation and its concomitant costs in both economic and human terms.

Although the *Faragher* defense implicitly incentivizes employers to implement proactive measures to eliminate sexual harassment from the workplace, the defense falls short because these preventive actions are not statutorily mandated. More precisely, *Faragher* offers a carrot; it does not wield a stick. Employers are therefore free to forego the defense and ignore its potential benefits, choosing to assume the risk of liability by gambling that their employees will not seek the protection afforded under Title VII. In addition, not all food service workers are even afforded the protections of Title VII because the establishments in which they work do not meet the statutory threshold for Title VII coverage, which requires fifteen or more employees.<sup>58</sup>

Another important development in the body of sexual harassment law that is particularly significant to the food service industry is the recognition that an employer can be held liable in negligence for a hostile work environment created by co-workers and third parties, including customers and independent contractors.<sup>59</sup> As the Supreme Court made clear in *Vance v. Ball State University*,<sup>60</sup> in cases where the harasser is not a supervisor but rather a co-worker, “a[n] [employee] could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.”<sup>61</sup> The standard of negligence has been applied by courts in cases involving harassment perpetrated by customers.

One of the more egregious reported cases involving customer conduct, *Lockard v. Pizza Hut*,<sup>62</sup> illustrates this principle. The case arose from a hostile work environment claim filed by Rena Lockard, a server at a local

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58. 42 U.S.C. § 2000(e)(b) (2018); *see also* U.S. CENSUS BUREAU, 2019 SUSB ANNUAL DATA TABLES BY ESTABLISHMENT INDUSTRY (April 1, 2022), <https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html> [<https://perma.cc/MQU3-D8G4>] (follow “U.S. & states, NAICS, detailed employment sizes (U.S. 6-digit and states, NAICS sectors)” hyperlink; then scroll down to code 772; add the Employment data reported for Enterprise codes 02, 03 and 04 in column H) (reporting that the industry comprised of “Food Services and Drinking Places” employs approximately 1.7 million workers at establishments with fewer than 15 employees).

59. *See Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> [<https://perma.cc/NK2Q-X8AP>] (last visited Apr. 1, 2022).

60. 570 U.S. 421 (2013).

61. *Id.* at 449.

62. 162 F.3d 1062 (10th Cir. 1998).

Pizza Hut in rural Oklahoma. In that case, Ms. Lockard was successful in demonstrating severe or pervasive conduct created by two male customers who had engaged in a pattern of behavior over a period of time. During their first few visits to the restaurant, these customers subjected Ms. Lockard to verbal harassment.<sup>63</sup> On a subsequent visit, one of the men commented that Ms. Lockard smelled good, asking her to identify her fragrance, to which Ms. Lockard responded that it was none of his business. The customer then pulled Ms. Lockard by the hair. Ms. Lockard recounted the incident to her supervisor, Mr. Jack, and asked that she be relieved of her obligation to serve the table. Mr. Jack rejected her request, stating, “You wait on them. You were hired to be a waitress. You waitress.”<sup>64</sup> Upon returning to the table to serve a pitcher of beer, that same customer pulled Ms. Lockard towards him by her hair and committed a sexually explicit act upon her. Ms. Lockard informed Mr. Jack that she was resigning and called for a ride home. She subsequently filed a lawsuit against her employer, alleging a hostile work environment.<sup>65</sup>

During the course of the trial, Ms. Lockard introduced evidence that she had been the victim of sexual assault as a teenager.<sup>66</sup> “Although she had been able to cope” with the effects of this prior sexual abuse, she began to experience post-traumatic stress disorder and major depression after the incident at the Pizza Hut and was unable to work for approximately two years thereafter.<sup>67</sup> The jury found in favor of Ms. Lockard and awarded \$200,000 in compensatory damages.<sup>68</sup> On appeal, the Tenth Circuit upheld the jury’s award, finding that the customers’ actions met the standard of “severe or pervasive” conduct sufficient to create a hostile work environment.<sup>69</sup> The court also affirmed that her supervisor, Mr. Jack, who had knowledge of the physically aggressive behavior of these two customers, failed to “respond adequately” to Ms. Lockard’s complaint, reasoning that “Mr. Jack placed Ms. Lockard in an abusive and potentially dangerous situation, although he clearly had both the means and the authority to avoid doing so by directing a male waiter to serve these men, waiting on them himself, or asking them to leave the restaurant.”<sup>70</sup> Accordingly, the court held that Ms. Lockard’s employer could be held liable in negligence for this violation of Title VII. Research suggests that harassing conduct perpetrated by customers accounts for a significant part of the harassment experienced by food service employees.<sup>71</sup> The *Lockard* case pointedly illustrates the Hobson’s choice that many restaurant work-

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63. *See id.* at 1067.

64. *Id.* (internal quotation marks omitted).

65. *Id.* at 1068.

66. *Id.* at 1067–68.

67. *Id.*

68. *Id.* at 1066.

69. *Id.* at 1072.

70. *Id.* at 1075.

71. *See* Specker, *supra* note 9, at 344.

ers confront all too often: torn between walking away from their job or placing themselves at personal risk of physical and emotional harm.<sup>72</sup>

Against the backdrop of evolving legal standards, the #MeToo movement exploded on to the landscape with a tweet by actress Alyssa Milano on October 15, 2017, that evoked over a million retweets across eighty-five countries.<sup>73</sup> Although the initial impetus for the movement derived from experiences recounted by women in Hollywood, women from across socioeconomic backgrounds began to speak up about their experiences with sexual harassment.<sup>74</sup> A few months later, in January 2018, the TIME'S UP Legal Defense Fund was initiated in response to the #MeToo movement to assist survivors of sexual harassment across all economic sectors,<sup>75</sup> prioritizing cases by low-income workers and other marginalized groups.<sup>76</sup> Through the efforts of these initiatives, the plight of women who experience sexual harassment in their workplaces was brought to the public forum, sparking a nationwide shift in attitudes towards our understanding of, and tolerance for, sexual harassment in the employment setting.<sup>77</sup>

According to polling data analyzed and interpreted by Professor Joan Williams and her co-authors, several significant shifts in our social norms can be identified in response to the #MeToo movement.<sup>78</sup> Notably, a vast majority of Americans now recognize that sexual harassment is a serious problem, with younger Americans holding this sentiment most strongly.<sup>79</sup> Moreover, both women and men acknowledge that sexual harassment includes certain behaviors such as “being forced to do something sexual (91% of women; 83% of men); masturbating in front of someone (89% of women; 76% of men); exposing oneself (89% of women; 76% of men); sharing intimate photos without permission (85% of women; 71% of men); and sending sexually explicit texts or emails (83% of women; 69% of men).”<sup>80</sup> In addition, “[t]here is even strong agreement that verbal comments alone can constitute harassment: 86% of women and 70% of men believe that making sexual comments about someone’s looks or body is sexual harassment.”<sup>81</sup>

Perhaps most dramatic, “[e]ighty-six percent of Americans now endorse a ‘zero-tolerance’ policy,” whereby harassing behavior should no

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72. See *Memorandum of Key Findings from a Survey of Women Fast Food Workers*, *supra* note 14, at 3; TAKE US OFF THE MENU, *supra* note 1.

73. Williams et al., *supra* note 44, at 142 n.4.

74. See Heydemann & Tejani, *supra* note 44, at 239.

75. See *id.*

76. TIME'S UP LEGAL DEFENSE FUND, 2019 ANNUAL REPORT 10 (2020), <https://timesupfoundation.org/wp-content/uploads/2020/04/2019-TULDF-Annual-Report-Final.pdf> [<https://perma.cc/CL58-AC7V>].

77. See Williams et al., *supra* note 44, at 150–54.

78. *Id.*

79. *Id.* at 151.

80. *Id.* at 152.

81. *Id.*

longer be excused or tolerated.<sup>82</sup> And, in a striking reversal from previously-held views about the likelihood of specious claims of sexual harassment, “less than a third (31%) of Americans now think that false accusations of sexual harassment are a major problem,”<sup>83</sup> and “77% of Americans believe that both the accuser and the accused should get the benefit of the doubt until proven otherwise in sexual harassment cases.”<sup>84</sup> This broad-based shift in perspective provides the foundation and impetus for new and aggressive measures to hold employers accountable for workplace harassment.

Incrementally, a handful of states have enacted statutes that mandate sexual harassment training; other states simply encourage employers to provide training as part of their obligation to ensure a non-discriminatory workplace.<sup>85</sup> Although these developments are certainly welcome, the continued incidence of sexual harassment suggests that the threat of a legal action under our existing legal landscape has neither been a sufficient deterrent to harassing conduct nor a sufficient incentive to take proactive measures to prevent it. A dramatic shift in perspective is needed. If the #MeToo movement accomplished nothing else, it revealed the very serious physical, mental health, and economic impact that sexual harassment can have on its targets. It’s time to acknowledge that protection from sexual harassment is a public health issue that merits the same degree of attention that is afforded to other public health issues, such as food safety. Addressing sexual harassment as a public health issue on par with food safety in the restaurant industry should work to elevate the urgency of the problem and its seriousness.

## II. THE OCCUPATIONAL HAZARD OF SEXUAL HARASSMENT IN THE FOOD SERVICE INDUSTRY

### A. *The EEOC Task Force on Sexual Harassment*

From 2010 to 2020, approximately 137,000 charges of sex-based harassment were filed with the EEOC.<sup>86</sup> Despite the focus on workplace harassment in recent years, including during the height of the #MeToo Movement, the number of charges filed has remained fairly static throughout the past decade at roughly 12,000 claims per year.<sup>87</sup>

In 2015, two years *before* the #MeToo movement really placed sexual harassment in the national spotlight, the EEOC launched a task force on the study of harassment in the workplace, including sexual harassment, and generated a detailed report which focused on understanding and ad-

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82. *Id.* at 153.

83. *Id.* at 153–54.

84. *Id.* at 154.

85. See *50-State Sexual Harassment Training Requirements*, *supra* note 10.

86. See EEOC CHARGE REPORT, *supra* note 5.

87. *Id.* (showing slight increase in 2018, and slight decrease in 2020, possibly related to Covid-19 shut-downs).



addressing the problem.<sup>88</sup> The Task Force was comprised of an impressive group of academics from the social sciences, legal practitioners, employer and employee advocacy groups, and labor organizations.<sup>89</sup> For the purpose of this Article, some key findings of the Report included the following:

- workplace harassment of all kinds is a persistent problem;
- the presence of one or more identified organizational risk factors can foster the existence of sexual harassment;
- many incidents of harassment go unreported for fear of workplace retaliation;
- traditional training has been ineffective and must be changed;
- changing the organizational culture is key to effective prevention of harassment; and
- harassment will not stop until all stakeholders are committed to change.<sup>90</sup>

The Report further found that in probability samples in which the term “sexual harassment” was undefined, 25% of women reported encountering workplace sexual harassment.<sup>91</sup>

Interestingly, in probability samples in which specifically defined behaviors were described, such as “unwanted touching,” the rate of reported harassment rose to 40%.<sup>92</sup> Perhaps the most startling information uncovered by the Report was the infrequency of formal reporting. In fact, a few studies found that only about 30% of those surveyed ever discussed the harassment with a supervisor or manager. Rather, the most common response was to share the harassment with family members or friends.<sup>93</sup> Given the prevalence of harassment and the fact that most incidents are never reported, the EEOC concluded that the “findings raised serious concerns” and demonstrated the urgent need to devise a “comprehensive strategy to remedy [the] problem.”<sup>94</sup>

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88. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [<https://perma.cc/LW2A-PEBT>] [hereinafter EEOC SELECT TASK FORCE REPORT]. The Report is stunning for its breadth and depth into the issue of sexual harassment as well as its findings and recommendations. Notably, the Report examines the prevalence of harassment, the business case for stopping and preventing harassment, the risk factors for harassment, and policy suggestions for preventing sexual harassment in the workplace.

89. *Id.* at 1–2.

90. *Id.* at iv–vi.

91. *Id.* at 8.

92. *Id.* at 8–9.

93. *Id.* at 16.

94. *Id.* at 17.

B. *Sexual Harassment in the Food Services Industry*

Statistics from the food service industry are even more alarming.<sup>95</sup> According to an analysis of EEOC claims conducted by the Center for American Progress, the food service and accommodation industry is the biggest offender of workplace sexual harassment, accounting for the largest number of sexual harassment charges filed by industry during the decade of 2005 to 2015.<sup>96</sup> Those charges accounted for just over 14% of all sexual harassment claims filed with the EEOC during that timeframe.<sup>97</sup> Thus, it is not overstating to describe sexual harassment in the food service industry as a serious occupational hazard. From small counter cafes to extravagant dine-in restaurants, food servers are among the most vulnerable population of workers to experience sexual harassment, with two-thirds of women workers experiencing sexually harassing behavior from management and nearly 80% experiencing sexually harassing behavior from co-workers and customers.<sup>98</sup> Factors such as tip-based compensation, the culture of “kitchen talk” that normalizes sexualized conversations, the consumption of alcohol by customers, and the employee’s dependence on managers for lucrative table assignments and shifts combine to create the toxic culture of sexual harassment in restaurants.

In addition to the factors above, research shows that work environments in which workers face strong power imbalances tend to foster sexual harassment more so than in environments where the power imbalance is not as strong.<sup>99</sup> Such power dynamics are found more readily in low-wage jobs, where many young employees are first exposed to the working world.<sup>100</sup> This is particularly so in the food service industry, where the power imbalance is evident at three levels: between server and customer, between server and manager, and between server and co-worker.<sup>101</sup> With respect to the server-customer relationship, the power dynamic emanates almost entirely from the nature of tipping, where a server’s income literally depends on how friendly and accommodating they are to customers.

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95. Research on sexual harassment reveals that there are several organizational risk factors that can predict the likelihood that sexual harassment will occur. Those risk factors include, *inter alia*, a young workforce, workplaces with significant power disparities between men and women, and workplaces that rely on customer service or client satisfaction. *See id.* at 84–88. Accordingly, the prevalence of sexual harassment in the food service industry, where many such risk factors exist, is unsurprising.

96. Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017, 4:59 PM), <https://www.americanprogress.org/article/not-just-rich-famous/> [<https://perma.cc/P888-PZY7>].

97. *Id.*

98. *See* THE GLASS FLOOR, *supra* note 7, at 13 (finding that men also report sexual harassment, though to a lesser extent).

99. *See* Frye, *supra* note 96, at 5 (finding women who struggle with power imbalance in their workplaces vulnerable).

100. *See* THE GLASS FLOOR, *supra* note 7, at 3.

101. *See* Specker, *supra* note 9, at 344–46.

As one server describes, “I just want my tip, I don’t want anything to mess up my tip.”<sup>102</sup> Thus, overlooking inappropriate or sexually harassing behavior becomes the norm, as evidenced by the fact that 59% of women servers report being sexually harassed by their customers on a monthly basis.<sup>103</sup>

Between servers and their managers or supervisors, power imbalance exists in the form of shift and table assignments, whereby an “agreeable” server—i.e., one who doesn’t complain about sexual harassment—will receive better assignments and thus better income and job stability.<sup>104</sup> Approximately two-thirds of women reported being sexually harassed by management on a monthly basis.<sup>105</sup>

Finally, as between servers and co-workers, servers need to rely on co-workers such as table bussers and cooks “in order to achieve assistance on the floor, higher table turnover, and a reputation as a team player.”<sup>106</sup> An astounding 79% of women reported enduring some form of sexually harassing behavior from co-workers.<sup>107</sup>

### C. *The Physical and Mental Effects of Sexual Harassment*

While the prevalence of sexual harassment is well documented, the effects of sexual harassment on one’s health are less well understood.<sup>108</sup> In a recent study conducted in *JAMA Internal Medicine*, researchers examined a group of women to investigate the association between sexual harassment and mental and physical health.<sup>109</sup> The study concluded that women with a history of sexual harassment experienced higher blood pressure and poorer sleep than women who were not sexually harassed.<sup>110</sup> Moreover, women with a history of sexual assault experienced poorer mental health, such as depression and anxiety, than those who had no

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102. *Id.* at 344.

103. *Id.*

104. *Id.* at 345.

105. See THE GLASS FLOOR, *supra* note 7, at 13.

106. *Specker*, *supra* note 9, at 346.

107. See THE GLASS FLOOR, *supra* note 7, at 17. Behaviors included sexual jokes, pressure for dates, texts of a sexual nature, being shown suggestive photos, deliberate touching, cornering or pinching, inappropriate kissing and fondling, being told to dress in a “sexier” manner, being told to flirt with customers, and being told to expose parts of your body. *Id.* While men also reported experiencing such behavior, both the type and rate of harassment differed. *Id.*

108. See Rebecca C. Thurston, Yuefang Chang, Karen A. Matthews, Roland von Känel & Karestan Koenen, *Association of Sexual Harassment and Sexual Assault with Midlife Women’s Mental and Physical Health*, 179 JAMA INTERNAL MED. 48, 48 (2019); see also Darius K.S. Chan, Chun Bun Lam, Suk Yee Chow & Shu Fai Cheung, *Examining the Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCH. WOMEN Q. 362, 362 (2008) (finding “sexual harassment experiences are negatively associated . . . with psychological health[ ] and physical health . . .”).

109. See Thurston et al., *supra* note 108.

110. *Id.* at 50.

such sexual assault history.<sup>111</sup> These findings are consistent with a survey of women who work in the fast food industry, reporting similar health effects including an increase in general stress level, fear or worry about reporting to work, greater sadness or depression, lower productivity at work, a change in sleep patterns and appetite, and less enjoyment of free time.<sup>112</sup>

Not surprisingly, the negative mental and physical health effects of sexual harassment translate to negative organizational effects such as decreased job satisfaction, greater turnover intentions, and higher rates of employee absenteeism as well as lower employee morale in the workplace.<sup>113</sup> Moreover, such effects are felt even by employees who are not personally harassed, but who nonetheless report diminished well-being in such work environments where sexual harassment is occurring.<sup>114</sup> Research further suggests that these negative organizational consequences are universal.<sup>115</sup>

A recent news story surveyed 190 restaurant workers in the Philadelphia area to examine why restaurants are facing such an extreme post-pandemic labor shortage.<sup>116</sup> The results of the survey found that the toxic climate of sexual harassment in the restaurant industry has contributed, at least in part, to the shortage of workers. 52% of respondents identified poor workplace culture as a “very important” cause of the current labor shortage, and 70% of those surveyed ranked better working conditions and positive culture as “very important” in making restaurant jobs more attractive.<sup>117</sup> Yet respondents acknowledge that is an uphill climb in an industry that notoriously adheres to the premise that the customer is always right.

#### D. *Sexual Harassment Prevention Practices: What Works?*

There have long been efforts underway to stem the tide of sexual harassment through adoption of workplace policies that prohibit it, as well as through training for employees.<sup>118</sup> Unfortunately, such efforts are oftentimes too little—focusing on avoiding legal liability—or too late—as part of a remediation response after a lawsuit arises, and do little to change the

111. *Id.* at 50–52.

112. See *Memorandum of Key Findings from a Survey of Women Fast Food Workers*, *supra* note 14, at 2.

113. Rebecca S. Merkin & Muhammad Kamal Shah, *The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings from Pakistan Compared to the United States*, 3 SPRINGERPLUS, May 1, 2014, at 1.

114. *Id.* at 3.

115. *Id.* at 9.

116. Jenn Ladd, *‘This is a Real Job’: Philly’s Restaurant Workers Dissect the Labor Shortage, and Contemplate a Different Future*, PHILA. INQUIRER (July 10, 2021), <https://www.inquirer.com/news/labor-shortage-pandemic-workers-restaurants-philadelphia-hiring-20210710.html> [<https://perma.cc/5SEA-LXYZ>].

117. *Id.*

118. See EEOC SELECT TASK FORCE REPORT, *supra* note 88, at ii.

climate that encourages sexual harassment.<sup>119</sup> While there are practices that seem to be more promising, such as workplace civility training and bystander intervention training, such practices succeed only when there is buy-in from the top levels of management in the organization.<sup>120</sup>

Shortly after the *Ellerth* and *Faragher* opinions were announced, organizations began to implement policies and procedures designed to avail themselves of the affirmative defense set forth in those decisions. Accordingly, much of the current sexual harassment training focuses on prevention of legal liability rather than on establishing healthy workplace cultures.<sup>121</sup> In the two decades since *Ellerth* and *Faragher*, researchers have had the opportunity to study the efficacy of workplace sexual harassment training programs.<sup>122</sup> While there is no one-size-fits-all approach, there is strong evidence to suggest that ultimate success in reducing sexual harassment occurs in organizations that include multiple actors, especially those in positions of authority.<sup>123</sup> In addition, organizations should consider differing levels of response to sexual harassment, with primary, secondary and tertiary intervention strategies.<sup>124</sup> Primary intervention strategies include the promulgation of clear and consistent policies prohibiting sexual harassment.<sup>125</sup> These policies need to be transparent, with clear channels of communication to report incidents, as well as clearly articulated repercussions for those who engage in sexually harassing behavior.<sup>126</sup> Secondary intervention strategies involve the swift response to sexual harassment, such as grievance procedure processes that include “multiple reporting channels, the timeliness of investigations, the application of appropriate sanctions, and the use of mediation.”<sup>127</sup> Finally, tertiary intervention addresses long-term responses to sexual harassment, such as acknowledging the negative effects of sexual harassment on the health

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119. *See id.* at v.

120. *See* Myrtle P. Bell, James Campbell Quick & Cynthia S. Cycyota, *Assessment and Prevention of Sexual Harassment of Employees: An Applied Guide to Creating Healthy Organizations*, 10 INT’L J. SELECTION & ASSESSMENT 160, 162 (2002) (finding aggressive, proactive sexual harassment prevention more effective than passive, reactive sexual harassment prevention).

121. *See* EEOC SELECT TASK FORCE REPORT, *supra* note 88, at v.

122. *See, e.g.*, Bell et al., *supra* note 120, at 160 (“[M]ost methods of sexual harassment prevention are passive and often reactive, rather than aggressive and proactive.”). The intractable nature of sexual harassment continues to make it a fertile topic for research. *See, e.g.*, Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*, 39 J. ORG. BEHAV. 134, 138–39 (2018) (proposing organizational framework for understanding primary factors influencing sexual harassment training efficacy).

123. *See* EEOC SELECT TASK FORCE REPORT, *supra* note 88, at v.

124. *See* Paula McDonald, Sara Charlesworth & Tina Graham, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, 53 ASIA PAC. J. OF HUM. RES. 41, 41 (2015).

125. *See id.* at 43–45.

126. *See id.*

127. *Id.* at 47.

and well-being of employees.<sup>128</sup> This level of intervention seeks to address the negative impacts of sexual harassment on the organization, such as absenteeism and low employee morale, through proactive follow-up to those involved to ensure that retaliation has not occurred.<sup>129</sup>

In its Report on workplace sexual harassment, the EEOC helpfully summarized key elements of successful harassment prevention programs based on testimony from researchers involved in the Report.<sup>130</sup> Paramount among success factors is workplace culture:

Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. We heard this from academics who testified to the Select Task Force; we heard it from trainers and organizational psychologists on the ground; and we read about it during the course of our literature review. Two things . . . became clear to us. First, across the board, we heard that leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable is paramount. And we heard that this leadership must come from the very top of the organization. Second, we heard that a commitment (even from the top) for a diverse, inclusive, and respectful workplace is not enough. Rather . . . an organization must have the *systems* in place that hold employees *accountable* for this expectation . . . . These two sides of the coin—leadership and accountability—create an organization’s culture.<sup>131</sup>

While the EEOC Report identifies other factors involved in successful prevention programs, such as promulgation of anti-harassment policies and compliance training programs,<sup>132</sup> it concludes that all such efforts “*must be part of a holistic effort* undertaken by the employer to prevent harassment that includes the elements of leadership and accountability described above.”<sup>133</sup> The question, then, is how to achieve that holistic effort from restaurant management, when the entire restaurant industry is built upon a climate that clearly fosters sexual harassment.

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128. *Id.* at 48–49.

129. *See id.*

130. *See* EEOC SELECT TASK FORCE REPORT, *supra* note 88, at 31–65.

131. *Id.* at 31.

132. The EEOC Report includes a thorough discussion on the effectiveness of training programs. It concludes that training should be supported at the highest levels, should be conducted and reinforced on a regular basis for all employees, should be conducted by qualified, live and interactive trainers, and should be routinely evaluated. *Id.* at 51–53. The Report also calls for workplace civility training as well as bystander intervention training, which shows promise in changing workplace culture. *Id.* at 54–59. As such, these types of training could perform an important function in the restaurant industry, where a culture change is needed.

133. *Id.* at 45.

Additional legislation in this area may not have much effect. While such laws are admirable and necessary, sexual harassment is already unlawful at both federal and state levels, and as pointed out in the EEOC Task Force Report, the illegality of it has not translated to fewer incidents of sexual harassment:

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years - is there something we've been missing?<sup>134</sup>

Even some of the newer, more targeted laws may not be as effective as hoped. For example, the 2020 Illinois law that requires bar and restaurant owners to conduct sexual harassment training is, without doubt, the most promising legislation yet aimed at tackling the issue of sexual harassment in the food service industry.<sup>135</sup> But even though the main requirements of that law are rigorous, such as promulgation of a robust, written sexual harassment policy and required anti-harassment training specific to the restaurant and bar industry, the penalty for violation is a fine.<sup>136</sup> Given the intractable nature of sexual harassment in restaurants, including the fact that much harassment is perpetrated by customers whom owners may not be eager to offend, the choice of simply paying a penalty may be accepted as the cost of doing business in an industry rife with sexual harassment.

Moreover, while it is clear that laws that *merely* require training, without more, have done little to prevent discrimination and harassment, employers may nonetheless use evidence of such training to shield themselves from legal liability.<sup>137</sup> Legal scholar Susan Bisom-Rapp argues that current, ineffective trainings should be “legally irrelevant” in calculating employer liability.<sup>138</sup> Rather,

[o]nly those employers demonstrating efforts to reform educational programming and link it to comprehensive and holistic bias elimination efforts should be able to reference training as a shield from punitive damages. Creating doctrinal incentives for transformative prevention efforts can strengthen the impact of

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134. *Id.* at ii.

135. 775 ILL. COMP. STAT. 5/2-110 (2020).

136. *See id.* 2-110(E).

137. *See* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. LAW REV. ONLINE 62, 64 (2018).

138. *Id.*

equal employment opportunity (EEO) law and make harassment a rare, rather than everyday, phenomenon.<sup>139</sup>

As set forth more fully in Part IV, *infra*, a shift in the restaurant industry's culture likewise requires a stronger doctrinal incentive. Requiring a holistic sexual harassment prevention program as a condition of the individual food handler's licensing process supplies that incentive. It does so in several ways. First, by making the anti-harassment program a condition of the food license, restaurant owners are faced with a penalty that is harder to dismiss. They will need to weigh ignoring the requirement against not merely paying a fine, but potentially shuttering their doors. Second, while this "stick" approach may not change minds immediately, over time, the workplace culture shift that results from ongoing focus on sexual harassment prevention will become the norm. This directly addresses the EEOC Report's main recommendation as well, *i.e.*, that leadership and accountability are required from the highest levels to change workplace culture away from harassment. Licensing becomes the key to obtaining that leadership buy-in.

The notion of regulatory interventions to change workplace culture is persuasive.<sup>140</sup> Legal scholar Suzanne B. Goldberg has argued that legal regulation through mandates such as regular trainings and assessments of internal complaint processes "has potential to support an anti-harassment workplace culture."<sup>141</sup> Such regulations require workforce engagement that "may help convey that sexual harassment prevention and response is more than just a compliance obligation."<sup>142</sup> Rather, such regulations, when crafted thoughtfully and in conjunction with employers and employees, may contribute to a broader workplace cultural shift.<sup>143</sup>

### III. SEXUAL HARASSMENT PREVENTION AS A CONDITION OF LICENSING IN THE FOOD SERVICE INDUSTRY

#### A. *The Regulatory Environment of the Food Service Industry*

Restaurants, like other retail food establishments, play a vital role in the delivery of food to consumers. They also pose significant health risks to the public that are associated with food preparation, handling, and storage. Indeed, the Centers for Disease Control and Prevention (CDC) "estimates that each year roughly 1 in 6 Americans (or 48 million people) gets sick [from foodborne illnesses], 128,000 people are hospitalized, and

139. *Id.*

140. See Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 491–95 (2020) (arguing in favor of law's exertion over workplace culture).

141. *Id.* at 487.

142. *Id.*

143. See *id.* at 491.



3,000 people die from foodborne diseases.”<sup>144</sup> As such, food safety has long been recognized as a public health issue, demanding increased collaboration at every level of government.<sup>145</sup> Although the federal government plays a critically important role in ensuring food safety, the daily work of monitoring the safety of food prepared and sold through retail establishments, such as restaurants, rests with state and local authorities.<sup>146</sup>

Recognizing the paramount importance of preventing foodborne illnesses, restaurants are subjected to a complex regulatory scheme that includes a requirement to obtain applicable licenses from governing agencies or departments. In particular, restaurants must secure a food service license<sup>147</sup> in addition to obtaining a general commercial activity (or business privilege) license and other relevant licenses depending upon the locale in which they operate. To maintain a food service license, the restaurant must comply with numerous regulations, including those designed to ensure food safety and hygiene. A critical requirement to obtaining and maintaining a license to serve food includes compliance with the relevant jurisdiction’s food code.<sup>148</sup>

To promote a coordinated approach to the prevention of foodborne illnesses, the Food and Drug Administration (FDA) has developed a model Food Code,<sup>149</sup> which is updated every four years<sup>150</sup> and supplemented in the interim to “reflect current science and food safety practices.”<sup>151</sup> The purpose of the Code is to provide guidance to “the approximately 75 state and territorial agencies and more than 3,000 local departments that assume primary responsibility for preventing foodborne illnesses and for licensing and inspecting establishments within the retail segment of the food services industry,” a sector that “employs a work force

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144. *Estimates of Foodborne Illness in the United States*, CTNS. FOR DISEASE CONTROL AND PREVENTION (Nov. 5, 2018), <https://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> [<https://perma.cc/QT4D-84CF>].

145. See U.S. PUB. HEALTH SERV. & FOOD AND DRUG ADMIN., *FOOD CODE: 2017 RECOMMENDATIONS OF THE UNITED STATES PUBLIC HEALTH SERVICE FOOD AND DRUG ADMINISTRATION* ii–iii (2017), <https://www.fda.gov/media/110822/download> [<https://perma.cc/KA6P-N9BD>] [hereinafter *FDA FOOD CODE*] (noting that the federal government’s involvement in food protection began as early as 1924 when the U.S. Public Health Service commenced studies on the role of milk in the spread of disease, ultimately leading to the development of a series of model food codes to guide state and local jurisdictions in regulating retail food services).

146. See *Retail Food Protection*, U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/retail-food-protection> [<https://perma.cc/LQY3-AF76>] (last visited Apr. 6, 2022).

147. See *FDA FOOD CODE*, *supra* note 145, at § 8-301.11.1; *Retail Food Facility Safety Act*, 3 PA. CONS. STAT. § 5703(a) (2012).

148. See 3 PA. CONS. STAT. § 5703(c).

149. See *FDA FOOD CODE*, *supra* note 145, at iv.

150. *Id.* at xii.

151. U.S. PUB. HEALTH SERV., FOOD AND DRUG ADMIN. & U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *SUPPLEMENT TO THE 2017 FOOD CODE* ii (2019), <https://www.fda.gov/media/133749/download> [<https://perma.cc/KA6P-N9BD>].

of over 16 million” across more than a million establishments.<sup>152</sup> The Code provides “guidance on food safety, sanitation, and fair dealing that can be uniformly adopted for the retail segment of the food industry.”<sup>153</sup> With only a few exceptions, state agencies responsible for licensing and inspecting restaurants for food safety have adopted a version of the FDA’s Food Code.<sup>154</sup> Local jurisdictions typically follow state regulatory guidance for their local codes.<sup>155</sup>

In general, state and local food codes require the implementation of policies and procedures that address employee behavior and hygiene, equipment use and maintenance, and overall workplace sanitation.<sup>156</sup> To effectuate the goal of minimizing foodborne illnesses, restaurants are required to employ a certified food protection manager who knows and can demonstrate competency about food safety standards and practices.<sup>157</sup> Critically, the designated manager must be present on-site while the restaurant is open for business.<sup>158</sup> Because some of the more significant risks associated with foodborne illnesses derive from the behavior and hygiene of food handlers and food handling practices, managers are expected to engage in oversight of their staff, which includes, *inter alia*, observing work practices, providing appropriate training, and informing their employees of their obligation to report information about their health or activities that may bear upon the potential transmission of foodborne illnesses to customers and others.<sup>159</sup> In short, there is an expectation that managers will take an active role in ensuring compliance with the regulations needed to maintain a food service license.

As an additional safeguard to public health, food codes uniformly authorize periodic inspections of licensees to provide independent verification that all safety standards are being met.<sup>160</sup> Reports of inspections are

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152. FDA FOOD CODE, *supra* note 145, at ii.

153. *Id.* at iv.

154. See U. S. FOOD AND DRUG ADMIN. NAT’L FOOD RETAIL TEAM, ADOPTION OF THE FDA FOOD CODE BY STATE AND TERRITORIAL AGENCIES RESPONSIBLE FOR THE OVERSIGHT OF RESTAURANTS AND RETAIL FOOD STORES (2020), [https://www.fda.gov/media/107543/download#:~:text=the%202017%20Food%20Code%20is, Virginia%20\(two%20agencies\)%2C%20and](https://www.fda.gov/media/107543/download#:~:text=the%202017%20Food%20Code%20is, Virginia%20(two%20agencies)%2C%20and) [https://perma.cc/RR6F-49PV].

155. See, e.g., 3 PA. CONS. STAT. § 5707(a) (2021) (mandating that any licenser of retail food facilities follow the state regulations).

156. See *id.* at §§ 5708–11.

157. See FDA FOOD CODE, *supra* note 145, at §§ 2-101.11-102.12, 102.11-12; FLA. ADMIN. CODE ANN. r. 61C-4.023(1) (2021).

158. See FDA FOOD CODE, *supra* note 145, at §§ 2-101.11-102.12, 102.11-12; FLA. ADMIN. CODE ANN. r. 61C-4.023(1) (providing an exception “during those periods of operation when there are three or fewer employees engaged in the storage, preparation, or serving of foods.”).

159. See FDA FOOD CODE, *supra* note 145, at § 2-103.11; GA. COMP. R. & REGS. 511-6-1-.03(2) (2021).

160. See FDA FOOD CODE, *supra* note 145, at § 8-401.10; 3 PA. CONS. STAT. § 5704.

made available to the public, typically through electronic postings on a government website.<sup>161</sup> As a tool for compliance, the licensing process incentivizes restaurants to ensure adequate training and monitoring of employees precisely because failure to maintain food safety and hygiene presents an existential threat to the business itself. Specifically, regulatory violations “can not only result in a hefty fine, but also can deter patrons, cause reputational harm, and ultimately force an establishment to close.”<sup>162</sup>

As explained in Sections II.C and III.A above, the impact of sexual harassment is no less severe than the impact of potential foodborne illnesses that can be contracted through restaurants that fail to comply with their legal obligations. If restaurants can be required to take aggressive measures to prevent foodborne illnesses as part of maintaining a food service license, then so too can they be mandated to adopt preventive measures to protect their employees from sexual harassment as a condition of obtaining and maintaining a license to operate. The need to elevate sexual harassment prevention to the same status afforded to prevention of foodborne illnesses is compelled by the numbers. Whereas nearly 17% of Americans will experience a foodborne illness each year,<sup>163</sup> 66% of female restaurant servers report being sexually harassed by managers *on a monthly basis*,<sup>164</sup> 74% report being sexually harassed by co-workers *on a monthly basis*,<sup>165</sup> and 59% report being sexually harassed by customers *on a monthly basis*.<sup>166</sup> Given the scope of the problem, there is no principled reason to suggest that sexual harassment prevention should be assigned a lesser priority than requiring a restaurant to ensure food safety given the health implications to workers in the restaurant industry.

#### B. *The Nevada Gaming Model*

The proposal to incorporate sexual harassment prevention into the business licensing process is not unprecedented. A few months after the #MeToo movement grabbed the attention of the nation, the Wall Street

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161. See FDA FOOD CODE, *supra* note 145, at § 8-403.50 (explaining the agency shall “treat the inspection report as a public document and shall make it available for disclosure to a person who requests it as provided in law”); *Look Up a Food Safety Inspection Report*, CITY PHILA. (Dec 10, 2019), <https://www.phila.gov/services/permits-violations-licenses/get-a-license/business-licenses-permits-and-approvals/food-businesses/look-up-a-food-safety-inspection-report/> [https://perma.cc/4PPH-NM4C].

162. Bruce Bronster, *Responding to Recent Trends in the Leisure and Hospitality Industry*, ASPATORE (2014), at 8, 2014 WL 3773071. See, e.g., 3 Pa. C.S.A. § 5703(i)(2)(i) (authorizing suspension or revocation of the license for violations of applicable regulations); FDA FOOD CODE, *supra* note 145, §§ 8-904.10, 8-906.40.

163. *Estimates of Foodborne Illness in the United States*, *supra* note 144 (noting that 1 out of 6 Americans experience a foodborne illness each year).

164. THE GLASS FLOOR, *supra* note 7, at 13.

165. *Id.*

166. *Id.*

Journal reported on a series of claims alleging decades of sexual assault and harassment perpetrated by high-profile Las Vegas casino owner Steve Wynn, Chairman, CEO, and controlling shareholder of Wynn Resorts.<sup>167</sup> Shortly thereafter, the Nevada Gaming Commission (“NGC”) proposed amendments to Regulation 5, which governs the licensing of gaming establishments.<sup>168</sup> As originally proposed, the amendments required each licensee to adopt and maintain a comprehensive plan and written policies addressing sexual harassment awareness and prevention in its workplace.<sup>169</sup> The written policy was required to include the following: procedures and methods for reporting claims of sexual harassment; investigatory procedures to be followed by the licensee; potential consequences to anyone in the licensee’s organization who engages in sexual harassment; and an annual assessment of the policies and procedures “to ensure that employees are being effectively educated thereof.”<sup>170</sup>

In addition, each licensee would complete and file a checklist annually with the Nevada Gaming Board to demonstrate compliance with minimum standards regarding the plan, policies, and procedures established by the NGC’s chair.<sup>171</sup> Pursuant to the checklist, licensees would need to maintain records related to their sexual harassment policies, procedures and claims for five years, and to provide the records for inspection by agents of the board upon request.<sup>172</sup> Most importantly, licensees would be mandated “to communicate sexual harassment prevention policies and procedures to all employees, owners, officers, and directors upon commencement of employment, ownership, or position and at least once annually thereafter”<sup>173</sup> and “to conduct an annual assessment of sexual

167. See Alexandra Berzon, Chris Kirkham, Elizabeth Bernstein & Kate O’Keefe, *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018) <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953> [<https://perma.cc/3YD3-KGKW>].

168. NEV. GAMING CONTROL BD., PROPOSED AMENDMENTS TO NEVADA GAMING COMMISSION REGULATION 5 § 5.250 (Nov. 5, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14021> [<https://perma.cc/NMF2-LRHT>] [hereinafter PROPOSED REG. 5]. For a fuller discussion of the incidence of sexual harassment in the casino industry and the Proposed Amendments to Regulation 5, see Ann C. McGinley, *Sex and Gender-Based Harassment in the Gaming Industry*, 9 U.N.L.V. GAMING L.J. 147 (2019); see also Richard N. Velotta, *#MeToo-Related Policy Changes Coming to Las Vegas Casinos*, L.V. REV. J. (Nov. 21, 2019, 6:28 PM), <https://www.reviewjournal.com/business/casinos-gaming/metoo-related-policy-changes-coming-to-las-vegas-casinos-1897685/> [<https://perma.cc/Z5XM-D6HM>].

169. PROPOSED REG. 5, *supra* note 168, at § 5.250.

170. *Id.* § 5.250(1).

171. *Id.* § 5.250(2).

172. NEV. GAMING CONTROL BD., PROPOSED SEXUAL HARASSMENT AWARENESS AND PREVENTION: MINIMUM STANDARDS CHECKLIST (Nov. 5, 2018) (Question 16), *as amended* by NEV. GAMING CONTROL BD. ADDITIONAL AMENDMENTS BASED ON RESORT ASSOCIATION COMMENTS (Nov. 13, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14023> [<https://perma.cc/5JPZ-KH5S>] [hereinafter PROPOSED CHECKLIST].

173. *Id.* (Question 14).

harassment policies and procedures to ensure that those policies and procedures effectively educate employees as to the policies and processes available to report incidents of sexual harassment.”<sup>174</sup> The checklist also would require licensees to disclose detailed information regarding the number and disposition of sexual harassment claims filed with agencies in Nevada.<sup>175</sup>

After a period of time allotted for public hearings and comment, the proposed amendments were revised and took effect in March 2020, with the newly promulgated amendments to Regulation 5 set forth in much more generalized terms, as follows:

1. Each licensed gaming establishment or other gaming business that employs 15 or more employees shall adopt and implement written policies and procedures prohibiting workplace discrimination or harassment of a person based on the person’s race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin, including, without limitation, sexual harassment. Such written policies and procedures must include, without limitation: (a) The procedures and methods available to a person seeking to report an instance of workplace discrimination or harassment; and (b) The procedures the licensed gaming establishment or other gaming business will follow when investigating a report of workplace discrimination or harassment.<sup>176</sup>

As amended, Regulation 5 authorizes inspection of the written policies and procedures, including supporting documentation, at any time by a board member or designee of the chair.<sup>177</sup> If deficiencies are determined to exist, the chair (or designee) can order the deficiencies to be cured within a specified time.<sup>178</sup> More consequential, the NGC possesses “full and absolute power and authority to deny any application or limit, condition, restrict, revoke or suspend any license, registration, finding of suitability or approval, or fine any person licensed, registered, found suitable or approved, for any cause deemed reasonable by the [NGC].”<sup>179</sup> In other words, the NGC holds the power to terminate the very life of the casino for failure to comply with the Regulation.

From the perspective of compliance and paradigm shifting, the removal of the requirement to complete and file the checklist along with some of the specific disclosures detailed above is disappointing because completion of the checklist would have ensured an added degree of focused attention and accountability by licensees to the issue of sexual har-

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174. *Id.* (Question 15).

175. *See id.* (Question 16).

176. Nev. Gaming Comm’n Reg. 5.250 (2021).

177. *Id.* § 5.250(3).

178. *Id.* § 5.250(4).

179. NEV. REV. STAT. § 463.1405(4) (2021).

assment. There was, however, one significant and welcome addition to the amendments as promulgated that reflects a deeper understanding by the NGC of the individuals who comprise the workplace environment for casino employees, and the context in which sexual harassment can be perpetrated. Specifically, the amendments to Regulation 5 did make explicit that the sexual harassment policies and procedures must address and apply to sexual harassment engaged in by persons within the organization as well as *persons outside the organization*, including “a customer, client, vendor, contractor, consultant, or other person that does business with the organization.”<sup>180</sup> In effect, licensees will no longer be able to simply dismiss complaints of sexual harassment perpetrated by customers, who comprise a significant cohort of offenders. Although the amendments as originally proposed were substantially reduced in scope, the changes to Regulation 5 as promulgated do represent a first step towards shifting the paradigm to recognize sexual harassment prevention as essential to the very essence of the business’s operations. Indeed, the work of the NGC provides a model for other states and localities to build upon by incorporating sexual harassment awareness and prevention into their business licensing processes.

#### CONCLUSION

If leadership and accountability are the keys to changing an organization’s culture, the question becomes how to create that sense of leadership and accountability in the restaurant industry, where the culture of sexual harassment is so embedded. We suggest here that what is needed is an industry-wide jump-start in the form of a regulatory requirement to change that culture. Similar to the proposed Nevada gaming regulations discussed above, restaurants should be required, as part of their food handler’s licensing process, to implement meaningful sexual harassment prevention that incorporates primary, secondary, and tertiary corrections, including the promulgation of anti-harassment policies and the proactive and consistent training of all employees on a regular basis. In addition, restaurants should implement a robust system of gathering, tracking, and responding to all complaints of sexual harassment—whether those complaints are the result of employee or customer behavior—and should clearly articulate anti-retaliation policies.<sup>181</sup> Finally, the adoption of simple compliance checklists posted in employee-designated space could allow for easy audit by inspectors in an industry that is already adapted to rigorous workplace inspection. Such a process would combine the best of the newly implemented Illinois law, which requires robust training, with the appropriate regulatory penalty for non-compliance.

While the shift in workplace culture may not be immediate, the ongoing attention to anti-harassment efforts over the long haul can help move the needle towards a healthier restaurant culture.

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180. Nev. Gaming Comm’n Reg. 5.250(2)(a)–(b) (2021) (emphasis added).

181. See *supra* note 167.

