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Seeking Justice: Reform to the Resolution of Sexual Harassment Workplace Claims

An Honors Thesis submitted in partial fulfillment of the requirements for Honors in
Department of Management.

By
Maygen Martinez
Under the mentorship of Dr. Stephanie Sipe

ABSTRACT

The era of the #MeToo Movement has brought about significant change in both personal and professional lives. With support from the community, many survivors of sexual assault are now able to publicly confront the atrocities that have happened to them. Further, and as a result of this impetus, historic legislation and internal action have caused many companies to end their mandatory arbitration practices for sexual harassment complaints. The ending of mandatory employer-sponsored arbitration opens the door to a significant change in the way discrimination and harassment complaints are resolved in the workplace. More employees than ever are now able to take their cases directly to court, likely increasing the number of employee discrimination and harassment cases brought through the United States court system. With the addition of the recent #MeToo movement cases now seeking a court remedy, we can then only assume the percent of employee claims of sexual harassment that are denied a trial, and at least the appearance of “justice”, by summary judgment will rise. Based on current data, most employment discrimination cases filed in court are resolved using the pretrial tool of summary judgment, which hinders an affected employee from truly having his or her “day in court”. Although this change is considered a “win” for employees, it is not without consequence. This article will review the impact of the upcoming changes to employee discrimination and harassment claims, and will propose reforms to existing law to ensure employees who bring sexual harassment claims have an opportunity to seek justice.

Thesis Mentor: _____
Dr. Stephanie Sipe

Honors Director: _____
Dr. Steven Engel

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Georgia Southern University

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“In all societies, both women and men are powerfully conditioned to repress the daily realities of (sexual harassment and workplace glass ceilings) and to collude with the rest of society in keeping these dimensions of shared experiences hidden.”¹

The era of the #MeToo Movement, which evolved in 2017 to encourage and support victims of sexual harassment and assault as they came forward to share their stories, has brought about significant change in both the personal and professional lives of women and men. With support from the community, many survivors of sexual assault are now able to publicly acknowledge and confront the atrocities that have happened to them in the workplace. Further, and as a result of this impetus, historic legislation and internal corporate action have caused many companies to end their mandatory arbitration practices for equal employment sexual harassment complaints. The ending of mandatory employer-sponsored arbitration opens the door to a significant change in the way employment discrimination and harassment complaints are resolved. More employees than ever are now able to take their cases directly to federal or state equal employment opportunity agencies and then on to court, likely increasing the number of employee discrimination and harassment cases filed with the United States federal courts. However, what seems like a “win” for employees may not turn out to be so. With the addition of the recent #MeToo movement cases now seeking a court remedy, there is significant risk that the percent of employee claims of sexual harassment that are denied a trial, and at least the appearance of justice, by a court’s use of summary judgment will rise.

Although the elimination of mandatory arbitration clauses is considered a “win” for sexual harassment complaints, it is not without consequence. Based on current data,

¹ William Keepin, (2007). *Divine Duality: The Power of Reconciliation Between Women and Men*

most employment discrimination cases filed in federal court are resolved using the pretrial tool of summary judgment, which hinders an affected employee from truly having his or her “day in court”. Summary judgment allows a judge to decide a case without a trial, witnesses or a jury. This litigation tool prevents an employee from taking their case to trial when the judge believes that based on all the facts that have been established through pre-trial discovery, i.e. interrogatories, depositions, documents, etc. the parties agree on the material facts of the case, so the only action left to take is to apply the law to these “accepted” facts. This article will review the impact of the anticipated increase in employee discrimination and harassment claims filed with the EEOC and the courts, and will propose reforms to existing legal structures to ensure that employees who bring sexual harassment claims have an opportunity to seek justice.

Until recently, many employees have been unable to receive justice for their sexual harassment complaints due to the widespread use of mandatory arbitration clauses by employers. Mandatory arbitration procedures tend to favor employers, and even when employees win the result is confidential, so that other employees are unaware of the unlawful behavior and the employer can escape public scrutiny. Another obstacle faced by employees has been the prevalence of summary judgment decisions issued by trial courts in favor of employer defendants, which eliminates an employee’s opportunity to have her claim heard by a jury of peers.² If a viable solution to the growing problem of

² In 2016, it was reported that more than 75% of federal district court judges are men. (Retrieved October 9, 2019 from <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/>)

employment discrimination claims is not found, employees will continue to be denied a full and fair forum for their claims to be heard.

The anticipated flood of employment discrimination suits filed in federal courts could act to overload an already saturated system. This could result in significant negative consequences, as not only are many employees unable to get justice for their claims as a result of an increasing summary disposition by trial courts, but also employers may see and react to a decrease in court ordered liability and thus be dis-incentivized to address and correct discriminatory or harassing behavior in the workplace. Our current system of handling employment law claims no longer achieves the goals of punishing most employer wrongs and remedying meritorious employee harms. This article will propose reforms to our current litigation system by advocating for the use of a specialty court model already used by federal courts, as well as a similar model used by Great Britain, to suggest real and lasting improvements to the full and fair resolution of employment discrimination claim.

PART I: WHAT IS THE IMPACT OF #METOO

The #MeToo Movement gained attention in 2017 after a number of celebrities and other high profile victims of sexual harassment or sexual assault chose to share their stories in a public forum (Kohn, 2019). As a result, the term “Me Too” was coined and used to encourage other victims of sexual harassment to speak out, as in “*This happened to me too*” (Gajanan, 2018). This movement found its start in the Hollywood film industry and quickly spread into other workplaces (Burke, 2020). After significant press and social media attention was given to this movement, members of the public also began to speak out about their own experiences with sexual harassment in the workplace. As the

#MeToo movement gained momentum, demand for change in internal corporate practices and in company culture quickly escalated (Alexander, 2019). In particular, employees were no longer content with handling their sexual harassment claims quietly in the background via employer mandated arbitration hearings, and frankly, they were now realizing just how impactful their voices could be. A climate of social action began to swell amongst victims of the improper handling of sexual harassment claims, and soon allies joined their cause. Organized labor unions began advocating for an end to mandatory arbitration of employment discrimination claims and encouraging others to do as well (Fortado, 2018). The workplace was being redefined by the workers in it, as support for their demand that employers remove mandatory arbitration clauses for employment discrimination claims from their employment agreements grew.

As the #MeToo Movement grew, employees began to use social action to push for legislation that supported the ban of arbitration clauses to resolve workplace disputes. In December of 2017, Representative Cheri Bustos introduced a bill to the House of Representatives to make mandatory arbitration clauses in employment contracts for sexual harassment claims illegal (Ending Forced Arbitration of Sexual Harassment Act, H.R. 4734, 115th Cong. 2017). This bill was accompanied by a petition that was signed by all 56 State Attorneys General supporting the Act. Unfortunately, the bill was not passed, even though it had bipartisan support. In February 2019, Rep. Bustos reintroduced a modified bill once again to the House of Representatives requesting mandatory arbitration to be made illegal for sexual harassment claims (Ending Forced Arbitration of Sexual Harassment Act of 2019). No movement was made on the bill, but Bustos was able to include this proposed bill with other legislation that was passed in the

House of Representatives in September 2019. The Forced Arbitration Injustice Repeal (FAIR) Act was sponsored by Representative Henry C. Johnson, Jr. and passed the House of Representatives with a vote of 225 - 186 on September 20, 2019 (Forced Arbitration Injustice Repeal Act, H.R.1423, 116th Cong. 2019). A bill similar to Rep. Bustos' modified bill was introduced to the Senate in 2017 by Senator Kirsten E. Gillibrand, but unfortunately there has been no action on this bill in the Senate to date. contracts (Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203 115th Cong. 2015). Despite pressure from the #MeToo movement, currently no federal law prohibits the use of mandatory arbitration clauses in employment.

Although Congress ultimately was unsuccessful in protecting employee's rights to have their sexual harassment cases decided in a court of law, states joined the fight to end mandatory arbitration in employment contracts by passing their own legislation. For example, Maryland and Vermont enacted aggressive legislation that bans the use of mandatory arbitration for sexual harassment claims across all employment contracts known as An Act Relating To The Prevention Of Sexual Harassment, Vermont H.707 (2018) and Disclosing Sexual Harassment in the Workplace Act of 2018, Maryland S.B.1010 (2018). Washington state passed legislation outlawing employment contracts from preventing employees from filing a discrimination complaint with a government agency, effectively banning mandatory arbitration on sexual harassment claims (S.B. 6313). New York established an Executive Budget for 2019 that included the banning of mandatory arbitration for sexual harassment claims across all contracts. However, in the case of *Latif v. Morgan Stanley & Co., LLC*, Case No. cv11528 (U.S. dist. S. D. NY) 2019 U.S. Dist. LEXIS 107020, Judge Denise Cole determined this ban was preempted

by the Federal Arbitration Act (Murphy, 2019). Similarly, a bill signed and passed by California's governor that would end the use of mandatory arbitration on sexual harassment claims was blocked soon after it was passed by a California state judge (Darmiento, 2019). This decision was appealed and an appellate court heard oral argument on January 10, 2020 on the question of whether the bill violated the Federal Arbitration Act. This bill will continue to be unenforceable in California until the appellate court announces its final decision (Jang &Vierra, 2020).

The reason why employees fought hard against mandatory arbitration clauses in employment contracts is that they prevent employees from taking a claim against the employer to court. These clauses are considered an alternative dispute resolution where an impartial third party is brought in to handle the claim expediently, privately, and outside the litigation system. Arbitration decisions hold no legal precedent (Estlund, 2018), and mandatory arbitration clauses can and have prevented class action lawsuits from being pursued in court (see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, (2011)). Class action lawsuits would allow multiple victims of sexual harassment to be represented as a group by one individual throughout the course of the lawsuit, resulting in remedies for all victims to take place in one case. The controversy that followed the #MeToo Movement specifically highlighted how mandatory arbitration silences victims of sexual harassment. Not only does the enforcement of mandatory arbitration clauses negatively impact the individual employees, but also many scholars have claimed that the private resolution of sexual harassment claims further prevents laws from developing that could prevent future workplace sexual harassment violations (Sternlight, 2019).

The history of mandatory arbitration clauses in the employment context has been fraught with controversy. In the 1991 Supreme Court decision *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), mandatory arbitration clauses were deemed legal and binding if the agreement was signed before the relationship began. This holding was expanded when a North Carolina appellate court, in *Howard v. Oakwood*, 134 N.C. App. 116 (1999), decided that a mandatory arbitration clause can be enforced even when it is enacted *after* employment as long as employees are informed, reasoning that continued employment assumes an agreement to the new policy. In 2018, a study found that more than 60 million Americans were bound by employment agreements that included mandatory arbitration provisions (Colvin, 2018). From 1998 to 2017, data found that the use of mandatory arbitration policies surged to over 50%, and that 61.8% of companies with over 1,000 employees included provisions requiring mandatory arbitration of employment discrimination claims in their policies (Colvin). One goal of the #MeToo movement was to make the public aware of the abuses of mandatory arbitration by employers because (1) these clauses prevent employees from being able to pursue their case in an open and public forum, and (2) allow employers to cover up their wrongdoing.

Even though attempts to change federal law regarding mandatory arbitration clauses in employment agreements have been stymied, and similar state legislation has been challenged, the #MeToo Movement was able to use the power of social action to pressure a response from employers. Employees demanded of employers both culture change and the end of mandatory arbitration. This resulted in a new fear amongst employers to avoid the notoriety visited upon a number of unwitting companies that had

been “outed” by the #MeToo movement. No employer wanted to be the next “Harvey Weinstein case”³ (Ward, 2018). It took only a year from the public exposure of the Weinstein Company’s years of mishandling sexual harassment claims before the company went up in flames, declaring bankruptcy in March of 2018. To avoid the Weinstein stain, employers reacted to the negative perception of forcing sexual harassment victims and their claims into silence and furiously began eliminating tightening internal company policies on how to handle sexual harassment claims (Baum, 2019). Employers realized they could no longer ignore the “silent victims,” who were now refusing to stay silent. The #MeToo movement did not just affect employers who knowingly created these “silent victims”; even employers who believed their handling of sexual harassment claims had been politically correct in the past soon realized the consequences of not staying vigilant against these workplace atrocities and spoke up about their forced silencing (Geisler, 2019)⁴.

As a direct result of the #MeToo Movement, companies became more likely to address and change their internal environment to prevent sexual harassment claims from being swept under the rug as they often had been in the past. Internal practices, such as investigation of sexual harassment claims, were restructured to be more thorough and fair (Dwoskin & Squire, 2018), and claims were less likely to slip through the cracks.

³ Over four decades, Harvey Weinstein, an extremely well-known public figure and filmmaker, was accused of sexually assaulting over 80 women. The Harvey Weinstein company was accused of mishandling these claims and forced by the public to oust Weinstein from his position. In March of 2018, The Weinstein Co. declared bankruptcy.

⁴ Geisler argues that all companies must look at their internal practices to address these issues. Harassment arises from a corporate culture that silently approves this behavior. This begins with bullying and verbal harassment and other hostile interactions. If companies truly want to prevent sexual harassment claims, they must address actions that create the environment that harbors them, even if such actions aren’t technically “illegal.”

Evidence shows that accused harassers have faced termination at higher rates than ever before as employers' fear of social media "outing" and the new found confidence of the victims of sexual harassment to speak their truth publicly (Tippett, 2017). It seems that company culture also began to shift as leaders became more attentive to their policies and procedures and began addressing employee attitudes that could foster a potential environment of harassment (Arya et. al., 2019).

Further, suggestions from legal sources flooded industry with recommendations on how to change internal practices to be more effective. For example, scholars suggested that a well-designed sexual harassment policy should include several options for victims to report claims, and also stressed the importance of employers engaging in a thorough investigation of every claim. Another recommendation made by legal counsel or scholars to employers is that sexual harassment training policies should also now include periodic review and evaluation of training practices (Rhode, 2019). Employers have also been encouraged to conduct exit interviews and company-wide surveys on their culture of inclusivity and fairness as well as the effectiveness of their policies (Rhode, 2019). This suggests that the outlook of companies on workplace sexual harassment has changed as many employees have become more proactive, prompting employers to address sexual harassment claims more promptly and fairly than ever before.

Another important result of the #MeToo movement was that employers were pressured to do the one thing legislation, although favored, could not succeed in doing. Due to the public backlash surrounding mandatory arbitration policies, many high profile companies promptly removed and announced the elimination of their mandatory arbitration clauses for sexual harassment claims. Two large California based law firms

and one New York based law firm ended their mandatory arbitration clauses in March 2018 (Morris, 2019). Vox Media ended mandatory arbitration in February of 2019, with Wells Fargo following a year in February of 2020. Entire industries have even been swept into the push to end these clauses. Throughout 2017 and 2018, several Silicon Valley companies chose to end their mandatory arbitration policies, including Facebook, Google, Uber, Apple, Airbnb, and eBay (McGregor, 2018). Some changed their policies due to specific public backlash, while others simply chose to follow the tide.

Through the repercussions of the #MeToo movement, we expect to see even more companies following the wave of ending their mandatory arbitration clauses. However, while the voluntary ending of mandatory arbitration clauses certainly is a big win for employees, it leads to the likely next anticipated problem with respect to the fair resolution of sexual harassment claims, which is the liberal use of the pre-trial tool of summary judgment by federal court judges. Summary judgement allows courts to dismiss the claims before trial and to decide the case based on pre-trial evidence gathering, without direct witness testimony and cross examination and before a jury is ever seated to hear the facts of the case. With the decrease of employers who require mandatory arbitration of employment discrimination claims, employee claims filed with the EEOC and in federal court will likely increase. Statistics show that sexual harassment claims filed with the EEOC, or similar state agencies, have been on the rise since the beginning of the #MeToo movement⁵ (“Reports of Harassment”, 2019). Therefore, as the number of cases filed in federal court increases, it is logical to expect that the number of cases

⁵ There has been an 18% increase of sexual harassment claims found filed through the EEOC, or similar state agency, since the end of the #MeToo movement throughout 2017 and 2018.

disposed of by summary judgment will increase as well, which could set employees back despite the mandatory arbitration success.

Part II: Why #MeToo Will Cause Challenges For Federal Courts

Summary judgment was created as a procedural device to permit judges to expediently dispose of a case when there is no issue of material fact to be decided by a jury (Schneider, 2010). Summary judgment is appropriate when the pleadings, answers to interrogatories, admissions, depositions, and affidavits on file indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When the burden at trial will rest on the non-moving party, the moving party need not produce evidence to negate the elements of the non-moving party's case; rather, it need only point out the absence of supporting evidence. *See id.* at 322–23. The nonmovant must then demonstrate that there is, in fact, a genuine issue for trial by going “beyond the pleadings” and “designat[ing] specific facts” for support. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). While not weighing the evidence or evaluating the credibility of witnesses, courts should grant summary judgment where the critical evidence in support of the nonmovant is so “weak or tenuous” that it could not support a judgment in the nonmovant's favor. *Armstrong v. City of Dall.*, 997 F.2d 62, 67 (5th Cir. 1993).

Summary judgment is determined after all the parties' evidence, including depositions, interrogations, admissions on file, or any other information gathered during the discovery phase of litigation is completed. It is routine that at this stage of litigation a defendant will file a motion for summary judgment with the court, arguing that because

there is no “genuine dispute of material facts,” the case should be resolved by the judge by applying relevant law to the “agreed upon” facts (FED. R. Civ. P. 56(a)). Unfortunately for federal court plaintiffs, the caution with which federal courts evaluated summary judgment motions ended in 1986, when three court cases were decided by the U.S. Supreme Court. These cases relaxed the standards for award of summary judgment motions and increased the likelihood of its success for defendants.

The three decisions that dramatically changed the use of summary judgment were *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (Miller, 2003). These three cases reshaped the federal court’s definition of summary judgment and the requirements needed to grant this motion. In *Matsushita* the Court raised the standard for surviving summary judgment to “unambiguous evidence” that tends to exclude an innocent interpretation. In *Anderson v. Liberty Lobby*, the Court determined that a plaintiff may not defeat a defendant's motion for summary judgment without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. In what is arguably the Court’s most expansive decision, the *Celotex case*, the use of summary judgment was broadened by the Court’s determination that the defending party can challenge the opposing party for “lacking the significant evidence” needed to prove the claim. This decision mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

These landmark decisions opened the floodgates to defendants, often employers hoping to resolve litigation without the “hassle” or risk of going to trial. Many scholars argue that before the 1986 change in summary judgment law, many of these employment discrimination cases would have seen trial (Cecil, et. al., 2007). Summary judgment has been seen as a tool to dismiss an increasing number of civil rights cases, resulting in a lack of justice for individuals (Berger et. al., 2005). The standard of summary judgment was altered after these decisions, and weakened former presumptions in the former favor of the plaintiff’s facts. By requiring the non-moving party to produce strong enough evidence to support a jury verdict, the judge must inevitably “weigh” the evidence. This means that now plaintiffs are required to not only convince a judge of the existence of a “material fact” that is still in dispute, but also the sufficiency of that fact. This is an extremely difficult burden to meet, especially when the non-moving party is denied the opportunity to elicit testimony from a live witness, whose veracity and value simply cannot be weighed, measured and determined from lines of testimony pulled from a transcript and potentially “spun” by defendant’s counsel.

In a recent example, *Martin v. State of New York, et. al.*, No 19 -1479 (2nd Cir., March 30, 2020), the Court of Appeals found that the trial judge had not erred in ruling in favor of the employer on its motion for summary judgment by determining that even though it took the employer, a New York prison, eight months to investigate a claim of sexual harassment reported by its employee against a co-worker who circulated intimate photos of her around the workplace, the employer’s steps were “reasonable” and “sufficiently expeditious.” Both the trial judge and the 2nd Circuit Court of Appeals made a factual decision that “no reasonable jury” could find that 8 months was negligent

procrastination by the prison in conducting its investigation without a hearing, the presentation of evidence, or the direct and cross examination of witnesses. The problem with this decision and others like it is that more often than not, the plaintiff vehemently denies that the parties agree on the material facts of the case. And despite the language of Rule 56, that the “evidence be viewed in a light most favorable to the non-moving party,” a judge will often engage in impermissible fact-finding by weighing the plaintiff’s evidence and finding it to be insufficient. Unfortunately, the facts of the *Martin* case are not unlike the majority of sexual harassment cases that get dismissed in favor of the defendant upon summary judgment (Chin, 2013).

Employment discrimination claims are one of the most common type of claims found to be dismissed on summary judgment. In 2006, “courts granted in whole or in part 80% of defendants' motions for summary judgment in employment discrimination cases” (Seiner, 2009). In 2009, a study found that the inability for Title VII issues to make it into a courtroom had not only risen but was projected to continue to rise (Clermont & Schwab, 2009). Modern day scholars have begun to speak out on the issue as they publish law review articles that highly criticize the courts’ heavy use of summary judgement, specifically on employment discrimination cases (McGinley, 2013). More recent data shows that summary judgment motions are granted in whole, or in part, about seventy-seven percent of the time on average in employment discrimination cases (Chin, 2013). This evidence shows that because summary judgment is such a common tool used in employment discrimination claims, the likelihood that a plaintiff will have his or her case heard by a jury of peers is slim. Some scholars even argue that the resolution of an

employment discrimination claim by summary judgment is nearly guaranteed (Ausili, 2016).

Full litigation of sexual harassment claims has historically been low in number for both of the reasons articulated above: (1) the employer's use of mandatory arbitration clauses, and (2) the courts' liberal use of summary judgment. Therefore, even as mandatory arbitration clauses for employment discrimination claims are becoming more rare, it is safe to assume that the evidence of over-use of summary judgment by federal trial courts will leave employees in no better position than they were under mandatory arbitration clauses.

Many scholars have sought to uncover the reasoning behind the increasing number of summary judgment decisions in employment discrimination claims. One suggested reason for the rise of summary judgment in favor of the defendant may be that judges feel compelled to "resolve" cases quickly due to the overwhelming amount of caseloads they handle (Schneider, 2007). Others suggest the use of summary judgment may be due to the uneasiness judges feel when handling sexual harassment claims (Schneider). Some studies have found that the use of summary judgement in employment discrimination cases is tied to more complicated factors, such as the role of race in employment discrimination cases. One study found that 61% of the time "white judges" granted summary judgment in employment discrimination cases, while minority judges only granted summary judgment 38% of the time (Weinberg & Nielsen, 2012). One district court judge argues that there is a deep need for more diversity across the bench, especially when it comes to the handling employment discrimination claims (Chin, 2013).

Further, comparing across case types, plaintiffs in employment discrimination cases have a much lower win rate than plaintiffs in other types of cases. The attitudes of judges towards sex discrimination cases is also concerning, as nearly 11% of judges surveyed have stated that such cases were a waste of federal court time, and 36% of judges surveyed chose to not comment on the topic altogether (Beiner, 1999). Regardless of motive, summary judgment being granted in whole, or in part, significantly disadvantages plaintiffs (Berger et. al., 2005), and compromises their ability to seek a remedy of sexual harassment by a jury of their peers. With the rise of the “#MeToo” movement, the number of sexual harassment claims filed each year is likely to rise. With the severe curtailing of employers’ use of mandatory arbitration provisions for employment discrimination claims in the employment policies, this growing volume of cases now will head directly to the EEOC and ultimately the federal courts for resolution. If, as scholars argue, federal courts are much too liberal in their award of summary judgment in employment discrimination claims because, perhaps, is (1) our court system is already overwhelmed and unable to handle the volume of cases currently on the docket., and (2) judges are uncomfortable with or even ill-equipped to make summary decisions on sexual harassment claims, we must then find a new approach to resolving employment discrimination cases, especially if we want to ensure that the victims of sexual harassment fairly get their claims heard and resolved.

Part III: How Should The Conflict Between #MeToo and Federal Court Pressures Be Resolved

With the recent #MeToo Movement encouraging a flood of victims to file their claims for workplace sexual harassment, the ending of the slanted alternative dispute resolution of mandatory arbitration on employment discrimination claims, and the unchecked overuse of the pretrial tool of summary judgment on the claims that do make it to trial, there is no better time than the present to pose a viable solution to a growing issue of access to justice. This proposed solution is not only used, in other forms, across the United States judicial system, but it is even implemented, and successful, in countries with similar governmental structures to our own. In order to give victims of workplace sexual harassment a forum to have their cases fully heard and resolved without overburdening an already overburdened federal court system, it is time for Congress to create a specialty court system to handle these cases efficiently, expeditiously and with subject matter expertise.

For example, Great Britain has been using specialty courts to resolve employment discrimination claims for more than 50 years. Industrial Tribunals were first introduced to the United Kingdom in 1964 under the Industrial Training Act (Industrial Training Act, 1964). The original board was led by a chairman who was legally qualified to practice law. This chairman would proceed over hearings with a nominee from the Confederation of British Industry (CBI) and a nominee by the Trades Union Congress (TUC). The tribunal was created to hear appeals made by employers in response to the act's required training levies, payments that were paid to the board to improve training practices across industries. The implemented tribunals began hearing issues concerning conditions of

employment, employment contracts, and redundancy pay nearly four years after they were created (Lord & Redfern, 2014).

This transformed the original use of the tribunal to focus on overseeing the relationship of employers, employees, and unions alike. The industrial tribunals were soon brought under review by order of the U.K. government (Lord & Redfern, 2014). The review suggested that the tribunals be renamed labour tribunals and handle all disputes between employees and their employers. The examples of disputes that would be presented to the tribunal included unfair dismissal and appeals to joining worker unions (Donovan Commission, 1968). Later in 1998, the labour tribunals were named employment tribunals under the Employment Rights (Dispute Resolution) Act 1998. Present day the United Kingdom employment tribunals hear all legal issues regarding employment, including employee discrimination claims. There is even an appeals process through the court system for those who feel the ruling is unjust. As of 1999, the employment tribunals in Great Britain reported hearing around 74,000 claims (Schneider, 2001). In 2004-2005, there were 86,181 claims taken to the tribunal, 28,870 of those being discrimination based and 39,727 of those being general unfair dismissal (Harris, 2005). According to the statistics released by the Employment Tribunal Services in 2018-2019, there were a total of 94,332 claims, 20,358 of those being discrimination based and over 4,000 specific to sex discrimination.

The creation of an alternative court system where legal precedent and public accountability is key in handling matters of employee-employer disputes, specifically employment discrimination, could seem outlandish until we examine the United States Constitution, specifically Article I, Section 8. The United States Supreme Court has interpreted this article to allow for the creation of special tribunals (Fallon 1988). The

U.S. Tax Court, the U.S. Court of Appeals for Veteran Claims, and the U.S. Court of Appeals for the Armed Forces are all examples of tribunals created under this interpretation.

Legislative courts, as Article I courts are called, found their beginnings in *American Insurance Co. v. Canter*, 26 U.S. 511 (1828), where a Supreme Court decision by Chief Justice Marshall interpreted the Constitution to allow the creation of non-Article III courts to be created by Congress. Such courts would act outside of the typical judicial system, unlike previous inferior courts and the U.S. Supreme Court. They were granted the rights to handle disputes in all federal districts, but do not hold all powers available of Article III courts, such as life tenure for their judges or guaranteed salaries, and they are also subjected to review of their decisions by the Supreme Court that presides over them. However, the purpose of legislative courts is significant – they assist in relieving the caseload of Article III courts, and they focus on limited legal issues so that these cases are handled with a higher level of expertise. They are also able to handle disputes in a quick and speedy matter, disputes that were normally under the jurisdiction of Article III courts (Fallon, 1988).

The United States Bankruptcy Court is a key example of this. The Bankruptcy Reform Act of 1978 established a system of bankruptcy courts that now operate in each of the 94 federal districts. The judges on each court hold terms of fourteen years, although they, like all legislative court judges, have a different salary system (Finley, 1980). The bankruptcy court practice is much like that of federal district courts which previously handled bankruptcy cases, while relieving district courts of the burden of such cases. Legislative courts function much like Article III courts in the way they apply the law and legal precedent. Their decisions have important implications for decisions

ultimately issued by Article III courts, including the U.S. Supreme Court (Lederman, 2001).

Moving the alternative dispute resolution of arbitration into a public venue and providing appeal and review rights will objectively eliminate previous controversy found in the handling of employment discrimination claims. The implementation of an Article I legislative court system to handle employee-employer relation disputes, similar to the employee tribunals implemented in the U.K., would also discourage an already overburdened federal court system from overusing the power of summary judgment as a docket management tool. Although the recent #MeToo movement is no longer at the forefront of today's news cycle, we must not forget its cause and reason, and we must continue to work to ensure that we are not just giving our employees a voice, but giving them a place to be heard, and a remedy for the harm which they have suffered.

Conclusion

Daily we are exposed to controversy and frustration resulting from the mishandling of employment discrimination claims. The April 10, 2020 decision *Theidon v. Harvard University* (948 F 3d. 477, 11th Cir.), further evidences the continuing abuse of summary judgment by federal courts and shows, yet again, why a new approach to the resolution of employment discrimination claims is necessary.

These are the facts of the case as we know them as described by the 11th Circuit Court of Appeals in its decision affirming the trial court's award of summary judgment to the defendant, Harvard University. In 2004, Harvard hired Kimberly Theidon as an Assistant Professor of Anthropology. Within her first year, Theidon's first book, *Entre prójimos: el conflicto armado interno y la política de la reconciliación en el Perú* ("Entre prójimos"), was published in the Instituto de Estudios Peruanos, a prestigious Peruvian

academic press. Entre prójimos attracted considerable critical acclaim, winning the Premio Iberoamericano Book Award Honorable Mention from the Latin American Studies Association and serving as the inspiration for the 2010 Oscar-nominated film “The Milk of Sorrow.”

Theidon’s achievement and success resulted in her promotion to Associate Professor in June of 2008, with “unanimously positive” support from leading scholars in the fields of social anthropology and Latin American studies. In a letter from the Acting Chair of the Anthropology Department, Mary Steedly praised Theidon’s “outstanding” performanc, including her ability to secure external funding for research projects, her teaching and advising, and Theidon’s exemplary service to Harvard.

On August 25, 2010, the Dean of Harvard’s Faculty of Arts and Sciences, Michael D. Smith, notified Theidon that she was being appointed to the position of John L. Loeb Associate Professor of the Social Sciences, “one of a small number of endowed positions for [Harvard’s] most distinguished tenure-track faculty (*Theidon v. Harvard University*, 984 F .3d 477 (2020). Dean Smith commended Theidon on an “honor richly deserved,” one which “recognizes outstanding achievement in teaching, research, and departmental citizenship” (*Theidon v. Harvard University*, 2020).

Less than a week after being elevated to John L. Loeb Associate Professor, Theidon met with Judith Singer, Senior Vice Provost for Faculty Development and Diversity at Harvard, to express concerns about gender disparities in the Anthropology Department. According to Singer, Theidon complained that women were given the “lion’s share of the undergrad teaching load,” and that there was only one senior, tenured female professor within the Anthropology Department, at the time, Mary Steedly, who had been counseling

Theidon in ways that were “totally inappropriate,” including by suggesting Theidon downplay her intelligence and warning that Theidon would be “evaluated by a higher standard” (*Theidon v. Harvard University*, 2020). According to Theidon, on at least one occasion early in Theidon’s career, Steedly told Theidon she needed to be a “dutiful daughter” to succeed in the Department, one who “doesn’t complain about the extra workload” and “expectations placed on female faculty members that are not placed on male faculty members” (*Theidon v. Harvard University*, 2020). Theidon’s expressed concerns resulted an investigation and a finding by a Visiting Committee, which concluded that the Anthropology Department indeed needed to take remedial measures to address gender disparities. One administrator called the department “dysfunctional” (*Theidon v. Harvard University*, 2020).

In June 2012, Theidon began the formal tenure process. Admittedly the process of being awarded tenure at Harvard University is particularly rigorous. Harvard views tenure as a privilege reserved for “scholars of the first order of eminence who have demonstrated excellence in teaching and research and who have the capacity to make significant and lasting contributions to the department(s) that proposes the appointment.”

The process is multi-layered, and includes:

- (1) Submission of candidate’s Tenure Packet;
- (2) Review of candidate’s packet by Review Committee of department faculty;
- (3) Solicitation of 12 – 15 external letters of evaluation from experts in the field;
- (4) Preparation of draft case statement by Review Committee;
- (5) Vote on draft case statement by tenured faculty in the department;
- (6) Confidential letters written by tenured faculty in the department and written and sent to the Dean of the college to be included in candidate’s tenure file;

- (7) File is reviewed faculty on college's Appointment and Promotions committee, which proposes actions to be taken by the Dean;
- (8) Ad hoc committee of external scholars and Harvard Professors reviews candidate's case and makes a recommendation on tenure;
- (9) This recommendation goes to the Harvard President for final decision on tenure.

Theidon made it through steps 1 - 7 with favorable recommendations. However, at phase 7, two members of the Review Committee from her own faculty did an about-face and argued that Theidon did not deserve tenure to the shock of the non-voting committee chair, Senior Vice Provost of Faculty Development and Diversity (*Theidon v. Harvard University*, 2020). The ad hoc committee then contacted the President of Harvard with their "no tenure" recommendation. President Faust reviewed the tenure materials and contacted the Provost, admittedly "bewildered" by the committee's recommendation (*Theidon v. Harvard University*, 2020). At this point, the Provost and Vice Provost explained the concerns that had been raised primarily by the two members of the ad hoc committee representing the Anthropology Department, and the President then accepted committee's recommendation.

It is important to note that at least two of the members of the ad hoc committee were from the Anthropology Department (including Urton, a male anthropology professor), the department that Theidon had accused of gender discrimination in 2010 and 2011. Her accusations resulted in a finding that the Anthropology Department indeed needed to take remedial measures, creating what many would regard as a mar on the reputation of this department.

After her denial of tenure, Theidon filed a suit against Harvard for gender discrimination and retaliation. In support of her claim, Theidon alleges that Harvard

deviated from standard procedure and sabotaged her tenure prospects by failing to send out a sampling of her publications to external scholars tasked with evaluating her contributions during the tenure review process. In her view, the omission of journal articles from her external review tenure file, coupled with Harvard's deletion of this self-described mistake from future draft case statements, is probative of pretext. Theidon also argues that Harvard improperly allowed her 2010 complaints about sex discrimination to color the tenure review process.

Her final claim of discrimination and retaliation centers on procedural irregularities, i.e. that Harvard implemented a stricter publication requirement during Theidon's tenure review than was required by the tenure procedures or imposed upon male comparators who received tenure in the Anthropology Department in 2011, 2012, and 2014. Specifically, Theidon contends certain faculty members erroneously led the ad hoc committee to believe candidates needed a second published book for tenure at Harvard (despite the fact there was no such requirement at Harvard). Theidon cites to the deposition testimony of one ad hoc committee member who explained that anthropology scholars at her university must have a second book and a second research project to receive tenure, suggesting, as Theidon tells it, that the committee member superimposed her university's standards onto Theidon (*Theidon v. Harvard University*, 2020). As a result, Theidon reasons that the committee erroneously subjected her to a more stringent publication standard than Harvard actually requires and Harvard did nothing to stop it.

Harvard filed a motion for summary judgment in response to Theidon's complaint, which was granted by the trial court on a finding that Theidon had *failed to present enough evidence from which a reasonable jury could find that she had been*

discriminated or retaliated against because of her gender discrimination allegations.

(*Theidon v. Harvard University*, 2020, emphasis added). The Eleventh Circuit Court of Appeals agreed, leaving Theidon without the opportunity to present to a jury the issue of motive for the reasons behind her denial of tenure.

Despite relevant evidence that was required by Rule 56 to be construed in her favor, the court's award of summary judgment prevented Theidon from having a jury evaluate the witness testimony and other evidence to support her claim of discrimination, as well as denied her the possibility of a remedy for the harm she had suffered. Kimberly Theidon's case is exactly the reason that it is time to make changes to the current structure of our judicial system with respect to employment discrimination claims in order to more effectively hear and offer remedy to actual victims of discrimination, harassment, and retaliation in the workplace. The solution to the problems presented herein, i.e. (1) the future increased number of employment discrimination cases flooding the already over-burdened federal district courts as a result in employers abandoning the use of mandatory arbitration clauses; (2) evidence that judges who often lack sufficient time or subject matter expertise in employment discrimination are the ones deciding whether a plaintiff's claim should proceed to a jury; and (3) the current lack of justice for victims of employment discrimination, as well as lack of accountability imposed on employers who allow such discrimination to fester, Congress should move forward to create a full and fair forum for such claims to be heard. An Article I specialty court system known as the Employment Discrimination Court, much like our existing Bankruptcy and Tax Courts and similar to Great Britain's Employment Tribunal, could expeditiously and expertly handle all employee-employer disputes, resulting in great

benefit to the victims of discrimination in the workplace, the over-burdened Article III court system, and to society as a whole.

“How I wish we lived in a time when laws were not necessary to safeguard us from discrimination.”⁶

⁶ Barbra Streisand

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