SEXUAL HARASSMENT IN THE SHADOW OF MANDATORY ARBITRATION

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INTRODUCTION

On November 1, 2018, thousands of Google employees staged global walk-outs protesting Google's sexual harassment policies.[1] A week later, Google announced that it would be making significant policy changes regarding its handling of sexual misconduct.[2] One of the most significant changes that Google made to its policy was amending its mandatory arbitration policy to not require employees to individually arbitrate their sexual harassment and sexual assault claims.[3] Soon after, other large companies in the tech industry followed suit, including eBay, Airbnb, Square, and Facebook.[4]

Mandatory arbitration describes the once controversial, now commonplace practice in which a company requires employees to agree to arbitrate legal disputes with the company rather than using the courts.[5] The agreement to arbitrate is included in the employment contract an employee signs with its employer, the consideration for such contract being either new or continued employment.[6] The rise of mandatory arbitration in employment agreements, due in large part to the 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane*,[7] has significantly altered the employment law landscape.[8] Within the past three decades, mandatory arbitration has risen from a practice used by just over two percent of the workforce, to one now affecting more than half of private-sector nonunion workers.[9] This means that many employees seeking a legal remedy for workplace sexual harassment must understand and maneuver this changing landscape.

This note seeks to trace the development and interception of sexual harassment and mandatory arbitration in the judiciary, as well as provide a better understanding how the protections against sexual harassment granted by Title VII have become severally impacted by mandatory arbitration clauses found in most employment contracts. Part I provides background into the development of sexual harassment under Title VII. In addition, Part I illustrates how the judicial

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1. Matthew Champion et al., *Google Employees Around The World Are Walking Out to Protest Sexual Misconduct*, BUZZFEED NEWS (Nov. 1, 2018), https://www.buzzfeednews.com/article/matthewchampion/google-walkout-sexual-misconduct [https://perma.cc/F7JA-2LHU].

2. Ryan Mac & Caroline O'Donovan, *Despite Changes To Sexual Misconduct Policies, Google Walkout Organizers Say There's More To Be Done*, BUZZFEED NEWS (Nov. 8, 2018), https://www.buzzfeednews.com/article/ryanmac/google-sexual-misconduct-policy-changes-walkout-timesup [https://perma.cc/66BE-PPBW].

3. *Id.*

4. Davey Alba & Caroline O'Donovan, *Square, Airbnb, And eBay Just Said They Would End Forced Arbitration For Sexual Harassment Claims*, BUZZFEED NEWS (Nov. 15, 2018), https://www.buzzfeednews.com/article/daveyalba/tech-companies-end-forced-arbitration-airbnb-ebay [https://perma.cc/SL5F-KZAE].

5. *See generally* Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECONOMIC POLICY INSTITUTE 2 (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/N5RG-FNLJ].

6. *Id.*

7. Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20 (1991).

8. Colvin, *supra* note 5, at 3.

9. *Id.* at 1.

system's understanding and definition of sexual harassment in the workplace has evolved and grown as our society has changed its views of sexual harassment. Because of this, sexual harassment law itself has evolved and grown. Part II analyzes the impact mandatory arbitration jurisprudence, including the Supreme Court's recent 2018 ruling in *Epic Systems Corp. v. Lewis* has had on sexual has had on sexual harassment claims.[10] Part III addresses current legal landscape employees face when attempting to bring sexual harassment claims against their employers. Notably, mandatory arbitration has grown from a possible alternative in sexual harassment claim resolution, to the mandatory norm. Part IV concludes that following the rise of mandatory arbitration employment contracts, and the Supreme Court's policy of favoring such contracts against other public policy concerns, Title VII has become a means to arbitrate, not to litigate for most private employees. The Supreme Court's holding in *Epic Systems Corp. v. Lewis* is the latest of a long line of decisions favoring mandatory arbitration in employment. In the era of #MeToo where sexual harassment in the workplace is now a major part of our country's public discourse, the ability for employees to receive a remedy for workplace sexual harassment, through litigation or arbitration is increasingly more difficult. Because of this, the ability of the #MeToo era to positively impact the law surrounding workplace sexual harassment is also more difficult.

I. THE EVOLUTION OF SEXUAL HARASSMENT JURISPRUDENCE

A. Background

Sexual harassment in employment, particularly against women, has existed in America for centuries. Public discussion regarding sexual harassment in the workplace has existed in America since the antebellum period.[11] However, for most of American history there has been little to no legal remedies available to women facing sexual harassment in the workplace.[12] Criminal law and tort law offered little legal protections for women well into the mid-20th century.[13] In 1964, Congress passed the Civil Rights Act.[14] Title VII of the Act made it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin."[15] The House of Representatives included sex as a prohibited form of discrimination under Title VII at the last minute.[16] Subsequently, courts have had little legislative history to guide

10. 138 S. Ct. 1612 (2018).

11. Reva B. Siegel, *Introduction*, DIRECTIONS IN SEXUAL HARASSMENT LAW, 1, 3 (Catharine A. MacKinnon and Reva B. Siegel ed., 2003).

12. *See id.* at 3-8.

13. *Id.*

14. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e-15 (2018).

15. 42 U.S.C. § 2000(e)(2).

16. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986).

their interpretations of what the prohibited "sex discrimination" under Title VII encompasses.[17] Because the legislature has not provided direction on what "sex discrimination" is under Title VII, the courts have the opportunity to interpret the term. The judiciary has played an invaluable role in determining whether sexual harassment is a legitimate claim under Title VII, as well as what constitutes as sexual harassment in the context of employment. The judiciary's views on the matter has developed and evolved over the past half century since the Civil Rights Act of 1964 as our country's views on the matter similarly evolved.

Originally, sexual harassment was not an actionable claim under Title VII.[18] This was primarily due to a consensus among lawyers that sexual harassment was simply not sexual discrimination.[19] In 1977, the D.C. Circuit Court recognized sexual harassment in the workplace as a prohibited form of sex discrimination under Title VII, the first court to do so in the nation.[20] This decision came amidst the backdrop of women participating in the workforce in record numbers and a growing movement amongst legal scholars recognizing sexual harassment as sex discrimination.[21]

Since 1977, sexual harassment law has developed and evolved as women's roles in the workforce and in law has grown. The Supreme Court noted on more than one occasion that the inclusion of the phrase "terms, conditions, or privileges of employment" makes plain an intent by Congress "to strike at the entire spectrum of disparate treatment of men and women in employment."[22] Courts now generally view the definition of sex discrimination broadly,[23] and are in consensus that sexual harassment is an illegal form of sex discrimination under Title VII.[24] The judicial branch's broad view approach in defining sex discrimination, including sexual harassment, has led to an evolution and expansion of sex discrimination law under Title VII, which is able to continuously adapt as the public's understanding of sex discrimination evolves.[25]

B. Workplace Sexual Harassment Defined

Workplace sexual harassment is defined as "abusive treatment of an employee, by the employer or by a person or persons under the employer's control,

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17. *Id.*

18. *See, e.g.*, Corne v. Bausch and Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975); Tomkins v. Public Service Electric & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (Title Vll is "not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.").

19. Siegel *supra* note 11, at 11.

20. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

21. *Id.* at 11- 19.

22. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986), (quoting Los Angeles Dept. of Water and Power v. Manhart 435 U.S. 702, 707, n. 13 (1978)).

23. *See generally Meritor*, 477 U.S. 57.

24. Lex K. Larson, *Employment Discrimination* § 46.01 (2d ed. 2019).

25. Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 122 (2018).

which would not occur but for the victim's sex."[26] Sexual harassment includes "demands for sexual favors either in return for employment benefits or under threat of adverse employment action…[and/or] an oppressive atmosphere, whether created by sexual innuendo or intimidation, or by expressions of gender-based hostility, if the conduct is encouraged or at least tolerated by the employer."[27] In 1980, the Equal Employment Opportunity Commission first extensively outlined the "quid pro quo," and "hostile work environment," categories in its first Guidelines on Sexual Harassment.[28] These two categories were first extensively outlined in 1980 by the Equal Employment Opportunity Commission's first Guidelines on Sexual Harassment.[29] "Quid pro quo" sexual harassment occurs when an individual submits to or rejects unwelcome sexual conduct of an employer or someone under the employer's control, and the employer or someone under the employer's control (e.g. a supervisor) uses the submission or rejection is subsequently as a basis for employment decisions regarding the individual.[30] Therefore, "quid pro quo" sexual harassment is considered "economic" or "tangible" in nature because the sexual harassment results in an explicit consequence for the employee that can objectively be appraised.[31] "Hostile work environment" sexual harassment extends the scope of sexual harassment beyond forms of discrimination that are "economic" or "tangible."[32] The standard for hostile work environment sexual harassment balances whether the alleged conduct unreasonably interferes with an employee's ability to perform their job, among other factors.[33]

C. The Evolution of Supreme Court Jurisprudence in Sexual Harassment Employment Law

The Supreme Court's understanding and holdings regarding sexual harassment have evolved in the decades following the enactment of Title VII as the American public's views on sexual harassment has evolved. The Supreme Court, in the seminal case *Meritor Savings Bank, FSB v. Vinson*, first recognized "hostile work environment" as a form of sexual harassment prohibited under Title

26. Larson, *supra* note 24.

27. *Id.*

28. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), https://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf [https://perma.cc/UUK4-CGP5].

29. *Id.*

30. U.S. EQUAL EMP. OPPORTUNITY COMM'N, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), https://www.eeoc.gov/policy/docs/sexualfavor.html [https://perma.cc/A4US-9T2S].

31. *Id.*; Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

32. *Harris*, 510 U.S. at 21.

33. *Id.* at 23.

VII.[34] The Court defined "hostile work environment" as "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[35] The Court added that for a sexual harassment claim brought under a "hostile work environment" theory to be actionable under Title VII, the sexual harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[36]

In *Harris v. Forklift Sys*, the Court further delineated what an actionable claim for "hostile work environment" requires. The Court applied a reasonableness standard: a work environment is hostile if both the victim subjectively perceives the environment as abusive or hostile and a reasonable person would objectively find such an environment abusive or hostile.[37] In addition, the Court clarified a disagreement among the circuits on whether a "hostile work environment" must lead to tangible injury such as to seriously affect a plaintiff's psychological health or otherwise cause the plaintiff to suffer injury.[38] The Court held that there is no requirement for there to be tangible injury so long as the reasonableness standard is met.[39] Importantly, the Court noted that a court or other legal forum reviewing a "hostile work environment" claim must look to the totality of the circumstances when making its determinations.[40]

Following the Court's decisions in both *Meritor Savings Bank, FSB v. Vinson* and *Harris v. Forklift Systems*, courts across the country had difficulty both defining and distinguishing between "quid pro quo" harassment and "hostile work environment," as well as how to determine the scope of an employer's liability in cases of sexual harassment.[41] The Supreme Court addressed this confusion in the 1998 pair of cases: *Burlington Industries v. Ellerth* and *Faragher v.*

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34. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The EEOC had previously been using "hostile work environment" as an actionable form of sex discrimination under Title VII for several years. *See generally* 29 C.F.R. §1604.11(a)(3) (1985), 45 Fed. Reg. 74677 (1980).

35. *Meritor*, 477 U.S. at 65-66, (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

36. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d. 897, 904 (11th Cir. 1982)). A plaintiff asserting sexual harassment under a "quid pro quo" theory is not required to meet this element because "quid pro quo" sexual harassment inherently alters the conditions of the individual's employment.

37. *Harris*, 510 U.S. at 21-22.

38. *See id.* at 20.

39. *Id.* at 21-22.

40. *Id.* at 23. In a concurring opinion, Justice Ginsburg notes that a reviewing body should look to whether the harassment, "so altered the working conditions as to make it more difficult to do the job," *id.* at 25.

41. *See* Olivia V. Waxman, *The Surprising Consequences of Supreme Court Cases That Changed Sexual Harassment Law 20 Years Ago*, TIME (June 26, 2018), http://time.com/5319966/sexual-harassment-scotus-anniversary/ [https://perma.cc/VQ85-AKRF]. ("But in truth the tangle of laws currently defining sexual harassment is so jumbled that even if everyone could agree on the facts, it's simply impossible to predict the outcome of a case like Jones v. Clinton. Just 25 years ago, sexual harassment was considered a radical-fringe by-product of feminist theory. Today it's embedded in multiple Supreme Court decisions (three more are expected before July), thousands of corporate policies and a host of

City of Boca Raton.[42] The Court asserted that "quid pro quo" and "hostile work environment" are not controlling if it can be assumed that the plaintiff can prove discrimination and the inquiry is whether the employer is vicariously liable.[43] An employer is always liable under Title VII where there is a tangible change in employment due to the employee's sex.[44]

Absent a tangible change in employment an employer is liable under Title VII if the actionable hostile environment is "created by a supervisor with immediate or successively higher authority over the employee."[45] If no tangible employment action is taken, then an employer may assert an affirmative defense to release itself from vicarious liability.[46] The defense includes two elements: "(1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provide by the employer or to avoid harm otherwise."[47]

In addition, the Court laid out the specific elements required for an employee to succeed in a "hostile work environment" claim:

(1)that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.[48]

In the decades following the creation of Title VII where a legal remedy for sexual harassment was statutorily created, the Supreme Court developed, expanded, and further defined a successful sexual harassment cause of action. The Supreme Court addressed sexual harassment in the workplace procedurally and substantively. The Court continually faced new fact patterns and questions regarding how, when, and why employees face different forms of sexual harassment in the workplace. In addition, the Court made its decisions against the backdrop of a society in which sexual harassment and its new and varying forms were being discussed and debated by the public.

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lower-court cases that have spread like kudzu across the legal landscape. The result is a thicket of rulings. Since 1991, juries have returned well over 500 verdicts on sexual harassment — decisions that often contradict one another and send mixed signals about how we should behave anytime we meet a co-worker we'd like to see after five.").

42. *Id.*

43. Burlington Indus. v. Ellerth, 524 U.S. 742, 753-54 (1998).

44. *Id.*

45. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). "In order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so," *id.* at 783.

46. *Id.* at 807.

47. *Id.*

48. O'Rourke v. City of Providence, 235 F.3d 713, 728 (2001).

D. Sexual Harassment and Employee Concerted Action

Another way that sexual harassment law developed procedurally in the last half century is through concerted action by employees to more successfully assert sexual harassment claims. The Senate recognized the importance of class actions when amending Title VII with the Equal Employment Opportunity Act, when it rejected a proposal to abolish or restrict class actions.[49] The Senate Report on the Equal Opportunity Act stated, "[t]he committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restrictions on such actions would greatly undermine the effectiveness of Title VII."[50] The Supreme Court similarly found that class actions play an important role in laws which grant substantive civil rights. For example, in *Newman v. Piggie Park Enterprises., Inc.*, the Court stated "when a plaintiff brings [a class] action . . . he does so not only for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."[51]

Many sexual harassment claims, especially "hostile work environment" claims, are often difficult for a single employee to prove, especially when the employer invokes an affirmative defense. Because of this, employees often come together in a concerted action to successfully assert sexual harassment claims, often in the form of class action suits.[52] Because a legal fact finder is tasked with looking at the totality of the circumstances,[53] the more employees who can attest to the hostile work environment, the higher the likelihood of their claim being successful.[54] Mutually corroborating testimony of co-workers can serve a number of critical purposes for plaintiffs, including strengthening an employee's "ability to meet their burden of proving that the alleged harassing conduct was not isolated or sporadic, . . . and . . . establish[ing] why the conduct should be deemed objectively harassing to a reasonable person."[55]

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49. S. Rep. No. 92-415 at 27, (1971). *See* Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc., et al. at 18-19, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018), (No. 16-285, 16-300, 16-307), 2017 U.S. S. Ct. Briefs LEXIS 2970, at 18-19.

50. S. Rep. No. 92-415 at 27 (1971).

51. 390 U.S. 400, 400-02 (1968).

52. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010, 1013-15 (8th Cir. 1988) (three female "flag persons" proved sexually hostile environment perpetrated by male road construction crew); Velez v. Novartis Pharm. Corp., 244 F.R.D. 243 (S.D.N.Y. 2007) (female sales employees alleged hostile work environment and other gender based claims against national pharmaceutical company); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 879-87 (D. Minn. 1993) (class of female workers in taconite mining facility established that "sexualized" work environment was objectively hostile).

53. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

54. *See e.g. Jenson*, 824 F. Supp. at 879 n. 78 (D. Minn. 1993) ("numerous witnesses testified about the presence of visual, verbal, and physical references to sex and sexual relations. . . the uniformity with which they discussed the sexualized nature of the work place convinces the Court that the work place was sexualized.").

55. Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as Amici Curiae Supporting Respondents in Nos. 160285 & 16-300 and Petitioner in No. 16-307, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018), 2017 LEXIS 2970 at 21.

Class action suits are particularly helpful in addressing the difficulties employees face when experiencing workplace sexual harassment and deciding whether to sue their employer. Costs of bringing sexual harassment claims can be high and potential recovery in employment cases is often low (particularly with low-wage workers).[56] Class actions allow workers to share costs and increase payout, increasing the potential for claims to be brought in the first place.[57] Class actions also embolden workers to join together instead of confronting their employer alone, which employees are often less likely to do.[58] Finally, class actions and other forms of employee concerted action generally allow employees to be more aware of their employment rights, and the potential that these rights may have been violated.[59]

The first sexual harassment class action lawsuit successfully brought in the United States was *Jenson v. Eveleth Taconite Company*.[60] *Jenson* provides a good example as to why sexual harassment lawsuits are often suitable for class certification, and why class actions are often the best vehicle for women to end systemic sexual harassment that permeates throughout their workplace.[61] In *Jenson*, women working at a mining company in Minnesota faced not only pervasive sexual harassment ("hostile work environment") within their job, but also alleged discrimination in hiring, job assignment, discipline, promotion, and compensation.[62] When certifying the class, the court noted that all the women working in the mine as a class suffered from sexual harassment, rather than individual women experiencing their own particularized sexual harassment.[63] The court also

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56. *See* Jarvaise v. Rand Corp., 212 F.R.D. 1, 4 (D.D.C. 2002).

57. *Id.* ("[w]ithout class certification, there could be . . . a significant number of individuals deprived of their day in court because they are otherwise unable to afford independent representation.").

58. Mullen v. Treasure Chest Casino, L.L.C., 186 F.3d 620, 625 (5th Cir. 1999) (employees "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.").

59. *See generally Concerted Activity,* NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted-activity [https://perma.cc/68QX-67TA]. Other examples of employee concerted action include many pre-dispute forms of employees working together for their mutual benefit, including talking with co-workers regarding employment terms and conditions, petitioning, "participating in concerted refusal to work [because of] working conditions," and talking as a group with the employer, government agency, or media. *Id.*

60. 824 F. Supp. 847, 875 (D. of Minn. 1991).

61. *See generally id.* at 888.

62. *Id.* at 856, 889. For a more detailed account of the daily struggles the women faced due to sexual harassment in the mine, as well as a full account of the progression of the case, *see generally* CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002).

63. *Jenson*, 139 F.R.D. 657, 662-63 (D. Minn. 1991) (class certification). Examples of the sexual harassment include "sexually explicit graffiti and posters" throughout the company including "in lunchroom areas, tool rooms, lockers, desks, . . . offices, . . . in women's vehicles, on elevators, in women's restrooms, in inter-office mail, and in locked company bulletin boards." Women [also] reported "incidents of unwelcome touching, including kissing, pinching, and grabbing." In addition, "Women reported offensive language directed at individuals

found that because the plaintiffs' claims were strong enough to "fairly include claims for discriminatory treatment or sexual harassment . . . ," they easily met the 23(a) requirements for certifying a class: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.[64] The court found the class action to be a good vehicle for the women at the mine because there was enough evidence that a reasonable woman working in the mine would find the environment hostile; class action allowed for efficiency and economy in resolving these women's common issues.[65] Finally, the court found the 23(b) requirements are easily met under subsection 23(b)(2)[66] in class actions such as *Jenson* because all the women in the mine would benefit from the ending the sexual harassment.[67] Thus, class actions have been recognized by the courts from *Jenson* onward as an important vehicle for all parties involved when the sexual harassment is so invasive as to create a "hostile work environment" for all women within the offending company.[68]

E. Substantive Developments in Sexual Harassment Law

The legal community's understanding of sexual harassment, as prohibited under Title VII, has not only evolved and broadened procedurally, but also substantively, as the nation's notions and understanding of sexual harassment has changed.[69] Most notably, the legal community, which includes legal scholars, lawyers, and courts, made a substantive change in the approach it takes in understanding why and how sexual harassment occurs. Following Vicki Schulz's groundbreaking article, *Reconceptualizing Sexual Harassment*,[70] the legal community and the Supreme Court asserted that sexual harassment is not only "sexualized conduct men direct at women," but includes "non-sexualized conduct" that is nevertheless based on the employee's sex, no matter the sex of the perpetrator or victim.[71] For example, sexual harassment can include harassment directed towards a member of the same sex, as determined in *Oncale v. Sundowner Offshore Services Inc*.[72]

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as well as frequent 'generic' comments that signaled that women did not belong in the mines." *Id.* at 663.

64. *Id.* at 663-66.

65. *Id.* at 664-65.

66. FED. R. CIV. P. 23(b)(1)(B) "[A]djudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.").

67. *Jenson*, 139 F.R.D. at 666.

68. *See e.g.*, Jason R. Bent, *Systemic Harassment*, 77 TENN. L. REV. 151, 160-162 (2009).

69. Mizrahi, *supra* note 25, at 122-23.

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

71. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

72. *Id.* at 79-80.

II. EVOLUTION OF MANDATORY ARBITRATION LAW OF DISCRIMINATION CLAIMS

A. The Federal Arbitration Act, Mandatory Arbitration, and Substantive Rights

The Federal Arbitration Act (FAA), enacted in 1925 and codified in 1947,[73] states that "a "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[74] Since the enactment of the FAA, there has been an oft-quoted "liberal federal policy favoring arbitration agreements."[75] This liberal policy means that the Supreme Court, and lower courts following in the Court's footsteps, uphold arbitration agreements as valid and enforceable in a multitude of settings including business, employment, and consumer contexts, absent an inherent conflict with the purposes of other statutes.[76]

Initially, the Supreme Court believed arbitration was incompatible with discrimination claims, including Title VII.[77] In *Alexander v. Gardner-Denver Co.,* the Court found "no suggestion in the statutory scheme that a prior arbitral decision … forecloses an individual's right to sue."[78] The Court held that because Title VII was enacted in order to codify and expand the remedies to plaintiffs facing discrimination, an individual could not relinquish their right to seek a judicial remedy under Title VII by agreeing to or submitting to arbitration for contractual disputes related to their employment.[79] Notably, the Court doubted the competence of arbitration in resolving substantive rights claims, and found arbitration to be "comparatively inferior to the judicial process in the protection of Title VII rights."[80] Because arbitrators have specialized competence, they are unable to apply judicial construction necessary in Title VII cases.[81] The Court also

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73. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

74. 9 U.S.C. § 2 (2018).

75. *See e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 400 U.S. 1, 24 (1983). There has been, however, an ongoing national debate on whether the FAA was ever intended to cover employment contracts. Much legislative history, including statements made by leading proponents in the Senate and the chairman of the committee of the American Bar Association that wrote the bill that assert that the act was not intended for employment contracts. *See Gilmer*, 500 U.S. at 36-43 (1991) (Stevens, J., dissenting) ("[T]he FAA specifically was intended to exclude arbitration agreements between employees and employers.").

76. *Gilmer,* 500 U.S. at 26.

77. *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

78. *Id.* at 47. "We think it is clear that there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51.

79. *Id.* at 47-48.

80. *Id.* at 56-59. Specifically, the Court viewed arbitration to be ineffective means of resolving discrimination claims because "the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation."

81. *Id.* at 57-58.

identified procedural deficiencies in the arbitration that make it unsuitable as a forum to hear Title VII cases, including that the record is often incomplete, the roles of evidence do not apply, arbitrators are not obligated to give reasons to a reviewing court, and that discovery, cross examination, and testimony under oath are often severely limited or unavailable.[82]

The Supreme Court's view on the arbitration process, as well as the use of mandatory arbitration, shifted by the mid 1980's. In a series of cases, the Court enforced multiple agreements to arbitrate in a dispute regarding substantive rights under the Sherman Act, the Securities Exchange Act of 1934, and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO).[83] The Court held that "a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[84]

By 1991, the Supreme Court effectively ended the debate on whether some substantial rights granted by Congress were exempt from mandatory arbitration agreements and thus required litigation rather than arbitration.[85] In *Gilmer v. Interstate/Johnson Lane Corp.*, an employee subject to mandatory arbitration brought a claim against their employer under the Age Discrimination in Employment Act (ADEA).[86] The Court held that an employee should be held to mandatory arbitration clauses when bringing statutory claims against their employer,"[87] or when, under traditional contract theory, the agreement to arbitrate is unconscionable.[88] Emphasizing, again, the federal policy of favoring arbitration, the Court held that such intention must be discoverable in the text of the statute, the legislative history, or in an "inherent conflict" between arbitration and the statute.[89]

The Court took great pains to distinguish the facts of the case from *Gardner-Denver* in order to rationalize the large deviations in holdings between the two cases.[90] In addition, the Court re-examined much of the reasoning behind its decision in *Gardner-Denver,* whether enforcement of mandatory arbitration would lead to "a stifling of the development of the law."[91] In a complete reversal of its reasoning in *Gardner-Denver*, the Court concluded that arbitration was a competent forum for deciding statutory right claims.[92] The Court's decision in

82. *Alexander*, 415 U.S. 57-58.

83. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

84. *Mitsubishi*, 473 U.S. at 628.

85. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

86. *Id.*

87. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

88. *Gilmer*, 500 U.S. at 26. The Court noted, however that "[m]ere inequality in bargaining power" is not a basis for a court to find unconscionability in an agreement to arbitrate in employment contracts. *Id.* at 33.

89. *Id.* at 26.

90. *Id.* at 33-35.

91. *Id.* at 31-35.

92. *Id.* at 34.

Gilmer limited the role of the courts in reviewing statutory rights claims, as judicial review under the FAA is limited to only when arbitrators "manifestly disregard the law, or render their awards by fraudulent, corrupt, or undue means, or where arbitrators are guilty of misconduct, or exceed their authority."[93] The Court noted that an important consideration in its ruling was that the employment contract was signed pursuant to the rules of the New York Stock Exchange, which not only required mandatory arbitration, but also required all arbitration decisions and awards to be in writing and made available to the public.[94]

The same year that the Supreme Court decided *Gilmer*, and against the backdrop of a national trend towards favoring arbitration in the legal landscape, Congress amended Title VII in 1991.[95] The amendments allowed plaintiffs to obtain jury trials and recover compensatory and punitive damages under Title VII.[96] Importantly, Congress included a note within the Civil Rights Act of 1991 that explicitly condoned alternative means of dispute resolution, including arbitration to resolve disputes arising under Title VII.[97]

After the passage of the Civil Rights Act of 1991 and the Supreme Court's decision in *Gilmer*, courts have unanimously held that employees were able to sign away their right to judicial review of substantive rights violations under Title VII through mandatory arbitration clauses.[98] While opponents to mandatory arbitration in Title VII claims, including the EEOC, point to remarks in the legislative history of the Civil Rights Act of 1991 that seem to evince against mandatory arbitration, courts have repeatedly stated that given the plain language of the text "no amount of commentary from individual legislators of committees would

93. John D. Shea, *An Empirical Study of Sexual Harassment/Discrimination Claims in the post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?* 32 SUFFOLK U.L. REV. 369, 371 (1998).

94. *Gilmer*, 500 U.S. at 31-32.

95. *The Civil Rights Act of 1991*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html [https://perma.cc/ATD4-44GP] (last visited Mar. 5, 2019).

96. *Id.*

97. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 42 U.S.C.A. §1981.

98. Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999) (holding that Congress did not intend for Title VII to preclude enforcement of pre-dispute arbitration agreements); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 163 F.3d 53 (1st Cir. 1998) (holding that Title VII does not, as a matter of law, prohibit pre-dispute arbitration agreements); Cole v. Burns Int'l Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997) (affirming an order compelling arbitration of Title VII claims where an employee signed a mandatory arbitration agreement as a condition of his employment); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (holding that Title VII claims are subject to mandatory arbitration); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (holding that Title VII claims are subject to compulsory arbitration); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (holding that Title VII claims can be subject to compulsory arbitration).

justify a court in reaching" a conclusion that Title VII claims were exempt from mandatory arbitration clauses.[99]

The Supreme Court has continued to advance a pro-mandatory arbitration position in employment disputes decided since *Gilmer.*[100] Importantly, the Court, in the 2001 case *Circuit City Stores v. Adams*, held that employees subject to mandatory arbitration clauses cannot bring state claims regarding sexual discrimination.[101] In addition, the Court held that the FAA applies to all employees per the Commerce Clause, except for the narrow exception of transportation workers under § 1.[102]

B. The Epic Decision

In *Epic Systems Corporation v. Lewis,* the Supreme Court addressed whether employees could enter into class action lawsuits against their employer outside of the arbitral forum if they had signed a mandatory arbitration agreement.[103] As discussed above, class certification is a powerful tool employees utilize when bringing sexual harassment claims against their employer. Previously, there was a circuit split as to whether employees who had signed mandatory arbitration clauses were able to pursue class action lawsuits against their employers instead of individualized arbitration.[104] In addressing this question, the Supreme Court combined three cases, *Morris v. Ernst & Young, LLP* from the Ninth Circuit Court of Appeals,[105] *National Labor Relations Board v. Murphy Oil USA, Inc., et al.* from the Fifth Circuit Court of Appeals,[106] and *Epic Sys. Corp v. Lewis* from the Seventh Circuit Court of Appeals.[107] While the circumstances and facts of each of the cases were different, the underlying issue was the same – in each case an employee had entered into an employment contract that mandated individual arbitration and had subsequently sued their employer in a class action lawsuit.[108] The employees, unlike the employees in *Gilmer*, had additional provisions in their employment contracts that did not allow for publication or

99. Seus v. John Nuveen & Co., 146 F.3d 175, 182-83 (3rd. Cir. 1998). *See also Koveleskie*, 167 F.3d at 365.

100. *See* Andrew R. Livingston & Michael Delikat, *Employment Arbitration: the Landscape and Recent Developments*, AMERICAN BAR ASSOCIATION 2-3 (2018), https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/Arbitration%20of%20Employment%20Disputes%20in%20the%20USA.pdf [https://perma.cc/FP2X-VWPL].

101. 532 U.S. 105 (2001).

102. *Id.*

103. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

104. *See id.* at 1619, 1632.

105. *Id.*, *rev'g* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *and rev'g* Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *and aff'g* Nat'l Labor Relations Bd. V. Murphy Oil USA, Inc., 808 F.3d 1013 (5th Cir. 2015).

106. 808 F.3d 1013 (5th Cir. 2015).

107. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *overruled by* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

108. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

disclosure of the arbitration decisions, which the Court noted in *Gilmer* as potential reasons for finding mandatory arbitration agreements to arbitrate substantive claims unconscionable.[109]

The *Epic* plaintiff, Lewis, and other similarly situated employees, argued that the National Labor Relations Act (NLRA), which was enacted in part to give employees the right to organize unions and to bargain collectively, also gives the employees a legal right to bring class action lawsuits against their employer even when they signed employment contracts requiring individualized mandatory arbitration.[110] Plaintiffs pointed towards the saving clause of the FAA which requires courts to not enforce arbitration agreements "upon grounds as exist at law or in equity for the revocation of any contract."[111] The employees asserted that the NLRA provides such a ground at law or in equity, and therefore, employees should be allowed to pursue class actions even if they signed agreements to arbitrate individually.[112] Importantly, the National Relations Labor Board (NRLB) supported the same position as the employees since 2010.[113]

With a narrow majority (5-4), Justice Gorsuch delivered the opinion of the Court, repeatedly emphasizing that while there is a policy debate over employees' rights to class action, the law under the FAA is clear.[114] Courts are required by Congress to "enforce arbitration agreements according to their terms- including terms providing for individualized proceedings."[115] The Court squarely rejected the employee's and NRLB's assertion that the saving clause of the FAA applied to the NRLA,[116] stating that the plain language of the savings clause made it apparent that the saving clause was referring to the laws regulating the revocation of *any contract*, not any other national or state laws which may apply.[117] The Court asserted that the saving clause of the FAA "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[118] With its holding, the Court made clear that this means that the saving clause cannot be used by employees, or others opposed to arbitration, to target or limit arbitration "either by name or by more subtle methods, such as by interfer[ing] with fundamental attributes of arbitration."[119]

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109. *Id.* at 1648 (Ginsburg, J., dissenting); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991).

110. *Epic*, 138 S. Ct. at 1619.

111. *Id.* at 1622 (quoting 9 U.S.C. § 2 (2018)).

112. *Epic*, 138 S. Ct. at 1622.

113. *Id.* The Court notes that because the NLRB had previously asserted that the FAA's saving clause allows for employees who have signed mandatory arbitration agreements to bring class action suits against their employers under the NLRA, many courts felt obliged to follow this assertion under the *Chevron* doctrine. *Id.* This is one reason why there was a circuit split. *Id.*

114. *Id.* at 1619, 1633.

115. *Id.* at 1619.

116. *Id.* at 1622.

117. *Id.*

118. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

119. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

The Court relied and expanded on its previous holding in the 2011 case *AT&T Mobility LLC v. Concepcion*, in which the Court held that states could not enact laws that limit the ability for arbitration agreements in consumer contracts to prohibit class action suits by relying on the FAA's saving clause.[120]

Similarly, the *Epic Systems* Court held that the NLRA did not ensure, even with expansive language granting collective rights for employees against their employers, a right to class action.[121] This is especially true if the employee had signed a contract for mandatory individualized arbitration.[122] In essence, the Court held that there cannot be limitations to arbitration agreements outside of traditional contract laws unless Congress directly puts limitations on them through "specific statutory discussion."[123] Because the FAA is a federal act, states cannot provide such limits outside of their general regulation of all contracts, and federal statutes that may directly or indirectly limit arbitration agreements in relation to class action or other provisions do not actually limit the FAA's scope unless they directly state so.[124]

The dissent, authored by Justice Ginsburg, discussed the fundamental reasons Congress enacted the NLRA, which was to ensure that employers could not restrict employees from banding together for their collective good, including through class actions.[125] The dissent also pointed to the expansive language of the NLRA, and argued that taking the language and Congress's intent in enacting the law, employees simply cannot waive their right to class actions against their employer, even through mandatory arbitration agreements.[126]

In addition, the dissent takes time to address Congress's intent in enacting the FAA because it has been used by the Court for the past couple of decades as a primary reason to enforce mandatory arbitrations in a number of settings.[127] The oft quoted line by the Court "liberal federal policy favoring arbitration" was first stated only in 1983 in the case *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* over 50 years after the enactment of the FAA.[128]

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120. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

121. *Epic*, 138 S. Ct. 1630.

122. *Id.*

123. *Id.* at 1622, 1627.

124. *Id.* at 1627 ("What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U.S. 228; *Gilmer*, 500 U.S. 20; CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).").

125. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (Ginsburg, J., dissenting).

126. *Id.* at 1641.

127. *Id.* at 1642-46.

128. *Id.* at 1644 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

There, the quote was made in the context of a commercial arbitration agreement between a hospital and a construction contractor.[129] The FAA was enacted for arbitration agreements between skilled parties where arbitration provides a more cost effective and timely resolution to contract disputes between the two.[130] The dissent argues, and I agree, that the Court in the decades following *Moses H. Cone Memorial Hospital* has expanded Congress's intent far beyond its limits when using it as a justification for upholding arbitration agreements in situations that are very different than a commercial setting.[131] The intent of Congress to uphold commercial contracts between two legally savvy business is now used by the Court to uphold mandatory arbitration clauses between companies and individuals with wholly unequal bargaining power and legal knowledge.

Towards the end of its discussion, the dissent states that it does "not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group wide basis. . ."[132] The dissent continued that "[i]t would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, and other laws enacted to eliminate, root and branch, class-based employment discrimination. With fidelity to the Legislature's will, the Court could hardly hold otherwise."[133] This would most likely include class action claims of sexual harassment through a "hostile work environment" theory. While I am hopeful, the Court's *Epic* holding, combined with similar holdings in the past couple of decades, leads me to believe that courts will likely find individual mandatory arbitration agreements enforceable when such claims are brought.

C. Sexual Harassment Class Actions Following the Epic Decision

The subsequent case law following the *Epic* decision, in which employees subject to mandatory arbitration clauses bring sexual harassment or other Title VII lawsuits as class actions against their employers, while sparse, seem to suggest that Justice Ginsburg is incorrect.[134] While more time is required for similarly situated cases to reach the Circuit Courts, district court opinions suggest that the *Epic* decision has been read to bar employees subject to mandatory arbitration from bringing Title VII claims, including sexual harassment claims, to court. For example, the U.S. District Court for the Eastern District of Michigan, Southern Division, found that because Title VII did not afford employees a substantive right to class action, they could not pursue a class action against their employers because they had signed individualized mandatory arbitration agreements.[135]

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129. *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1 (1983).

130. *Epic*, 138 S. Ct. at 1622 (Ginsburg, J., dissenting).

131. *Id.* at 1643-45.

132. *Id.* at 1648.

133. *Id.* (citations omitted).

134. Williams v. Dearborn Motors 1, LLC, No. 17-12724, 2018 WL 3870068 (E.D. Mich. Aug. 15, 2018).

135. *Id.* at *6.

In addition, plaintiffs who were in the middle of workplace sexual harassment class action litigation and had previously signed mandatory arbitration clauses are simply withdrawing their cases.[136] A notable example is James Damore, a former Google engineer who gained notoriety for writing the now ill-famed "diversity memo."[137] Mr. Damore brought a class action suit against Google for, among other things, sexual harassment.[138] Following the *Epic* decision, he and other co-plaintiffs dropped the suit and agreed to arbitration.[139]

III. SEXUAL HARASSMENT AND INDIVIDUALIZED ARBITRATION NOW

A. When Employees Can Still Bring Sexual Harassment Claims to Court

There are now few options for employees subject to mandatory arbitration to bring sexual harassment claims against their employers in court. Typically, for an employee to bring a sexual harassment claim, his or her arbitration agreement must be found unenforceable. Courts generally find two ways in which arbitration agreements are found unenforceable, and therefore lawsuits permissible, between employees and their employers in sexual harassment claims.[140] First, where the sexual harassment claims themselves are outside of the arbitration agreement, and second where the arbitration agreement was unconscionable.[141] Sexual harassment claims are typically found to be outside of the arbitration agreement when the agreement does not include any language that specifically addresses sexual harassment or substantive rights claims. Sexual harassment claims are also typically found to be outside the arbitration agreement when the specific facts of the sexual harassment claim are outside the "scope of employment." Courts around the country disagree on what forms of sexual harassment fall within the "scope of employment."[142] Different circuits read the terms of employment contracts to arbitrate more broadly and narrowly, which often leads to

136. Ethan Baron, *Google's fired 'diversity memo' engineer exits lawsuit for arbitration*, THE MERCURY NEWS (Oct. 18, 2018, 7:33 PM), https://www.mercurynews.com/2018/10/18/googles-fired-diversity-memo-engineer-exits-lawsuit-for-arbitration/ [https://perma.cc/2GJ2-3EBK].

137. *Id.*

138. *Id.*; Complaint Damore v. Google, LLC, No. 18CV321529 (Cal. Super. Ct. Jan. 8, 2018).

139. Baron, *supra* note 136.

140. Eric Koplowitz, *"I Didn't Agree to Arbitrate That!"- How Courts Determine If Employees' Sexual Assault And Sexual Harassment Claims Fall Within The Scope of Broad Mandatory Arbitration Clauses*, 13 CARDOZO J. CONFLICT RESOL. 565, 572-73 (2012).

141. *Id.*

142. *See, e.g.*, Jones v. Halliburton Co., 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008) ("There is no clear consensus among courts as to whether the kind of claims at issue in this case fall within the scope of a provision requiring arbitration of claims that relate to employment.").

different employees seeing different results in their ability to bring sexual harassment claims found to be outside the "scope of the employment" based entirely on the state in which they bring the claim.[143]

Second, courts generally find arbitration agreements unenforceable, and therefore lawsuits permissible, between employees and their employers in sexual harassment claims when the arbitration agreement itself was either substantively or procedurally unconscionable according to the jurisdiction's contract law, which is typically state common law. Because contract law varies from state to state, the unconscionability of an arbitration agreement depends greatly on where the contract was formed.

B. State Attempts to Limit Mandatory Arbitration Of Sexual Harassment Claims

Within the past few years, and in the wake of the #Metoo movement, state legislatures have increasingly taken it upon themselves to address the issue of sexual harassment claims being subject to mandatory arbitration clauses.[144] However, because the FAA has supremacy over state enacted laws, these attempts will likely be moot and overruled when challenged in court. For example, former California Governor Brown vetoed a bill in September 2018 that addressed not only the issue of sexual harassment claims being subject to mandatory arbitration clauses, but prohibited employers from requiring their employees to sign predispute mandatory arbitration agreements as a condition of their employment.[145] Governor Brown vetoed the bill because it would likely violate federal law (FAA).[146] However, a little over a year later California Governor Gavin Newsom signed into law a bill banning employers' from requiring their employees to sign any form of mandatory arbitration clauses.[147]

Other states, including New York, Washington, and Maryland, have specifically targeted mandatory arbitration clauses in regard to sexual harassment claims by enacting legislation.[148] The language of these bills attempts to fall within the FAA's saving clause by applying and referring to contracts rather than

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143. Koplowitz, *supra* note 140, at 572-76.

144. Kate Patrick, *Despite California's New Ban, Mandatory Arbitration Reform Is Still Uncertain*, INSIDE SOURCES (Aug. 30, 2018), https://www.insidesources.com/california-mandatory-arbitration-class-action-lawsuit-metoo-sexual-harassment [https://perma.cc/JZ7P-FLP7].

145. Assemb. B. 3080, 2018 Gen. Assemb. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080 https://perma.cc/QBH6-4R5M].

146. *Id.*

147. Alexia Fernández Campbell, *California Finally Bans Forced Arbitration at Work*, VOX (Oct. 11, 2019), https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51 [https://perma.cc/ZS3W-C4VU].

148. *New York Prohibits Mandatory Arbitration of Sexual Harassment Claims*, SANFORD HEISLER SHARP, LLP (July 20, 2018), https://sanfordheisler.com/new-york-prohibits-mandatory-arbitration-of-sexual-harassment-claims/ [https://perma.cc/EX9L-PN57].

mandatory arbitration agreements.[149] New York prohibits "any clause or provision *in any contract* which requires . . . the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination . . ."[150] Washington prohibits an employment contract from "requir[ing] an employee to waive the employee's right to publicly pursue a cause of action . . . or [from] requir[ing] an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[151] Legal scholars, however, seem to be in agreement that there is a significant likelihood that the Supreme Court would find these state laws invalid following the *Epic* decision.[152]

C. When Employees Have to Arbitrate Sexual Harassment Claims

Currently, 60.1 million Americans are subject to mandatory arbitration in connection to their employment.[153] This equates to over half of private sector, non-union workers.[154] Of *Fortune's* top 100 companies, 80 companies force arbitration through mandatory arbitration agreements, 39 of which contain class, collective, and joint action waivers.[155] Contrary to the Court's assertion in *Gilmer*, many if not most employees who want to assert claims under the ADA, Title VII, or any other legislation providing a statutory right, will be subject to mandatory arbitration.[156] While there is sparse and varying literature regarding the success rates of employees in arbitration versus litigation, recent literature has indicated that employees have a lower success rate when bringing claims against their employers in arbitration.[157] Private arbitration can be especially difficult for employees asserting sexual harassment claims under a "hostile work environment theory."[158] "The problem with private arbitration, especially when

149. *Id.*

150. N.Y. C.P.L.R. 7515(a)(2), (4)(b)(i)-(iii) (MCKINNEY 2019) (emphasis added).

151. S.B. 6313, 65th Legis., 2018 Reg. Sess. (Wash. 2018).

152. *New York Prohibits Mandatory Arbitration of Sexual Harassment Claims*, *supra* note 148; *see also* Latif v. Morgan Stanley & Co., No. 18cv11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019) (upholding a mandatory arbitration clause in a sexual harassment claim despite New York state laws limiting sexual harassment arbitration).

153. Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECONOMIC POLICY INSTITUTE 5 (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/PT94-BY6M].

154. *Id.*

155. Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY 4 (Mar. 2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/VA8L-L56M].

156. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) ("Furthermore, judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements.").

157. Colvin, *supra* note 153, at 3.

158. Yuki Noguchi, *Supreme Court Ruling Could Limit Workplace Harassment Claims, Advocates Say*, NATIONAL PUBLIC RADIO (Nov. 16, 2017), https://www.npr.org/2017/11/16/564387907/supreme-court-ruling-could-limit-workplace-harassment-claims-advocates-say [https://perma.cc/D48W-CHC5].

you have to go it alone, is that you cannot share information, facts that you would otherwise get in a discovery of a regular case," says Catherine Ruckelshaus, general counsel of the National Employment Law Project, a workers' rights group.[159] "If you lose the ability to show the pattern in practice, then the patterns and practices are going to continue," she says.[160]

Another issue in arbitration not found in the court system is that arbitration is a for-profit business. More than three dozen arbitrators told the *New York Times* that "they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business."[161] One arbitrator confessed that "plaintiffs had an inherent disadvantage," saying, "'[w]hy would an arbitrator cater to a person they will never see again?'" versus, as *The Times* found, a company employing the same arbiter for 29 cases.[162]

In addition to lower success rates for employees in arbitration versus litigation, mandatory arbitration tends to suppress claims employees may have otherwise brought against their employer.[163] One reason this occurs is because attorneys are less likely to represent employees who are subject to mandatory arbitration – due to the lower success rates and because employees who are successful tend to have lower damage awards than employees who are successful in litigation.[164] While there is a debate because of the limited research on mandatory arbitration in lieu of judicial remedies regarding whether arbitration is always bad for the employee, this author finds it telling that an entire class of second year law students boycotted a prestigious law firm during recruitment until the law firm agreed to drop their mandatory arbitration policy.[165] In addition, research has shown that the mere presence of mandatory arbitration clauses discourages employees from taking action at all, most likely because of the strong public opinion that employers are favored in arbitration, leading to a decrease in

159. *Id.*

160. *Id.*

161. *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/NN8P-SY4W].

162. *Id.*

163. Colvin, *supra* note 153, at 5.

164. *Id.*

165. Karen Sloan, *Kirkland & Ellis Drops Mandatory Arbitration for Associates Amid Law Student Boycott*, LAW.COM (Nov. 21, 2018), https://www.law.com/2018/11/21/kirkland-ellis-drops-mandatory-arbitration-for-associates-amid-law-student-boycott/?slreturn=20190020160632 [https://perma.cc/TY3D-22AN].

employees bringing any claim.[166] The fact that employees never elect to do arbitration reflects in itself a public opinion that arbitration is neither fair nor aligned with the rule of law.[167]

There continues to be limited research on mandatory arbitration clauses, and the clause's positive and/or negative effects on those involved during a legal dispute. However, the public policy discussion surrounding arbitration clauses in relation to sexual harassment claims leaves little room for debate against the widely-held belief that arbitration is not the correct forum for sexual harassment claims. The #MeToo movement has brought to light the prevalence of sexual harassment in the workplace and the inability of women to come forward publicly with their stories. In 1981, Chief Justice Warren Burger explained the simple logic of why sexual harassment and all Title VII claims are unsuitable for arbitration:

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens."[168]

There is also no doubt that sexual harassment claims often face uphill battles in courtrooms as well.[169] Given the large number of elements required for an employee to prove sexual harassment by "hostile work environment," it is unsurprising that 37% of sexual harassment lawsuits are dismissed before trial.[170] But because court case decisions, unlike arbitration, are required to be made available to the public, the courts are likely to be much more aware and beholden to general shifts in public opinions regarding sexual harassment, including the #MeToo movement.[171] As Deborah Rhode, director of Stanford's Center on the Legal Profession states, "often times it takes a kind of cultural consciousness raising moment like the one that we're having now to force a reevaluation of standards…everything that we've seen on the #MeToo hashtag suggests that there's a lot of pent-up fury out there, and more…women…are going to seek legal recourse and attorneys in this social climate are going to think they're more likely to win."[172]

166. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 698 (2018) ("[T]he available evidence suggests that the overwhelming majority of claims that would have been litigated but for the presence of a [mandatory arbitration agreement] are simply dropped without being filed in any forum at all.").

167. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2814-15 (2015).

168. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

169. Noguchi, *supra* note 158.

170. *Id.*

171. *Id.*

172. *Id.*

IV. CONCLUSION

The rise of mandatory arbitration employment contracts, and the Supreme Court's policy of favoring such contracts against other public policy concerns seen most recently in its *Epic* decision, means for most employees Title VII has become a means to arbitrate, not to litigate. While the #MeToo movement has aided in raising public awareness about the pervasiveness of sexual harassment in the workforce, there is little likelihood that there will be growth and development of sexual harassment law within the judiciary in response to the growing public discourse when sexual harassment claims are brought to arbitration, or not brought at all.

Employers currently wield the ability to require arbitration of sexual harassment and other statutory rights claims. And while some major companies like Google are re-thinking requiring mandatory arbitration of sexual harassment claims, it seems to be normatively unjust to allow the potential defendants of a sexual harassment suit to decide, over everyone but Congress, whether the suit should be heard in a judicial forum or through an arbitrator of their choice.[173] "The choice of forums inevitably affects the scope of the substantive right to be vindicated."[174] And in a time when there is a public outcry for a larger recognition of the pervasiveness of sexual harassment in the workplace, it is unfortunate that the ability most employees have to bring a sexual harassment claim against their employers in court is very narrow in scope. As Supreme Court Justice Ginsburg aptly wrote: "When companies can muffle grievances in the cloakroom of arbitration the result is inevitable: curtailed enforcement of laws 'designed to advance the well-being of the vulnerable.'"[175]

173. *See Barrentine*, 450 U.S. at 750 (Burger, C.J., dissenting) ("[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts.").

174. U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 359-60 (1971).

175. Lamps Plus, Inc. v. Valera, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).