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Five tips for drafting privacy policies

BY DONATA KALNENAITE, ESQ.

Like it or not, we live in an age of big data and privacy invasions. Events such as the recent Equifax breach have left consumers weary of sharing their personal information online for the fear of it being stolen and used for improper purposes. Therefore, it is now more important than ever for websites to have a Privacy Policy that delineates what information is collected, shared and with whom. If a website owner walks through your office door and requests that you draft a Privacy Policy, would you be able to help him or her? The following are five tips that will help you draft a clear and concise Privacy Policy that not only abides by the law but also reassures the users of the website.

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Why do powerful serial harassers get away with it for so long?

BY RICHARD T. SEYMOUR

The questions raised in the public mind by the allegations against Bill Cosby, Roger Ailes, Bill O'Reilly, Harvey Weinstein and other powerful accused sexual and racial harassers is important: If the allegations are true, how did they manage to get away with it for so long? Why didn't the victims complain earlier? Where were Human Resources and company compliance officers? Parts of the answers to these questions are clear, and the evidence of the enablers is not pretty.

There is a common theme in many of the accounts given by harassment victims: fear. Fear of retaliation, fear of having a career destroyed, fear of being unemployable if the victim has a public record of having filed a harassment lawsuit,

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Five tips for drafting privacy policies

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1. The Privacy Policy should be drafted in a way that will be understood by even the most lay of persons

The Federal Trade Commission ("FTC") provides guidance that states that Privacy Policies should be written in a way that is easy to read and understand. Remember, the policy that you write will most likely be read by people who want to purchase a necklace or a child's car seat, not by lawyers. Thus, "heretofore" and "herein" should be left for complex commercial contracts and are not appropriate for Privacy Policies.

2. One Privacy Policy does not fit all websites

As attorneys, we all love our templates. However, it is important to remember that each website collects different types information and disseminates it to different types of people. While some websites may have a purchasing option that redirects the user to PayPal, others may ask the user to send them a check to effectuate a purchase. Some websites collect cookies to track information while others do not. Therefore, it is important that you have a comprehensive understanding of your client's website and all of its features and you mold the Privacy Policy to fit that particular website.

3. Remember that the case law and statutes change

Privacy is a very hot topic right now not only for consumers but also for law makers and judges. This area of the law has new cases on a frequent basis and thus you must remember to constantly monitor the case law and the guidance as put forth by the FTC. This will help you draft policies that are up to date and will protect your client to the fullest extent of the law.

4. You must advise your client to place the Privacy Policy in the right area of the website

Having a well written Privacy Policy is half of the battle. The remainder of the battle is where this Privacy Policy is placed. The link must include the word "privacy" and must be visible, not hidden and easily accessible. Furthermore, the FTC also has guidance regarding the type and its size that that should be used. Before your client's website launches or immediately after the Privacy Policy is uploaded you should visit the website to ensure that the Privacy Policy link meets all of the visibility requirements as stated by the California Business and Professions Code Sections 22575 – 22579.

5. Create a checklist for yourself

A Privacy Policy can be a complex and lengthy document. In order to ensure that you do not miss anything, use a checklist.

With the proper care and attention to detail, Privacy Policies can both reduce the potential for liability and reassure website visitors that their information is safe thus leading to more business for your client. These five tips for drafting Privacy Policies should help you win over your clients with better writing. ■

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Why do powerful serial harassers get away with it for so long?

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the fear of public humiliation as the most intimate and painful details of their lives are laid bare in discovery and in court, and the fear of not being believed. HR officials—who are asked to hold to account officials far more powerful than they could ever hope to be—can also experience a great deal of fear if they act to protect the employer.

Victims' fear of retaliation is paramount, and they are right to fear it. Serial sexual harassers do not engage in harassment simply because of sexual interests, but to exercise dominance over the victims, and demonstrate by words and actions that they have power over the victims. Racial harassers are also trying to do the same. Swatting down anyone who complains is an expected part of the attempt to show dominance and is not some rare event.

A hypothetical situation may make the dilemma faced by both retaliation victims and HR officials clear. Amy Anxious is a new employee just starting out, who has not yet had a chance to develop any friendships among the other employees. She is about as vulnerable as a young woman can be in that environment. Paul Putrid is physically revolting but high up in the company, thinks he is God's gift to women, and thinks he can get any woman into bed if he tries hard enough. He takes a strong interest in Amy, tells her he can further her career, and gives her assignments that require her to work closely with him. He starts to make her uncomfortable by telling her about his marital problems and suggests they take a weekend trip together. Amy is getting really bothered by this, and also by the idea that she has no remedy either inside or outside the company.

This article discusses the standards developed under Title VII of the Civil Rights Act of 1964,[1] which forbids harassment based on sex, race, and other protected characteristics, and also forbids retaliation against those who oppose unlawful actions or participate in the Title VII enforcement process. State and local laws may have different results.

Serial Harassment Enabler #1: The Judicial Standard for Harassment Claims

Amy is correct; she has no remedy in court. The judicial standard in harassment cases requires much more severe or pervasive conduct before the law provides a remedy. While judicial reluctance to become involved in the everyday interactions of the workplace is understandable, the courts have set the bar for harassment complaints too high, making the beginning stages of serious, toxic harassment into a "safe zone" for harassers.

The Supreme Court has sensibly described the kinds of factors to be taken into account: "… whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[2]

The standard is sound, but its application has been unforgiving to employees like Amy,[3] and to the victims of racial harassment.[4]

Thus, Amy is right: When things start to get creepy, she has no claim. When things get even creepier, she may still have no claim. In the real world, *she has no idea when a court might think she has a viable harassment claim*, and that sad fact really discourages claims.

Serial Harassment Enabler #2: The Judicial Standard for Retaliation Claims

Amy is reluctant to complain, because she fears retaliation and fears that she has no real remedy if she is fired for complaining of sexual harassment.

Once again, Amy's instincts are dead right. They should not be, but they are.

The Supreme Court has held that a complaint of sexual harassment is not protected by the anti-retaliation provisions of Title VII unless an objective "reasonable person" in the plaintiff's situation would think the conduct being complained about is a Title VII violation.[5]

The Supreme Court has also recognized that harassment is not a simple question. "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. … The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[6]

As a result, the nature of sexual and other forms of harassment is usually that it builds over time, and that there will be times when it is building but is not yet harassment and complaints about it will not yet be protected.

Here too, *Amy has no idea when a court might think she has a viable retaliation claim*, and that sad fact really discourages claims.

Serial Harassment Enabler #3: The Judicial "Catch-22"[7]

Nor are these the only ways Amy's fears are justified in the real world. The confluence of these judicial limitations on the protections of harassment victims hits them hard in the real world, and confirms their worst fears and anxieties.

The Supreme Court's decisions in *Burlington Indus., Inc. v. Ellerth*[8] and *Faragher v. City of Boca Raton*[9] established an affirmative defense in harassment cases not resulting in a tangible employment action by a supervisor in a direct line of authority over the victims, *i.e.*, for the vast majority of cases: an employer will not be liable if it established a reasonable system to prevent harassment from occurring, a reasonable system for handling complaints

if harassment did occur, and if the plaintiff unreasonably failed to complain. A woman or other harassment victim can lose all rights by waiting too long to complain.[10]

Title VII allows 180 days within which to file a charge of discrimination with the EEOC, and 300 days if there is a State or local fair employment practices agency, yet the court will guillotine sexual harassment cases for "waiting too long" even if her internal complaint was made in a small fraction of that time.[11]

Serial Harassment Enabler #4: Skepticism and Fear of Disbelief

One of the most powerful reasons women like Amy, and other persons persecuted in the workplace, are reluctant to complain each time something really bad happens is the fear of disbelief. It costs my clients emotionally to admit, even to themselves, that they have been singled out as powerless and unable to protect themselves. It costs them even more emotionally if they summon the courage to complain and then find themselves ignored or belittled. Time after time, my clients have said that finding out they had no support and that their assumed protections were a sham was an even bigger hit than the original harassment. One of my clients, who was sexually assaulted by another employee, complained time and again to supervisors who did not even look up from their magazines, let alone take notes or investigate. The employer then lied to the police trying to serve an arrest warrant on the perpetrator, and fired my client for telling the police where he was. Employees who doubt their employer's commitment to protecting them will often avoid putting it to the test and getting confirmation of their doubts.

When I have spoken to audiences of HR professionals over the years, and in speaking with acquaintances, I have noticed far more skepticism of sexual harassment claims than of other claims of discrimination. To get people to listen, I have to tell them that whatever else they may be thinking of, I am talking about really serious conduct that no one would dispute is a problem. Then my listeners open up and become far more open. Skepticism is a fact with which victims have to deal, and it adds to the reluctance to complain.

There are several reasons for the skepticism. The most important is probably the unintended effect of well-meaning people who have tried to shovel into the concept of sexual harassment any conduct, statement, or idea that might make an overly-sensitive person feel uncomfortable. The common use of the term "unwelcome," for example, glosses over the question whether an accused harasser could reasonably have known the conduct was unwelcome. Clearly, actionable harassment can occur with repeated conduct or actions after the recipient has made clear it is offensive. Also clearly, some conduct is so bad that any reasonable person would know in advance it would be offensive.

What leads to skepticism are rules making an off-color joke, an invitation to have a cup of coffee, and a proposition, harassment or not depending on the subjective reaction of the listener—and that reaction not having to have been communicated—and the one-size-fits-all claim of "micro-aggressions."

Well-meant efforts to protect women and racial and sexual minorities have bloated the definition of harassment to the point where too many regard claims of harassment as presumptively suspect. The bloat has wound up hurting real victims who have real problems that need real remedies.

The term "sexual assault" is similarly being bloated by the inclusion of trivial instances, endangering the ability of seriously sexually assaulted women and men to get a fair hearing, and endangering their willingness even to complain. Thoughtless sociological surveys that exaggerate the frequency of sexual assaults by failing to exclude the trivial have made matters worse.

University sexual harassment policies are a frightening example of such bloating, and have miseducated millions. The common-sense rejection of such learned idiocies leads many perfectly reasonable people to be skeptical of (1) anything proposed by university leaders who seem to have lost their minds, and (2) sexual harassment claims.

The current wave of "me too" stories may in the short term influence women to come forward and complain of actual sexual harassment, and may influence blacks, Hispanics, Asians, and LGTBs to complain of harassment against them, and that would be very good. Some of the stories are stomach-churning, and are making the public much more aware of just how bad things have become, and still are for many women and other targets of abuse.

At the same time, there is a huge risk because some of the "me too" stories involve the kind of bloat described above that they are capable of re-igniting skepticism and making it stronger.

A further source of skepticism is the exaggeration of advocates that false claims of sexual harassment are as rare as unicorns, and therefore that every complainant should be believed. This simply goes too far, and provokes a skeptical response that harms the real victims of harassment and makes them less likely to report the abuse they suffered. The fact is that women are people, and people lie about things—especially sex. Everyone is familiar with the false allegations against a fraternity at the University of Virginia and the false allegations against the Duke Lacrosse team. The National Sexual Violence Resource Center's examination of reports of criminal rape and sexual violence complaints rejected some studies' high estimates of the proportion of such complaints that are false, and concluded: "In contrast, when more methodologically rigorous research has been conducted, estimates for the percentage of false reports begin to converge around 2-8%."[12]

The key point is that attorneys on all sides, judges, jurors, arbitrators and mediators must reject any temptation to believe one side or another, and look at each complaint on its own merits. The failure to do so can have horrific consequences.[13] Similar advocate "experts" used to say that children never lie about the sexual abuse of children. We saw where that led, and it was horrific.[14] In the United Kingdom, the police have until recently followed a practice of automatically believing all complainants. That too has led to disaster, an enormous waste of resources, and enormous loss of credibility.

In my own practice, I represent falsely accused harassers, as well as

victims of harassment. Sometimes they are the same, as the real harasser tries to stave off a complaint by making a preemptive complaint first. The reasons for false complaints are as varied as people themselves, but false complainers share one value with serial harassers: they regard their victims as worthless beings on whom they can wipe their feet. Last Summer in England, a young woman got 16 months in prison for making a false complaint of a knife-wielding sexual assault against a taxi driver in revenge for his refusing grease-covered currency in payment for a ride.[15]

In representing victims of harassment, I look for the same kinds of supporting evidence that anyone would want to see: Did the complainant talk to others at the time, did they try to complain, was there a record of the effort, did they talk to any managers or supervisors, was there a credible reason for not complaining at the time, did the same thing happen to others like the plaintiff, did anyone witness the events, and the like? I do not want my clients to be subjected to any skepticism that they can dispel, and the more support they have for their claims the better for their credibility and for the result we get. The key is: *When I look for such corroboration, I usually find something very useful.* When attorneys and advocates say that all complaints should automatically be believed, they fall down on their job and do a disservice to the persons they are trying to help.

Anything that can be done to steer the stories towards the most serious and away from the least serious, and to educate the public, will help everyone and encourage real victims of serious harassment and assaults to come forward. Recognition that all claims need to be investigated seriously, to separate the liars from the truth-tellers and the trivial from the serious, would also help restore credibility and help real victims of harassment like Amy. The public—and juries—do not accept the well-meant but noncredible message that all complaints are both serious and true.

Serial Harassment Enabler #5: Depriving HR Officials of Statutory Protections

What about Denise Do-Right, the HR manager who takes Amy Anxious' complaint, tries to do her job, and is fired for it?

Her fears of lack of statutory protection are as well-founded as Amy's fears. A number of courts have created a judicial exception to the plain language of Title VII's anti-retaliation provision, and have held that HR officials have no remedy when they are fired for trying to do their jobs properly.[16]

Two Circuits have rejected a managerial exception to Title VII's anti-retaliation provisions,[17] but most have not addressed the question, or have held that HR officials have no protection while performing their ordinary duties.

If we as a nation intend to get serious about stopping serial harassers, HR officials—and the in-house counsel who advise them and other managers—must be protected.

Serial Harassment Enabler #6: The Lifetime Caps on Damages for Title VII Cases

The Civil Rights Act of 1991, enacted on November 21, 1991, created a common-law damages remedy for intentional violations of the law, including sexual harassment, but capped the amount at relatively low levels.[18] The cap is a lifetime cap for that employee at that employer, so *the employer can allow a harasser to repeat really bad harassment for free*.[19]

When measured against the sharp and sudden loss of employment, the low damages allowed by the caps do not provide enough incentive for persons like Amy to complain to the EEOC and to sue the employer.

Congress has not increased the caps since November 1991, and for a long time these caps have not been sufficient to incentivize employers to stop serial harassers, especially those who bring in business. In other words, Congress has allowed businesses to the choice of allowing serial harassers to continue if they pay a single fee per victim, in the form of the capped damages. That arrangement is morally unacceptable, but also does not work functionally because the recoveries for real harm are too low. If Congress merely linked the caps to the Consumer Price Index retroactive to November 21, 1991, they would be increased as follows:

Size of Employer 42 U.S.C. § 1981(b)(3)	**Amount of Capped Compensatory and Punitive Damages Frozen on November 21, 1991 42 U.S.C. § 1981(b)(3)**	**Amount on November 5, 2017 if the Caps Were to Be Linked to the Consumer Price Index[20] as it Was in November 1991**
Over 14 and fewer than 101 employees	$50,000	$89,500
Over 100 and fewer than 201 employees	$100,000	$179,000
Over 200 and fewer than 501 employees	$200,000	$358,000
Over 500 employees	$300,000	$537,000

What Can Practitioners Do to Protect Their Clients?

For employee attorneys, the answers are simple: bring racial discrimination, harassment, and retaliation claims under 42 U.S.C. § 1981 (and § 1983 if the defendant is a municipality and one can show official policy), bring 42 U.S.C. § 1983 claims against individual wrongdoers for their own acts and omissions (if one can defeat qualified immunity, which should not be difficult for a racial or sexual claim), bring discrimination, harassment, and retaliation claims under State or local law that allow greater damages relief, bring common-law claims for assault or for battery, bring a Title IX claim for sexual discrimination, harassment, and retaliation where possible, and in extreme cases of retaliation bring a 42 U.S.C. § 1985 conspiracy to obstruct justice claim. Employee attorneys should also resist the temptation to file a complaint as soon as the victim comes in the door. It is often much better to have the victim first clear up all the problems that could make litigation difficult by complaining internally, escalating the complaints higher, giving remedial actions a chance to work and make litigation unnecessary, and complaining again if the remedial actions

do not work.

For defense attorneys, the answers are also simple: train clients and their HR managers in the true extent of their exposure, both in court and in the court of public opinion. Allowing a serial harasser to continue may make economic sense in the short term to a foolish employer, but at the price of destroying a company's brand name, image, and even its commercial opportunities or existence in the future, and at the cost of severely damaging the victims of the harassment, damaging the morale of other workers who see what is going on, and destroying the kinds of mutually supportive workplaces that drive productivity.

HR managers should be instructed to limit the company's exposure by treating every complaint seriously and doing a good job of winnowing the wheat from the chaff. Some are very, very good at this, and others are punished if they even try. HR managers should be empowered to take cases of serious harassment to the very top, including the Board of Directors if necessary. Otherwise, it could be like the situation in one case, in which the plaintiff testified that a University official's initial response to her report of sexual harassment by the University Chancellor: "Oh, no, not again!"[21] No sane manager these days wants to be in that situation.

It seems to me that the most important work of defense attorneys occurs before any claim is filed in court or with the EEOC, in fine-tuning their clients' harassment and retaliation training, in counseling their client on how to handle such complaints as arise, and in making absolutely certain there is no retaliation. If defense counsel do their job correctly, Amy Anxious can confidently change her name to Amy Taken Seriously.

For both sides, it is crucial to find out whether there were prior complaints or other means by which management should reasonably have known what was going on, and how the employer handled them. Many of my sexual and racial harassment cases have involved victims who did not make internal complaints or made them late, and whose claims were saved by the fact that the employer ignored prior complaints or allowed retaliation against those who complained.

Employers and their counsel should also re-think policies about keeping the results of their investigations and corrective discipline confidential. There are some very good reasons to do so—including wanting to avoid the risks that friends of the harasser may try to make the complainant or other women miserable to punish them for the complaint—but they come at the cost of employees not seeing that the employer is taking harassment complaints seriously, and potentially emboldening other harassers.

And above all, it is important to prevent retaliation. Judges do not like retaliation, and juries *really* do not like the idea that someone was punished for coming to them for relief. And juries have the power to do something about it.

How Does All This Affect Mediation?

My perception from mediating sexual harassment cases is that the mediator often has to engage in "what if" scenarios with each side, and to have copies of cases—summary judgment decisions, and decisions on motions for remittitur of jury verdicts—to use as examples of how judges and juries may take the case. Sometimes, counsel for a party will provide me with examples, but I usually have to gather them myself. The plaintiff needs to understand how high the barriers to liability are, and the defendant needs to understand what can happen if the plaintiff manages to jump through all the hoops.

To succeed, the mediator *must* be able to understand the emotions driving both sides, and be able to change their direction in a more constructive manner than some parties and counsel have when they first walk into the session.

How Does All This Affect Arbitration?

Arbitrators of statutory claims have to follow the law, unless they are arbitrating under a system that is intentionally designed to allow them a certain leeway in favor of the consumer or employee, or unless an employer allows the lofty policies of its handbook or harassment policies, as well as the law, to be enforced in arbitration.

When I am selected by the parties to decide a dispute, I have to be a little like a trial judge: I have to put aside my personal proclivities and disagreements with the way the law has developed, and apply the law as it is to the facts I find. Every arbitrator with integrity has to do the same.

Arbitrators are unlike trial judges, however, because a conscientious judge can try to change the law in the direction the judge thinks makes the most sense. Judges have that freedom because they know they do not have the last word, and the parties can seek to change their rulings on appeal. I do not think a conscientious arbitrator has that freedom, because for all practical purposes there is no appeal.[22] So we have to apply the law as the courts have declared it, or as we think the courts would declare it if the case were in court. ■

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1. 42 U.S.C. 2000e et seq.

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

3. *E.g.*, *McMiller v. Metro*, 738 F.3d 185, 188–89 (8th Cir. 2013), stated:

Four decisions help to illustrate the boundaries of a hostile work environment claim under circuit precedent. In *Duncan v. General Motors Corp.,* 300 F.3d 928 (8th Cir.2002), the court determined that a plaintiff had not proved a hostile work environment with evidence that a supervisor sexually propositioned her, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a position, displayed a poster portraying the plaintiff as "the president and CEO of the Man Hater's Club of America," and asked her to type a copy of a "He–Men Women Hater's Club" manifesto. *Id.* at 931–35. In *Anderson v. Family Dollar Stores of Arkansas, Inc.,* 579 F.3d 858 (8th Cir.2009), where a supervisor had rubbed an employee's back and shoulders, called her "baby doll," "accus[ed] her of not wanting to be 'one of [his] girls,' " suggested once in a long-distance phone call "that she should be in bed with him," and "insinuat[ed] that she could go farther in the company if she got along with him,"

this court ruled that the evidence was insufficient to establish a hostile work environment. *Id.* at 862. And in *LeGrand v. Area Resources for Community and Human Services,* 394 F.3d 1098 (8th Cir.2005), the court ruled that a plaintiff who asserted that a harasser asked him to watch pornographic movies and to masturbate together, suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm, kissed the plaintiff on the mouth, "grabbed" the plaintiff's buttocks, "brush[ed]" the plaintiff's groin, "reached for" the plaintiff's genitals, and "briefly gripped" the plaintiff's thigh, had not established actionable harassment. *Id.* at 1100–03. Even *Rorie v. United Parcel Service, Inc.,* 151 F.3d 757 (8th Cir.1998), which this court described as a "borderline" case for submission to a jury, *id.* at 762, involved harassment of greater frequency and duration than the three incidents alleged by McMiller. The plaintiff in *Rorie* testified that her supervisor asked her about a coworker's penis size, told her that she looked better than other women in her uniform, and "throughout" three years of employment "often" told her that she smelled good, patted her on the back, and brushed up against her. *Id.* at 761.

The court remanded plaintiff's quid-pro-quo sexual harassment claim.

4. *E.g.*, *Phillips v. UAW* Int'l, 854 F.3d 323, 328 (6th Cir. 2017), stated:

Accordingly, this court has found even offensive and bigoted conduct insufficient to constitute a hostile work environment if it is neither pervasive nor severe enough to satisfy the claim's requirements. *See, e.g.*, *Williams*, 643 F.3d at 506, 513 (finding no hostile work environment where defendant "call[ed] Jesse Jackson and Al Sharpton 'monkeys' and [said] that black people should 'go back to where [they] came from' " among other racist comments); *Reed v. Procter & Gamble Mfg. Co.*, 556 Fed.Appx. 421, 432 (6th Cir. 2014) (no hostile work environment where plaintiff was subjected to race-based comments and his supervisor stood behind him and made a noose out of a telephone cord); *Clay*, 501 F.3d at 707–08 (fifteen racially-motivated comments and instances of disparate treatment over a two-year period were isolated, not pervasive, and therefore not actionable under Title VII). We find the same here.

5. *E.g.*, "No reasonable person could have believed that the single incident recounted above violated Title VII's standard." *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 271 (2001).

6. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

7. Merriam-Webster's online dictionary defines "Catch-22": "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." See https://www.merriam-webster.com/dictionary/catch-22, downloaded October 24, 2017. The term comes from Joseph Heller's novel, Catch-22 (1961).

8. 524 U.S. 742 (1998).

9. 524 U.S. 775 (1998).

10. *E.g.*, *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307 (11th Cir. 2007), stated:

Baldwin waited too long to complain. Her complaint came three months and two weeks after the first proposition incident and three months and one week after the second one. That is anything but prompt, early, or soon. *See, e.g., Walton,* 347 F.3d at 1289–91 (an employee's reporting delay of two and a half months after the first incidents of harassment was too long for *Faragher-Ellerth* purposes). …

11. See note 10 above.

12. See "*False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*," downloaded on November 15, 2017 from https://www.nsvrc.org/publications?tid=27&tid_1=All&keys=false+report.

13. See, *e.g.*, *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1282-1283 (11th Cir. 2010), affirming $389,739.07 in sanctions against plaintiffs' counsel for pursuing a baseless sexual harassment case without adequate investigation and after it became clear the case had no basis, and stating:

"Still, like Ahab hunting the whale, [plaintiff's counsel] relentlessly pursued the claims. All the while they blinded themselves to as much of the contradictory evidence as they could. They deliberately did not obtain the deposition testimony of any of Norelus' co-workers who would have seen or heard something had anything improper occurred. They did not concern themselves with that testimony, according to [plaintiff's counsel], because they assumed all of the witnesses, except for their client, were either lying or simply could not remember witnessing the gross sexual harassment inflicted on her."

14. See Clyde Haberman's March 9, 2014 article in the New York Times, "The Trial That Unleashed Hysteria Over Child Abuse," https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html?_r=0.

15. I first read of this in the London Times, but similar stories were carried in the UK newspaper The Sun on September 19, 2017 (See "'PALS SHUNNED ME!' Cabbie's hell over Leeds student's grope slur for refusing a kebab-stained £10," downloaded from https://www.thesun.co.uk/news/4496212/student-sophie-pointon-jailed-false-taxi-sexual-assault-claim-leeds/) in the International Business Times on September 19, 2017 (see "Criminology student jailed for making false sex attack claim against innocent Leeds cabbie," downloaded from http://www.ibtimes.co.uk/criminology-student-jailed-making-false-sex-attack-claim-against-innocent-leeds-cabbie-1639981), and in other sources.

16. *See generally* Deborah L. Brake, *Retaliation in the EEO Office*, 50 Tulsa L. Rev. 1 (2014), and Lindemann, Grossman & Weirich, Employment Discrimination Law, 5th Ed., Vol. 1, Chapter 15.III.E at pp.15-30 to 15-31 (Bloomberg BNA 2012), copyright © American Bar Ass'n, 2012, and cases there cited.

17. *DeMasters v. Carilion Clinic*, 796 F.3d 409, 421-24 (4th Cir. 2015); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 578-82 (6th Cir.), *cert. denied*, 531 U.S. 1052 (2000).

18. 42 U.S.C. § 1981A(b)(3).

19. *E.g.*, *Black v. Pan Am. Labs., L.L.C.*, 646 F.3d 254, 264 (5th Cir. 2011), which stated:

… Other courts have uniformly held that Title VII's damages cap applies to each party in an action, not to each claim. *See Fogg v. Ashcroft,* 254 F.3d 103, 106–08 (D.C.Cir.2001); *Smith v. Chi. Sch. Reform Bd. of Trs.,* 165 F.3d 1142, 1150 (7th Cir.1999) (agreeing with Sixth Circuit's holding that "the cap applies per plaintiff, per suit (rather than per claim)"); *Baty v. Willamette Indus., Inc.,* 172 F.3d 1232, 1245–46 (10th Cir.1999) (same).

20. Bureau of Labor Statistics, U.S. Department of Labor, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm, used November 6, 2017. Each November 1991 dollar had the same purchasing power as $1.79 in September 2017, the latest month available.

21. *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 874 (N.D. Ind. 1998). The court later upheld an $800,000 punitive-damages award against the Chancellor personally. *Fall v. Indiana Univ. Bd. of Trustees*, 33 F. Supp. 2d 729, 739-48 (N.D. Ind. 1998).

22. The Federal Arbitration Act, 9 U.S.C §§ 1 *et seq.*, allows very little room for judicial review of the substance of arbitral awards. While both the AAA and JAMS rules allow for appellate arbitration of the award in certain circumstances, I understand that very few parties have done so.

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