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EMPOWERING THE EEOC: AN ENFORCEMENT STRATEGY TO TACKLE WORKPLACE SEXUAL HARASSMENT

Noah Bloomberg, J.D.

In July 2021, employees at Activision, one of the largest video game companies in the world, staged a strike and protested against routine sexual harassment facilitated by the "frat boy" culture within the company.[1] Employees filed a lawsuit alleging that male employees engaged in "cube crawls" in the office, which involved heavy drinking accompanied by rampant sexual harassment of female coworkers, among other forms of sexual harassment.[2] Women made up only twenty percent of the company's employees at the time.[3]

According to the Complaint, the victims allege that they had to regularly fend off unwanted sexual advances, including groping.[4] Additionally, male employees often joked about rape

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[1] Dani Anguiano, *Activision Blizzard Employees Walk Out Over Harassment and "Frat Boy" Culture Allegations*, GUARDIAN (July 28, 2021, 3:58 PM), https://www.theguardian.com/us-news/2021/jul/28/activision-blizzard-walkout-allegations-harassment-frat-boy-culture.

[2] *Id.*

[3] *Id.*

[4] Complaint for Plaintiffs at 4, Dep't Fair Emp. and Housing v. Activision Blizzard, Inc. et al., No. 21STCV26571, 2021 WL 3109804 (Cal. Super. Ct. 2021), https://aboutblaw.com/YJw.

and commented on female coworkers' bodies.[5] A former senior director at the company allegedly "engaged in blatant sexual harassment with little to no repercussion."[6] The parents of an Activision employee even claimed the toxic culture was a "significant factor" to their daughter taking her own life on a company retreat in 2017.[7]

Activision ultimately settled the sexual harassment lawsuit for $18 million.[8] In a separate legal filing, the company denied all allegations of wrongdoing and claimed they reached a settlement to avoid further legal expenses.[9] Months later, Microsoft acquired Activision for over $60 billion.[10]

The #MeToo movement significantly contributed to holding influential individuals accountable for sexual misconduct; however, the institutions behind these individuals failed to change their enabling ways.[11] Only after years of litigation do workplaces reform their sexual harassment

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[5] *Id.*

[6] *See* Sarah Batancourt, *Video Game Company Activision Blizzard Sued Over "Frat Boy Culture" Allegations,* GUARDIAN (July 22, 2021), https://www.theguardian.com/us-news/2021/jul/22/activision-blizzard-sued-frat-boy-culture-allegations.

[7] Emma Roth, *Activision Blizzard Sued Over Claims Sexual Harassment Contributed to Employee's Death,* VERGE (Mar. 6, 2022, 11:53 AM), https://www.theverge.com/2022/3/6/22964148/activision-blizzard-lawsuit-claims-sexual-harassment-contributed-employee-death.

[8] Kellen Browning, *Activision to Pay $18 Million Settlement Over Workplace Misconduct*, N.Y. TIMES (Sept. 27, 2021), https://www.nytimes.com/2021/09/27/technology/activision-blizzard-eeoc-settlement.html.

[9] *Id.*

[10] Tom Warren, *Microsoft to Acquire Activision Blizzard for $68.7 Billion,* VERGE (Jan. 18, 2022, 8:34 AM), https://www.theverge.com/2022/1/18/22889258/microsoft-activision-blizzard-xbox-acquisition-call-of-duty-overwatch. For reference, Microsoft acquired LinkedIn for $26 billion in 2016. *Id.*

[11] *See* Masha Gessen, *One Year of #MeToo: Punishing Individual Abusers is Not the Same as Justice*, NEW YORKER (Oct. 10, 2018), https://www.newyorker.com/news/our-columnists/one-year-of-metoo-punishing-individual-abusers-is-not-the-same-as-justice.

policies, and they do so to avoid further liability rather than to eliminate sexual harassment.[12]

Title VII, the federal employment anti-discrimination act, is the key mechanism for combatting employment discrimination, including sexual harassment in the workplace.[13] The Equal Opportunity Employment Commission ("EEOC") is the federal agency charged with enforcing Title VII.[14] EEOC enforces Title VII using two methods: (1) An employee can bring a discrimination claim against her employer after failing to reach a settlement through the EEOC; or (2) the EEOC can pursue the claim on behalf of the complainant.[15] Though Title VII has been monumental in providing employees with a legal mechanism to hold employers liable for workplace sexual harassment, it has failed to deter it adequately.[16]

Studies estimate that between twenty-five to eighty-five percent of women have experienced sexual harassment in the workplace.[17] Post-#MeToo, numerous publicly traded companies in addition to Activision — such as Google,[18]

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[12] *See, e.g.*, Jennifer Elias, *Google's $310 Million Sexual Harassment Settlement Aims to Set New Industry Standards,* CNBC (Sept. 29, 2020, 11:58 AM), https://www.cnbc.com/2020/09/29/googles-310-million-sexual-misconduct-settlement-details.html; Rachel Sharp, *McDonald's Workers Plan Mass Walkout Over Sexual Harassment and Assault Allegations*, INDEPENDENT (Oct. 25, 2021, 6:46 PM), https://www.independent.co.uk/news/world/americas/mcdonalds-worker-strike-sexual-harassment-b1944992.html.

[13] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17; Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 53 (1995) ("Congress created the Equal Employment Opportunity Commission ('EEOC') to administer these statutes. The EEOC is the sole arm of the federal government with an exclusive focus on eradicating job discrimination.").

[14] White, *supra* note 13.

[15] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Filing a Lawsuit*, https://www.eeoc.gov/filing-lawsuit (last visited Sept. 7, 2023).

[16] *See* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole,* 78 WASH. & LEE L. REV. 155, 166 (2021).

[17] Kenneth Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO STATE L. REV. 1057, 1058 (2018).

[18] Sherisse Pham & Sara Ashley O'Brien, *Google Employees Walk Out Over Sexual Harassment Scandals*, CNN (Nov 1, 2018, 7:37 AM),

McDonald's,[19] and Nike[20] — received national attention after employees staged walkouts in protest of company failures to address rampant sexual harassment. Based on the pervasive sexual harassment at these multi-billion-dollar companies, Title VII appears to be ineffective in fostering widespread change in reducing workplace sexual harassment even after #MeToo.[21] Thus, the EEOC needs to do more to enforce the law to bring about institutional reform in national corporate workspaces.

This Note argues that Title IX's use to address sexual harassment on college campuses can serve as a model to reform Title VII.[22] Under Title IX, The Department of Education used an administrative approach that the EEOC can emulate through Title VII to tackle the problem of workplace sexual harassment. In 2011, the Office for Civil Rights ("OCR"), a subagency of the Department of Education charged with enforcing Title IX, began using a strong administrative enforcement strategy to compel universities to address widespread sexual violence on their campuses.[23] Title IX is similar to Title VII in that it prohibits discrimination based on sex, but in education rather than employment.[24] However, despite the similarities between

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https://www.cnn.com/2018/11/01/tech/google-employee-walkout-andy-rubin/index.html.

[19] Lauren Zumbach, *McDonald's Employees, Activists Protest Alleged Sexual Harassment Outside Downtown Headquarters*, CHICAGO TRIBUNE (Oct. 26, 2021, 3:21 PM), https://www.chicagotribune.com/business/ct-biz-mcdonalds-sexual-harassment-protest-20211026-jy4osghfebd7pjmilizgqqmgwe-story.html.

[20] Edward Helmore, *Nike Lawsuit Records Allege Culture of Sexism, Bullying, and Fear of Retaliation*, GUARDIAN (Dec. 20, 2022, 9:16 AM), https://www.theguardian.com/business/2022/dec/20/nike-lawsuit-records-sexual-abuse-toxic-workplace-claim.

[21] *See, e.g.*, *supra* notes 18, 19, 20.

[22] Education Amendments of 1972, 20 U.S.C. § 1681; *Title IX and Sexual Violence in Schools*, ACLU (Oct. 1, 2011) https://www.aclu.org/documents/title-ix-and-sexual-violence-schools#:~:text=Title%20IX%20of%20the%20Education,school%20and%20on%20college%20campuses.

[23] *See infra* Part III.

[24] 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

the OCR and EEOC, the EEOC is significantly more limited in how it enforces the law.[25] Therefore, Congress needs to strengthen the EEOC such that it possesses the same enforcement power as the OCR, which would allow the EEOC to utilize the same enforcement strategy that the OCR uses on college campuses.

Further, this Note argues that for Title VII to adequately combat workplace sexual harassment on a national scale, the EEOC needs stronger enforcement authority. Though Congress intended EEOC to be the primary mechanism for enforcing Title VII,[26] it is currently too limited by federal law. With more power, the EEOC can enforce Title VII in a way that remedies individual cases of widespread sexual harassment and institutes a substantial change within workplace policies to proactively address sexual misconduct.[27] This requires legislation from Congress and a change in strategy by the EEOC that resembles OCR's enforcement of Title IX.

Part I will survey how many Title VII congressional framers intended the EEOC to have a much stronger enforcement capacity than it currently does. Part II will explore how Title VII enforcement, because of EEOC limitations, is presently insufficient to combat workplace sexual harassment. Part III will detail the administrative enforcement strategy used by the OCR to combat sexual assault and change the culture on college campuses. Part IV will discuss limitations on the application of the OCR model. Part IV will propose how Congress can amend Title VII to give the EEOC the same enforcement powers as the OCR and use a similar strategy to combat workplace sexual harassment proactively. Lastly, Part VI will conclude why Congress could, despite limitations, garner bipartisan support in passing such an amendment.

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be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

[25] *See infra* Part II.

[26] Eric E. Petry, *Master of Its Own Case: EEOC Investigations After Issuing A Right-to-Sue Notice*, 85 U. CHI. L. REV. 1227, 1232 (2018) ("The new agency was tasked with addressing employment discrimination on the basis of race, color, national origin, sex, or religion.").

[27] *See infra* Part III.D.

I. CONGRESS'S VISION OF THE EEOC PRIOR TO TITLE VII'S ENACTMENT

Proponents of Title VII proposed in the original bill that the EEOC should have a war chest of enforcement capabilities for private employers.[28] This war chest was to include the authority to (1) promulgate legally binding substantive rules, (2) receive and investigate allegations of employment discrimination, (3) prosecute and adjudicate discrimination claims, and (4) file cease-and-desist orders to compel employers to reform and end their discriminatory practices.[29] However, the final version of the act only allowed the EEOC to pass procedural regulations,[30] investigate and conciliate discrimination claims with private employers, and issue a right-to-sue letter to the complainant.[31] The final version passed severely curtailed the EEOC's enforcement capabilities.[32] Limitations were necessary as a compromise to pass the bill, which required the focus to be more on investigations and less on adjudication and on a desire for informal conciliation rather than strong enforcement.[33]

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[28] *See* Michael Z. Green, *Proposing A New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 320 (2001).

[29] *Id.*

[30] *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource (Procedural regulations govern the process by which Title VII complaints are pursued. Unlike substantive regulations, procedural regulations have no bearing on what employers must do to satisfy Title VII and avoid liability.).

[31] Green, *supra* note 28, at 310 ("So the initial compromise that stripped down the EEOC to an agency which merely receives charges, investigates them and attempts to conciliate them has limited any efforts to strengthen the EEOC's enforcement impact."); *see also id.* at 324–25 (Originally the EEOC could issue a right to sue or recommend the case to the Department of Justice. The EEOC had no right to sue on behalf of the plaintiff until after an amendment in 1972.).

[32] *Id.* at 310, 322.

[33] *Id.*

A. SUBSTANTIVE RULEMAKING AUTHORITY

The original Title VII bill afforded the EEOC the power to pass "suitable regulations" for the enforcement of Title VII.[34] In other words, the EEOC could pass substantive regulations that employers would be legally required to comply with to satisfy Title VII's anti-discrimination mandate.[35] Though the rulemaking authority of the administrative state is now a contentious topic, it was uncontroversial in the debate leading up to Title VII's passage.[36] Opponents of substantive rulemaking powers did not oppose the authority outright; instead, they thought it was unnecessary.[37] The opponents considered the power analogous to that of the National Labor Relations Board ("NLRB"), a federal agency focused on employment, which rarely used its rulemaking authority.[38]

Two days before Title VII passed in the House, Representative Emmanuel Cellar replaced "*suitable* regulations" in the bill with "*procedural* regulations."[39] The amendment was shadowed by seventeen other amendments and adopted by voice vote without debate.[40] At no point did a

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[34] H.R. 7152, 88th Cong. § 713(a) (1964) ("Giving the EEOC power "to issue, amend, or rescind suitable regulations.").

[35] Federal agencies with substantive rulemaking authority can pass substantive rules that interpret the federal law they are charged with enforcing. After going through a public comment procedure (known as notice and comment) required by the Administrative Procedure Act, federal agencies can publish regulations that have the force of law. These regulations are afforded significant deference by the judiciary. *See* Jonathan M. Gaffney, CONG. RSCH. SERV. LEGAL SIDEBAR, LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 4 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10558.

[36] White, *supra* note 13, at 59–61.

[37] *Id*.

[38] *Id*. ("Throughout its existence, the NLRB has exercised its broad policymaking powers through adjudication rather than substantive rulemaking, using particular cases to develop and announce the policies it will follow in enforcing the NLRA.").

[39] *Id.* at 60.

[40] *Id*.

single congressman argue that Title VII rulemaking authority should be procedural rather than substantive.[41] As a result of the change, the EEOC could only pass legally binding rules concerning the process by which private parties pursue Title VII complaints.[42]

Shortly after its formation, the EEOC proved to be weak. As early as 1966, a task force set out to determine means of strengthening the EEOC's enforcement capacity.[43] The U.S. Attorney General considered whether the EEOC should be given substantive rulemaking authority through an amendment; however, lawyers within the task force convinced him this was unnecessary.[44] They advised that, like the Federal Trade Commission and other federal agencies, courts would find the EEOC had "presumed substantive authority" even without an express provision within its enabling acts.[45] For this reason, Congress did not address the question of substantive rulemaking authority when it amended Title VII, ultimately leading to the passage of the Equal Opportunity and Employment Act of 1972.[46] This flawed assumption denied the agency an essential enforcement power afforded to nearly every other federal agency.[47]

B. CEASE AND DESIST ORDERS

Rather than formally include substantive rulemaking authority, the task force favored an amendment allowing the EEOC a cease-and-desist power.[48] Congress heavily debated this issue during the original Title VII bill and again with the

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[41] *Id.* at 60–61.

[42] *Id*.

[43] Green, *supra* note 28, at 322–23.

[44] *Id*.

[45] Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 5 (1999) (discussing how "the Justice Department felt that 'the federal courts were likely to defer to [the EEOC's] presumed substantive authority much as they had with . . . other established regulatory agencies' even absent formal substantive rulemaking authority.").

[46] *Id.* at 8.

[47] *See infra* Part IV.

[48] Bales, *supra* note 45, at 7.

1972 amendment.[49] The EEOC would be empowered to investigate workplaces, and if they discover a discriminatory practice, they could issue a cease-and-desist letter.[50]

Republican opponents were not concerned that the EEOC would be too powerful. Their concern was the EEOC being the prosecutor, judge, and jury over Title VII cases.[51] In light of this, the parties reached a compromise in which the EEOC retained investigative powers to determine whether a plaintiff had a right to sue.[52] Further, the amendment allowed the EEOC to sue on behalf of the plaintiff.[53] However, an EEOC finding of discrimination, or evidence supporting that finding, had no bearing on any subsequent legal proceeding.[54] District Courts would serve as the ultimate factfinders in Title VII cases, and parties would need to obtain admissible evidence through formal discovery methods after filing an action.[55]

C. ADJUDICATORY POWER

Many other federal agencies have adjudicatory power, which the original Title VII bill provided to the EEOC. For example, the NLRB[56] and the Security and Exchange Commission ("SEC")[57] can bring enforcement actions against

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[49] *Id*.

[50] *See, e.g.*, H.R. REP. NO. 92-238, at 58 (1971) ("Providing the EEOC with authority to cease and desist . . . would transform this agency into a quasi-judicial body very similar to the [NLRB].").

[51] White, *supra* note 13, at 64 (Republicans already viewed the EEOC as overly complainant-friendly).

[52] *Id.* at 59.

[53] *Id*.

[54] *Id*.

[55] 42 U.S.C. § 2000e-5(b) (2012); *see* White, *supra* note 13, at 59 (Federal law mandates by threat of fines that any evidence from an EEOC investigation cannot be disclosed publicly or in a subsequent legal proceeding.).

[56] *See* Bales, *supra* note 45, at 4.

[57] David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1164 (2016) ("[The SEC] has an essentially unfettered choice between taking its civil complaint to an Article III or agency judge. The agency route, moreover, offers most of the remedies that civil litigation offers the SEC. ALJs can censure, suspend, bar, or fine defendants.").

defendants presumed to have violated federal law. An administrative law judge ("ALJ") then hears these cases at an administrative hearing and can order civil sanctions, such as monetary penalties, if the ALJ finds a violation.[58] They are much more convenient than federal lawsuits, considering district courts have massive backlogs of cases related to all federal question claims.[59] In these cases, the agency is not bringing an action on behalf of a complainant; instead, it is bringing the action on its own against a violator.[60]

The EEOC modeled the NLRB in the original Title VII bill.[61] Proponents of Title VII wanted the EEOC to be able to adjudicate claims just as the NLRB handles violations of the National Labor Relations Act.[62] However, the hotly debated issue of "cease and desist powers" led to the ultimate forfeiture of any EEOC adjudicatory power within the 1972 amendment.[63] Without the ability to adjudicate claims, District Courts are the only federal authority that can determine whether a Title VII violation occurred. However, considering that the agency lacks substantive rulemaking authority, courts rarely defer to EEOC interpretations of Title VII set out in published non-binding guidance documents.[64] This results in federal judges lacking the expertise and insight into workplace discrimination that the EEOC has, and may lead to judges making up the law themselves.[65] When William Rehnquist was head of the Office of Legal Counsel, he recognized that "Title VII was such a

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[58] *Id.* at 1161 n.27, 1163-64 (These administrative hearings are quasi-judicial such that a federal law issue is not heard and decided by an Article III judge in a District Court but instead heard and decided by an ALJ in an administrative tribunal.).

[59] *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 4 (2009).

[60] *See* White, *supra* note 13, at 59.

[61] *Id.*

[62] *Id.*

[63] *Id*. at 65.

[64] *Id.* at 102 ("[The EEOC has] the inherent authority to interpret its enabling acts and . . . has been delegated interpretive authority under each statute. [T]he EEOC [can] issue[] its interpretation in an informal format, such as an interpretive guideline, opinion letter, commission decision, amicus brief, or policy guidance.").

[65] *See infra* Part II.A.

specialized field of law that its administration would be more just and efficient if handled by an agency with expertise, rather than 'having the law made piecemeal by hundreds of district judges.'"[66] The EEOC's expertise became functionally meaningless without substantive rulemaking authority and the ability to adjudicate cases.[67]

II. HISTORICAL LIMITS OF TITLE VII ENFORCEMENT

Many members of Congress and executive officials intended to strengthen Title VII at its inception and during the 1972 amendment.[68] However, the flawed assumptions discussed herein led to poor policymaking that severely limited the EEOC's enforcement capacity in practice. Without the ability to pass substantive rules or adjudicate claims, the EEOC relies on conciliation with employers and private litigation from or on behalf of plaintiffs.[69] This section analyzes why both are ineffective.

A. ADMINISTRATIVE PROCESS FOR COMMENCING A TITLE VII ACTION

A sexually harassed employee cannot simply consult with a plaintiff's attorney and file a Title VII complaint in federal court.[70] To bring a Title VII claim, an employee must proceed through an administrative obstacle course before having a right to sue. The first requirement for an employee is to file a complaint with the EEOC.[71] The EEOC then investigates the complaint to see if there is reasonable cause to believe the charge is true.[72]

If the agency finds reasonable cause, it must undergo an informal conciliation process before filing suit, which includes

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[66] White, *supra* note 13, at 64-65.
[67] *See infra* Part II.
[68] *See* Bales, *supra* note 45, at 5-10.
[69] Davis, *supra* note 17, at 1061.
[70] *See id.* at 1094.
[71] 42 U.S.C. § 2000e-5(b) (2012).
[72] *Id.*

conferencing with the parties and trying to settle.[73] Conciliation agreements can include monetary payment to the complainant and changes to company policies.[74] If the agency fails to conciliate the claim, the EEOC can proceed in two ways: (1) file a claim on behalf of the complainant; or (2) issue a right to sue letter, which gives the plaintiff ninety days to bring suit in federal court.[75]

The purpose of conciliation is to make the process of remedying discrimination more efficient by pursuing voluntary compliance from the employer rather than protracted and expensive litigation.[76] This is a flawed premise. This process is restrictive and inefficient because it places an administrative bulwark between an injured plaintiff and the justice system. This would be akin to requiring a traffic accident victim to go through an agency to screen their claim before pursuing litigation instead of having the right to hire an independent lawyer on contingency. Instead, Title VII complainants must rely on an overburdened federal agency to investigate the claim promptly.[77] Furthermore, conciliation agreements are not legally binding, unlike settlements born from lawsuits.[78] Thus, there is no mechanism to hold an employer accountable for not complying with a conciliation agreement.[79]

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[73] Davis, *supra* note 17, at 1094.
[74] *Id*. at 1095.
[75] *Id.*
[76] *Id*.
[77] *See* Maryam Jameel, *More and More Workplace Discrimination Cases are Being Closed Before They're Even Investigated,* VOX (June 14, 2019, 9:30 AM), https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination ("For years, Congress has chastised the agency that investigates workplace discrimination for its unwieldy backlog of unresolved cases while giving it little to no extra money to address the problem.").
[78] *See* Davis, *supra* note 17, at 1062, 1095 ("Once having negotiated a settlement, an employer may revert to complacency. For example, an employer, under the terms of a settlement agreement, may adopt strong anti-harassment policies, but once out of the EEOC's spotlight, it may be lax in enforcing them.").
[79] *Id.*

Title VII includes more than just sex-based discrimination claims, and there are too many complaints for the EEOC to timely investigate.[80] Furthermore, the focus on conciliation and litigation is remedial.[81] This only helps individual plaintiffs, assuming the plaintiff, or the EEOC on behalf of the plaintiff, prevails in court or an employer complies with a conciliation agreement.[82]

B. THE HURDLES OF A TITLE VII CLAIM

Supreme Court jurisprudence has made it extremely difficult for a plaintiff to succeed on a Title VII sexual harassment claim. A plaintiff must satisfy a high bar by proving he or she (1) was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; (3) the conduct was severe or pervasive; and (4) there is a basis for holding the employer liable for the harassment.[83] The Court has also made it very difficult to hold an employer liable even if a court finds the allegation of harassment severe enough to rise to a civil rights violation.[84] This section details the difficulties for plaintiffs in satisfying each element of a Title VII sexual harassment claim.

i. SEVERE OR PERVASIVE

The Supreme Court first recognized sexual harassment as employment discrimination under Title VII in *Meritor's Savings Bank, FSB v. Vinson*.[85] The Court identified two forms of actionable workplace sexual harassment: (1) quid pro quo sexual harassment; and (2) hostile environment sexual

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[80] Jameel, *supra* note 77.
[81] Davis, *supra* note 17, at 1095.
[82] *See id.*
[83] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *see also* Larsa Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations,* 55 WM. & MARY L. REV. 1961, 1966 (2014).
[84] Ramsini, *supra* note 83.
[85] Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

harassment.[86] Quid pro quo requires the harassment to relate to a tangible employment action, such as a manager firing or demoting an employee for not acquiescing to sexual demands or offering to promote an employee in exchange for a sexual favor.[87] A hostile environment involves continual subjection to sexually demeaning conduct, which can include derogatory sexual comments, unwanted touching, and many other types of behavior of a sexual nature.[88]

The Court required that conduct creating the alleged hostile environment be severe or pervasive.[89] Courts review whether a plaintiff was subjected to severe or pervasive sexual harassment under an objective standard,[90] which is a tremendous hurdle to overcome in hostile environment cases. For example, in *Drouilard v. Spring/United Management Company,* the plaintiff's coworker cornered her by her desk and asked her to massage his testicles after she gestured for him to get away.[91] On other occasions, the coworker called the plaintiff a "bitch" and regularly referred to female customers as "bitches."[92] The court found the "massage" insufficiently severe as a matter of law because it did not involve force or physical contact with the plaintiff.[93] Similarly, while the court recognized using the term "bitch" was distasteful, the use was not often enough to render the harassment pervasive.[94] These

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[86] Ramsini, *supra* note 83, at 1966-67.

[87] Jill Henken, *Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law,* 34 VILLANOVA L. REV. 1243, 1245 (1989).

[88] *Id.* at 1246.

[89] *Vinson*, 477 U.S. at 66-67.

[90] Katherine M. Cole, *She's Crazy (to Think We'll Believe Her): Credibility Discounting of Women with Mental Illness in the Era of #MeToo*, 22 GEO. J. GENDER & L. 173, 200 (2020) (citing Harris v. Forklift Sys., 510 U.S. 17, 21 (1993)) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

[91] Drouillard v. Sprint/United Mgmt. Co., 375 F. Supp. 3d 245, 251-52 (E.D.N.Y. 2019).

[92] *Id.* at 253.

[93] *Id.* at 265.

[94] *Id.*

facts are not unique to this case. Courts regularly dismiss repeated instances of clearly despicable and overtly sexual behavior as not severe or pervasive enough to make a claim out of fear that Title VII will mandate a "civility code" within offices.[95]

ii. UNWELCOME

A plaintiff must also show that the sexual conduct was unwelcome, which means the plaintiff must communicate in some way that they did not want the conduct.[96] This element is fraught not only because it opens the door for victim blaming, but also because it is challenging to prove in many cases. For example, in *Hocevar v. Purdue Frederick Co.*, the court did not find a hostile environment when managers regularly referred to women, including the plaintiff, as "bitches" and distributed pornographic material during meetings that the plaintiff attended, as well as at other times.[97] The court recognized that the gendered curse words demeaned women and could create a hostile environment.[98] Still, the court did not consider them unwelcome, considering the plaintiff had used the word "bitch" in the office herself.[99]

Furthermore, proving unwelcomeness is prejudicial because an employee may face or fear retaliation for openly protesting or rejecting the harassment. For example, in *Blake v. MJ Optical, Inc.*, the plaintiff was repeatedly sexually harassed

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[95] *See* Johnson-Luster v. Wormuth, No. 19-2235F5, 2022 WL 767837, at *11 (E.D. La. Mar. 14, 2022) (citing cases holding that "Title VII is not a 'general civility code' for the workplace" and noting that "a recurring point in Supreme Court opinions is that simple teasing, offhand comments, and isolated incidents (unless *extremely* serious) will not amount to discriminatory changes in the terms and conditions of employment.") (emphasis added).

[96] *See Vinson*, 477 U.S. at 58 ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary.").

[97] Hocevar v. Purdue Frederick Co., 223 F.3d 721, 729-31 (8th Cir. 2000) (Lay, J., dissenting).

[98] *Id.*

[99] *Id.*

by a supervisor who was the son of the business owner.[100] The supervisor groped her on several occasions, sometimes even multiple times a day.[101] In response, the plaintiff claimed she gave him dirty looks and asked why he touched her.[102] He also commented on her breasts by saying, "[Y]ou'd better watch those things because they're going to poke my eyes out," and he asked whether her nipples were "the size of nickels or quarters."[103] The plaintiff was visibly embarrassed and went home that day to buy a padded bra.[104]

Despite this evidence, the trial court held the plaintiff did not sufficiently prove the conduct was unwelcome because she did not make timely complaints.[105] On appeal, the circuit court affirmed the trial court, and they never gave credence to the plaintiff's argument that her employer, the harasser's mother, would not have done anything about the harassment.[106] Requiring victims to meet this high burden of proving unwelcomeness and, at the same time, risk retaliation is unacceptable. The law should instead hold employers accountable for failing to prevent sexual harassment.

iii. BASIS FOR EMPLOYER LIABILITY

Even when a plaintiff can meet the burden of proving hostile environment sexual harassment, pro-employer Supreme Court Title VII jurisprudence still presents employees with tremendous difficulty in holding employers liable. In the EEOC's initial guidance on sexual harassment under Title VII, the agency advised that employers should be held strictly liable

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[100] Blake v. MJ Optical, Inc., 870 F.3d 820, 823 (8th Cir. 2017).
[101] *Id.*
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*. at 828 (The Supreme Court denied writ. 138 S. Ct. 1442 (2018)).
[106] *Blake*, 870 F.3d at 824, 826-30 (The plaintiff shared that the harasser regularly became furious at her, causing her to shake and cry and be concerned that he might hit her. When reporting one incident to her boss, the harasser's mother, the plaintiff's employer, told her not to worry because her son "wouldn't do something like that.").

for any sexual harassment by its agents.[107] The EEOC broadly defined an agent as any employee with job-created power.[108] However, the Supreme Court rejected the EEOC's guidance and held that employers are only strictly liable for quid pro quo harassment from a supervisor.[109] The Court held that an employer would only be liable for co-worker (non-supervisor) harassment under a negligence standard.[110]

For supervisor hostile environment harassment, the Court provided employers with an affirmative defense that is easy to satisfy at the summary judgment stage in many cases.[111] The employer must demonstrate that (1) they exercised reasonable care to avoid harassment and eliminate it when it might occur; and (2) the complaining employee failed to act with "reasonable care" to take advantage of the employer's safeguards to prevent harm from occurring.[112] The first prong merely requires that the employer have a grievance procedure in place.[113] The second prong often defeats plaintiffs who fail to report harassment promptly due to fear of retaliation.[114] An important note is that the employer does not have to worry about putting on a defense until the plaintiff first proves an actionable hostile environment and sexual harassment. Thus, the *Ellerth and Faragher* defense creates an additional obstacle for a plaintiff in Title VII litigation.

Furthermore, the Court significantly reduced the liability net in *Vance v. Ball State University* when it held that an employee is not a supervisor unless he has the power to hire,

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[107] Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1320 (2014).

[108] *Id.*

[109] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[110] *Id.* (which would later also be stripped away. *See Blake*, 870 F.3d at 823.).

[111] *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08; Chamallas, *supra* note 107, at 1324 ("No vicarious liability for supervisor-created hostile environments if the employer can establish the affirmative defense, which employers are often able to do, even at the summary judgment stage.").

[112] *Id.*

[113] *See Ellerth*, 524 U.S. at 764.

[114] *See Farragher*, 524 U.S. at 807.

fire, promote, or demote an employee.[115] This narrow definition does not reflect workplace realities where managers possess other forms of authority, such as setting schedules or assigning tasks, regardless of whether the manager has employment status authority.[116]

The difficulty of prevailing and recovering on a sexual harassment claim significantly disincentivizes employees from bringing claims. Finding an attorney willing to take the case on a contingency fee is difficult for those willing to bring a claim who cannot afford a lawyer. Even then, the lawyer may not take the case unless the sexual harassment is severe and there are "perfect facts" to ensure a strong chance of success.

Overall, private litigation has not been enough to deter sexual harassment. The elements of a Title VII hostile environment claim are challenging to prove, and liability is difficult to secure against an employer. Additionally, even when a plaintiff prevails, this merely remedies one instance of discrimination in one workplace. Only vigorous administrative enforcement — not litigation — can enable widespread change. Unfortunately, administrative enforcement of Title VII has also proven insufficient.

C. LIMITED RULEMAKING AUTHORITY AND ENFORCEMENT

Rather than litigation, a more proactive approach would be for the EEOC to require all companies to institute effective preventative measures to reduce sexual harassment. However, the EEOC lacks the authority to compel this despite its grant of substantive rulemaking authority under the Age

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[115] Vance v. Ball State Univ., 570 U.S. 421, 423 (2013).

[116] *Id.* at 2460 (Ginsberg, J., dissenting). Justice Ginsberg criticized the narrow definition of supervisor and cited cases where the harassing employee was able to "adversely affect the plaintiff's working conditions or employment prospects, by, for example, denying the plaintiff overtime, threatening negative performance evaluations, meting out harsh job assignments, or controlling work schedules to prevent plaintiffs from taking desired days off." All of these are forms of "job created power." Chamallas, *supra* note 107, at 1327-28.

Discrimination Act and the Americans with Disabilities Act.[117] Thus, even if the EEOC could develop the most effective system possible for preventing and redressing sexual harassment within workplaces, it would not be able to require employers to conform to it under Title VII. As a result, businesses perform the minimum requirements to avoid liability, and when they do not, they rarely face legal consequences due to the difficulties with Title VII litigation.

Federal agencies with substantive rulemaking power possess the authority to interpret federal laws. They are responsible for enforcing and passing legally binding regulations designed to carry out the mandates of those laws.[118] For example, the Environmental Protection Agency has a massive regulatory scheme based on its interpretation of various environmental laws. Courts defer to agency regulations so long as the agency bases them on a reasonable interpretation of the law — a low bar to satisfy.[119] This deference gives enormous power to federal agencies to mandate policies and procedures that entities must obey to comply with the related law and avoid legal consequences.

Title VII grants the EEOC procedural rulemaking authority (i.e., the ability to pass legislative regulations governing the process by which complaints are pursued). Even without substantive rulemaking authority, the EEOC can pass sub-regulatory guidance documents that advise, rather than legally determine, the contours of actionable sexual harassment or what employers require to remedy a hostile environment and avoid liability.[120] The problem is that courts (and workplaces) are reluctant to defer to these guidance

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[117] *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource.

[118] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).

[119] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[120] *See* EEOC, *supra note* 117.

documents,[121] as evidenced by the Court's rejection of EEOC guidance on strict liability for sexual harassment and the definition of a supervisor.[122] Courts afford guidance documents a lower level of deference, requiring the agency's interpretation to be "persuasive," however, the Court has rarely found EEOC interpretations to satisfy this threshold.[123]

The EEOC's enforcement system is demonstrably too weak. It has no adjudicatory power, substantive rulemaking authority, or ability to commence enforcement actions independently, even though that is what its proponents in Congress intended.[124] Enforcement relies on informal conciliation agreements and complex Title VII litigation. As a result, the EEOC does not have an effective means of enforcing Title VII to create widespread change. It can only investigate individual offices and sue in a few cases[125] or pass guidance documents on Title VII sexual harassment that are afforded little to no deference by the judiciary.[126]

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[121] *See* Theodore Warren, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC A Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1542 (1999) (discussing how EEOC interpretations of Title VII have rarely been given deference by the Court).

[122] *See supra* notes 109, 115, and accompanying text. The Supreme Court explicitly advised courts to give little deference to EEOC interpretations of Title VII considering Congress did not afford the agency substantive rulemaking authority. *See also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (Recently, in contrast with prior decisions, the Court has refused to even discuss its rationale when rejecting a position taken by the EEOC in sub-regulatory documents.); Eric Dreiband Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 93 A.B.A. J. LAB. EMP. L. 102 (2016).

[123] Melissa Hart, *Skepticism and the EEOC*, 74 FORD. L. REV. 1937, 1948 (2006).

[124] *See supra* Part I.

[125] Between 2015 and 2020, the EEOC filed an average of eighty-two Title VII lawsuits per year (not exclusively sex discrimination charges). During the same period, it received an average of 80,000 Title VII charges per year. EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2021* (2022). https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2020.

[126] *See* Hart, *supra* note 123.

III. THE OBAMA ADMINISTRATION AND TITLE IX

In 2011, the Department of Education and its OCR faced a similar predicament, finding that past administrations' enforcement of Title IX was insufficient to mitigate the widespread occurrence of sexual violence within universities. The OCR during Obama's administration effected widespread reform on college campuses through its use of Title IX. It revolutionized the way schools investigate and resolve sexual assault and harassment claims through changes in how it enforces Title IX's prohibition against sex-based discrimination in education.

Title IX is practically a result of Title VII. Title VII prohibits discrimination on the basis of sex (among other protected classes) in employment. Title IX prohibits discrimination based on sex in education. Moreover, enforcement of Title IX is very similar to Title VII. Title IX vests the agency, here the Department of Education through the OCR, with the authority to investigate complaints of sexual misconduct and reach resolution agreements with universities. It also allows a private right of action for students to sue their universities for law violations.[127]

Though the enforcement roles are similar, the Obama OCR used a more effective strategy than the EEOC. Unlike prior administrations, it used its administrative enforcement powers to enforce Title IX in a way that effected widespread change on college campuses rather than narrowly seeking to redress individual claims through litigation. The Assistant Secretary of the OCR asserted that Title IX could "change the culture" on college campuses and "cure the epidemic of sexual violence."[128]

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[127] Letter from Russlynn Ali Assistant Sec. for Civ. Rts. to Colleague (Apr. 4, 2011) 10, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (disclaimer: this document has been formally rescinded by the Department and remains available on the web for historical purposes only) (hereinafter cited as "DCL").

[128] Kristen Lombardi, *Education Department Touts Settlement as "Model" for Campus Sex Assault Policies,* CTR. PUBLIC INTEGRITY (Dec. 8, 2010),

The OCR used four main tactics to enable colleges to take necessary steps to reduce sexual violence on their campuses. First, it passed sub-regulatory rules in the "Dear Colleague Letter" ("DCL"), which addressed how colleges must respond to and prevent sexual misconduct.[129] Second, it made public its investigations of universities and its findings to pressure colleges subject to Title IX to conform to the procedures and standards in the sub-regulatory guidance document. Third, it used the threat of enforcement actions to pressure schools to comply with conciliation agreements signed after investigations to require colleges to conform to the DCL, which lacked legally binding mandates.

The EEOC can emulate OCR's enforcement approach to combat workplace sexual harassment nationally. However, the Department of Education has an enforcement power that the EEOC lacks: It can strip a school of its federal funding if it fails to comply with Title IX after an investigation and conciliation agreement.[130] Revoking funding is a significant bargaining chip not afforded to the EEOC.[131] Still, as discussed in Part III, compelling workplaces to change their policies and procedures concerning sexual harassment is unnecessary if the EEOC is given other enforcement capabilities that OCR currently maintains. This section will analyze how the OCR used its Title VII enforcement role to make universities nationwide take sexual assault complaints seriously and reform their sexual assault policies. The first step was passing a comprehensive guidance document advising colleges on how to prevent and

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https://publicintegrity.org/education/education-department-touts-settlement-as-model-for-campus-sex-assault-policies/.

[129] DCL, *supra* note 127.

[130] Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX*, AAUP (June 2016), https://www.aaup.org/sites/default/files/TitleIXreport_0.pdf.

[131] *Government Funding for Universities*, IBISWORLD (July 13, 2023), https://www.ibisworld.com/us/bed/government-funding-for-universities/4073/#:~:text=Federal%2C%20state%20and%20local%20grants,postsecondary%20education%20is%20not%20included. (Nearly every university is federally funded; therefore, Title IX is binding on every such university. Very few private workplaces are federally funded).

redress incidences of rape on college campuses to satisfy Title IX.

A. THE DEAR COLLEAGUE LETTER

In 2011, the OCR sent a "Dear Colleague Letter" to 4,600 colleges and universities across the country, clarifying their Title IX obligations concerning student-filed complaints of sexual misconduct.[132] It emphasized that the letter was a "significant guidance document" that did not "add requirements to applicable law, but provide[d] information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations."[133] Specifically, the document provided the OCR's interpretation and standards for determining whether a school violated Title IX, like how the EEOC might refer to its interpretive documents in an investigation to determine if there is reasonable cause that a Title VII violation occurred.[134] Though the document expressed that it was not introducing new requirements beyond applicable law, it used mandatory language such as "shall" and "required" for provisions not

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[132] Emily Yoffe, *Joe Biden Created the Culture He is a Target of*, POLITICO (Apr. 3, 2019), https://www.politico.com/magazine/story/2019/04/03/joe-biden-college-campus-sexual-assault-226481/

[133] *See* DCL, *supra* note 127, at 1 n.1

[134] For example, the EEOC issued a Title VII guidance document in 2012 that advised employers to use a multi-factor screening system when making employment decisions for an applicant with a criminal record known to the employer. Though this is not required by law, the EEOC insisted that it might be required to avoid a finding of reasonable cause of a Title VII violation should a denied applicant bring a Title VII claim based on these facts. The 5th Circuit held this was impermissible because the EEOC does not have substantive rulemaking authority. It can not find violations based on its own interpretations of the law unless it is a federal employer. For private employers or state employers, the EEOC must conform to applicable case law in determining whether a Title VII violation occurred. *See* Texas v. Equal Emp. Opportunity Comm'n, 933 F.3d 433, 446-48 (5th Cir. 2019).

previously recognized as required under Title IX.[135] The document required specific actions by the schools and recommended others as best practices to avoid violating Title IX.

To ensure compliance with Title IX, the DCL required that colleges investigate and adjudicate every report of sexual assault and harassment, use a preponderance of evidence standard within adjudicatory proceedings, and set an expectation that investigations should be concluded within sixty days to remedy the discrimination.[136] The document ended with a section recommending schools use prevention strategies to comply with Title IX. It recommended universities implement (1) sexual misconduct education programs for new students; (2) training programs for faculty, staff, and other employees, including student resident advisors; and (3) education and training programs for student athletes and coaches.[137]

Though the document claimed to provide "guidance" to universities on how to comply with Title IX, it effectively required them to comply with the provisions to avoid violations should there be an investigation.[138] Federal agencies may set narrower requirements than necessary to give rise to liability in a private enforcement context.[139]

B. PUBLIC DISCLOSURE OF INVESTIGATIONS AND ENFORCEABLE CONCILIATION AGREEMENTS

[135] *See* DCL, *supra* note 127.
[136] *See id.* at 4, 10, 12.
[137] *Id.* at 14.
[138] *Id.* at 2.
[139] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998). For example, Title IX regulations could require that schools adopt and publish grievance procedures even if failure to do so would not give rise to liability in a Title IX lawsuit. The ability to pass regulations narrower than what is required by law is only afforded to agencies with enforcement action and substantive rulemaking powers. *See id.* The EEOC has neither of these powers. *See supra* Part I.

The OCR pressured universities into compliance by disclosing the investigations and findings to the public.[140] Additionally, it pressured schools into complying with conciliation agreements by threatening to strip their funding if they failed to do so.[141] The OCR intended for other universities to use these publicized agreements as models to reform their sexual assault policies and procedures and avoid the same consequences.[142]

i. PUBLIC DISCLOSURES

Before 2011, the OCR rarely publicly disclosed investigations before completing them.[143] The OCR during Obama's administration did the reverse.[144] Even before commencing the investigations, the OCR publicly announced the names of its targets.[145] In 2014, the OCR released the names of fifty-five colleges it would investigate in the coming year.[146] By the summer of 2017, the OCR released the names of 396 universities it would or was already investigating. At the time, they had only resolved sixty-two investigations.[147]

Additionally, the OCR's investigations were far longer than prior administrations, with the average time of an investigation extending from 379 days in 2009 to 1,469 days in 2014.[148] As a result, the pressure was on schools to sign

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[140] R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION 151 (2018).

[141] *Id.*

[142] *See* Allie Grasgreen, *Holding Colleges Responsible*, INSIDE HIGHER ED (JUNE 11, 2020), https://www.insidehighered.com/news/2013/06/11/student-activists-spur-sexual-assault-complaints-some-say-education-department.

[143] MELNICK, *supra* note 140, at 151.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Haley Munguia, *It Takes Years to Investigate a Campus Sexual Violence Complaint*, FIVETHIRTYEIGHT, (May 6, 2015), https://fivethirtyeight.com/features/it-takes-years-to-investigate-a-campus-sexual-violence-complaint/.

conciliation agreements much more quickly to avoid the embarrassment and expenses of lengthy, drawn-out investigations.[149] Many schools not under investigation reformed their Title IX procedures and policies to satisfy the agency and preemptively mitigate enforcement pressure should they end up in the OCR's crosshairs.[150]

ii. ENFORCEABLE CONCILIATION AGREEMENTS

Though the DCL was facially a "significant guidance document," the letter assured its audience that its provisions were enforceable with legal action: "When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."[151]

Even though the Department of Education never withdrew funding from a school, investigated colleges were more than willing to comply with the agency's recommendations out of fear they would lose funding.[152] The OCR can initiate administrative proceedings before an ALJ to determine if they violated Title IX. If the ALJ finds a violation, she can order that the school lose its funding.[153] Unlike the EEOC, the OCR did not need to rely on litigation to get schools to comply with the DCL and conciliation agreements because the threat of an administrative hearing was enough to pressure schools into compliance.[154]

Notably, the enforcement of these agreements drew considerable controversy, considering the OCR did not undergo the APA-required notice-and-comment procedure

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[149] *See* MELNICK, *supra* note 140, at 151.
[150] *See id.*
[151] *See* DCL, *supra* note 127, at 1 n.1, 16.
[152] MELNICK, *supra* note 140, at 151.
[153] *See* R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFAIRS (Summer 2018) ("Yet not once has the OCR ever cut off funds to enforce Title IX: Exercising this "nuclear option" is simply too administratively cumbersome and politically perilous.").
[154] *Id.*

before requiring schools to conform to the DCL.[155] In effect, the agency was treating provisions of a guidance document as substantive regulations without going through the process necessary for regulations to be enforceable as law.[156] If the OCR passed the DCL as substantive regulations under APA requirements, it would have been entirely permissible to enforce it as it did, and the EEOC would be able to implement its regulations the same way if given the same enforcement powers.[157]

iii. THE OCR'S ACHIEVEMENTS WITH TITLE IX

Unlike the prior administrations that relied on private enforcement, the Department achieved considerable success by utilizing a heavy-handed enforcement strategy.[158] Universities nationwide revamped their Title IX grievance procedures in response to the DCL.[159]

Additionally, universities spent an estimated $100 million between 2011-2015 to bolster their Title IX compliance.[160] Plenty of the money went to expanding resources for schools' Title IX offices.[161] To ensure full compliance with the demands of the DCL, Harvard hired more than fifty Title IX coordinators, and Yale hired thirty, even though the regulations only require a single coordinator.[162]

The OCR's aggressive enforcement not only raised awareness of the issue within university departments, but it

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[155] Ari Cohn, *Did the Office for Civil Rights' April 4 'Dear Colleague' Letter Violate the Law*, FIRE (Sept. 12, 2011), https://www.thefire.org/news/did-office-civil-rights-april-4-dear-colleague-letter-violate-law.

[156] *Id.*

[157] *Id.* Hypothetically, if the EEOC had substantive rulemaking authority and enforcement powers, it could bring enforcement actions against employers who do not conform to regulations addressing required sexual assault policies within workplaces. *See id.*

[158] Melnick, *supra* note 153.

[159] MELNICK, *supra* note 140, at 151.

[160] Melnick, *supra* note 153.

[161] *Id.*

[162] *Id.* (noting that "[a]t the University of California, Berkeley, Title IX spending rose by over $2 million between 2013 and 2016.").

also garnered national attention and support from state officials. In 2014, California adopted an affirmative consent standard for all state-supported colleges and universities.[163] Inspired by the DCL, the law also required that schools adopt the complainant-friendly preponderance of evidence standard when adjudicating sexual assault claims as part of their grievance procedures.[164] New York Governor Andrew Cuomo adopted a similar law in the same year for all sixty-four colleges within the State University of New York system.[165]

Overall, the OCR successfully enforces Title IX by using its regulations to compel universities to do the leg work rather than relying on the court system. The OCR recognized that sexual assault on campuses is an institutional problem rather than something unique to individual colleges. Thus, passing regulations that apply universally to all educational institutions and vigorously enforcing them proved successful in bringing about widespread proactive change on campuses.

IV. LIMITATIONS OF THE OCR MODEL FOR THE EEOC

The EEOC and the OCR have similar enforcement roles: informal rulemaking, investigating, conciliating, and suing in federal court, if necessary.[166] Therefore, the EEOC could use a similar system for enforcing Title VII to address sexual harassment in workplaces nationwide. However, there are differences between the agencies and the contexts in which they operate that create difficulties in adopting the OCR Title IX enforcement model.

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[163] *See* Steve Nelson, *California 'Yes Means Yes' Law Worries Skeptics,* U.S. NEWS (Sept. 29, 2014), https://www.usnews.com/news/articles/2014/09/29/california-yes-means-yes-law-worries-skeptics.

[164] *See id.*

[165] *See Uniform Sexual Assault Policy Announced for All SUNY Campuses,* SUNY NEW PALTZ (Dec. 2, 2014), https://sites.newpaltz.edu/news/2014/12/governor-cuomo-announces-suny-adopts-a-comprehensive-system-wide-uniform-sexual-assault-policy-for-all-64-campuses/.

[166] *See supra* Part I; *see also* DCL, *supra* note 127, at 16.

A. PASSING A COMPREHENSIVE REGULATORY GUIDANCE DOCUMENT

Like the OCR, the EEOC can use its experience and expertise to pass a guidance document for how workplaces must reform their policies to better address and prevent sexual harassment. After investigating individual companies found to violate Title VII, the EEOC can then require them to adopt the document's provisions within a conciliation agreement. However, the EEOC does not have a means of enforcing the guidance document or a conciliation agreement.[167] The document would be non-binding, considering the EEOC has no substantive rulemaking authority. Furthermore, the EEOC cannot bring enforcement actions against employers that violate Title VII or a conciliation agreement resulting from an investigation because it only has right-to-sue powers.[168]

The Department of Education can act to strip a school of its federal funding by referring the case to an administrative law judge to determine if a violation occurred.[169] Though the OCR has never done so, the threat of it has been enough to compel compliance.[170] The EEOC cannot bring an enforcement action with monetary penalties against an employer who fails to abide by regulations or a conciliation agreement born out of a Title VII investigation. It can only sue on behalf of a plaintiff in federal court,[171] and proving the elements of a Title VII claim is daunting. Without the ability to bring enforcement actions backed with monetary penalties, the EEOC cannot do anything to require employers to take proactive steps to prevent sexual harassment.

B. QUASI-TRIBUNAL MEANS OF RESOLVING CASES

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[167] *See supra* Part I.
[168] White, *supra* note 13, at 59.
[169] Melnick, *supra* note 153.
[170] *Id.*
[171] White, *supra* note 13, at 59.

As discussed in Part I, many agencies do not need to rely on private litigation in federal court to enforce federal laws.[172] Federal agencies like the DOE/OCR,[173] the NLRB,[174] and the SEC[175] can initiate enforcement actions against defendants and have them heard before an ALJ. In contrast, the EEOC allows a plaintiff to sue, or it may sue on her behalf, but as discussed in Part II, this is incredibly ineffective for effecting widespread change.[176]

The OCR used the threat of an enforcement action before an ALJ to urge schools to comply with the DCL.[177] Even though this "nuclear option" has never been used, schools were still quick to comply with the DCL and post-investigation resolution agreements.[178] These proceedings are far more frightening than a private Title IX lawsuit. The high bar for recovery in Title IX and Title VII cases applies to claims in federal court where a plaintiff is seeking damages, or the agency is seeking damages on behalf of the plaintiff.[179] In an enforcement action before an ALJ, the standards for a finding of violation are set by federal law or regulations,[180] for example, the provisions of the DCL.

V. OCR'S MODEL OF ENFORCEMENT AS A GUIDE FOR CONGRESS TO STRENGTHEN THE EEOC

Concerning sexual harassment, the EEOC and the OCR have the same roles but in different contexts: rooting out sex discrimination in employment versus education. Furthermore,

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172 *See supra* Part I (discussing the enforcement capacity of the NLRB and SEC).
173 *See* DCL, *supra* note 127, at 16.
174 *See* Bales, *supra* note 45, at 4.
175 *See* Zaring, *supra* note 57, at 1164.
176 *See supra* Part II.
177 *See* Melnick, *supra* note 153.
178 *See id.*
179 *See* Davis, *supra* note 17, at 1097 (discussing how enforcement actions brought by an agency before an ALJ, independent of a plaintiff, are not required to prove the elements required in a private damages case).
180 *See id.*

both agencies investigate entities subject to the laws and reach compliance agreements when they find potential or actual violations. Despite the similarities in purpose and enforcement methods, the OCR has far more power and freedom in choosing how it enforces the law. Federal law limits how the EEOC can pursue discrimination charges such that its enforcement capacity is significantly weaker than the OCR's. For example, the EEOC cannot publicly disclose when it levies a charge against an employer.[181] On the other hand, the OCR made every detail about its investigations available to the public.[182]

Given the scope and breadth of employment discrimination, Congress needs to amend federal law to give EEOC more flexibility in enforcing the law. Considering there are significantly more workers than students, and Title VII protects multiple forms of discrimination instead of solely sex-based discrimination, Congress should grant the EEOC the same enforcement capabilities as OCR, if not more.

This section analyzes how Congress can strengthen the EEOC to use the same successful enforcement strategy employed by OCR to combat workplace sexual harassment by compelling workplaces to take proactive measures to prevent and address it. This section will identify the various tactics used by the OCR and offer a proposal for how Congress can strengthen the EEOC so that it can utilize the same tactics.

A. PASSING ENFORCEABLE MANDATES

The DCL was the foundation of the OCR's work in reforming campus Title IX policies nationwide. The OCR used its expertise and informed judgment around the issue of sexual violence on campuses to develop policies and procedures suited for resolving sexual assault incidents on college campuses than those already utilized. The OCR's enforcement of the DCL through resolution agreements effectively persuaded universities nationwide to reform their procedures following the DCL. Though the requirements provided in the DCL were not legally binding on schools because they did not go through the notice-and-comment procedure, the OCR could

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[181] *See* EEOC, *supra* note 30.

[182] *See* Melnick, *supra* note 153.

enforce them using the threat of withdrawal of funds or litigation.[183]

Congress should amend Title VII to give the EEOC substantive rulemaking authority, which it has already done for the Age Discrimination Act and the Americans with Disabilities Act.[184] The amendment would enable the agency to require employers to implement proactive sexual harassment policies aimed at reducing workplace sexual harassment rather than avoiding liability. However, the requirement should be limited to large employers. Limiting the amendment to large employers would make the grant of substantive rulemaking to the EEOC more politically palatable,[185] and large businesses are more likely to have the resources to comply with EEOC sexual harassment mandates.

The benefit of proactive measures required under federal regulations is their preventative approach. If Activision and Google had such measures in place due to federal requirements, the companies could have saved a fortune in legal expenses, and countless employees could have avoided workplace sexual harassment.

B. PUBLIC DISCLOSURES

The OCR pressured schools nationwide to comply with the DCL by pressuring them with long and expensive public investigations.[186] For example, any employee of the EEOC cannot publicly disclose any information arising from a Title VII investigation.[187] Furthermore, the EEOC cannot disclose information about any charges filed against an employer without consent.[188] Before making a public charge, one must file a lawsuit. This limitation significantly restricts the EEOC's

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[183] *See supra* Part III.B.

[184] *See supra* note 117.

[185] *See infra* Part V (Congress recently passed bi-partisan legislation banning enforcement arbitration agreements for victims of workplace sexual harassment, so legislation strengthening the EEOC might be met without partisan resistance).

[186] *See supra* Part II.B.

[187] *See* 42 U.S.C. § 2000e-5(b) (2012).

[188] *Id.*

ability to use the OCR's method of public disclosure of investigative findings to hold workplaces accountable for discriminatory practices without litigation.[189]

Congress should allow public access to such investigations, findings, and conciliation agreements for large companies so long as the plaintiff agrees. In recent years, many large companies overhauled their sexual harassment procedures *after* the conclusion of lengthy lawsuits.[190] Ideally, the EEOC should publicize the findings of investigations of companies with widespread sexual harassment to pressure them to sign a conciliation agreement. Like OCR-published resolution agreements with individual colleges,[191] companies can use published conciliation agreements as blueprints to reform their policies and procedures to satisfy EEOC expectations and avoid enforcement actions. The economic consequences of bad publicity can provide an incentive for large companies to not only adopt EEOC policies and procedures but also to abide by them.

C. ENFORCEMENT ACTIONS IN ADMINISTRATIVE HEARINGS

Like the OCR, the SEC, and the NLRB, Congress should allow the EEOC to bring enforcement actions against large employers alleged to violate Title VII or a conciliation agreement before an ALJ. These hearings are a far more convenient and economical means of enforcing federal law than crowding the federal court system with complex, expensive, and protracted Title VII litigation brought on behalf of a plaintiff. Furthermore, these enforcement actions would be less burdensome to win compared to private litigation cases. In an ordinary Title VII case before a District Court, the EEOC or a plaintiff would need to prevail on the burdensome hostile environment standard: harassment that is severe or pervasive,

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[189] *Id.*

[190] *See, e.g.*, Jennifer Elias, *Google's $310 Million Sexual Harassment Settlement Aims to Set New Industry Standards*, CNBC (Sept. 29, 2020), https://www.cnbc.com/2020/09/29/googles-310-million-sexual-misconduct-settlement-details.html (Google implemented 80 reforms to its sexual harassment policy after a $310 million settlement).

[191] *See supra* Part III.B.1.

unwelcome, and that there is a basis for employer liability. In an enforcement action, the EEOC would merely need to prove whichever basis of liability the regulations set.[192] Similar to how the OCR backed its enforcement proceedings with threats of withdrawn funding, the EEOC could support these enforcement proceedings with the threat of fines and public disclosures, just like the SEC.[193]

Congress should amend Title VII to provide EEOC with the same enforcement powers as the OCR. This would enable the EEOC to pass substantive regulations requiring large companies to institute proactive sexual harassment policies and procedures. Then, the EEOC could continue to investigate and conciliate claims, like the OCR did with individual colleges, and bring enforcement actions when a company does not comply with regulations or a conciliation agreement. There is no legitimate reason that the EEOC should not have the same enforcement powers to protect the rights of employees as the OCR for students, the NLRB for labor unions, and the SEC for investors. Additionally, the EEOC already has substantive rulemaking authority for age and disability discrimination,[194] and adjudicatory powers for discrimination charges for federal employers.[195] Thus, the EEOC should have the full array of enforcement powers afforded to other federal agencies and those already afforded to the EEOC for age and disability discrimination in employment.

Despite criticism, providing the EEOC with such powers would not grant sweeping regulatory authority. The

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[192] *See* Davis, *supra* note 17, at 1102 ("Because the EEOC, in enforcement proceedings, would not seek compensation for a victim, it would not have to prove any of the elements of an existing sexual harassment claim that touch on the issue of injury."). I suggest that the EEOC pass regulations for large businesses requiring specific procedures and policies the same way the OCR did for colleges. The EEOC could then bring enforcement actions before an ALJ to determine whether a business violated the regulations of the agreement.

[193] *See* Zaring, *supra* note 57.

[194] *See* EEOC, *supra* note 117.

[195] *See* Davis, *supra* note 17, at 1100-01 ("[The EEOC can] institute administrative enforcement proceedings *only* for complaints of federal employees.") (emphasis added).

power would be limited to sexual harassment regulations and on par with several other federal agencies, and it could be limited to large companies.

VI. CONCLUSION

Even though the EEOC's initial proponents in Congress sought for it to have the same enforcement powers as other government agencies like the NLRB and the SEC,[196] poor political compromise left it with a toothless mechanism for achieving Congress's lofty vision of eradicating employment discrimination.[197] As a result, the EEOC has been ineffective in tackling the epidemic of workplace sexual harassment.

During the Obama presidency, the OCR used a strong administrative enforcement strategy to combat a similar epidemic on college campuses. Like the EEOC, it investigated individual enterprises (colleges) and reached conciliation agreements. However, it used a guidance document to reform institutions, public disclosures of violations, and the threat of enforcement actions to make this mission successful in bringing about widespread changes across college campuses.[198] Though the EEOC and OCR have similar enforcement roles, the EEOC currently lacks the authority to pass substantive regulations, publicize investigations and findings, and bring enforcement actions.[199] Thus, it cannot utilize the same strategy.

Congress should amend Title VII to provide the EEOC the same enforcement powers as the OCR for enforcing workplace sexual harassment regulations. Ideally, the EEOC would have such enforcement powers for all workplace discrimination it is charged with eradicating. The best practice would be to start narrowly with sexual harassment, considering eradicating sexual harassment from the workforce is already a bipartisan issue. In February of 2022, Congress enacted a similar sexual harassment "carve-out" within the Federal Arbitration Act: The Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021. This Act passed with

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196 *See supra* Part I.C.

197 *See supra* Part I; White, *supra* note 13.

198 *See supra* Part III.

199 *See supra* Part IV.

bipartisan support to allow victims of workplace sexual harassment or assault to bring their claims to court regardless of an arbitration agreement.[200]

Though expanding the agency's power might pose as controversial as it was in the 1960s,[201] Congress should not be concerned with the amendment proposed in this Note, considering it will apply only to large companies with the means to institute more robust sexual harassment policies and procedures applicable only to sexual misconduct. Additionally, some expect the EEOC to prepare a new set of sexual harassment policies after Biden's nomination of a progressive commissioner to the EEOC in 2022.[202] This is riding on Congress's recent $15 million funding increase for fiscal 2022.[203]

In 2018, Masha Gessen published an article in the New Yorker noting how the #MeToo movement secured accountability against individuals — but not institutions — within one year after the #MeToo hashtag went viral on Twitter.[204] A few years later, there is a strong wave of political momentum — as evidenced by the 2022 FAA amendment — for Congress to give the EEOC the tools it needs to effect widespread institutional reform within large companies and eradicate workplace sexual harassment. An emboldened agency and a new set of comprehensive regulations could bring

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[200] *See* H.R. 4445, 117th Cong. (2022); Tom Spiggle, *Congress Passes New Law Ending Forced Arbitration for Sexual Harassment and Assault Claims*, FORBES (Feb. 16, 2022), https://www.forbes.com/sites/tomspiggle/2022/02/16/congress-passes-new-law-ending-forced-arbitration-for-sexual-harassment-and-assault-claims/?sh=2b31fe0a2289.

[201] *See supra* Part I (discussing Republican opposition to the EEOC having adjudicatory powers like the NLRB).

[202] J. Edward Monero, *EEOC Expected to Tackle Harassment, Pay with Majority Democrats*, BLOOMBERG LAW (April 6, 2022), https://news.bloomberglaw.com/daily-labor-report/eeoc-expected-to-tackle-harassment-pay-with-majority-democrats ("Employers are preparing for a wave of progressive regulatory activity from the U.S. Equal Employment Opportunity Commission, which is poised to have a Democratic majority by the end of the year.").

[203] *Id.*

[204] *Gessen*, supra note 11.

about a sea change in company cultures like the Dear Colleague Letter did for college campuses.