

Statement of Eric B. Meyer, Esquire, FisherBroyles, LLP

Chairman Kauffman, members of the House Labor and Industry Committee, thank you for offering me the opportunity to testify today.

My name is Eric Meyer. I am a partner with FisherBroyles, LLP, which is the largest cloud-based law firm in the world. I am a labor and employment attorney, generally representing management. I also publish a labor and employment law blog called The Employer Handbook (www.TheEmployerHandbook.com) and serve as a volunteer mediator with the U.S. Equal Employment Opportunity Commission (EEOC). Additionally, I am a frequent lecturer across the country on all things employment law, including sexual harassment.

Someone recently commented to me that I live and breathe employment law. I did not correct him.

I am honored to be here today to discuss current state and federal laws governing workplace harassment and sexual misconduct, related legal issues, and employer best practices.

Title VII of the Civil Rights Act of 1964 is the federal 'anti-harassment' law.¹ Title VII prohibits employment discrimination based on race, color, religion, national origin, and sex.

Title VII was the culmination of the growing civil rights movement in the 1960s. However, Title VII almost never came to fruition. Howard Smith of Virginia, the Democratic Chairman of the Rules Committee, added "sex" as a last-minute amendment to Title VII during Senate debate.² Mr. Smith planned his one-word amendment as a 'poison pill' for Title VII. However, his plan backfired. The Senate passed the bill, and President Lyndon Johnson signed Title VII into law.³

Still, Title VII's passage was met with a toxic mix of fear and crude humor. The New York Times Editorial Board worried about whether the Rockettes would have to allow male dancers.⁴ And when a reporter asked Franklin D. Roosevelt Jr., the Chairman of the U.S. Equal Employment Opportunity Commission (EEOC), "what about sex?" he replied, "Don't get me started. I'm all for it."⁵

Since then, we know Title VII to be one of the most important laws for the advancement of employee rights in the workplace. In 1969, Title VII was amended to cover pregnancy discrimination, as a subset of sex. In the years that followed, the Supreme Court has stamped its imprimatur on Title VII. The highest court in the land has outlawed sexual harassment,⁶ ruled

¹ 42 USC § 2000e, *et seq.*

² Louis Menand, The Sex Amendment: How Women Got In On The Civil Rights Act, *The New Yorker*, <https://www.newyorker.com/magazine/2014/07/21/sex-amendment> (last visited April 16, 2018).

³ *Id.*

⁴ Clay Risen, The Accidental Feminist, *Slate*, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.html (last visited April 16, 2018).

⁵ *Id.*

⁶ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

that sex-stereotyping is a form of sex discrimination,⁷ and, in an opinion authored by the late Justice Antonin Scalia, unanimously recognized that same-sex harassment violates Title VII.

For its part, after an inauspicious start, the EEOC has transformed itself into a Title VII trailblazer for American workers. In 2012, the EEOC concluded that transgender discrimination violates Title VII as a form of sex discrimination.⁸ In 2015, the EEOC determined that discrimination based on sexual orientation violates Title VII too.⁹

The following year, in 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace was formed.¹⁰ Its mission was to address the consistent problem of workplace harassment and to propose solutions to the problem. Consider that the EEOC receives tens of thousands of charges of workplace discrimination each year, while many other victims of workplace harassment suffer in silence. Although the vast majority of HR professionals report that their company has a sexual-harassment policy, almost one out of four non-management employees don't know whether this policy exists.¹¹ Worse yet, roughly three out of four individuals who experienced harassment do not complain to their employer.¹²

That brings us to 2018. There hasn't been a spike in sexual-harassment claims filed with the EEOC.¹³ However, headline-grabbing stories of business leaders behaving badly have helped to galvanize the '#MeToo movement.' And businesses are taking to heart recommendations of the EEOC Select Task Force for best practices that employers should implement to improve how they address workplace discrimination.

The Task Force identified leadership and accountability as two starting points. This holistic approach is 'top-down' and requires 'buy-in' at all levels. Companies must create systems to "foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted."¹⁴ 'Zero tolerance' is the buzzword. But, zero tolerance does not mean that every infraction of an anti-harassment policy results in a termination of employment. However, zero tolerance means no more free passes -- especially for the business leaders.

⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁸ *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

⁹ *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

¹⁰ EEOC Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/ (last visited February 9, 2018).

¹¹ Society for Human Resource Management, SHRM Research Finds Some Employees Unaware of Company Sexual Harassment Policies, <https://www.shrm.org/about-shrm/press-room/press-releases/pages/sexual-harassment-survey.aspx> (last visited April 16, 2018).

¹² EEOC Select Task Force on the Study of Harassment in the Workplace, https://www.eeoc.gov/eeoc/task_force/harassment/ (last visited February 9, 2018).

¹³ Vin Gurrieri, EEOC Acting Chair Expects New Harassment Guidance 'Soon', Law360, <https://www.law360.com/articles/1008734> (last visited April 16, 2018).

¹⁴ Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic Executive Summary & Recommendations, https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm (last visited February 9, 2018).

Additionally, companies must create an environment in which employees not only understand anti-harassment policy and procedure but are encouraged -- not chilled -- from complaining about workplace behavior that may violate the policy. Consequently, while retaliation remains the number one claim of employment discrimination filed with the EEOC,¹⁵ companies must reinforce the message that they will not tolerate reprisals against those who complain about harassment at work.

Thank you again, Chairman Kauffman and the members of the House Labor and Industry Committee, for offering me the opportunity to testify today. I am happy to answer any questions that you may have for me.

¹⁵ U.S. Equal Employment Opportunity Commission, Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited April 16, 2018).