

## SEX- AND GENDER-BASED HARASSMENT IN THE GAMING INDUSTRY

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“It is unrealistic and repressive to suggest that one should never use sex to sell, but, if one does, the organisation has a responsibility to ensure that staff are supported and protected against unacceptable behaviour from customers.”\*\*

### PART I: INTRODUCTION: HARASSMENT IN THE CASINOS

In early February 2018, Steve Wynn, the Las Vegas casino mogul and Chairman, CEO, and controlling shareholder of Wynn Resorts, resigned in response to allegations of years of sexual assault and harassment of Wynn employees<sup>1</sup> that were first reported by the *Wall Street Journal*.<sup>2</sup> The news, which

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\*\* David Gilbert, et al., *Sexual Harassment Issues in the Hospitality Industry*, 10 INTER. J. CONTEMP. HOSP. MGMT. 48, 52 (1998).

<sup>1</sup> Maggie Astor & Julie Creswell, *Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html>.

<sup>2</sup> Alexandra Berzon, et. al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018, 1:02 AM), <https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953>. Subsequently, Wynn sold all his shares of the company’s stock, worth \$12.1 million. See Richard N. Velotta, *Steve Wynn may be personally fined by Nevada gaming regulators*, LAS VEGAS REV.-J. (Jan. 29, 2019 7:14 PM), <https://www.reviewjournal.com/business/casinos-gaming/steve-wynn-may-be-personally-fined-by-nevada-gaming-regulators-1585199/>.

arose months after the #MeToo<sup>3</sup> and Time's Up<sup>4</sup> movements, rocked Las Vegas and the gaming world, even to the extent of raising questions concerning Wynn's continuing business interests outside of Las Vegas.<sup>5</sup>

Soon after Wynn's resignation, the Nevada Gaming Control Board ("GCB")<sup>6</sup> initiated an investigation into the Wynn matter.<sup>7</sup> On January 25, 2019, the GCB filed a complaint against Wynn Las Vegas, LLC, doing business as Wynn Resorts, and Wynn Resorts, Limited<sup>8</sup> and simultaneously entered into a stipulation with respondents, settling the matter.<sup>9</sup> The stipulation noted that Wynn Resorts had appointed a new Chief Executive Officer ("CEO"), three women to the Board of Directors, a female General Counsel, a female President of Wynn Las Vegas, and a female Senior Vice President of Human Resources—North America.<sup>10</sup> It also stated that Wynn Resorts had implemented a number of initiatives to improve workplace culture, including compliance and sexual harassment training, a Women's Leadership Council, and pay and promotion equity studies to measure pay equality among men and women.<sup>11</sup> Finally, it established six weeks of paid parental leave and launched training in diversity and implicit bias.<sup>12</sup>

Although Steve Wynn was not a respondent to the complaint, the stipulation and settlement between the GCB and the company left open the possibility that

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<sup>3</sup> Actor Alyssa Milano borrowed the term from an earlier group started by Tarana Burke and posted it online. See Emma Brockes, *Me Too founder Tarana Burke: 'You have to use your privilege to serve other people'*, THE GUARDIAN (Jan. 15, 2018, 12:57 AM), <http://perma.cc/2P3W-29PX>.

<sup>4</sup> Time's Up is a movement launched on January 1, 2018 to protest and work against sexual harassment. Chloe Melas, et al., *Voices behind Time's Up*, CNN, <https://www.cnn.com/interactive/2019/01/entertainment/times-up-movement-anniversary/index.html>. Time's Up funds the Time's Up Legal Defense Fund, which works for equality for women. *About TIME'S UP*, TIME'S UP, [https://www.timesupnow.com/about\\_times\\_up](https://www.timesupnow.com/about_times_up) (last visited Apr. 26, 2019).

<sup>5</sup> Velotta, *supra* note 2 (discussing a Boston casino that was in the works when Wynn's resignation took place that led to a Massachusetts inquiry into Wynn).

<sup>6</sup> GCB is authorized by Nevada law to ensure that licensees do not conduct gaming operations in an unsuitable manner. NEV. REV. STAT. § 463.1405(1) (2017); NEV. REV. STAT. § 463.1405(4) (2017).

<sup>7</sup> Megan Messerly, et al., *State gaming board opens probe into sexual misconduct allegations against Wynn*, NEV. INDEP. (Jan 30, 2018, 4:13 PM), <https://thenevada-independent.com/article/state-gaming-board-opens-probe-into-sexual-misconduct-allegations-against-wynn>.

<sup>8</sup> See generally Complaint, Nev. Gaming Control Bd. v. Wynn Las Vegas, No. 18–15, at 6–7 (Nev. Gaming Comm'n Jan. 25, 2019), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14275>.

<sup>9</sup> See generally Stipulation for Settlement and Order, Nev. Gaming Control Bd. v. Wynn Las Vegas, LLC., No. 18–15, (Nev. Gaming Comm'n Jan 25, 2019), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14277>.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.*

Steve Wynn, whose gaming licenses have been placed on hold by the GCB, will be personally fined by the Nevada Gaming Commission (“NGC”).<sup>13</sup> Moreover, in the stipulation, the respondents agreed to a fine against the company and left the amount of the fine against Wynn Resorts to be determined by the NGC.<sup>14</sup> On February 26, 2019, the NGC fined Wynn Resorts \$20 million for its failure to control Steve Wynn’s behaviors.<sup>15</sup>

Especially in the era of #MeToo, this response was necessary and salient. Given the sexualized setting of Las Vegas casinos, there is some question whether the Wynn allegations would have caused such a kerfuffle before #MeToo erupted. The facts alleged, however, were particularly serious and the victims numerous—forced sex with and impregnation of a nail salon employee,<sup>16</sup> a forced nonconsensual sexual relationship with a cocktail server,<sup>17</sup> harassment of employees who worked at the Spa at Wynn as they gave Steve Wynn massages,<sup>18</sup> harassment of flight attendants on the private jet used by Mr. Wynn and owned by a subsidiary of Wynn Resorts on numerous occasions,<sup>19</sup> and an employee who facilitated sexual relationships between cocktail servers and Mr. Wynn and/or guests of the property.<sup>20</sup> In all of these situations, the complaint alleged, there were numerous upper level employees, including General Counsel and Senior Vice Presidents, who knew about the allegations but failed to report them in violation of the company’s sexual harassment policies and gaming regulations.<sup>21</sup>

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<sup>13</sup> See Velotta, *supra* note 2 (explaining that Steve Wynn was not a respondent to this complaint and that a complaint could still be filed against him; that NGC would decide on February 28, 2019 the amount of the fine against Wynn Resorts). The NGC has the authority and power to limit, condition, restrict, revoke or suspend a gaming license if it deems reasonable. See *supra* note 6; NEV. REV. STAT. § 463.641 (2019); Stipulation, *supra* note 9, at 6 (explaining that the Commission has the sole discretion to accept or deny Wynn Resort’s Stipulation for Settlement); Nev. Gaming Comm’n Reg. 5.040 (2019).

<sup>14</sup> Stipulation, *supra* note 9, at 2 (stipulating that the NGC will determine the amount of the fine).

<sup>15</sup> Alexandra Berzon & Micah Maidenberg, *Wynn Resorts to Pay \$20 Million Fine Related to Sexual Misconduct Investigation*, WALL ST. J. (Feb. 26, 2019, 7:35 PM), <https://www.wsj.com/articles/wynn-resorts-to-pay-20-million-fine-related-to-sexual-misconduct-investigation-11551227702>. Subsequently, the Massachusetts Gaming Commission fined Wynn Resorts an additional \$35 million and imposed training and other requirements but permitted a Massachusetts-based business – Encore, Boston Harbor — to open in June 2019. See Richard N. Velotta, *Wynn Resorts fined \$35 Million in Massachusetts, Encore Boston Harbor to Open in June*, LAS VEGAS REV.-J. (Apr. 30, 2019 6:39 PM), <https://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-fined-35m-in-massachusetts-encore-boston-harbor-to-open-in-june-1653088/>.

<sup>16</sup> See Complaint, *supra* note 8, at 9.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.* at 9–16.

Moreover, the complaint alleged that Mr. Wynn was not required to attend the trainings on the company's sexual harassment policies.<sup>22</sup> Even before the #MeToo era, it should have been difficult to ignore these serious allegations, but as the GCB complaint alleged, it had been no secret that Steve Wynn had harassed numerous employees over a number of years and senior managers within the organization had done nothing about it.<sup>23</sup> In the stipulation settling the GCB complaint, respondents admitted to nearly all of the allegations in the complaint; they did not admit or deny, however, allegations in Paragraphs 72-73 (alleging knowledge of Wynn's sexual misconduct by two former General Counsel), and a portion of Paragraph 57 (alleging that Maurice Wooden was aware of the allegations of sexual misconduct).<sup>24</sup> The failure to admit or deny these few allegations was inconsequential considering the details that Wynn Resorts admitted and the number of high-level executives who admittedly knew about allegations regarding Wynn's behavior and failed to act.<sup>25</sup>

The facts alleged and admitted to are devastating. They paint a picture of a CEO who was above the law and his company's failure to reign him in: a \$7.5 million settlement for impregnating the nail salon employee whom he sexually assaulted, nearly a \$1 million settlement for forcing a cocktail server to have a sexual relationship with him, knowledge by many executive level employees about many other instances of sexual harassment, and a failure to act.<sup>26</sup>

Although it took years for Steve Wynn's wrongdoings to surface, once the allegations became public the GCB and Wynn Resorts both moved quickly to conduct investigations into the alleged sexual misconduct.<sup>27</sup> Wynn Resorts, as a

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<sup>22</sup> *Id.* at 18.

<sup>23</sup> *See generally*, Complaint, *supra* note 8.

<sup>24</sup> Stipulation, *supra* note 9, at 1.

<sup>25</sup> *See id.* (admitting most of the allegations in the Complaint).

<sup>26</sup> *See generally id.*. *See also* Complaint, *supra* note 8. After Wynn's misconduct became public, the value of Wynn stock plummeted. Some of this drop appears to have been caused by the bad press surrounding the company's failure to control its CEO; a subsequent drop was likely caused by the soft Chinese market resulting from concerns over a trade war between China and the U.S. Seventy-five percent of Wynn Resorts' income comes from Macao, a Chinese gaming enclave. After the drop in share prices, more than a dozen stockholder derivative suits were filed against Wynn Resorts. Some believe that the plaintiffs will prove their cases more easily by relying on admissions in the stipulation. *See* Todd Prince, *Wynn Resorts settlement with Nevada regulators may help lawsuits*, LAS VEGAS REV.-J. (Feb. 5, 2019, 7:00 AM), <https://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-settlement-with-nevada-regulators-may-help-lawsuits-1590168/>.

<sup>27</sup> *See* Astor & Creswell, *supra* note 1; Berzon et al, *supra* note 2; Richard N. Velotta, *Steve Wynn to be investigated by Gaming Control Board*, LAS VEGAS REV.-J. (Jan. 30, 2018, 5:16 P.M.), <https://www.reviewjournal.com/business/casinos-gaming/steve-wynn-to-be-investigated-by-gaming-control-board/>; Devin O'Connor, *Steve Wynn Sexual Harassment Investigation Wraps Up, Details Not Made Public*, CASINO.ORG (Aug. 8, 2018), <https://www.casino.org/news/steve-wynn-sexual-harassment-investigation-by-wynn-resorts-wraps-up>.

result, made significant changes in personnel and policies.<sup>28</sup>

It would be easy to dismiss the Wynn situation as an unusual abuse of power by an out-of-control CEO, but it may be only the tip of the iceberg, not only at Wynn, but in other casinos in Las Vegas and elsewhere. While the Wynn facts are severe, they represent what many see as typical sexual harassment in that they describe relatively powerless and vulnerable female employees who are preyed upon by a more powerful male supervisor or manager in the company.<sup>29</sup>

This article discusses the issue of sex- and gender-based harassment in the gaming industry and proposes potential solutions to the problem. Part II examines the different varieties of sex- and gender-based harassment that occur in casinos, potential causes of the harassment, research on harassment of employees in the casino/hospitality industry, and general research on preventing and remedying harassment. Part III discusses the Amended Gaming Regulations that the GCB proposed in light of the Wynn case, and analyzes the potential effectiveness of these regulations in light of the social science research concerning what works to end harassment and discrimination in workplaces. It also considers the unique characteristics of the gaming industry and calls for specialized, industry- and organization-specific research. It proposes a research plan that would permit researchers to understand exactly what causes harassment in the casinos and other gaming establishments, how effective the current policies are, and how to move forward with a model to defeat sex- and gender-based harassment and discrimination in the gaming industry. Finally, Part IV concludes that the casino industry would benefit from directed, specific, ethnographic research in order to create models to test their usefulness. Once models are found to be effective, change will occur only if industry leaders demonstrate how seriously they take harassment and require that harassing employees and customers be held accountable for their behaviors.

## PART II: LAW & HARASSMENT IN CASINOS: CHARACTER AND CAUSES

While the Steve Wynn situation is egregious, it is not the only instance or type of sex- or gender-based harassment.<sup>30</sup> In fact, while many consider sexual harassment by a powerful male supervisor of a female subordinate the norm in harassment cases, there are many other types of relationships that involve harassment and discrimination as well as other types of victims, perpetrators, and causes other than sexual desire.<sup>31</sup> Yale law professor Vicki Schultz explains that

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<sup>28</sup> See Stipulation, *supra* note 9, at 2–4.

<sup>29</sup> See *e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683, 1686 (1998) [hereinafter Schultz]; ANN C. MCGINLEY, MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS 46, 58 (2016) [hereinafter MCGINLEY].

<sup>30</sup> See generally Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22, 24–65 (June 2018) [hereinafter Schultz].

<sup>31</sup> See generally Schultz, *supra*, note 29, at 1686–87; MCGINLEY, *supra* note 29, at

the “sexual desire-dominance paradigm” that is generally taken to be the norm, defines harassment as a “top-down, male—to—female, *sexual* phenomenon, driven by sexual desire.”<sup>32</sup>

*A. Non-Sexual Behaviors Occurring Because of Sex*

Limiting our understanding merely to sexual behavior misses sex- and gender-based harassment that may not be sexual in nature, or whose cause is the perpetrator’s interest in establishing his superior masculine credentials.<sup>33</sup> In essence, the law does not limit illegal harassment to sexual behavior, nor does it require that the relationship between the harassers and victims be one of superior and subordinate.<sup>34</sup> Any harassing behavior directed at an individual because of the person’s sex or gender (or race, color, national origin, age, religion or disability) is illegal so long as it is unwelcome and severe or pervasive.<sup>35</sup> But since proving a hostile working environment requires a showing that the behavior is sufficiently severe or pervasive to alter the terms or conditions of employment, if we do not consider the behavior—both sexual and non-sexual harassing behavior—in the aggregate, a victim’s claim may fail.<sup>36</sup>

Research demonstrates that even when sexually-harassing behavior is present, often other gender-based harassment exists.<sup>37</sup> Both the sexual and the gender-based harassment should be aggregated to determine whether the environment is sufficiently severe or pervasive to alter the terms or conditions of employment and thereby constitute illegal harassment.<sup>38</sup> The key is not whether the behavior is sexual or not; it is whether it occurs because of the victim’s sex or gender.<sup>39</sup> Consider the case of Harvey Weinstein, whose alleged sexual assaults account for the recent rise of the #MeToo movement.<sup>40</sup> Vicki Schultz demonstrates that in addition to sexually assaulting and harassing women,

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44–52.

<sup>32</sup> Schultz, *supra* note 30, at 27.

<sup>33</sup> Schultz, *supra* note 30, at 26–27; MCGINLEY, *supra* note 29, at 65–68.

<sup>34</sup> See *id.* at 51, 62, 68, 72–73; Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Scholars*, 71 STAN. L. REV. ONLINE 17, 21–22, 24, 26 (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/>.

<sup>35</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993); *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited May 22, 2019).

<sup>36</sup> See Schultz, *supra* note 30, at 43–44.

<sup>37</sup> See *id.* at 34.

<sup>38</sup> See Schultz, *supra* note 29, at 1720–21.

<sup>39</sup> See MCGINLEY, *supra* note 29, at 39–40.

<sup>40</sup> See Fiza Pirani, *#MeToo: A timeline of 2018’s sexual harassment scandal*, THE ATLANTA J.-CONST. (May 25, 2018), <https://www.ajc.com/news/national/metoo-timeline-2018-sexual-harassment-scandals/Lv8ftAS6o0EMSdmqfo2R1L/>; see also Brockes, *supra* note 3 (description of how the #MeToo label went viral).

Weinstein also allegedly harassed his female employees in derogatory ways—yelling and cursing at them, berating them “using gender-based obscenities and stereotypes,” and telling them to leave and make babies because that was the only thing they were good for.<sup>41</sup> He also allegedly harassed male employees by directing gendered homophobic slurs at them, and by attacking their masculinity by calling them “cunt” or “pussy.”<sup>42</sup>

In the case of Steve Wynn, it does not appear that the investigations of his behavior considered non-sexual, gender-based behaviors, but gaming establishments should eliminate not only sexually-harassing behaviors but also gender-based harassment and other forms of discriminatory treatment.<sup>43</sup> Moreover, because harassment is more common in sex-segregated industries and/or jobs, employers should consider whether discrimination or harassment is common in all sex-segregated environments and attempt to integrate their workforces.<sup>44</sup> It is important as well to consider whether there is intersectional harassment or discrimination, based on sex or gender as well as race and national origin. The social science research demonstrates that women of color are more likely to be harassed than any other group.<sup>45</sup>

#### B. *Victims and Perpetrators*

Both women and men suffer sex- and gender-based harassment.<sup>46</sup> And, while men are the vast majority of perpetrators of harassment, women also

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<sup>41</sup> Schultz, *supra* note 30, at 36.

<sup>42</sup> *Id.* at 36 n.43, n.45 (citing Verified Petition, *People v. The Weinstein Co.*, No. 450293/2018 (N.Y. Sup. Ct. Feb. 11, 2018)).

<sup>43</sup> See MCGINLEY, *supra* note 29, at 37–43; see also Complaint, *supra* note 8; Stipulation, *supra* note 9 (focusing on sexual behavior but not on not-sexual, gender-based harassment and discrimination).

<sup>44</sup> See Will McGrew, *Gender segregation at work: “separate but equal” or “inefficient and unfair”*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 18, 2016), <https://equitablegrowth.org/gender-segregation-at-work-separate-but-equal-or-inequitable-and-inefficient/> [hereinafter McGrew]; Schultz, *supra* note 30, at 49; Paula McDonald et al., *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*, 53 ASIA PAC. J. HUM. RES. 41, 53 (2015).

<sup>45</sup> AMANDA ROSSIE, ET AL., NAT’L WOMEN’S LAW CTR., *OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN* 2, 5 (2018), available at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>

(noting that Black women file three times as many sexual harassment charges with the EEOC as white, non-Hispanic women); Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 13, 2018), <https://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color/> (noting that because of historical treatment of people of color, women of color are more susceptible to sexual harassment than white women are).

<sup>46</sup> See MCGINLEY, *supra* note 29, at 40–41.

engage in harassment of others.<sup>47</sup> Sexual attraction is a cause of some harassment, but sex-based harassment can also occur as a result of a victim's failure to conform to stereotypical norms and/or individual or a group of perpetrators who seek to prove their masculinity to themselves and others.<sup>48</sup>

Harassment occurs on the casino floors, in the back of the house, in guest rooms, at pools, and in clubs.<sup>49</sup> To prevent and remedy harassment and discrimination in gaming institutions, it is necessary to understand that executives, supervisors, co-workers, customers and third-party actors engage in harassment of employees and contractors working for and on casino premises.<sup>50</sup> Because of the sexualized environment in many gaming establishments, the dressing of female cocktail servers in skimpy costumes, and the marketing in Las Vegas that "What happens here, stays here," the environment may prime male customers to harass not only those female cocktail servers, bar tenders, and other women working on the casino floors, in clubs, in bars and on the pool decks but also other women, and perhaps men, working in the casinos.<sup>51</sup>

### C. Causes of Harassment

The research also demonstrates that in workplaces and positions that have

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<sup>47</sup> See Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99, 100 (June 2018), <https://www.stanfordlawreview.org/online/the-masculinity-motivation/>; Paula McDonald & Sara Charlesworth, *Workplace Sexual Harassment at the Margins*, 30 WORK, EMP. & SOC'Y 118, 119, 123, 129 (2016).

<sup>48</sup> See MCGINLEY, *supra* note 29, at 54, 67–68.

<sup>49</sup> See Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 (examining sexually harassing conditions in a Las Vegas casino and the application of the law) [hereinafter *Harassing "Girls"*]; Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J. L. & FEM. 65, 89–107 (2006) (discussing the application of Title VII to employees whose jobs are sexualized in varying degrees) [hereinafter *Harassment of Sex(y) Workers*]. See also Ann C. McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 STAN. L. & POL'Y REV. 253 (2012) (analyzing the sexual harassment of female workers in clubs operating in Las Vegas casinos) [hereinafter *Trouble in Sin City*]. See generally *infra* notes 71, 74, 76, 80.

<sup>50</sup> For sources relating to harassment of casino employees, see *supra* note 49; *infra* Part II.D.

<sup>51</sup> For an analysis of the law surrounding the harassment of sexy workers in sexualized environments, see generally *Trouble in Sin City*, *supra* note 49 (analyzing the sexual harassment of female workers in clubs operating in Las Vegas casinos); *Harassing "Girls"*, *supra* note 49 (examining sexually harassing conditions in a Las Vegas casino and the application of the law); *Harassment of Sex(y) Workers*, *supra* note 49 (discussing the application of Title VII to employees whose jobs are sexualized in varying degrees). For an analysis of the law surrounding harassment of non-sexy workers in sexualized environments, see Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 NW J. L. & SOC. POL'Y 88, 92–93 (2013) (discussing standards for holding employers liable for harassment of non-sexy workers in sexualized environments).



been historically male, sex- and gender-based harassment occurs more readily.<sup>52</sup> Sex-segregation of work spaces is a key cause not only of unequal pay for women but also of male harassment of women and men.<sup>53</sup> A vast majority of women and men work in sex-segregated conditions.<sup>54</sup> As a society we have become so used to the idea of jobs being appropriate for specific genders that we barely notice it.

In predominantly male workplaces or jobs identified as masculine, men harass women as they infiltrate the jobs, and they also harass other men either because they do not live up to stereotypically masculine norms or in order to keep them in line—to draw the boundaries as to who is the proper ideal worker.<sup>55</sup> This harassment not only seeks to keep women out but also to keep men masculine.<sup>56</sup> Doing so provides job security to men as well as emotional security that their jobs appropriately reinforce their masculine identities.<sup>57</sup>

#### *D. Research on Casino/Hospitality Industry Harassment*

##### *1. Union Surveys of Casino Workers*

UNITE HERE's Culinary and Bartenders Unions conducted a survey of more than 10,000 Las Vegas casino workers about sexual harassment in the casino-hotels.<sup>58</sup> The responses found that 59% of cocktail servers and 27% of hotel housekeepers said that they had been sexually harassed by guests, managers, or others while they were on the job.<sup>59</sup> Additionally, 72% of cocktail servers and 53% of hotel housekeepers said that a guest had done something to them that made them feel uncomfortable or unsafe.<sup>60</sup> Similar results were obtained in a UNITE HERE survey of 500 women working in hotels and casinos in Chicago.<sup>61</sup> The Chicago survey found that 65% of casino cocktail servers reported that a guest had groped, pinched, grabbed, or tried to touch them in an unwelcome way, and 49% of housekeepers reported that guests had exposed

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<sup>52</sup> See McGrew, *supra* note 44. See also Schultz, *supra* note 29, at 1759–61.

<sup>53</sup> See Schultz, *supra* note 29, at 1758–59.

<sup>54</sup> See *id.* at 1756, n.392.

<sup>55</sup> See MCGINLEY, *supra* note 29, at 53.

<sup>56</sup> *Id.* at 27, 53, 59, 65–66.

<sup>57</sup> *Id.* at 4–7.

<sup>58</sup> PRESS RELEASE, CULINARY WORKERS UNION LOCAL 226, LAS VEGAS CASINO WORKERS' UNION IS CALLING ON VISITORS TO NOT SEXUALLY HARASS WORKERS (May 29, 2018), available at <https://www.culinaryunion226.org/news/press/las-vegas-casino-workers-union-is-calling-on-visitors-to-not-sexually-harass-workers>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> UNITE HERE LOCAL 1, HANDS OFF, PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY 1, 4 (July 2016), available at <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf>.

themselves, flashed them, or answered the door naked.<sup>62</sup> The Chicago survey also found that 58% of hotel workers and 77% of casino workers reported that they had been sexually harassed at work by a guest.<sup>63</sup> Of those hotel workers who were harassed by a guest, 56% said that they did not feel safe returning to work.<sup>64</sup> Only one-third of those sexually harassed reported the harassment to their employers.<sup>65</sup>

## 2. *Informal Interviews of Casino Workers*

In informal interviews that have taken place approximately once every year or two for the past nineteen years, my students in Employment Discrimination Law have interviewed a sum total of approximately four hundred employees who work in the casinos. The purpose of the interviews was not to add to academic research, but rather to educate the students. Students were assigned to prepare a harassment policy and training Power Point, as well as a memo explaining their choices in writing the policies. They were assigned to interview at least five casino employees so they would understand the conditions on the ground, whether harassment occurs, whether casino employees understand what the employer's policies are, etc. Students have spoken to cocktail servers, dealers, pool attendants, housekeepers, and managerial employees, but most of the interviewees worked on the floor as bartenders, dealers, or cocktail servers. Students have found consistently over a nineteen-year period that most employees do not know whether the employer has a policy, do not remember receiving a policy, and do not know what illegal harassment is.<sup>66</sup> Many workers respond initially that they have never suffered harassment, but when harassment is explained to them, they state that they have been harassed while working in the casino. They note that customers as well as co-workers engage in harassment. Few to none of the employees interviewed by the students stated that they had ever reported harassing behavior.<sup>67</sup>

In informal interviews that I have conducted over the years and in work with students, both former and current employees have confidentially told me that harassment by customers is the norm, especially for women working as cocktail

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<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 8.

<sup>66</sup> The data students collected was acquired as part of a teaching project rather than a research project, and interviewees and their employers were assured of confidentiality. Therefore, this data is not available for publication.

<sup>67</sup> These are not scientific snow ball ethnographic surveys, but I offer this information because it results from years of similar responses from a fairly large number of employees. A true scientific ethnographic study would be very useful in figuring out what the issues are and how to remedy them.

servers and dealers in skimpy costumes. Workers have told me that either they haven't reported the customer harassment for fear of retaliation or of being moved from serving the high roller tables. Once moved, they lose tips. When they have reported harassment by customers to their floor managers, cocktail servers and dealers have explained that they have been moved, and the unruly customer either gets a slap on the fingers or no punishment at all.<sup>68</sup> Workers attribute the harassment to customer drunkenness, anger at losing at the tables, drug use, and a marketing initiative by the casino that invited the sexualization of women working at the casino.<sup>69</sup>

Although none of these interviews or surveys constitutes a well-run ethnographic study, they do demonstrate that it is very likely that although the casinos have policies and training, these measures seem not to work to prevent and remedy sex- or gender-based harassment.

### 3. *Social Science Research on Harassment and Discrimination in the Hospitality Industry*

Social scientists have begun to engage in research of sexual harassment in the hospitality industry.<sup>70</sup> One New Zealand study found that sexual harassment is prevalent in hospitality, especially of younger European women who work in the food and beverage positions or in the front offices.<sup>71</sup> The study found that the perpetrators of harassment are customers, peers, superiors and, on occasion, subordinates, in that order.<sup>72</sup> Approximately 29% to 39% of the harassment reported was by customers.<sup>73</sup> Other scholars note that few women are represented in high positions in the hospitality industry, and women employed in restaurants, bars, and casinos are often expected to engage in emotional labor, to wear sexualized costumes, and to flirt with customers.<sup>74</sup> This sexualization of women in the hospitality industry leads to sexual harassment and an unwillingness or fear to report it.<sup>75</sup>

These scholars believe that hotel environments create a particular vulnerability of employees to sexual harassment.<sup>76</sup> There is a high degree of customer and employee interaction, and hotel employees work long, irregular

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<sup>68</sup> See *Harassing "Girls"*, *supra* note 49, at 1236–37.

<sup>69</sup> See *id.* at 1235.

<sup>70</sup> See *infra* notes 71–78; 80–81; 93–97.

<sup>71</sup> Jill Poulston, *Metamorphosis in Hospitality: A Tradition of Sexual Harassment*, 27 INT'L. J. HOSPITALITY MGMT. 232, 238 (2008).

<sup>72</sup> *Id.* at 236.

<sup>73</sup> *Id.* at 238.

<sup>74</sup> Nigel Morgan & Annette Pritchard, *Gender Matters in Hospitality*, 76 INT'L. J. HOSPITALITY MGMT. 38, 41 (2019).

<sup>75</sup> *Id.* at 41.

<sup>76</sup> See Gilbert, *supra* note 1, at 49–50.

hours, many of which take place at night.<sup>77</sup> Moreover, hotel staff continually have to be polite and friendly toward customers who act in offensive ways.<sup>78</sup> This emotional labor is similar to that described as gendered by Arlie Hochschild in studying the work of flight attendants.<sup>79</sup> While they are public places, hotels also have private spaces that are temporary homes.<sup>80</sup> The rooms are sexualized, according to these scholars, because many customers expect hotel workers to serve their sexual needs.<sup>81</sup> In many of the incidents of harassment described in one study, for example, customers made assumptions that service employees in a hotel environment also played a sexual role.<sup>82</sup> While most service workers in these positions are women, men who worked as receptionists and in room service were also harassed, some by female customers and others by male customers.<sup>83</sup> The authors of this study posited that men were more vulnerable if they worked in jobs that were previously held by men but had more recently become feminized.<sup>84</sup> In essence, men doing “women’s jobs” are more likely to suffer harassment, perhaps because filling these jobs feminizes men holding the jobs themselves, thereby removing the power that masculinity would ordinarily play to protect them against harassment.<sup>85</sup>

One study in casinos that was focused on bad behavior by customers generally and did not ask about sexual harassment found that the “customer is always right” attitude prevails and has given “bargaining power” to customers, making many customers reluctant to follow organizational norms and behaviors in a service encounter.<sup>86</sup> Customers who misbehave are labeled “jaycustomers.”<sup>87</sup> In what is claimed to be the first study of jaycustomer behaviors in casinos, the authors argue that casinos are unique in the hospitality

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<sup>77</sup> *Id.* at 49–51.

<sup>78</sup> *Id.* at 51.

<sup>79</sup> See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (3d. ed. 2012) (discussing the toll that flight attendants’ need to smile and act friendly constantly takes on the employee).

<sup>80</sup> Yvonne Guerrier & Amel S. Adib, ‘No, We Don’t Provide that Service’: *The Harassment of Hotel Employees by Customers*, 14 *WORK, EMP. & SOC’Y* 689, 702 (2000).

<sup>81</sup> *Id.* at 702. See also Karen Schwartz, *New Report Details Exploitation of Hotel Industry Workers*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/travel/new-report-human-trafficking-exploitation-of-hotel-industry-workers.html> (discussing trafficking of hotel employees for both labor and sex).

<sup>82</sup> Guerrier & Adib, *supra* note 80.

<sup>83</sup> *Id.* at 691, 697, 702.

<sup>84</sup> See *id.* at 691, 702.

<sup>85</sup> See MCGINLEY, *supra* note 29, at 27 (noting that men who are feminine are harassed by other men to prove their masculinity and to encourage them to leave the job).

<sup>86</sup> Lawrence Hoc Nang Fong, et al., *Exploring Jaycustomer Behavior and Handling Approach in Casinos*, 29 *INT’L. J. CONTEMP. HOSPITALITY MGMT.* 1403, 1403 (2017).

<sup>87</sup> *Id.*

industry because of the large sums of money flowing across the casino floor, players' desire to win, super-charged environments, and the negative social impacts of problem gambling.<sup>88</sup> There exist antecedents to negative behaviors that are both individual to the person and related to the situation.<sup>89</sup> The situational antecedents include: drunkenness, customer dissatisfaction, an environment that encourages illegal activities, crowding, and the employees' endorsement of the "customer is always right" adage.<sup>90</sup> In a study asking casino employees to identify negative jaycustomer behavior, employees noted (in descending order) oral abuse, unreasonable arguments, breaking casino rules, breaking the law, physical abuse, property abuse, breaking a promise (once the customer agrees with the employee to act in a particular way), instigation of others, and retaliation against employees.<sup>91</sup> Employees responded to negative behaviors by (in descending order) reporting the customers to superiors, managing customers' emotions, requesting investigations, accommodating the customer, seeking support from security, isolating the employee from the customer, requesting intervention, apologizing to customer, offering gifts, restraining the customer, requesting intervention from a casino host, and expelling the customer.<sup>92</sup>

One older study of Reno, Nevada casinos measured sexual harassment of casino employees by supervisors and co-workers only (not customers).<sup>93</sup> This study collected employee responses to questionnaires in 1992 and 1993 and found that overall 8.25% of workers—approximately 15% of the women and 2% of the men who responded—felt that a *supervisor or co-worker* had harassed them.<sup>94</sup> Those employees who believed that they had been sexually harassed were less satisfied with their jobs and less committed to the organization.<sup>95</sup> Although the researchers found that casino employees perceive equal amounts of sexual harassment as employees in other industries, and harassed casino employees were less happy in their jobs than those who did not suffer harassment, they did not quit their jobs at a higher rate than their non-harassed co-workers.<sup>96</sup> The researchers concluded that this data likely meant that casino

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<sup>88</sup> *Id.* at 1404.

<sup>89</sup> *Id.* at 1409.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1415. Curiously, none of the employees identified sexual harassment in this study even though previous studies demonstrate that sexual harassment is a common jaycustomer behavior. *Id.* at 1423. Because here the vast majority of employees questioned were male and they were asked to identify only one negative incident, it is likely that the study did not capture sexual harassment that existed. *Id.*

<sup>92</sup> *Id.* at 1419.

<sup>93</sup> See generally Yvonne Stedham & Merwin C. Mitchell, *Sexual Harassment in Casinos: Effects on Employee Attitudes and Behaviors*, 14 J. GAMBLING STUD. 381 (1998).

<sup>94</sup> *Id.* at 393.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

workers accept that sexual harassment is part of the job.<sup>97</sup>

*E. Remediating Sex-based Harassment: Social Science Research and the Equal Employment Opportunity Commission Task Force*

*1. What We Know About Policies and Training*

Unfortunately, there is no research that proves that policies and trainings standing alone work to prevent illegal harassment in workplaces.<sup>98</sup> In *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*,<sup>99</sup> authors Mark Roehling and Jason Huang explain that although U.S. employers spend more than \$10 billion annually on sexual harassment training, there are significant questions regarding its effectiveness.<sup>100</sup> The issue of effectiveness is particularly complicated because the research is inadequate for the following reasons:

- (1) The overlap of legal and other definitions of sexual harassment;
- (2) The organizations' interest in defining sexual harassment more broadly than the law does;
- (3) Researchers' limited attempts to integrate legal and behavioral science perspectives;
- (4) Researchers' heavy reliance on public employees as research subjects;
- (5) Researchers' failure to provide detailed descriptions of the trainings in research results;
- (6) Researchers' failure to rule out non-training employer actions aimed at reducing sexual harassment as a cause of an increase in reporting or decrease in harassment;
- (7) Researchers' use of evaluation periods that may be too short to reach conclusions as to the effectiveness of the training;
- (8) The lack of clarity among social scientists concerning whether the increase of reporting following training means an

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<sup>97</sup> *Id.* at 396–97.

<sup>98</sup> See Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE (June 2018), <https://www.stanfordlawreview.org/online/sex-harassment-training-must-change-the-case-for-legal-incentives-for-transformative-education-and-prevention/>.

<sup>99</sup> Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*, J. ORGANIZATIONAL BEHAV. 1 (2018).

<sup>100</sup> *Id.*

increase in harassment or an increase of awareness; and  
(9) The studies' failure to distinguish between internal and external reporting.<sup>101</sup>

Research findings demonstrate that sexual harassment training appears to increase knowledge about what sexual harassment is, as measured at the end of the training, but there is no research that answers the question of whether increased knowledge is retained.<sup>102</sup> Moreover, despite increased knowledge of what sexual harassment is after training, the research generally concludes that training alone is unlikely to result in significant reduction of sexual harassment.<sup>103</sup> The research suggests, however, that training can play an important role in contributing to reduction or prevention of sexual harassment if conducted in accordance with scientific principles and the organization is supportive.<sup>104</sup>

Roehling and Huang conclude that future research is necessary to investigate organizational context, the policies that exist and how they interact with training, and how policies are enforced in particular organizations (e.g. zero tolerance, consistent punishment of harassers).<sup>105</sup> Moreover, future research should consider the influence of context across different units within a given organization.<sup>106</sup> Researchers should investigate how training affects different populations of employees with different cultural backgrounds, whether training is effective to remedy a known harasser's tendency to harass, and the extent to which sexual harassment training methods and media affect the result (e.g. face-to-face vs. online training).<sup>107</sup> Roehling and Huang also suggest that researchers address methods that attempt to change behaviors rather than attitudes, which are much more difficult to change.<sup>108</sup> Finally, these authors argue that while there may be some benefit from laboratory research on the effectiveness of training, there is a dire need for more research in the organizational context, and that researchers should conduct meta-analytic investigations to address the identified research questions, if available, from current studies.<sup>109</sup>

The Equal Employment Opportunity Commission ("EEOC") Select Task Force on the Study of Harassment in the Workplace, a bipartisan group that engaged in a comprehensive literature study, concluded as well that although standalone trainings are not proven effective, employers should have policies and trainings along with an emphasis on leadership and accountability in a holistic

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<sup>101</sup> *See id.* at 2, 6–7, 9–12

<sup>102</sup> *See id.* at 9.

<sup>103</sup> *See id.* at 10.

<sup>104</sup> *See id.* at 11–12.

<sup>105</sup> *See id.* at 13.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* at 15.

approach.<sup>110</sup> The Report concludes that without leadership that is obviously committed to eliminating discrimination and harassment from the workforce, these behaviors will continue to occur.<sup>111</sup> Leaders must demonstrate a “sense of urgency” about preventing harassment.<sup>112</sup> They can do so by “taking a visible role in stating the importance of having a diverse and inclusive workplace that is free of harassment, articulating clearly the specific behaviors that will not be acceptable in the workplace, setting the foundation for employees throughout the organization to make change (if change is needed), and, once an organizational culture is achieved that reflects the values of the leadership, commit to ensuring that the culture is maintained.”<sup>113</sup> Leadership must assess whether the workplace has risk factors for harassment, take steps to address or eliminate them, and conduct climate surveys of employees before and after a “holistic approach to prevention” is in place.<sup>114</sup> Leadership should also have effective policies and procedures and effective trainings.<sup>115</sup> Finally, leadership must devote time and money to the effort, and leaders with responsibility to eliminate harassment must have enough power and authority to make it happen.<sup>116</sup>

A second necessity is accountability, which requires an effective anti-harassment program with an effective, safe reporting system, a thorough system of investigation, and proportionate corrective actions.<sup>117</sup> Individuals who have engaged in harassment must be held accountable for their actions with sanctions that are in proportion to the behavior.<sup>118</sup> Mid-level managers and front-line supervisors must be held responsible for monitoring and stopping harassment of those under them—if they do not investigate thoroughly and impose proportional sanctions, they should be punished.<sup>119</sup> And, leadership must incentivize and reward mid-level managers and front-line supervisors for promptly reporting, investigating, and dealing with complaints.<sup>120</sup> In fact, it is ordinarily a good sign, at least initially, if harassment complaints rise in a particular division.<sup>121</sup> This often means that the trainings and policies are working, and managers and

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<sup>110</sup> See generally CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE iv, v (June 2016), available at [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf) [hereinafter EEOC TASK FORCE REPORT].

<sup>111</sup> See *id.* at 31–34.

<sup>112</sup> *Id.* at 32.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 33.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 33–34.

<sup>117</sup> *Id.* at 34.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 35.

<sup>120</sup> See *id.* at 34–35.

<sup>121</sup> See *id.* at 36.



supervisors are taking complaints seriously and not suppressing them.<sup>122</sup>

The EEOC Task Force acknowledged the lack of empirical evidence supporting standalone trainings and policies, but the Task Force noted that in absence of such empirical proof, there is at least some agreement that certain behaviors appear to work.<sup>123</sup> Employers must take a number of measures to prevent and respond to harassment.

Qualities of policies and procedures that the task force recommends include:

- (10) A clear explanation of prohibited conduct, including examples;
- (11) Assurance that participants will be protected from retaliation;
- (12) A complaint process with multiple, accessible avenues of complaint;<sup>124</sup>
- (13) Assurance of confidentiality to complainants to the extent possible;
- (14) A prompt, thorough, and impartial investigation; and
- (15) Assurance of immediate and proportionate corrective action when the employer finds that harassment has occurred, and an appropriate response to behavior that is not yet legally-actionable “harassment” but that could become illegal if not corrected.<sup>125</sup>

The Task Force also recommends that employer policies cover all illegal forms of harassment (based on race, color, disability, age, sex, gender, religion, etc.).<sup>126</sup> It advises frequent in-person compliance trainings that are conducted by qualified, live, interactive trainers, and that the training be frequently evaluated.<sup>127</sup> Training should be for all employees with descriptions of conduct that, if left unchecked, would create a hostile working environment.<sup>128</sup> The trainers should also explain the consequences of engaging in these behaviors and that corrective action will be proportionate to the offense.<sup>129</sup> The Task Force clearly recommends that middle-management and first-line supervisors receive additional compliance training that explains their accountability and the

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<sup>122</sup> *See id.*

<sup>123</sup> *See id.* at 45.

<sup>124</sup> The task force emphasized the importance of a “safe” reporting system that is communicated to employees. The report notes that a significant body of research establishes the concerns that employees have about reporting harassment in their workplaces. *See id.* at 41.

<sup>125</sup> *See id.* at 38.

<sup>126</sup> *See id.* at 43.

<sup>127</sup> *See id.* at 52–53.

<sup>128</sup> *Id.* at 50.

<sup>129</sup> *Id.*

employers' expectations of the concrete actions that supervisors should take to prevent and/or stop and remedy harassment.<sup>130</sup> This will include instructions on how to deal with particular behaviors, how to report them up the line, and the affirmative duties of line managers even in absence of a complaint.<sup>131</sup> This training should be tailored to the particular workplace and industry.<sup>132</sup>

Besides regular compliance training, and while recognizing the paucity of research supporting their effectiveness, the Task Force recommends workplace civility and bystander intervention training, tailored to the workplace, which have proved successful in some organizations.<sup>133</sup>

The Task Force also notes the influence of social media on the workplace environment and the employers' responsibilities in assuring that a toxic environment does not exist as a result of social media interactions.<sup>134</sup> It also explains the dangers and inappropriateness of "zero tolerance" policies.<sup>135</sup> A "zero tolerance" policy implies that all will be treated the same, no matter the gravity or lack thereof of the offense, but "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct."<sup>136</sup> For example, the first telling of a sexist joke may merit a warning of the offender, whereas conditioning a subordinate's promotion on the provision of sexual favors would likely merit discharge of the offender.<sup>137</sup>

## 2. Risk Factors and Industry-Specific Problems and Solutions

The EEOC Task Force also identified a number of risk factors for harassment in workplaces that may be relevant to the increased risk of harassment in the gaming industry.<sup>138</sup> One is that harassment is more likely to occur where there is a coarsened social discourse outside of the workplace.<sup>139</sup> Included in the risk factors identified by the EEOC are workplaces with the following characteristics:

- (1) Homogenous workforces;

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<sup>130</sup> *See id.* at 51.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 54.

<sup>134</sup> *See id.* at 39. For an examination of the importance of social media and the National Labor Relations Act, *see generally* Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L. J. 75 (2012).

<sup>135</sup> EEOC TASK FORCE REPORT, *supra* note 110, at 40.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 25.

<sup>139</sup> *Id.* at 27. One example given is that after the 9/11 attacks, there was an increase in workplace harassment based on religion and national origin.

- (2) Non-conformity of some workers to socially-acceptable gender stereotypes;
- (3) Cultural and language differences among employees;
- (4) Many young workers;
- (5) “High value” employees or significant power disparities among employees;
- (6) Employees’ jobs and compensation (tips) rely on customer service;
- (7) Work is monotonous;
- (8) Workers are isolated;
- (9) Alcohol is consumed by customers; or
- (10) Work units are decentralized.<sup>140</sup>

A number of the risk factors for harassment identified by the EEOC exist in workplaces in the gaming industry.<sup>141</sup> Certainly, on the casino floors many customers consume alcohol—often to excess—and employees’ jobs and compensation rely in large part on good customer service.<sup>142</sup> The same situation exists perhaps to an even greater extreme in the clubs and the pool clubs.<sup>143</sup> Moreover, guest room attendants working in guest rooms and halls of the hotels are often isolated, and many are Latinas who do not speak English well; employees in the massage rooms in the hotel spas are isolated while working, and their jobs and tips rely in large part on customer service.<sup>144</sup> Combine these characteristics with the skimpy costumes that women (but not men) wear while working in the clubs, at the pools, and on the casino floor, and the Las Vegas motto of “What happens here stays here,” and an environment emerges that is ripe for encouraging harassment.<sup>145</sup>

<sup>140</sup> *Id.* at 26-29, 83-88 (Appendix C, Chart of Risk Factors and Responses includes risk factors and specific strategies to reduce harassment).

<sup>141</sup> *Id.* at 25. See generally discussion *supra* Part II.D.

<sup>142</sup> See generally *Harassment of Sex(y) Workers*, *supra* note 49, at 76-77; *Harassing “Girls”*, *supra* note 49, at 1236-37, 1237 n.31, 1246-48, 1252.

<sup>143</sup> See, e.g., *Trouble in Sin City*, *supra* note 49, at 265-268 (describing horrific treatment of female employees in private clubs).

<sup>144</sup> See EEOC TASK FORCE REPORT, *supra* note 110, at 26. See also Dan Barry, *Latina Hotel Workers Harness Force of Labor and of Politics in Las Vegas*, N.Y. TIMES (Nov. 4, 2016), <https://www.nytimes.com/2016/11/06/us/politics/latina-hotel-workers-harness-force-of-labor-and-of-politics-in-las-vegas.html> (noting that 56% of members of the Culinary Workers Union which represents casino employees in Nevada is Latinx); Bernice Yeung, *Why cleaning a hotel room makes you a target for sexual harassment*, REVEAL (July 21, 2016), <https://www.revealnews.org/blog/why-cleaning-a-hotel-room-makes-you-a-target-for-sexual-harassment/>; see, e.g., Pauline Repard, *Massage therapists sue Grand Del Mar hotel over client sexual harassment*, SAN DIEGO UNION-TRIB. (Feb. 27, 2019), <https://www.sandiegouniontribune.com/news/courts/sd-me-sexual-harassment-lawsuit-grand-del-mar-20190227-story.html>.

<sup>145</sup> See *Harassment of Sex(y) Workers*, *supra* note 49, at 76-77; Hugo Martin, *Las*

The EEOC Task Force recommends that analyses of risks and solutions are best when they are industry and workplace specific, and that it would be ideal for employers to give access to social scientists to study workplaces to do empirical studies that would lead to research-based conclusions about the causes of and solutions for harassment at work.<sup>146</sup>

Besides the ideas suggested by the EEOC Task Force, Australian researchers propose an interesting model for preventing and remedying harassment in *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment*.<sup>147</sup> The researchers note that primary prevention strategies require a clear understanding of what behavior constitutes wrongdoing, visibility of the sexual harassment policy, an appropriate framing of the policy (which includes accessibility of informal advice and multiple communication channels), high-level management buy-in and modeling, a statement of intent to enforce the policy with clear penalties, and a commitment to broader gender equality issues.<sup>148</sup> Secondary interventions require immediate effective responses, which include effective complaint handling, and strong, consistently-applied sanctions.<sup>149</sup> Finally, tertiary interventions involve the employer's long-term responses after the problem has occurred that would allow the organization to restore health and safety and prevent further harassment and victimization (such as retaliation by employers as well as co-workers).<sup>150</sup>

The Australian authors' model operates on two axes, function and timing.<sup>151</sup> Along the function axis are message, management, and monitoring. Along the timing axis are primary, secondary, and tertiary.<sup>152</sup> Below is Figure 1, from the article, which explains in table form that employers must consider not only the timing but also their message, how to manage their policies and trainings and how to do continued monitoring.<sup>153</sup>

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*Vegas Revives 'What happens here, stays here' campaign*, L.A. TIMES (Jan. 2, 2018, 3:20 PM), <https://www.latimes.com/business/la-fi-las-vegas-campaign-20180102-story.html>.

<sup>146</sup> EEOC TASK FORCE REPORT, *supra* note 110, at 42-43; 46, 49, 60, 66.

<sup>147</sup> McDonald et al., *supra* note 44, at 41.

<sup>148</sup> *Id.* at 43-44.

<sup>149</sup> *See id.* at 46-47.

<sup>150</sup> *Id.* at 48-49.

<sup>151</sup> *Id.* at 49-50.

<sup>152</sup> *Id.* at 50.

<sup>153</sup> *Id.*

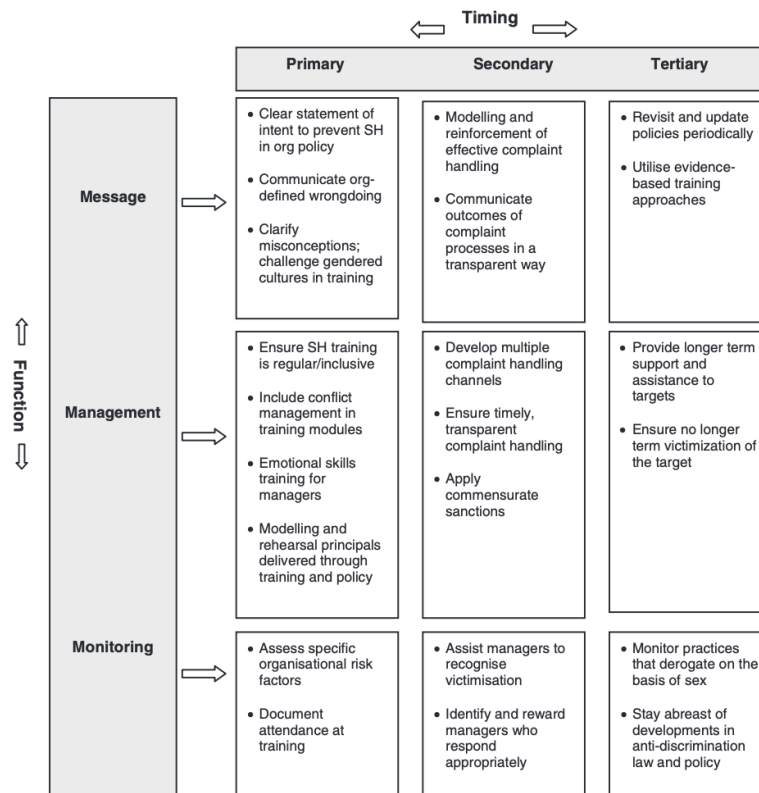


Figure 1 Timing and functions of effective sexual harassment prevention

In addition to the recommendations of the EEOC Task Force and the Australian researchers, it is important to understand the dynamics in the individual organization as well as the industry in order to calculate the effect of the prevention and remedial mechanisms. Unfortunately, research demonstrates that at least in some workplaces the employees interpret policies and trainings in accordance with previous societal understandings of power differentials rather than by looking at the specific language of the policy.<sup>154</sup>

In *Binary Logics and the Discursive Interpretation of Organizational Policy: Making Meaning of Sexual Harassment Policy*, authors Debbie Dougherty and Marlo Goldstein Hode found that employees reinterpreted a sexual harassment policy in a way that gave strength to dominant masculinity.<sup>155</sup> While the policy language reinforced the appearance of rationality and focused on behaviors that

<sup>154</sup> Debbie S. Dougherty & Marlo Goldstein Hode, *Binary Logics and the Discursive Interpretation of Organizational Policy: Making Meaning of Sexual Harassment Policy*, 69 HUM. REL. 1729, 1729 (2016).

<sup>155</sup> See *id.* at 1738.

should be avoided, the participants in the study (employees in a large government organization) reinterpreted the policy to focus on individual perceptions of what constitutes sexual harassment rather than the behaviors described as negative in the policy.<sup>156</sup> Thus, employees believed that individuals claiming sexual harassment could complain about behaviors that should be acceptable as a norm.<sup>157</sup> By shifting from behaviors to perceptions of the alleged sexual harassment victim, the research participants “discursively shifted women from victim to perpetrator and men from perpetrator to victim.”<sup>158</sup> The men were now the victims under the policy because women could accuse the men of sexual harassment for any behavior at all if they perceived it to be offensive.<sup>159</sup> The accusations are considered irrational (linked to the concept that women are irrational), and the men who say they are irrational justify their position by stating that 60% to 70% of individuals would not view the behavior as harassment.<sup>160</sup> Thus, male participants emphasized the rationality of their position.<sup>161</sup> The alleged perpetrator then becomes the “innocent victim caught by the idiosyncratic whim of the target.”<sup>162</sup> The general consensus among the participants in the study (male and female) was that harassers do not intend to harass.<sup>163</sup> This attitude creates problems for targets because if they don’t confront their harassers, they are considered the wrongdoer, but if they do, they will likely be ostracized.<sup>164</sup>

This research, while troubling, may indicate why policies and training do not seem to be effective. If employees reinterpret policies to be harmful to men and to allow irrational women to have the employer punish male co-workers, there will be no increase in dignity and respect that is likely the aim of the policy.

Consequently, these researchers argued that current sexual harassment policies should be revised in a way to respond to “the organizational culture and the varying needs” of those in the organization.<sup>165</sup> They recommend that policymakers challenge the target/perpetrator explanation by emphasizing that sexual harassment harms the entire workforce, that policies place strong emphasis on bystander intervention as a means of combatting harassment with trainings that emphasize bystander intervention, and by acknowledging the emotional landscape of sexual harassment rather than burying policy language within a “myth of rationality” so that transformative dialogue among organizational members can take place.<sup>166</sup>

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<sup>156</sup> *Id.* at 1739.

<sup>157</sup> *Id.* at 1740.

<sup>158</sup> *Id.* at 1739.

<sup>159</sup> *Id.* at 1739-41.

<sup>160</sup> *Id.* at 1740.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1741.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1751.

<sup>166</sup> *Id.* at 1752.

## PART III: NEVADA GAMING LAW &amp; REGULATION: PROPOSED AMENDED GAMING REGULATIONS AND SOCIAL SCIENCE RESEARCH

A. *Existing Nevada Gaming Law and Regulations*

Nevada law declares that “[t]he gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants[.]”<sup>167</sup> and its “continued. . . success. . . is dependent upon public confidence. . . .”<sup>168</sup> Public confidence is “maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments. . . .”<sup>169</sup> The NGC has the power to suspend or revoke gaming licenses.<sup>170</sup> It is the policy of both the NGC and the GCB to require that businesses that conduct gaming do so “in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State. . . .”<sup>171</sup> “[A]ny activity [by a] licensee, [or its] agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of. . . Nevada, or that would reflect. . . discredit upon the State. . . or the gaming industry” is, by regulation, “an unsuitable method of operation” that can lead to “disciplinary action by the [GCB] and the [NGC]. . . .”<sup>172</sup> Included in the “unsuitable methods” are “[f]ailure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State[.]” and “[f]ailure to conduct gaming operations in accordance with proper standards of custom, decorum and decency, or permit any type of conduct in the gaming establishment which reflects or tends to reflect on the repute of the State of Nevada and act as a detriment to the gaming industry.”<sup>173</sup> “Violation of any provision of the. . . Gaming Control Act or of [the] regulations by a licensee, [its] agent[s] or employee[s]” is “deemed. . . grounds for suspension or revocation of [the organization’s] license.”<sup>174</sup>

Nevada gaming law grants great power to gaming regulators. In fact, while anti-discrimination law under Title VII and Nev. Rev. Stat. 613.330 that prohibit sex -and gender-based discrimination and harassment has some force with employers, large employers faced with individual suits can reach settlements that do not hurt the employer much financially.<sup>175</sup> Thus, Title VII and Nevada law serve as a less-than-

<sup>167</sup> NEV. REV. STAT. § 463.0129(1)(a) (2018).

<sup>168</sup> *Id.* § 463.0129(1)(b).

<sup>169</sup> *Id.* § 463.0129(1)(c).

<sup>170</sup> *Id.* § 463.1405(4).

<sup>171</sup> Nev. Gaming Comm’n Reg. 5.010(1) (2019).

<sup>172</sup> Nev. Gaming Comm’n Reg. 5.011 (2019).

<sup>173</sup> Nev. Gaming Comm’n Reg. 5.011(1) and (10) (2019).

<sup>174</sup> Nev. Gaming Comm’n Reg. 5.030 (2019).

<sup>175</sup> *See, e.g.,* Robert D. Friedman, *Confusing the Means for the Ends: How a Pro-Settlement Policy Risks Undermining the Aims of Title VII*, 161 U. PA. L. REV. 1361, 1365-67 (2013) (discussing the inadequacy of private settlements in Title VII cases, especially because settlements are ordinarily confidential).

perfect method of preventing harassment and discrimination. As is obvious from the Nevada gaming statutes and regulations, the NGC has superior power to harm the gaming licensee because of NGC's ability to suspend or revoke the guilty organization's gaming license—which may amount to destruction of its business.<sup>176</sup> A gaming license does not create a property right, and therefore there appears to be no question that if Wynn employees and/or agents knowingly looked the other way as Steve Wynn engaged in the alleged illegal behaviors, the NGC would have statutory and regulatory authority to revoke or suspend Wynn's Resort's gaming license.<sup>177</sup> The stipulation signed between the GCB and Wynn Resorts recognized Wynn's efforts to correct its management problems, and instead of recommending a license suspension or revocation, it recommended a fine to be determined by the NGC.<sup>178</sup>

### B. Proposed Amendments to Gaming

As the GCB investigated Wynn, then-Chair of the GCB Becky Harris initiated an effort to amend GCB Regulation 5 to require that all gaming establishments and other licensed gaming businesses “maintain written policies and procedures addressing prevention, reporting, and investigation of and response to sexual harassment in the . . . workplace.”<sup>179</sup> Additionally, gaming licensees would be required to complete and file a Checklist with the GCB annually.<sup>180</sup> The Checklist requires licensees to answer sixteen questions about the licensee's policy, such as whether the policy includes statements on reporting and investigation procedures.<sup>181</sup> Upon request of the Chair of the GCB and for the time period designated by the Chair, the GCB may require licensees to provide accurate numbers of valid claims submitted internally, filed with the Equal Employment Opportunity Commission (“EEOC”), the Nevada Equal Rights Commission (“NERC”), other state or federal agencies, in state or federal courts, and raised through other channels, as well as the number of valid claims that achieved final disposition through official channels, legal action or other channels.<sup>182</sup> The proposed amended regulation also grants to the GCB the power to inspect a licensee's written policies and procedures as well as all records

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<sup>176</sup> See NEV. REV. STAT. § 463.1405(4) (2018); Nev. Gaming Comm'n Reg. 5.011 (2019).

<sup>177</sup> NEV. REV. STAT. § 463.1405(4); Nev. Gaming Comm'n Reg. 5.040 (2019).

<sup>178</sup> Stipulation, *supra* note 9, at 21.

<sup>179</sup> NEV. GAMING CONTROL BD., PROPOSED AMENDMENTS TO NEVADA GAMING COMMISSION REGULATION 5, SECTION 5.250 (Nov. 5, 2018) [hereinafter NEVADA PROPOSED AMENDMENTS], <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14021>.

<sup>180</sup> *Id.*

<sup>181</sup> NEV. GAMING CONTROL BD., PROPOSED SEXUAL HARASSMENT AWARENESS AND PREVENTION: MINIMUM STANDARDS CHECKLIST (Nov. 5, 2018), *as amended by* NEV. GAMING CONTROL BD., ADDITIONAL AMENDMENTS BASED ON RESORT ASSOCIATION COMMENTS (Nov. 13, 2018) [hereinafter NEVADA PROPOSED CHECKLIST].

<sup>182</sup> *Id.*



related to it.<sup>183</sup> After a number of public notice and comment sessions,<sup>184</sup> the GCB amended its proposed Regulation and Checklist, and with the support of then-Governor Sandoval, ultimately sent the proposed amendments to the NGC for adoption.<sup>185</sup> The NGC refused to act on the proposed amendment, explaining that it would not be appropriate to do so because the Wynn Resorts investigation by the GCB was still ongoing.<sup>186</sup> It is unclear whether the NGC will now take up the proposed regulations now that it has fined Wynn Resorts.

*C. Comparing the GCB Checklist to the EEOC Task Force Recommendations and the Social Science Research*

As noted above, the EEOC Task Force sets out recommendations for employers to create policies, engage in employee training, and to assure adequate reporting mechanisms for employees to notify the employer of harassing behaviors.<sup>187</sup> Appendix B to the EEOC Task Force Report also suggests four different checklists: (1) Checklist One: Leadership and Accountability; (2) Checklist Two: An Anti-Harassment Policy; (3) Checklist Three: A Harassment Reporting System and Investigations; and (4) Checklist Four: Compliance Training.<sup>188</sup>

If the GCB were to do nothing other than amend its regulations as proposed, its proposed amendments to Regulation 5 would represent an important change to Nevada law. Not only would it require all licensees—small and large—to promulgate policies and procedures prohibiting sexual harassment, but it also would require licensees to train their employees and report all filings of valid claims against them when requested by the GCB.<sup>189</sup> For most licensees, this would likely not impose a

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<sup>183</sup> See NEVADA PROPOSED AMENDMENTS, *supra* note 179.

<sup>184</sup> See NEV. GAMING CONTROL BD., Notice 2018-90 (Nov. 8, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=14019>; see also NEV. GAMING CONTROL BD., Notice 2018-66 (Sept. 27, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13725>; see NEV. GAMING CONTROL BD., Notice 2018-65 (Sept. 14, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13665>; see NEV. GAMING CONTROL BD., Notice to Licensees 2018-61 (Sept. 7, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13635>; see NEV. GAMING CONTROL BD., Notice 2018-43 (May 31, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13273>; see NEV. GAMING CONTROL BD., Notice 2018-35 (Apr. 30, 2018), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=13152>.

<sup>185</sup> See Howard Stutz, *Changes to Nevada Regulations Concerning Sexual Harassment Sent to the Gaming Commission After Governor Expresses Support*, CDC GAMING REPS. INC., (Nov. 15, 2018, 12:11 AM), <https://www.cdcgaming-reports.com/sandoval-backs-changes-to-nevada-gaming-regulations-concerning-sexual-harassment/>.

<sup>186</sup> See Richard Velotta, *Sexual Harassment Prevention Rules for Las Vegas Casinos Delayed*, LAS VEGAS REV.-J. (Nov. 15, 2018, 10:36 PM), <https://www.revjournal.com/business/casinos-gaming/sexual-harassment-prevention-rules-for-las-vegas-casinos-delayed-1528308/>.

<sup>187</sup> See EEOC TASK FORCE REPORT, *supra* note 110, at 38, 41, 43, 50-54.

<sup>188</sup> *Id.* at 79-82.

<sup>189</sup> See *Nevada Proposed Amendments*, *supra* note 179; see also Nevada Proposed

significant burden because they are already subject to federal and state laws that hold an employer responsible for sexual harassment of its employees by supervisors, other employees, and customers.<sup>190</sup> It is unclear whether the NGC will approve the Proposed Amendments to Regulation 5, but these amendments would likely improve the environment in gaming establishments in the state if casino executives were to take the goal of preventing sexual and gender-based harassment seriously, demonstrate their commitment to their employees, and assure independent investigations that include significant penalties when sexual harassment is found.

The GCB proposed amendments include many requirements that are similar to those recommended by the EEOC Task Force Report and other social science research that I describe above.<sup>191</sup> The GCB regulation, however, could be amended to create even more improvement or individual casinos could take on the task of following the additional recommendations that I make here.

First, the GCB could explicitly apply to all illegal forms of harassment—based on sex, sexual orientation, gender identity, race, color, religion, age, and disability. In essence, the harassment would not need to be sexual in nature but could also be non-sexual but based on gender, race, or other categories prohibited by federal and state law.<sup>192</sup> Second, the proposed amendments would also emphasize that the organization leaders should demonstrate their enthusiastic support of the anti-harassment measures, that middle managers and line supervisors would be held accountable for how they deal with complaints of harassment and would be required to report behaviors even if there were no complaints. Third, proposed amendments would highly recommend, if not require, that trainings be frequent, live, and in-person. Fourth, proposed amendments would require compliance training that would include examples that are tailored to the specific workplace and workforce. Fifth, they would require that gaming properties implement compliance training of managers and first-line supervisors in addition to training of other employees that “provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods.”<sup>193</sup> They would also provide clear instructions for how managers and first-line supervisors should report harassment up the chain of command, including sanctions that would be applied if they fail to report.<sup>194</sup> Sixth, proposed amendments would require organizations to demonstrate that they have done climate surveys, made risk assessments, and created metrics for harassment response and prevention as part of

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Checklist, *supra* note 181; *see also* NEV. GAMING CONTROL BD., Notice to Licensees 2018-61, *supra* note 184.

<sup>190</sup> *See* 42 U.S.C. § 2000e (2012); *see also* NEV. REV. STAT. § 613.330 (2018); *see, e.g.*, *Faragher v. Boca Raton*, 524 U.S. 775, 806–07 (1998) (noting that federal and state statutes both forbid sex and gender based harassment and hold employers liable for the harassment of their employees depending on who the harasser is—a supervisor, a fellow employee, or a customer. Neither statute, however, applies to employers with fewer than 15 employees).

<sup>191</sup> *See* discussion *supra* Parts II.E.1 & III.B.

<sup>192</sup> 42 U.S.C. § 2000e; NEV. REV. STAT. § 613.330.

<sup>193</sup> *See, e.g.*, EEOC TASK FORCE REPORT, *supra* note 110, at 82.

<sup>194</sup> *See, e.g., id.*

the performance reviews of supervisory employees.<sup>195</sup> Seventh, the organizations should be required to introduce bystander intervention training and to assess its efficacy regularly.

These improvements would conform with the best understandings and information available about how to predict, prevent, and remedy harassment based on sex and other protected characteristics. By the same token, if these additional amendments would be considered too onerous, the GCB's admittedly imperfect proposed amendments, if approved by the NGC, will go a long way to correcting the situation. I would also encourage casino management to take into account the individual characteristics of their organizations and different units within their organization, and to collect data about employee attitudes toward the policies they develop.

It is crucial, however, to understand that policies, trainings and other compliance mechanisms, standing alone, will not resolve problems of harassment in the casino industry. To the extent that policies and trainings are used merely to provide symbolic compliance, they may accomplish the goal of protecting some casinos in the industry from legal harm, but they will not meet the important goal of preventing and remedying harassment.<sup>196</sup>

In *Working Law*, Professor Lauren Edelman marshals a great deal of statistical proof to demonstrate that policies and practices that are established by organizations may have the effect of avoiding liability, but they may not operate to actually produce the laudatory effects of preventing discrimination.<sup>197</sup> The goal in the gaming industry should be to establish policies and practices that will move the industry into the future by not only serving as a symbol of compliance, but also by actually creating equality in the workplace. It is important to understand the link between segregated workplaces and their creation of severe inequalities, and how those conditions foster sexual harassment and discrimination.<sup>198</sup>

#### *D. Industry-Specific Research Needed*

If the NGC truly wishes to prevent and remedy harassment and discrimination, it should consider encouraging gaming properties to sponsor a multi-year, industry-specific research project that would aim to diagnose the problems that exist in the gaming industry and test best practices and new models to assure that the policies, trainings, and reporting mechanisms would work not only to prevent liability, but also, more importantly, to prevent and remedy discrimination and harassment.

Offering access to social science researchers to conduct ethnographic studies that would include interviews, focus groups, and properly-created survey questionnaires of all groups of employees would allow researchers to define the scope of the problem, how it varies throughout the property, and the employees' and managers' attitudes toward the problems. It would also permit the researchers to

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<sup>195</sup> See, e.g., *id.* at 79, 82.

<sup>196</sup> See, e.g., Bisom-Rapp, *supra* note 98, at 69-70.

<sup>197</sup> LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 163-67 (2016).

<sup>198</sup> See generally Schultz, *supra* note 30.

design and test models for eliminating risks in the gaming industry and eventually create models and best practices that are research-tested for the industry. While the authors of the EEOC Task Force Report noted some concern about individual employers' ability to maintain control over their data to avoid their use in lawsuits,<sup>199</sup> studies can be designed to assure confidentiality of individual employee and employer data, and also to collect aggregate data in the industry.<sup>200</sup>

The gaming industry is unique. It is highly regulated, and at the same time, highly sexualized.<sup>201</sup> It attracts millions of visitors yearly, and Las Vegas advertises that "What happens here stays here."<sup>202</sup> Because of these characteristics, sexual harassment by customers and third parties may be more prevalent than it is in other industries.<sup>203</sup> This may be especially true for the employees who work on the casino floor wearing skimpy costumes. Although we know that harassment is prevalent in casinos, it is important to do both quantitative and qualitative analysis—research that will allow us to know whether this hypothesis is correct, what the scale and the scope of the problem is, how employees of all different types and levels experience the problem, and the potential for addressing problems that are raised by the research.

We need to know how casino employees, on the floor and in the back of the house, in corporate offices, in the clubs, at the pools, and in guest hotel rooms experience their jobs. We need to know whether there is harassment that is sexual in nature or gendered, whether it is customer-, third-party-, co-worker-, or supervisor-initiated, and whether it causes harm to employees. It is vital to understand whether the sexualized nature of the industry causes increased harassment of employees other

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<sup>199</sup> EEOC TASK FORCE REPORT, *supra* note 110, at 49.

<sup>200</sup> See, e.g., Office of Research Integrity, *Human Subjects*, UNIV. OF NEV., LAS VEGAS, <http://www.unlv.edu/research/ORI-HSR> (last visited May 22, 2019) (for example, interviews can maintain the confidential identities of individual interviewees and focus group members by assigning an identifying number to individuals and destroying the name of the individuals after the interview or focus group is completed. The individual would be identified by number, type of job, type of employer, etc. Survey questionnaires would not identify the individual respondent but would give an identifying number as well as the type of job and employer in which the individual works. As to the employer, researchers would work with models and best practices in particular places of employment. At the time, they would know which employers they are dealing with, but ultimately, they would destroy the identifying information about the property, and make recommendations with reference to the type and size of employer, its general location, etc. This type of study must be approved by the researcher's Institutional Review Board, in accordance with federal law on Human Subjects. The IRB will assure that the subjects (including the employers) are protected from harm by requiring confidentiality agreements and protocols for destroying identifying information, etc.).

<sup>201</sup> See e.g., *Harassing "Girls"*, *supra* note 49 (detailing severe harassment that occurs at one Las Vegas casino). See also *Trouble in Sin City*, *supra* note 49 (describing horrific harassment of female employees in clubs inside of casinos and discussing the history of the Nevada gaming industry and its regulatory regime).

<sup>202</sup> See *id.* at 253 (describing the history of the motto "What happens here stays here").

<sup>203</sup> See, e.g., *Harassing "Girls"*, *supra* note 49 at 1234-1236 (detailing severe harassment that occurs at one Las Vegas casino). See also *Trouble in Sin City*, *supra* note 49 at 261-262 (describing horrific harassment of female employees in clubs in casinos).

than those working on the casino floors. Finally, it is important to understand whether in the gaming industry there are sex-segregated jobs that lead to sex discrimination and that make much of the discrimination and harassment that occurs invisible to those who do not suffer from it.

Organizations, and indeed, industries, can change their cultures, but it takes work. Before creating a new culture, an organization must have hard facts and qualitative data that explain how the culture affects the workplace.<sup>204</sup> Research and solutions must be *industry- and organization-specific*. That is, researchers should focus not only on the industry but also on specific organizations within the industry and units within those organizations. Only when models are tested in these various contexts will researchers know what works and what does not work, where, when, and why.

In sum, understanding what the problem is and how to remedy it requires a multi-faceted approach: (1) Identifying the problem(s) and the scale and scope of the problem(s); (2) Identifying how the problem(s) differ depending on the different parts of the industry, the organization, different units within the organization, and different categories of employees; (3) Identifying how varying the location in the organization may change the types of discrimination and harassment that exist; and (4) Creating, testing, and amending based on research results best practices and models that will work for the specific jobs and locations in the industry and within organizations.

Additionally, industry leaders must step up to demonstrate that it is important to them to solve problems of discrimination and harassment; they must hold those who harass or discriminate against others accountable. This will look different depending on who the perpetrators are. If they are supervisors or co-workers of the victims, their jobs should be affected, if not terminated. If they are guests or customers or third-party contractors, casino leaders must make clear that they will not tolerate harassment of their employees. If need be, management should terminate these relationships or exclude guests from the properties. Casinos are equipped with excellent security systems, ranging from cameras to security guards.<sup>205</sup> These systems can be used to not only study what is happening at casinos, but also to prevent and remedy behaviors as well.<sup>206</sup>

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<sup>204</sup> See Robin J. Ely & Debra E. Meyerson, *An Organizational Approach to Undoing Gender: The Unlikely Case of Offshore Oil Platforms*, 30 RES. ORGANIZATIONAL BEHAV. 3 (2010). See also Robin J. Ely & Debra Meyerson, *Unmasking Manly Men*, HARV. BUS. REV. (July-Aug. 2008), <https://hbr.org/2008/07/unmasking-manly-men> (both showing research including qualitative interviews of employees and customers to assure that we understand the problems that exist followed by creation of models for training, reporting, investigating harassment claims; a second step would require further interviews and testing of the models). (Note that this type of research has worked well in one of the most masculinized workplaces—oil rigs—to improve safety and productivity. I believe this approach would work well in casinos and other gaming institutions as it has on oil-rigs.)

<sup>205</sup> See, e.g., AcesWildMMA, *MGM Casinos Surveillance Cameras - 360 DEGREE Technology! (Mandalay Bay)*, YOUTUBE (Dec. 13, 2017), <https://youtube.com/watch?v=DkOuvR-ueX8> (demonstrating camera surveillance at MGM casinos).

<sup>206</sup> See Ann C. McGinley, *Wynn allegations are the tip of the iceberg*, NEV. INDEP. (Feb. 2, 2018, 3:00 AM), <https://thenevadaindependent.com/article/wynn->

## PART IV: CONCLUSION: THE WAY FORWARD: INDUSTRY- AND ORGANIZATION-SPECIFIC SCIENTIFIC RESEARCH

The allegations about Wynn Resorts' looking the other way when its CEO, Chair, and majority shareholder engaged in sexual harassment and assault are horrific, but they do not represent all sex-, gender-, race-, and national-origin-based harassment that exists of employees in gaming properties in Nevada.<sup>207</sup> The GCB worked hard to correct the problem by proposing amendments to Regulation 5 of the Nevada Gaming Regulations, and its proposal is consistent with many of the recommendations that the bipartisan EEOC Task Force on the Study of Sexual Harassment promulgated after spending a year studying the issues of prevention and remediation.<sup>208</sup> That said, the GCB proposed regulations would be more effective if they applied to all types of harassment, emphasized the importance of leadership in preventing harassment, the role of middle managers and line supervisors in prevention and correction, the importance of risk assessment, and most importantly, the importance of looking at the industry-specific issues such as customer harassment of employees. Without more, approval of the GCB proposed amendments would likely do more good than harm, and such approval should create important changes in the industry.

By the same token, the best solution to the harassment culture that pervades the casino industry is to institute a comprehensive research project surrounding harassment in the gaming industry. Such a project would entail scientific research – untouched by industry influence – that would create important knowledge and understanding of the prevalence, causes, means to prevent and remedy harassment in this sexualized industry. Once this information is developed, even more effective GCB regulations can be proposed and adopted. And gaming executives should exhibit the leadership that would be necessary to eliminate harassment on their properties. If the gaming industry in Nevada were to make these efforts, it would become a leader in the industry in the important area of supporting and protecting employees.

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allegations-are-the-tip-of-the-iceberg (encouraging casinos to use security cameras to detect, remedy, and prevent sexual abuse).

<sup>207</sup> See generally *Trouble in Sin City*, *supra* note 49. See also *Harassing "Girls"*, *supra* note 49 at 262-263; EEOC, FY 2009 - 2018 EEOC CHARGE RECEIPTS FOR NEVADA, [https://www1.eeoc.gov/eeoc/statistics/enforcement/charges\\_by\\_state.cfm#centercol](https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol) (listing statistics of discrimination, including harassment, charges filed in Nevada from 2009-18); Nevada Equal Rights Commission, *Types of Employment Discrimination*, NEV. DEP'T OF EMP., TRAINING & REHAB., <https://detr.nv.gov/Page?Id=141> (listing the most common types of discrimination charges filed) (last visited May 22, 2019).

<sup>208</sup> EEOC TASK FORCE REPORT, *supra* note 110, at 66-71; NEVADA PROPOSED AMENDMENTS, *supra* note 179.