

# Making Workfare More Fair: Protecting Workers in Welfare Programs from Sexual Harassment

Kathryn Evans<sup>†</sup>

## ABSTRACT

*Every year, hundreds of thousands of adults in the United States work full-time jobs through programs known as “workfare” as a requirement to collecting public benefits. Although these individuals work full time, their legal status as “employees” is not as clear as it should be. That fact, along with other factors such as their status as temporary workers and the public stigma against those who collect public benefits, make these workers particularly vulnerable to abuse in the workplace. This Article analyzes the issue of sexual harassment and assault in the workplace and the factors that place workfare participants at risk. It then discusses current legal protections and how to use the law and administrative processes to better protect these workers.*

INTRODUCTION .....	151
I. SEXUAL HARASSMENT IN THE WORKPLACE.....	153
A. The Universal Issue .....	153
B. Complications Particular to the Workfare Workforce .....	157
1. Low Power Means High Risk of Harassment.....	158
2. Barriers to Reporting .....	161
3. Perceived Lack of Credibility.....	165
II. FEDERAL PROTECTIONS IN PLACE .....	167
A. Title VII .....	167
B. Continuation of Welfare Benefits .....	172
III. SUGGESTIONS FOR IMPROVEMENT .....	173
A. Litigation and Legislation.....	173

---

DOI: <https://doi.org/10.15779/Z38D21RK0D>

<sup>†</sup> Kathryn Evans is a Litigation Fellow at Katz, Marshall & Banks LLP, working on employment and whistleblower cases. She obtained a J.D. from NYU Law in 2020, and a B.A. from Union College in 2017. The author would like to thank the editors of the *Berkeley Journal of Gender, Law & Justice*, especially Karnik Hajjar and Carly Shortell, for their editorial assistance with this Article.

B. Administrative Recommendations.....	175
C. Grassroots Organizing .....	178
CONCLUSION .....	178

## INTRODUCTION

The system of public assistance in the United States is a complex web of programs run by different government agencies and different levels of government within the federal system. They all have different qualification thresholds, depending on whom they are designed to help, and different requirements that recipients must meet in order to keep receiving benefits. Some programs are only available to those who have a job: for example, one must earn income to receive the Earned Income Tax Credit, and one must be injured on the job to receive worker’s compensation. But other federal programs are designed to aid people who are unemployed. These programs, namely Temporary Assistance for Needy Families (TANF) and the Supplemental Nutritional Assistance Program (SNAP or food stamps), require at least a majority of adult recipients to complete work activities in order to receive benefits.

Congress created TANF through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>1</sup> The statute established the basic requirements, which the Department of Health and Human Services (HHS) expanded on in subsequent regulations.<sup>2</sup> The federal government, however, only grants money to states, which add in their own funds and administer TANF programs to their citizens. TANF funding is available only to children and to adults who are caring for minor children or are pregnant<sup>3</sup> because Congress designed the program to provide for “needy families” and to ensure that children can stay with relatives.<sup>4</sup>

As the name of the bill—Personal Responsibility and Work Opportunity—suggests, the redesigned<sup>5</sup> welfare program was intended to put people to work so that they could become self-sufficient and would no longer need government assistance.<sup>6</sup> Thus, benefits come with a work requirement. Within each state’s population of TANF recipients, at least half of all families and 90 percent of all two-parent families must have an adult, or two, participating in work activities.<sup>7</sup> The statute lists twelve activities that qualify as “work activities” for the purposes

---

1. Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. §§ 601–619 (2018)).

2. 45 C.F.R. §§ 260.10–270.13 (2019).

3. 42 U.S.C. § 608(a)(1) (2018).

4. *Id.* § 601(a)(1).

5. TANF replaced an earlier general assistance program known as Aid to Families with Dependent Children. *See, e.g.* DAVID SUPER, PUBLIC WELFARE LAW 29 (2016).

6. *See* 42 U.S.C. § 601(a)(2) (2018).

7. *Id.* § 607(a). A single parent or caretaker relative must perform at least thirty hours of work activities per week, while two-parent households must perform at least thirty-five hours per week, or at least fifty-five hours per week if they receive federal funding for childcare and neither parent is disabled or caring for a severely disabled child. *Id.* § 607(e)(1)(A)–(B).

of TANF, including subsidized or unsubsidized private or public sector employment, work experience such as refurbishing public housing, community service, job search and readiness activities, providing child care to someone doing community service, and various vocational training and educational activities.<sup>8</sup> Anyone who fails to meet their work requirements will see their family's benefits reduced at least pro rata according to the number of hours they missed, or eliminated altogether.<sup>9</sup> TANF also has a provision for welfare-to-work grants, through which private industry councils and similar entities receive federal funds to create new jobs, training, and educational provisions designed to move unemployed welfare recipients into permanent private-sector jobs.<sup>10</sup>

Similarly, the Supplemental Nutrition Assistance Program requires all "physically and mentally fit" recipients ages sixteen to fifty-nine to register for employment and accept any work or training assignment they are given for as long as they are in the program.<sup>11</sup> States may create workfare programs for SNAP recipients to meet the required work hours.<sup>12</sup> States administer SNAP benefits to households as a unit, and if any head of household does not meet their work requirements, the entire household is cut off food stamps, at least temporarily.<sup>13</sup>

But what protections do individuals have while performing their workfare jobs? What duty does the government have to the people it places into work assignments as a requirement for obtaining their basic subsistence needs? More specifically, what happens when a welfare recipient is sexually harassed at their government-mandated, and often government-run, job?

Workfare participants are not well protected from workplace sexual harassment and assault, but there are ways for government entities, the legal community, and grassroots organizations to improve on that grim reality. Section I of this Article will discuss the issue of sexual harassment<sup>14</sup> in the workplace and

---

8. 42 U.S.C. § 607(d)(1)–(12).

9. *Id.* § 607(e)(1)(A)–(B).

10. *Id.* § 603(5).

11. 7 U.S.C. § 2015(d)(1)(A) (2018). A person may refuse a work assignment for good cause, as determined by the State agency that administers SNAP, which may include sex discrimination by the employer. *Id.* §§ 2015(d)(1)(A), (d)(1)(D)(i) (allowing the Secretary of Agriculture to define "good cause"); 7 C.F.R. 273.7(i) (providing guidelines for State agencies to determine whether a participant has good cause for refusing a work assignment).

12. *Id.* § 2029(a).

13. *Id.* § 2015(d)(1)(B). If an individual who is not the head of a household fails to meet work requirements, they forfeit only their individual share of the funding.

14. For purposes of this Article, "sex discrimination" or "gender discrimination" means treating someone worse because of their sex or gender and includes a wide range of actions such as giving someone different training or work assignments, refusing to hire, or paying less based on sex or gender. *See Sex-Based Discrimination*, EEOC, <https://www.eeoc.gov/sex-based-discrimination> (last visited Sept. 7, 2020) [<https://perma.cc/SW26-MNDM>]; *see also Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019) (using sex discrimination and gender discrimination interchangeably but noting medical and scientific trends to differentiate sex and gender). "Sexual harassment" is a type of sex or gender discrimination, and it consists of conduct that is sexual in nature or motivated by a person's sex, such as "unwelcome sexual advances" or "making offensive comments about women in general." *Sex-Based Discrimination*, *supra*; *see also, Sexual Harassment*, BLACK'S LAW DICTIONARY (11th ed.

why it is a particular issue for people who are placed in a job through a welfare program. Then, in Section II, I will examine the legal protections that are available to workfare workers through federal law. Finally, in Section III, I will discuss some suggestions for improving on those protections already in place, so that workfare participants can be less vulnerable as they earn a living.

## I. SEXUAL HARASSMENT IN THE WORKPLACE

### A. The Universal Issue

In recent years, the Me Too movement has brought discussions on sexual assault to the forefront of popular culture. Activist Tarana Burke founded the movement in 2006 as a way to support and empower young women of color who had experienced sexual abuse, assault, or exploitation.<sup>15</sup> Between October 15, 2017, and September 30, 2018, “#MeToo” was used over nineteen million times on Twitter as people all over the world used the hashtag to indicate that they had been sexually harassed or assaulted.<sup>16</sup> When Bill Cosby was convicted of aggravated indecent assault on April 26, 2018, it was considered “one of the first major courtroom victories for the #MeToo movement,”<sup>17</sup> even though courtroom convictions were not a goal Burke articulated for the movement.<sup>18</sup> A similarly high-profile conviction came in early 2020, when movie mogul Harvey Weinstein was convicted of sexual assault and rape against his production assistant, Mimi Haley, and actress Jessica Mann.<sup>19</sup> Several women have also filed civil suits against him, his companies, and various company executives. They allege that

---

2019). “Sexual assault” is any non-consensual, sexual touching. *Sexual Assault*, RAPE ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/articles/sexual-assault> (last visited Sept. 7, 2020) [https://perma.cc/7Y47-ZD8U]. “Rape” is sexual assault that involves any sort of penetration. *Id.* For a more in-depth discussion of the difference between sexual harassment, assault, and rape, see Sarah L. Cook, Lilia M. Cortina & Mary P. Koss, *What’s the Difference Between Sexual Abuse, Sexual Assault, Sexual Harassment, and Rape?*, CONVERSATION (Feb. 7, 2018), <https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218> [https://perma.cc/KSC5-PWWU].

15. *The Movement*, JUST BE INC. <https://justbeinc.wixsite.com/justbeinc/the-me-too-movement-c7cf> (last visited Feb. 23, 2021) [https://perma.cc/HT2V-9GMS]; Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created it – 10 Years Ago*, WASH. POST (Oct. 19, 2017) <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [https://perma.cc/8CPD-TLW3].
16. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [https://perma.cc/68XM-6Z7X].
17. Meredith Mandell, Adam Reiss & Daniella Silva, *Bill Cosby Found Guilty of Sexual Assault in Retrial*, NBC NEWS (Apr. 26, 2018, 5:33 PM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-found-guilty-sexual-assault-retrial-n869121> [https://perma.cc/KJW2-8G3K].
18. See *The Movement*, *supra* note 15 (explaining Burke’s goals in founding the Me Too movement as educating the public and empowering and connecting survivors).
19. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC (Feb. 24, 2020), <https://www.bbc.com/news/entertainment-arts-41594672> [https://perma.cc/67FT-Q5GW].

Weinstein committed sexual misconduct and that his company and fellow executives were negligent in allowing the misconduct.<sup>20</sup> As the Time's Up movement spread throughout Hollywood,<sup>21</sup> more and more women have come forward with allegations of sexual misconduct against powerful men in the industry, from TV personalities like Matt Lauer and Tom Brokaw, to musicians like R. Kelly and Chris Brown, to executives like CBS's Les Moonves.<sup>22</sup>

But what about sexual harassment and assault that people without a national audience face? In fiscal year 2019, the U.S. Equal Employment Opportunity Commission (EEOC) received 7,514 allegations of sexual harassment, which is relatively average for the past ten years.<sup>23</sup> However, this number represents less than one third of the nationwide reports of workplace sexual assault—in 2013, there were 7,256 charges filed with the EEOC<sup>24</sup> and over thirty thousand charges filed with federal, state, and local agencies throughout the country.<sup>25</sup>

The actual problem is much larger than those numbers suggest, as various studies have shown that sexual harassment and assault are massively underreported, both in and out of the workplace. For example, a YouGov and Huffington Post poll from 2013 found that 13 percent of respondents had been sexually harassed by a boss or superior, 19 percent had been sexually harassed by a coworker, and only 27 percent of those individuals reported the harassment.<sup>26</sup>

- 
20. *See* David v. Weinstein Co. LLC, 431 F. Supp. 3d 290 (S.D.N.Y. 2019) (alleging violations of Trafficking Victims Protections Act (TVPA) and negligence); Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156 (S.D.N.Y. 2019) (alleging TVPA and RICO violations, plus negligence and intentional tort); Noble v. Weinstein, 335 F. Supp. 3d 504 (S.D.N.Y. 2018) (alleging violations of TVPA); Huett v. Weinstein Co. LLC, No 2:18-cv-6012-SVW-MRW, 2019 WL 2902494 (C.D. Cal. Feb. 2019) (alleging sex trafficking and negligence); Canosa v. Ziff, No. 18 Civ. 4115 (PAE), 2019 WL 498865 (S.D.N.Y. Jan. 28, 2019) (alleging rape, sexual assault, intimidation, and harassment).
  21. Note that the Time's Up organization fights sexual assault and gender discrimination outside of Hollywood as well, but celebrity accusations are the ones that get the most popular attention. *See 2019 Year in Review*, TIME'S UP (Dec. 15, 2019), <https://timesupnow.org/2019-year-in-review/> [<https://perma.cc/YPY3-H6AY>] (listing the organization's achievements, such as ending pregnancy discrimination at Nike, suing McDonalds and triggering company policy change over harassment, and connecting nearly four thousand workers who were sexually harassed to attorneys).
  22. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [<https://perma.cc/92YZ-GXWJ>].
  23. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2019*, EEOC, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Nov. 29, 2020) [<https://perma.cc/ELV4-DLZU>] (reporting that there have been between 6,696 and 7,944 sexual harassment claims filed with the EEOC each year from 2010 to 2019).
  24. *Id.*
  25. Testimony of Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law Center, before the EEOC (Jan. 14, 2015), <https://www.eeoc.gov/eeoc/meetings/1-14-15/graves.cfm> [<https://perma.cc/DZ4W-8DCT>].
  26. Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/workplace-sexual-harassment-poll\\_n\\_3823671](https://www.huffpost.com/entry/workplace-sexual-harassment-poll_n_3823671) [<https://perma.cc/3XUZ-29ZJ>]; Results from 1000 Adult Interviews by Huffington Post & YouGov (Aug. 2013), [http://big.assets.huffingtonpost.com/toplines\\_harassment\\_0819202013.pdf](http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf) [<https://perma.cc/AKR4-SCYR>].

And some of those reports may have been made internally to managers, as opposed to filed with the EEOC or another government agency. Other research suggests that as few as 10 percent of women who experience harassment formally report it.<sup>27</sup> And reporting rates for the most egregious sexual assault, rape, are even lower.<sup>28</sup>

More recent polls have found a high incidence of sexual misconduct in the employment context and in general, although studies vary widely in their exact estimates.<sup>29</sup> In 2018, over 40 percent of women and nearly 17 percent of men polled told the Pew Research Center that they had “received unwanted sexual advances or verbal or physical harassment of a sexual nature” at work.<sup>30</sup> That same year, 50 percent of women and 18 percent of men polled by Ipsos and National Public Radio said that they had been sexually harassed,<sup>31</sup> and 48 percent of women polled by Gallup reported the same.<sup>32</sup> The Centers for Disease Control and Prevention (CDC) similarly estimate that 44 percent of women and 25 percent of men have experienced sexual violence, and that 21 percent of women and 3 percent of men have survived a completed or attempted rape.<sup>33</sup> The CDC

- 
27. Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs 2* (Inst. for Women’s Pol’y Rsch., Briefing Paper No. B376, 2018), [https://iwpr.org/wp-content/uploads/2020/09/TWPR-sexual-harassment-brief\\_FINAL.pdf](https://iwpr.org/wp-content/uploads/2020/09/TWPR-sexual-harassment-brief_FINAL.pdf) [<https://perma.cc/B6X4-7XEZ>].
  28. *Understanding Pregnancy Resulting from Rape in the United States*, CDC (Feb. 27, 2019), <https://www.cdc.gov/violenceprevention/datasources/nisvs/understanding-RRP-inUS.html> [<https://perma.cc/YX9S-ESZR>] (reporting that only 5.2 percent of individuals raped by an acquaintance report it to authorities); Anthony Lathrop, *Pregnancy Resulting from Rape*, 27 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 25, 25 (1998) (estimating that 18 percent of all rape survivors report it).
  29. See Shaw et al., *supra* note 27, at 1 (citing studies estimating that 25 to 80 percent of women experience workplace sexual harassment); Rebecca C. Thurston, Yuefang Chang, Karen Matthews, Roland von Känel & Karestan Koenen, *Association of Sexual Harassment and Sexual Assault with Midlife Women’s Mental and Physical Health*, 179 JAMA INTERNAL MED. 48, 49 (2018) (“In the United States, an estimated 40% to 75% of women have experienced workplace sexual harassment, and over 1 in 3 women (36%) have experienced sexual assault.”).
  30. See Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RSCH. CTR. (Apr. 4, 2018), <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/> [<https://perma.cc/D6C7-D6D8>].
  31. IPSOS, IPSOS/NPR EXAMINE HOW VIEWS ON SEXUAL HARASSMENT HAVE CHANGED IN THE PAST YEAR 9 (Oct. 31, 2018), [https://www.ipsos.com/sites/default/files/ct/news/documents/2018-10/ipsos\\_npr\\_sexual\\_harassment\\_topline\\_103118\\_final.pdf](https://www.ipsos.com/sites/default/files/ct/news/documents/2018-10/ipsos_npr_sexual_harassment_topline_103118_final.pdf) [<https://perma.cc/PUT6-UVGZ>] [hereinafter IPSOS & NPR SEXUAL HARASSMENT POLL]; see also IPSOS, SEXUAL ASSAULT: A NEW DIVIDED ERA OF UNDERSTANDING 7 (Oct. 31, 2018) available at [https://www.ipsos.com/sites/default/files/2018-10/ipsos\\_npr\\_sexual\\_assault\\_topline\\_103118\\_final.pdf](https://www.ipsos.com/sites/default/files/2018-10/ipsos_npr_sexual_assault_topline_103118_final.pdf) [<https://perma.cc/2FFG-Z4FW>] [hereinafter IPSOS SEXUAL ASSAULT POLL] (reporting that 43 percent of female respondents and 13 percent of male respondents said they had been sexually assaulted).
  32. Megan Brennan, *U.S. Men Less Concerned than in 2017 About Sexual Harassment*, GALLUP (Mar. 18, 2019), <https://news.gallup.com/poll/247823/men-less-concerned-2017-sexual-harassment.aspx> [<https://perma.cc/TNW8-9EQM>].
  33. Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marciejo Kresnow & Jieru Chen, *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release 2–3* (Centers for Disease Control and Prevention, 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf> [<https://perma.cc/K3KB-S5UV>].

additionally reports that 16 percent of women and 6 percent of men in the United States have been stalked.<sup>34</sup>

While these statistics are gruesome, this problem is not just about numbers, but about the human impact. Sexual harassment, whether verbal, physical, or both, is a great indignity to the target. It can cause lasting psychological harm such as depression, anxiety, and post-traumatic stress disorder (PTSD).<sup>35</sup> These psychological impacts may be even greater in the workfare population, as minority women have “societal trauma” which compounds the pain of sexual harassment.<sup>36</sup> Sexual harassment is also associated with other long-term health consequences, such as high blood pressure and insomnia.<sup>37</sup> Where physical violence is involved, there may be physical injuries, and rape puts women at risk of becoming pregnant.<sup>38</sup> The negative impacts of sexual harassment reverberate beyond the survivor’s health, straining interpersonal relationships with the perpetrator as well as other people in the survivor’s life.<sup>39</sup>

Sexual harassment also interferes with the target’s ability to do her job and advance in the workplace so it directly interferes with the stated goal of workfare to lead participants into permanent jobs. Negative health consequences such as anxiety and depression make it more difficult for anyone to perform their job well (or at all) and be recommended for advancement.<sup>40</sup> Lower job satisfaction due to

---

34. Smith et al., *supra* note 33, at 2–3.

35. See Kathleen M. Rospenda, Judith A. Richman, Jennifer L.Z. Ehmke & Kenneth W. Zlatoper, *Is Workplace Harassment Hazardous to Your Health?*, 20 J. BUS. & PSYCH. 95, 99 (2005) (reporting psychological impacts of sexual harassment were still present two years later); Shaw et al., *supra* note 27, at 4 (reporting that depression and PTSD can be effects of sexual harassment); Thurston et al., *supra* note 29, at 50–51 (finding that women with a history of sexual harassment at work were more likely to have “clinically elevated depressive symptoms” and anxiety in mid-life).

36. See generally, Thema Bryant-Davis, Heewoon Chung & Shaquita Tillman, *From the Margins to the Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault*, 10 TRAUMA, VIOLENCE & ABUSE 330 (2009). Societal trauma includes “intergenerational trauma, race-based trauma, sexism, racism, classism, heterosexism, historical trauma, insidious trauma, cultural violence, political and racial terror, and oppression.” *Id.* at 331.

37. Thurston et al., *supra* note 29, at 50–52.

38. Kate Clancy, *Here is Some Legitimate Science on Pregnancy and Rape*, SCI. AM. (Aug. 20, 2012), <https://blogs.scientificamerican.com/context-and-variation/here-is-some-legitimate-science-on-pregnancy-and-rape/#> [<https://perma.cc/DD6A-Q5PB>] (arguing that the incidence of pregnancy from rape is the same as pregnancy from consensual heterosexual sex, at 3 to 5 percent); Lathrop, *supra* note 28 (estimating that the likelihood that a given rape will result in pregnancy is between 4 to 10 percent); *Understanding Pregnancy Resulting from Rape*, *supra* note 28 (estimating that 17 percent of female rape survivors become pregnant as a result).

39. See generally Vicki Connop & Jenny Petrak, *The Impact of Sexual Assault on Heterosexual Couples*, 19 SEXUAL & RELATIONSHIP THERAPY 29 (2004) (discussing issues reported by heterosexual couples when the female partner is sexually assaulted by someone else, including sexual dysfunction, aversion to touching, communication errors, and increased rates of breaking up).

40. See, e.g., *Depression: A Costly Condition for Businesses*, AM. PSYCHIATRIC ASS’N FOUND. CTR. FOR WORKPLACE MENTAL HEALTH, <http://workplacementalhealth.org/Mental-Health-Topics/Depression> (last visited Sept. 7, 2020) [<https://perma.cc/LZ64-JUPV>] (discussing depression’s negative impacts on job performance). The American Psychiatric Association estimates that U.S. employers lose \$44 billion in lost productivity due to depression every year. *Id.*

harassment makes workers less productive and more likely to quit.<sup>41</sup> Harassment increases distractions in the workplace, which can decrease productivity and increase accidents.<sup>42</sup> It ruins relationships with potential mentors and supervisors and makes it more difficult to build beneficial business relationships.<sup>43</sup> Even bystanders to sexual harassment in the workplace are less likely to be happy, healthy, and productive employees and are more likely to quit.<sup>44</sup>

### B. Complications Particular to the Workfare Workforce

Millions of Americans depend on the federal government for temporary assistance at any given time. In 2018, just under half a million adults and over one million families received TANF assistance.<sup>45</sup> And in fiscal year 2019, an average of eighteen million households with over thirty-five million members received SNAP benefits each month.<sup>46</sup> Even with government assistance, these participants remain in deep poverty—in 2018, New Hampshire was the only state whose maximum TANF grant was over 50 percent of the federal poverty line based on family size.<sup>47</sup> Thus, it is no surprise that 90 percent of TANF recipients also receive medical assistance, 82 percent also receive SNAP benefits, 11 percent have subsidized housing, and 6 percent rely on subsidized childcare.<sup>48</sup>

TANF is designed to aid impoverished families with children,<sup>49</sup> and its adult recipients are primarily young, single mothers. In 2018, 72 percent of adult TANF recipients were single and never married, an additional 15 percent were separated, divorced, or widowed, and only 13 percent were married.<sup>50</sup> Eighty-six percent of

---

41. See M. Sandy Hershcovis, Sharon K. Parker & Tara C. Reich, *The Moderating Effect of Equal Opportunity Support and Confidence in Grievance Procedures on Sexual Harassment from Different Perpetrators*, 92 J. BUS. ETHICS 415, 423 (2010).

42. Shaw et al., *supra* note 27, at 4.

43. *Id.* at 5. See also Elizabeth R. Langton, *Workplace Discrimination as a Public Health Issue: The Necessity of Title VII Protections for Volunteers*, 83 FORDHAM L. REV. 1455, 1484–86 (2014) (discussing how sexual harassment limits the target’s participation in the workplace as a public forum for civic discourse).

44. Langton, *supra* note 43, at 1479–81, 1487; See also Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 828 (2003) (“[T]here is mounting evidence that employment-related sexual harassment imposes large costs on workers and firms through increased job turnover, higher absenteeism, reduced job satisfaction, lower productivity, and adverse health outcomes”).

45. U.S. DEP’T OF HEALTH & HUM. SERVS., OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS FISCAL YEAR (FY) 2018 4, 20 (2019) [hereinafter HHS 2018 TANF Report].

46. U.S. DEP’T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (Dec. 11, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-1a.pdf> [<https://perma.cc/UMS5-U8G3>].

47. GENE FALK & PATRICK A. LANDERS, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 7–8 (2019). The federal poverty guidelines are set yearly by HHS and are used for administrative purposes such as determining eligibility for certain federal aid programs. See *Poverty Guidelines*, HHS OFFICE OF ASSISTANT SEC’Y FOR PLANNING & EVALUATION (Jan. 8, 2020), <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/M5DE-6Q3L>].

48. HHS 2018 TANF Report, *supra* note 45, at T11.

49. 42 U.S.C. § 601(a).

50. HHS 2018 TANF Report, *supra* note 45, at T22.



adult recipients were women, nearly half of whom were in their twenties, and another third of whom were in their thirties.<sup>51</sup> All of these adults were parents or guardians of minor children, and just over half reported that their youngest child was under the age of six.<sup>52</sup> Over half of all adult TANF recipients have completed high school but few have any education beyond that.<sup>53</sup> This is in stark contrast to the overall U.S. adult population, in which 11 percent do not finish high school, 29 percent only finish high school, and 60 percent receive some higher education.<sup>54</sup> The racial and ethnic composition of the TANF population is also disproportionate to the country as a whole: it is 38 percent Hispanic, 29 percent Black, 27 percent White, and 2 percent Asian.<sup>55</sup> The general U.S. population is 18 percent Hispanic or Latino, 13 percent Black or African American, 60 percent White, and 6 percent Asian,<sup>56</sup> meaning Black and Latine people are hugely overrepresented in the TANF population, while White and Asian people are underrepresented.

### 1. Low Power Means High Risk of Harassment

Various factors add up to place welfare workers at a relatively high risk of sexual harassment and assault in the workplace. One of those factors is low economic power. Low-wage workers in general are at a high risk of being sexually harassed at work.<sup>57</sup> In 2018, about two thirds of the people who contacted the Times Up Legal Defense Fund requesting legal assistance with their sexual harassment claims were low-wage workers.<sup>58</sup> Low-wage workers, especially those

---

51. HHS 2018 TANF Report, *supra* note 45, at T18.

52. *Id.* at T9.

53. *Id.* at T20 (showing that 35.9 percent of adult TANF recipients have not completed high school, 55.3 percent are high school graduates, and 8.8 percent have more than a high school education).

54. *See Educational Attainment in the United States: 2018: Table 1*, U.S. CENSUS BUREAU (Feb. 21, 2019), <https://www.census.gov/data/tables/2018/demo/education-attainment/cps-detailed-tables.html> [<https://perma.cc/9JMZ-8JU6>].

55. HHS 2018 TANF Report, *supra* note 45, at T10. The adult-only population is slightly different but still highly disproportionate at 31.8 percent Hispanic, 31.2 percent Black, 30.5 percent White, and 2.9 percent Asian. *Id.* at T19.

56. *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045218#qf-headnote-b>. Note that both HHS and the Census Bureau state “Hispanics may be of any race.” *Id.*; HHS 2018 TANF Report, *supra* note 45, at T10.

57. *See* Bryant-Davis et al., *supra* note 36, at 333 (stating that low-wage workers and those receiving public assistance are more likely to suffer sexual assault); GWENDOLYN MINK, *HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN* 139 (2000) (noting vulnerability of low-wage workers to sexual harassment); Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, Ctr. for Am. Progress (Nov. 20, 2017), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [<https://perma.cc/CRK8-Q5KM>] (same); Testimony of Fatima Goss Graves, *supra* note 25 (same).

58. Alex Press, *Women are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation*, VOX (May 9, 2019), <https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eoec-complaints> [<https://perma.cc/3ETZ-QVZF>].

on welfare, face high risks if they lose their jobs and may be more willing to bear harassment at work rather than report it and possibly lose their income.<sup>59</sup> Welfare workers, whose income is calculated by the government to cover only their basic necessities, do not have the extra income to hire a lawyer to bring legal action against their harassers. Moreover, even if they are lucky enough to locate pro bono legal services, these workers must find the time to meet with their lawyer and go through the steps to bring a claim between their work activities, daily check-ins with the welfare office, and childcare responsibilities—which, by definition, all TANF recipients have.

Even more so than other low-wage workers, workfare participants may be perceived as expendable to employers. Although workfare participants are a source of very cheap labor—they are generally paid the minimum wage, which may be subsidized by the government—employers are not supposed to displace any hired employees with welfare workers.<sup>60</sup> So while cheap labor is valuable to any business, welfare workers are often seen as surplus employees who can be dominated and abused, rather than valuable members of the team.<sup>61</sup> Since businesses put few resources into hiring and training welfare workers, and many are brought on only as temporary workers, employers have less incentive to keep them than permanent workers—including the supervisors who may be engaging in harassment. Further, if one welfare worker quits or is reassigned, there is likely to be a new welfare recipient to fill their position.

In addition to being seen as expendable, workfare participants may be particular targets for sexual harassment because it is unclear what legal protections apply to them. As will be discussed later, it is not clear that federal law protects TANF recipients from gender discrimination in the workplace, the category under which sexual harassment falls.<sup>62</sup> If hired employees are protected by nondiscrimination law but those sent by the welfare office are not, the latter become targets as harassing them carries less risk.<sup>63</sup> Lack of clear protection under

---

59. See Ginger Adams Otis, *Female Parks Department Workers Stripped for Permanent Jobs, More Work at Raunchy Holiday Parties: Sources*, N.Y. DAILY NEWS (May 29, 2013), <https://www.nydailynews.com/new-york/women-parks-dept-stripped-better-jobs-sources-article-1.1357067> [<https://perma.cc/WW3G-KRSE>] (“Many of the women [forced to pole dance at a holiday party] are low-income single mothers, some of whom came into the job through the welfare system and are desperate to keep the seasonal positions that can run anywhere from four to six months at a time.”); MINK, *supra* note 57, at 139–40 (“[T]he cost of harassment is uniquely high for women who risk destitution if they complain about it. Low-wage women workers, including mothers on welfare, are particularly vulnerable in this way . . . [t]hose who need welfare would do best to suffer their sexual harassment if their only alternative is to quit their required work activity, deplete their time limits, and lose their families’ benefits.”); Shaw et. al. *supra* note 27, at 4 (noting that low-wage workers are at heightened risk for sexual harassment because they lose more from retaliation and job loss); Thurston et al., *supra* note 29, at 51 (“[F]inancially stressed women can lack the financial security to leave abusive work situations.”).

60. 7 U.S.C. § 2029(d)(1) (2018); 42 U.S.C. § 607(f) (2018).

61. ERIN HATTON, COERCED: WORK UNDER THREAT OF PUNISHMENT 103 (2020).

62. See *infra* section II.A. (discussing Title VII protection of workfare participants).

63. Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. C.L. & C.R. 159, 194 (2004).

federal law also sends a message that these workers *can* be harassed.<sup>64</sup> This contributes to societal stigma of welfare recipients and workplace culture that dehumanizes them.<sup>65</sup> This environment then makes it more socially acceptable to abuse welfare workers.<sup>66</sup>

Welfare workers have limited power in other ways as well. As people filling temporary and entry-level positions, welfare workers are always at the bottom of the business hierarchy. This means supervisors can leverage their power to coerce welfare workers. Researchers have found that significant power differentials put lower-level workers at an increased risk of being sexually harassed.<sup>67</sup> For example, supervisors may put a welfare recipient's benefits at risk by hiding their time cards or threatening to have their work placement terminated.<sup>68</sup> Or supervisors may use their role in giving assignments to order a worker into a vulnerable place where she is easier to assault. For example, asking her to help with something in a supply room and then trapping her inside and raping her.<sup>69</sup>

Demographic factors add to the power dynamic. Impoverished women of color—the predominant TANF-recipient population—lack political and social power with which to defend themselves or leverage government aid. Studies and polls universally show that women are more often targets of sexual harassment than men.<sup>70</sup> A YouGov and Huffington Post poll found that Hispanic and Black women suffered workplace sexual harassment at higher rates than White workers,<sup>71</sup> a result that is backed up by other research.<sup>72</sup> The relative youth of

---

64. Kean, *supra* note 63.

65. *E.g.*, HATTON, *supra* note 61, at 114–15 (stating that welfare recipients report “pervasive verbal abuse” by supervisors).

66. *See* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19, 28–29 (1998) (arguing that social stigma and creation of a “welfare caste” is designed to discourage people from using welfare and allow harsher work conditions); HATTON, *supra* note 61, at 102–03 (arguing that degrading treatment of welfare workers makes them seem lesser, which justifies further subjugating them).

67. Shaw et al., *supra* note 27, at 4.

68. This happened to two women on workfare in New York City, who were forced out of their work assignments by sexual harassment and eventually filed discrimination claims against the City. *United States v. City of New York*, 359 F.3d 83, 88, 89 (2d Cir. 2004).

69. *See* *Ellis v. Washington*, 409 F. Supp. 3d 148, 152 (W.D.N.Y. 2019).

70. *E.g.* Berman & Swanson, *supra* note 26 (reporting that 20 percent of female and 6 percent of male respondents had been sexually harassed by a supervisor); *Charges Alleging Sex-Based Harassment*, *supra* note 23 (reporting that only 16–18 percent of sexual harassment complaints filed with the EEOC are made by men); Smith et al., *supra* note 33, at 2–3 (reporting that 44 percent of women and 25 percent of men were targets of sexual violence, while 21 percent of women and 3 percent of men were targets of rape).

71. Huffington Post & YouGov Poll Results (Aug. 19–20, 2013) [http://big.assets.huffingtonpost.com/tabs\\_harassment\\_0819202013.pdf](http://big.assets.huffingtonpost.com/tabs_harassment_0819202013.pdf) [<https://perma.cc/C4B5-VJBN>] (reporting that 18 percent of Hispanic respondents, 17 percent of Black respondents, and 12 percent of White respondents were sexually harassed by a supervisor and 29 percent of Black respondents, 18 percent of Hispanic respondents, and 17 percent of White respondents were harassed by a coworker). *See* Berman & Swanson, *supra* note 26, for a full discussion of the poll results.

72. Tanya Katerí Hernández, *The Racism of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 479, 481 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“What the data suggests is that sexual harassers may target White women as victims at

TANF workers<sup>73</sup> also puts them at a disadvantage since “women who are younger or are in more precarious employment situations are more likely to be harassed” at work.<sup>74</sup>

Researchers John Krinsky and Maud Simonet found many of these factors at play when they studied sexual harassment in the New York City Parks Department. In interviews with 130 Parks Department workers over four years, they found that sexual harassment was prevalent, and that “[e]veryone understood job training participants in the [welfare-to-work program] to be the main targets of harassment.”<sup>75</sup> Interviewees attributed this in part to the fact that welfare-to-work participants were only given six-month assignments and were rarely hired into permanent positions at the end—in other words, they were expendable.<sup>76</sup> The authors added another dimension to the power dynamics: while 68 percent of permanent Parks Department employees were men, 74 percent of the welfare workers were women, and 90 percent of them were Black or Latine individuals.<sup>77</sup> As Krinsky and Simonet put it, “When the department created a stratum of workers who were both overwhelmingly women and very poor, in precarious positions, it should have been obvious things would go wrong.”<sup>78</sup> And in 2013, pictures and text messages from a city Parks Department holiday party led to reporting that supervisors in the department used their power over hiring decisions to make temporary female workers, who were “desperate to keep the[ir] seasonal positions,” dance on stripper poles in hopes of having their time at the department extended.<sup>79</sup>

## 2. Barriers to Reporting

As stated above, only a small percentage of all sexual assaults and harassment incidents in the United States are reported.<sup>80</sup> The reasons behind the vast underreporting that are discussed above apply to welfare workers, and some disproportionately impact welfare workers.

One reason that many employees do not report sexual harassment is fear of retaliation.<sup>81</sup> In one 2018 Ipsos poll, three quarters of respondents said that there

---

disproportionately lower rates than women of color. This conclusion is consistent with some of the few empirical studies to specifically focus on the influence of race on sexual harassment.”).

73. See HHS 2018 TANF Report, *supra* note 45, at T16 (about 80 percent of TANF recipients are in their twenties and thirties).

74. Thurston et al., *supra* note 29, at 51.

75. John Krinsky & Maud Simonet, *Playgrounds for Sexual Harassers: Our Parks Department has a Workplace Climate Rife for Misconduct*, N.Y. DAILY NEWS (Dec. 18, 2017), <https://www.nydailynews.com/opinion/playgrounds-sexual-harassers-article-1.3702100> [<https://perma.cc/5ZAY-L5N8>].

76. *Id.*

77. *Id.*

78. *Id.*

79. Otis, *supra* note 59.

80. See *supra* notes 26–29 and accompanying text.

81. Frye, *supra* note 57 (“[W]omen—particularly women of color—are more likely to work lower-

are “significant personal and professional costs for women who report being sexually assaulted.”<sup>82</sup> This polling number is backed by statistics. Just under three quarters of the sexual harassment claims filed with the EEOC include allegations of retaliation.<sup>83</sup> In Erin Hatton’s interviews with workfare participants, most reported they felt that they could not push back against any kind of verbal abuse from supervisors without being sanctioned.<sup>84</sup> Moreover, welfare workers may fear retaliation not only from their worksite supervisors, but also from their government caseworkers. Austin Sarat found that some welfare recipients worried that going to lawyers and making complaints about reduced benefits or other issues with their welfare would cause them to “be labelled ‘troublemakers’ or ‘bad actors’ by welfare officials, who might then use some minor violation of an unknown rule as an excuse to get revenge.”<sup>85</sup> While each state system and its rules are different, caseworkers generally have great discretion to determine what counts as a sanctionable violation of the work requirement.<sup>86</sup> In addition, upsetting a caseworker can be particularly dangerous, since they may have influence over a range of benefits that a recipient receives, from wages (TANF) and food supply (SNAP), to healthcare (Medicaid) and housing assistance.<sup>87</sup> Further, welfare recipients have little protection from such retaliation because many Administrative Law Judges (ALJs), who decide whether benefits were wrongfully terminated, apply rules strictly without inquiring into the reasons behind violations.<sup>88</sup> Thus, a workfare participant who misses work the day after being sexually harassed by a supervisor because she has reported the abuse and is waiting for a new assignment may be sanctioned for missing work and may have that sanction upheld by an ALJ despite her very good reason to miss a shift.

Whether the retaliation comes from a supervisor who can jeopardize a person’s workfare placement or a social worker who can directly terminate the individual’s benefits, these forms of retaliation are uniquely dangerous to workers on welfare. Many people who face retaliation at work have the option of seeking

---

wage jobs, where power imbalances are often more pronounced and where fears of reprisals or losing their jobs can deter victims from coming forward.”); Shaw et al., *supra* note 27, at 2, 4 (citing fear of retaliation as a reason that 10 percent of sexual harassment is reported and noting that low-wage workers face particularly serious consequences).

82. IPSOS & NPR SEXUAL ASSAULT POLL, *supra* note 31, at 7.

83. Press, *supra* note 58.

84. HATTON, *supra* note 61, at 115–16.

85. Austin Sarat, “...*The Law Is All Over*”: *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 361 (1990). See also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 34 (1990) (“And [the welfare recipient] knew that the rules of welfare would give the county plenty of ways to make her life hard if she became known as a troublemaker.”).

86. Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. POVERTY L. & POL’Y 13, 27–28, 51 (2005).

87. See White, *supra* note 85 (noting a welfare recipient’s fear of angering social workers because she could lose her general assistance and housing); HHS 2018 TANF Report, *supra* note 45, at T11 (showing other government programs used by TANF recipients).

88. Vicki Lens, *Revisiting the Promise of Kelly v. Goldberg in the Era of Welfare Reform*, 21 GEO. J. POVERTY L. & POL’Y 43, 62–63, 78 (2013).

new employment (albeit with questionable feasibility). While welfare workers too can look for a new job, the reason they are on welfare in the first place is that they have not been able to find employment outside the welfare system.<sup>89</sup> Moreover, when someone outside of the workfare system loses their job, they can look for government assistance through programs like TANF, SNAP, and unemployment insurance. But someone who loses their TANF or SNAP benefits due to retaliation from their workfare supervisor or welfare caseworker has been kicked out of the social safety net. They may be able to claim unemployment insurance<sup>90</sup> but do not have any other programs to fall back on.<sup>91</sup>

Fear of retaliation is often accompanied by a lack of faith that those in power will bring about justice. Polls in 2018 found that half of Americans think men getting away with sexual harassment is a major issue,<sup>92</sup> and 30 percent said that reports of sexual assault are “generally ignored.”<sup>93</sup> Welfare recipients deal with an additional level of bureaucracy when making sexual harassment complaints. Many of the welfare recipients Sarat interviewed expressed feelings that legal services attorneys, judges, and social workers were all part of the same government bureaucracy ultimately working for the government that signed their paychecks as opposed to the welfare recipients seeking assistance.<sup>94</sup> As one welfare recipient said succinctly, “Welfare, legal services, it’s all the Man.”<sup>95</sup> Many believed that since the lawyers, judges, and social workers tended to be repeat players within the same system, they played politics and did political favors for each other with little regard for the individual welfare recipients they served.<sup>96</sup> Some felt that these institutional players, such as lawyers and judges, were racist and prejudiced against poor people and would treat welfare recipients badly based on those biases.<sup>97</sup> This distrust of the legal and administrative system that handles complaints makes putting life-sustaining benefits at risk by reporting sexual harassment even less attractive.

Sarat’s interviewees were not entirely wrong, either. While many of the lawyers, social workers, and administrative judges want to help welfare recipients get their life-sustaining benefits, there are flaws in the system. Every state has its

---

89. See, e.g., HATTON, *supra* note 61, at 131 (quoting workfare participant as saying, “I don’t want to be here as much as you don’t want me here. . . . If I could find a regular job and work, I would.”).

90. See 45 C.F.R. § 260.35(b) (2019) (stating that unemployment insurance applies to TANF beneficiaries as it does to other workers).

91. HATTON, *supra* note 61, at 137 (noting difference between economic coercion in the average job and “status coercion” where “workfare workers may lose access to the social safety net,” which is a more “punitive and far-reaching consequence.”).

92. Graf, *supra* note 30.

93. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 7.

94. Sarat, *supra* note 85, at 351–55. See also Lens, *Revisiting the Promise*, *supra* note 88, at 74–76 (“Skepticism, not fear, keeps them from appealing; they believe the fair hearing system is indistinguishable from the welfare agency, which they view as inflexible, intractable, and arbitrary.”).

95. Sarat, *supra* note 85, at 351.

96. *Id.* at 356–57.

97. *Id.* at 357–58.

own system for deciding welfare disputes, but generally hearings to determine whether a person's benefits were rightfully terminated or reduced are run by administrative agencies within the executive branch, not by courts. As Lisa Brodoff explains, "In the federal system and in almost half of all state hearing systems, the ALJ is directly employed by the very agency whose decision is being challenged by the low-income appellant."<sup>98</sup> This means that the supposedly neutral decision-maker depends on one of the parties for their income, advancement, supervision, office resources, and more.<sup>99</sup>

The ALJ's entrenchment within the agency also leads some of the judges to take on the biases of the agency that recipients are irresponsible and to ignore agency shortcomings such as failure to answer the phone or to schedule appointments around a recipient's workfare schedule.<sup>100</sup> The first appeal is generally still within the agency itself, and welfare recipients must exhaust their administrative options before judicial review is available. But the judicial branch is limited in its ability to change the outcome of the case, given the deference judges must give to administrative officials who are supposedly experts in their fields and therefore more suited to make the correct decision than generalist judges.<sup>101</sup>

Finally, workers have to know their rights and how to enforce them in order to act on those rights. In 2018, 46 percent of American respondents told Ipsos that it is sometimes hard to know what is sexual assault.<sup>102</sup> Vox similarly reported that many women do not know what conduct is unlawful sexual harassment so they do not report what happens to them.<sup>103</sup> A common question to the Rape, Abuse, and Incest National Network telephone hotline is, "Was I raped?"<sup>104</sup> Confusion even amongst the legal community as to who is responsible for sexual harassment against workfare participants<sup>105</sup> makes it even harder for individuals to know when their legal rights have been violated. And the largely undereducated workfare population may also struggle with the formalities of a bureaucratic system for making complaints.<sup>106</sup>

---

98. Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 157–58 (2008).

99. Brodoff, *supra* note 98, at 157–159.

100. Lens, *Revisiting the Promise*, *supra* note 88, at 59–62.

101. See Brodoff, *supra* note 98, at 145–46 (noting that federal judges must uphold ALJ decisions that are supported by *some* evidence rather than a preponderance of evidence).

102. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 3.

103. Press, *supra* note 58.

104. Shaila Dewan, *She Didn't Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html> [https://perma.cc/8JFN-9NER].

105. See Section II.A., *infra* for a discussion of whether Title VII applies to workfare participants.

106. On a similar note, Vicki Lens posits that many welfare workers do not take advantage of the Fair Hearing process in part because it requires public speaking on one's behalf and navigating evidentiary rules. Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 53.

### 3. Perceived Lack of Credibility

While all people who accuse another of wrongdoing must prove it before they will be compensated, people who claim that another person sexually harassed or assaulted them face especially burdensome challenges. As Gwendolyn Mink puts it, “What stands between sexual harassment law and women’s vindication is that the law operates within a regime of disbelief.”<sup>107</sup> Although only 5 to 7 percent of sexual assault reports are false,<sup>108</sup> Americans tend to think that false reports are common. Almost one third of respondents told the Pew Research Center that false claims of harassment or assault are a major issue,<sup>109</sup> but over half told Ipsos that false sexual assault allegations against men are “very common.”<sup>110</sup> While 77 percent said that accusers should be given the benefit of the doubt until proven otherwise, 79 percent said the same of the accused,<sup>111</sup> and unless the accused admits their wrongdoing, only one can be believed. Similarly, while police officers say that they begin with a presumption that accusers are telling the truth, those who are more veteran in the field also claim that they can intuit who is lying based on the speaker’s display of emotion,<sup>112</sup> a completely unreliable indicator.<sup>113</sup> As Deborah Tuerkheimer explains, “Although false reports of rape are uncommon, law enforcement officers often default to incredulity when women allege sexual assault, resulting in curtailed investigations and infrequent arrests.”<sup>114</sup>

There are various reasons we tend not to believe sexual misconduct accusers. Psychologists explain that we do not want to believe that sexual assault is as prevalent as it is so we discount accusations.<sup>115</sup> Additionally, we tend to think of sexual assault as perpetrated by strangers in dangerous situations as opposed to by acquaintances in the workplace.<sup>116</sup> Further, we all have ideas of how we think sexual assault survivors would behave. We might believe that they would

---

107. MINK, *supra* note 57, at 136.

108. Dewan, *supra* note 104; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 18–20 (2017) (citing studies which found that 4.5 to 6.8 percent of police reports alleging sexual assault were false, and 5.9 percent of similar reports to a university).

109. Graf, *supra* note 30.

110. IPSOS SEXUAL ASSAULT POLL, *supra* note 31, at 2.

111. *Id.*

112. Melissa S. Morabito, Linda M. Williams & April Pattavina, *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.* 52–53, 59–60 (National Criminal Justice Reference Service, 2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/JUK9-SVTM>]; see also Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser & Marc A. Klippenstine, *Judgements of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759, 766–68, 779 (2010) (stating that judges, jurors, and police investigators are more likely to believe women who are visibly upset about their harassment as opposed to emotionally restrained).

113. See Dewan, *supra* note 104 (explaining that survivors react in different ways to sexual assault); Schuller et al., *supra* note 112, at 768–69 (noting that both sadness and numbness are common demeanors for sexual assault survivors describing their assault).

114. Tuerkheimer, *supra* note 108, at 28.

115. Dewan, *supra* note 104.

116. *Id.*



physically fight back, be enraged afterward, shun their attacker, report it immediately, and remember every detail of such a large event.<sup>117</sup> But every individual responds to traumatic events differently. Some may blame themselves for what happened, while others may need to remain on good terms with an attacker, especially if that person controls the survivor's paycheck.<sup>118</sup>

Additionally, perpetrators, their lawyers, and their supporters put considerable energy into destroying the credibility of the survivors who try to expose wrongdoing. For example, Weinstein's lawyer, Donna Rotunno, argued to both the jury and the media that the actresses who accused Weinstein of sexual misconduct had used him to get a leg up in the entertainment industry, that they could not have been raped because they voluntarily communicated with Weinstein after the alleged assaults, and that they actually just regretted having sex with him and were now turning that into legal action.<sup>119</sup> Those accused also claim that their accusers only want money and attention or to destroy the lives and reputations of the accused. Credibility issues are compounded for welfare recipients. The stigma of welfare recipients as fraudulent makes some recipients afraid to speak out.<sup>120</sup> For those who do speak out, the stigma weakens their credibility. The name of the bill that created TANF, the Personal Responsibility and Work Opportunity Reconciliation Act, reflects the popular belief that welfare recipients are lazy and must be forced into work. When a workfare participant claims that her supervisor assaulted her, the person receiving the report might believe that the participant is trying to get out of work or be transferred to an easier position. And if she brings a civil claim against a harasser, there is even more reason to say that the welfare recipient, who is just getting by on government benefits, is in it only for the money. Defense attorneys in Illinois claimed a woman who filed a rape claim against her workfare supervisor was trying to get out of her work assignment and still make the money.<sup>121</sup> The prosecutor in the criminal case responded that it would have been easier to "clean some bathrooms" than to lie about sexual assault to police,

---

117. Dewan, *supra* note 104; Schuller et al., *supra* note 112, at 763–64 (“[R]esearch has consistently demonstrated that women are more likely to be evaluated as genuine victims of rape if they are chaste and respectable, are unknown to their assailant, are sober, have fought back (with injuries to prove it), and report the incident immediately to the police.”).

118. Dewan, *supra* note 104.

119. See Christina Cauterucci, *What Kind of Woman Defends Harvey Weinstein?*, SLATE (Feb. 14, 2020), <https://slate.com/news-and-politics/2020/02/harvey-weinstein-lady-lawyer-donna-rotunno-not-worse.html> [<https://perma.cc/U9B9-PDHH>] (quoting Rotunno as saying “Regret sex is not rape.”); Ed Pilkington, *Donna Rotunno: The Legal Rottweiler Leading Harvey Weinstein’s Defense*, GUARDIAN (Feb. 9, 2020), <https://www.theguardian.com/film/2020/feb/09/donna-rotunno-lawyer-leading-harvey-weinsteins-defense> [<https://perma.cc/DB4D-Z2S7>] (describing defense arguments that accusers used Weinstein to get money, party invitations, and career advancements); The Daily Podcast, *The Woman Defending Harvey Weinstein*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/podcasts/the-daily/weinstein-trial.html> [<https://perma.cc/P5ZT-WUAJ>] (stating that contact between the accusers and Weinstein after the alleged sexual assaults proved it had been consensual).

120. White, *supra* note 85, at 37–38.

121. Mary Schenk, *Jury Acquits Man in Sexual Assault Case*, NEWS-GAZETTE (Apr. 10, 2013), [https://www.news-gazette.com/news/jury-acquits-man-in-sexual-assault-case/article\\_285d67c4-5afe-51a0-a221-c155edee8de4.html](https://www.news-gazette.com/news/jury-acquits-man-in-sexual-assault-case/article_285d67c4-5afe-51a0-a221-c155edee8de4.html) [<https://perma.cc/S3EX-U56T>].

nurses, lawyers, and the court for her \$243 in benefits.<sup>122</sup>

Demographics again play a role here. Researchers in Australia investigating sexual harassment cases found “that credibility is more likely to correlate with being Anglo, very young, a rational (masculine) demeanor/presentation in giving evidence, corroborative witnesses and legal representation.”<sup>123</sup> While here the relative youth of the TANF population might be to the participants’ benefit, race and gender will not. Nor will socioeconomic status, which makes TANF recipients unlikely to have legal representation at any step in the process. Workfare participants likely have a hard time collecting evidence that is already difficult to obtain in sexual harassment cases. Listeners who see the speaker as being part of a “suspect social group” (such as women on welfare) are more likely to distrust the speaker and amplify any signs that what they are saying is false.<sup>124</sup> On top of that, women alleging sexual misconduct are more likely to be believed if they are seen as “respectable” and “chaste.”<sup>125</sup> Given that the vast majority of TANF adult recipients are single mothers who never married,<sup>126</sup> they will likely not be seen as “chaste” by whoever is responsible for evaluating their credibility.

The issue of credibility is especially a problem for women of color who are “stereotyped as oversexed and wanton and thus the quintessential prostitute, in contrast to the depiction of White women as inherently respectable and pure.”<sup>127</sup> As Marilyn Yarbrough and Crystal Bennett explain, “[b]ecause of society’s image of African American women as highly sexual beings, there is a lingering myth that they cannot really be raped.”<sup>128</sup> These negative stereotypes also make Black women less likely to report sexual harassment than White women.<sup>129</sup>

## II. FEDERAL PROTECTIONS IN PLACE

### A. Title VII

What legal protections did Congress provide for the welfare recipients it required to go to work when it passed the PRWORA? It added a provision to the law which explicitly incorporated the Age Discrimination Act of 1975, 29 U.S.C. § 794 (Nondiscrimination under Federal grants and programs), the Americans with

---

122. *Id.*

123. Patricia Easteal & Keziah Judd, ‘*She Said, He Said*’: *Credibility and Sexual Harassment Cases in Australia*, 31 *WOMEN’S STUD. INT’L FORUM* 336, 336 (2008).

124. Tuerkheimer, *supra* note 108, at 14.

125. Kateri Hernández, *supra* note 72, at 484; CARINE M. MARDOROSSIAN, *FRAMING THE RAPE VICTIM: GENDER AND AGENCY RECONSIDERED* 28 (2014) (recording statements by politicians that true rape survivors are chaste).

126. *See supra* notes 50–52 and accompanying text.

127. Kateri Hernández, *supra* note 72, at 485; *see also* Frye, *supra* note 57 (“Women of color, in particular, often must confront the combined impact of racial, ethnic, and gender prejudice that can result in degrading stereotypes about their sexual mores or availability and increase their risk of being harassed.”).

128. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”*: *The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 *J. GENDER, RACE & JUST.* 625, 650 (2000).

129. Bryant-Davis et al., *supra* note 36, at 335.

Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964.<sup>130</sup> Workfare participants are thus protected from discrimination on the basis of age, disability, race, color, and national origin.

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex,<sup>131</sup> is conspicuously missing from the list. If we were to follow “[o]ne of the most frequently invoked, and frequently criticized, semantic canons of construction,” *expressio unius*,<sup>132</sup> we would say that the fact that Congress explicitly included four nondiscrimination laws in the PRWORA means it implicitly excluded Title VII. Further, Congress explicitly added a prohibition on gender discrimination to the welfare-to-work grant section of the PRWORA.<sup>133</sup> This addition suggests Congress did not think gender discrimination was prohibited in the rest of TANF. If gender discrimination was already forbidden by section 608(d) of the law, why did Congress need to *add* a prohibition on gender discrimination—and only gender discrimination—to section 603(5), the welfare-to-work section?

There is a bright side for those who would like to be protected from sexual harassment while on government-assigned work. First, HHS, which implements the PRWORA, has stated that federal nondiscrimination laws apply to TANF workers, writing:

The limitation on Federal regulatory and enforcement authority at section 417 of the Act does not limit the effect of other Federal laws [aside from the four listed in section 608(d)], including Federal employment laws (such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and unemployment insurance (UI)) and nondiscrimination laws. These laws apply to TANF beneficiaries in the same manner as they apply to other workers.<sup>134</sup>

While HHS specifically lists the examples of OSHA, FLSA, and UI, without explicitly including Title VII, the words “Federal laws, including . . . nondiscrimination laws” must encompass Title VII. As Title VII is a major federal statute passed more than three decades before the PRWORA, HHS must have been aware of Title VII’s existence when it implemented PRWORA in the late 1990s. Further, the HHS website explicitly states that Title VII applies to “public and private entities that administer, operate or participate in employment programs

130. 42 U.S.C. § 608(d) (2018).

131. 42 U.S.C. § 2000e-2(a)(1) (2018).

132. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 279 (3d ed. 2017) (defining *expressio unius* as “the principle that when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded.”).

133. 42 U.S.C. § 603(a)(5)(I)(iii) (“In addition to the protections provided under the provisions of law specified in section 608(c) of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.”).

134. 45 C.F.R. § 260.35(b) (2019).

under TANF even if these entities do not receive Federal assistance.”<sup>135</sup> In addition, both the U.S. Department of Labor (DOL) and the EEOC have expressed the official opinion that Title VII covers workfare workers.<sup>136</sup> While these agencies are not tasked with implementing the PRWORA, and therefore not entitled to *Chevron* deference in their interpretations of the statute,<sup>137</sup> the EEOC does implement Title VII, and guidance from both agencies can be persuasive.<sup>138</sup>

Applying Title VII’s ban on sex discrimination to workfare workers is also consistent with the stated purposes of the PRWORA, which include increasing economic independence “by promoting job preparation, work, and marriage,” preventing out-of-wedlock pregnancies, and encouraging “the formation and maintenance of two-parent families.”<sup>139</sup> As discussed above, sexual harassment in the workplace hinders all of these goals. It interferes with an employee’s ability to do her job and to advance in the workplace.<sup>140</sup> It can directly cause out-of-wedlock pregnancies.<sup>141</sup> Additionally, even when perpetrated by a third party who is not an intimate partner, sexual assault can ruin romantic relationships and marriages, as the survivor deals with emotional injuries and their partner experiences guilt and anger at the situation.<sup>142</sup>

- 
135. U.S. DEP’T OF HEALTH & HUM. SERVS., OFFICE FOR CIVIL RIGHTS, LAWS AND WELFARE REFORM OVERVIEW (July 26, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/laws-welfare-reform-overview/index.html> [<https://perma.cc/R3RM-3BYX>]; *see also* U.S. DEPARTMENT OF HEALTH & HUM. SERVS., CIVIL RIGHTS REQUIREMENTS – E. FEDERAL EMPLOYMENT DISCRIMINATION LAWS (July 26, 2013) <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/federal-employment-discrimination%20laws/index.html> [<https://perma.cc/R3RM-3BYX>] (explaining ways in which welfare agencies and employers may violate Title VII by discriminating against workfare participants).
136. U.S. DEP’T OF LABOR, LABOR PROTECTIONS AND WELFARE REFORM 2 (1997), <https://nclj.org/wp-content/uploads/2015/11/LaborProtectionsAndWelfareReform.pdf> [<https://perma.cc/K8FA-ZJUE>] (stating that antidiscrimination laws, including Title VI and Title VII, “apply to welfare recipients as they apply to other workers.”); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WHO IS AN “EMPLOYEE” UNDER FEDERAL UNEMPLOYMENT DISCRIMINATION LAWS?, [https://www.eeoc.gov/employers/smallbusiness/faq/who\\_is\\_an\\_employee.cfm](https://www.eeoc.gov/employers/smallbusiness/faq/who_is_an_employee.cfm) [<https://perma.cc/SVK4-9JQT>] (last visited Apr. 20, 2020) (stating that “[i]ndividuals assigned to your business under a work program (for example, a program that provides placements for welfare recipients)” are “employees” under federal employment discrimination laws).
137. *Cf. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (explaining that the agency Congress has tasked with carrying out a law is given deference in interpreting that law).
138. For example, the Second Circuit cited to the EEOC guidance when it determined whether Title VII protected workfare workers. *United States v. City of New York (CONY)*, 359 F.3d 83, 93 (2d Cir. 2004). The New York Court of Appeals cited to the DOL guidance that public assistance workers are covered by federal employment laws when deciding whether they must receive the minimum wage. *Carver v. New York*, 44 N.E.3d 154, 158 (N.Y. 2015).
139. 42 U.S.C. § 601(a) (2018).
140. *See supra* note 41 and accompanying text.
141. *See supra* note 38 and accompanying text.
142. Research on heterosexual couples after the female partner was sexually assaulted found that both partners were more likely to experience sexual dysfunction; that the female was more likely to be averse to touching, have anxiety, and experience flashbacks to the assault; that the male partner experienced “anger, a desire to protect the partner, anxiety, depression, guilt, and sexual difficulties;” and that arguments and break-ups were more common. Connop & Petrak, *supra* note 39, at 30–35.

The Second Circuit—the only federal appeals court to address the issue—agreed that workfare participants are “employees” covered by Title VII.<sup>143</sup> In the late 1990s, several New York City TANF recipients who were placed with city agencies to fulfill their work requirements filed claims with the EEOC alleging that they were sexually harassed in those positions.<sup>144</sup> The EEOC found probable cause that the city was liable for sexual harassment against its welfare workers,<sup>145</sup> so the cases were consolidated as *United States v. City of New York (CONY)* and appealed up to the Second Circuit.

The plaintiffs were five women who participated in the city’s Work Experience Program (WEP). Tammy Auer alleged that her supervisor at the city’s sanitation department made “sexually charged comments” to her, asked her to move in with him, touched her inappropriately, threatened to terminate her WEP assignment, showed up at her new workplace after she complained twice and was reassigned, and told her new supervisor not to give her any assignments.<sup>146</sup> Tonja McGhee had a brief, consensual relationship with her WEP supervisor at the city’s housing authority. After she broke it off, he called and threatened her, told his supervisor that she was not working, and called her into his office and told her to take off her pants.<sup>147</sup> She quit after making several complaints that went unanswered. Maria Gonzales’s supervisor touched her inappropriately, called her names, hid her time cards, and—after she complained about his harassment—threatened to have her killed.<sup>148</sup> Norma Colon’s supervisor at the Office of Employment Services asked her if she had her period, talked about women’s breasts, offered to fix her problems if she would sleep with him, and—after she rejected his advances—refused to help her get childcare.<sup>149</sup> The fifth plaintiff, Theresa Caldwell-Benjamin, faced racism in the form of a noose and racist caricature at her worksite.<sup>150</sup>

The Second Circuit rejected the City’s *expressio unius* argument that Congress’s inclusion of some nondiscrimination statutes in the PRWORA excluded Title VII.<sup>151</sup> The Second Circuit instead applied the Supreme Court’s two-part test for deciding who is an employee under Title VII, a statute with a completely circular definition of “employee” as “an individual employed by an employer.”<sup>152</sup> First, the plaintiffs had to prove that they were “hired” in that they received some substantial benefit in exchange for their work, a requirement that was met by the food stamps and cash benefits they received.<sup>153</sup> Second, the court

---

143. See *CONY*, 359 F.3d at 86.

144. Nina Bernstein, *City Must Shield Workfare Force on Harassment*, N.Y. TIMES, Oct. 1, 1999, at A1.

145. Bernstein, *supra* note 144.

146. *CONY*, 359 F.3d at 88.

147. *Id.* at 88–89.

148. *Id.* at 89.

149. *Id.* at 90.

150. *Id.* at 89.

151. *Id.* at 97–98.

152. 42 U.S.C. § 2000e(f) (2018).

153. *CONY*, 359 F.3d at 91–92.

looked at the thirteen-factor test from *Community for Creative Non-Violence v. Reid*,<sup>154</sup> most importantly how much control the employer has over the worker's means and manner of work.<sup>155</sup> Since city agencies had complete control over plaintiffs' work, the plaintiffs were "employees" under Title VII.<sup>156</sup>

Workfare participants who are assigned to work for non-government employers may have a harder time getting Title VII coverage since the supervising entity (where the discrimination occurs) and the paying entity (the government) are separate. In *O'Connor v. Davis*, the Second Circuit found that a university student who fulfilled her work-study requirements by serving at a local hospital that was not affiliated with the school was not an employee of the hospital.<sup>157</sup> The court reasoned that the hospital had never "hired" her since it gave her no remuneration for her work.<sup>158</sup> It did not matter that the plaintiff was receiving compensation for her work because the paying entity—plaintiff's university, using federal financial aid money—was not affiliated with the hospital and was not a party to the lawsuit.<sup>159</sup> The hospital apparently did not even know that the plaintiff was being compensated through the work-study program. It thought she was strictly a volunteer and treated her accordingly.<sup>160</sup>

In *CONY*, the Second Circuit distinguished the facts from *O'Connor* on the basis that, in the latter, the City of New York both paid the plaintiffs their benefits and received their work—it "hired" them and offered remuneration in the fashion of a typical employment relationship.<sup>161</sup> Thus, a situation in which the municipal or state government pays a workfare participant to work for a non-government employer would be distinguishable from the situations presented in *CONY*.<sup>162</sup> Furthermore, as long as the workfare participant sued both the government and the private employer, it would also be distinguishable from *O'Connor*, in which the payor was not a party to the lawsuit and the facility accepting plaintiff's services was unaware that the plaintiff was being compensated.<sup>163</sup> In the workfare context, private employers would be aware that workers are being paid for their work, so the government could be held accountable for not ensuring the safety of its welfare

---

154. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

155. *Id.* at 751–52 (stating that other factors include the amount of skill involved in the work, who provides tools, where the work is completed, how long the employment relationship lasts, how the worker is paid and files taxes, and what benefits they receive).

156. *CONY*, 359 F.3d at 91–92. Since this was a ruling on a motion to dismiss, the court held that the plaintiffs were employees under Title VII *if* all of their allegations were true, but the facts about compensation and control were not disputed. *Id.* at 97.

157. *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied* 522 U.S. 1114 (1998).

158. *Id.* at 116 ("We believe that the preliminary question of remuneration is dispositive in this case. It is uncontested that O'Connor received from Rockland no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation.").

159. *Id.* at 116 n.2.

160. Brief for Defendants-Appellees at 3–5, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (No. 96-7769), 1996 WL 33661719.

161. *CONY*, 359 F.3d at 95.

162. *See supra*, note 144 and accompanying text.

163. *See O'Connor*, 126 F.3d at 116 n.2 (explaining that the non-party payor was the employer, and not the location where services were performed).

recipients when it forces them to work somewhere. Indeed, the Second Circuit in *CONY* treated as persuasive EEOC guidance that states “welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs.”<sup>164</sup>

### B. Continuation of Welfare Benefits

Title VII, and analogous state and local laws, can play an important function in changing workplace culture, deterring potential harassers, and offering workers a civil cause of action if they are mistreated in the workplace. But in order to get a remedy, a harassed worker must file a complaint with the EEOC or a state or local civil rights agency and undergo a lengthy investigation and litigation process. Harassed workfare participants have much more immediate needs that must be addressed, namely getting out of a dangerous or hostile work environment while still receiving their life-sustaining benefits.

The PRWORA creates penalties for failing to complete work requirements “subject to such good cause and other exceptions as the State may establish.”<sup>165</sup> Therefore, if a state determines that being sexually harassed on the job is good cause to stop working, a worker should be able to remove themselves from a dangerous work environment without losing their benefits. Of course, this requires a method of reporting sexual harassment and assault to social workers. Social workers can then ensure that the individual’s benefits will not be cut off while the allegations are investigated and a new work assignment is arranged for the beneficiary while also providing appropriate medical and psychological treatment as needed.

The PRWORA explicitly allows states to waive any program requirements for survivors of domestic violence when those requirements would make it more difficult to escape the violence or would unfairly penalize survivors.<sup>166</sup> States can also permit survivors of domestic violence to receive TANF funds beyond the five-year cut-off that applies to most recipients.<sup>167</sup> Under the statute, a survivor of domestic violence is someone who has been “battered or subjected to extreme cruelty,” which includes being subject to sexual abuse.<sup>168</sup> This exception shows that Congress wanted to protect TANF recipients from sexual abuse. If states may ease work requirements and time limits to help recipients avoid sexual violence at home, why should the same protections not apply to sexual violence in their government-assigned job placements?

---

164. *O'Connor*, 126 F.3d. at 93 (quoting EEOC Notice No. 915.003 § 5.a (Dec. 3, 1997)).

165. 42 U.S.C. § 607(e)(1)(B) (2018).

166. *Id.* § 602(a)(7)(A).

167. *Id.* § 608(a)(7)(C).

168. *Id.* §§ 602(a)(7)(B), 608(a)(7)(C)(iii). Notably, neither the statute nor HHS regulations, 45 C.F.R. §§ 260.51–55 (2019), specify that there must be a familiar or intimate relationship between the abuser and their target, suggesting that workplace abuse may be included. But given the common meaning of “domestic violence,” this would be a difficult argument to make in court.

States may also offer grievance procedures so that workfare participants have a means of informing the government that their assignment has become unsafe or otherwise untenable, thereby minimizing the risk of sanctions if the participant misses work shifts. States that receive welfare-to-work grants are required to establish grievance procedures for discrimination complaints, and those procedures must allow for a hearing, remedies such as back pay and not being placed with the offending employer, and an appeal to a state agency.<sup>169</sup> There is no analogous requirement for the regular TANF work programs, but some states have grievance procedures anyway. For example, New York has a system where workfare participants can file a complaint, within thirty days of which there must be at least a meeting between the complainant, someone from the social services agency, and an independent mediator who has no control over the complainant's welfare benefits.<sup>170</sup> The worker cannot be sanctioned for failing to fulfill requirements relating to the dispute while it is being decided and may request a fair hearing after the mediation process, but "shall be required to participate in work activities as assigned . . . during the adjudication process."<sup>171</sup> It is unclear whether a person complaining about their supervisor would be transferred to a new worksite to fulfill the work requirement while the adjudication plays out.

### III. SUGGESTIONS FOR IMPROVEMENT

The widespread problem of workplace sexual harassment—and the particular vulnerability of workfare participants—is a large issue with numerous contributing factors and no easy solution. Nonetheless, there are ways to improve the situation, such as creating express legal protections for welfare workers and establishing better procedures within the welfare system for reporting, investigating, and remedying harassment. Stronger legal protections, increased enforcement of those protections, and improved workplace trainings can help deter potential harassers and change the culture at workfare sites to make all forms of sexual harassment unacceptable. Ultimately, stopping the harassment before it starts will save both the government and workers time, money, and emotional wellbeing. Grassroots organizers, who are well-positioned to communicate with and rally welfare recipients, can play an important role in bringing about these changes.

#### A. Litigation and Legislation

When those of us in the legal field identify problems in the world, we often look for solutions through litigation or legislative reform. Title VII is one mechanism for this. Like the WEP workers who sued the City of New York two

---

169. 42 U.S.C. § 603(a)(5)(I)(iv) (2018).

170. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 385.11(c)(1)–(4) (2019).

171. *Id.* §§ 385.11(c)(5), (6).



decades ago when they were subjected to sexual and racial harassment,<sup>172</sup> individuals who suffer harassment at workfare sites today can seek free legal assistance to file Title VII claims against the government provider of their benefits and anyone at the worksite responsible for the harassment. Individuals may also file complaints directly with the EEOC—or with state or local human rights agencies—as the *CONY* plaintiffs did.<sup>173</sup> Attorneys can then ask courts outside of the Second Circuit to extend Title VII coverage to workfare participants and seek protection for workers assigned to non-governmental worksites. The discussion of Title VII coverage above<sup>174</sup> offers several arguments for why welfare workers should be covered by Title VII, based on the purpose of the PRWORA, HHS regulations, and EEOC and DOL interpretations. Plaintiffs may also be able to bring state law claims, which may offer even stronger protections for workers. Making it clear that the law protects workfare participants from harassment, and that those laws will actually be enforced, can change a potential harasser's attitude about what constitutes sexual harassment and whether it is something they can do.<sup>175</sup> Letting the conduct go unpunished, on the other hand, can lead people to believe that the conduct was not sexual harassment in the first place.<sup>176</sup>

However, litigating sexual harassment cases—with their credibility issues, lack of concrete evidence, and heavy emotions—is hard enough, even where the law explicitly protects workers. Litigating a case under the current laws, where Title VII is not explicitly incorporated into the PRWORA, is even more challenging. Of course, there is a straightforward solution: Congress could add Title VII to the list of non-discrimination laws that apply to TANF workers or amend the definition of “employee” in Title VII to explicitly include those workers. Congress could also add a provision to the PRWORA requiring states to set up grievance procedures for workers to report harassment at their job sites and be promptly relocated.

State legislatures can similarly make sure that their civil rights laws explicitly protect individuals who are working to receive welfare benefits. They can provide for simpler complaint procedures under state law so that fewer people need lawyers to enforce their rights. States can also make explicit in the rules implementing their TANF programs that being sexually harassed at work is good cause for non-compliance with work requirements. This would help ensure that workers who are harassed can avoid having to choose between a dangerous work

---

172. *CONY*, 359 F.3d 83.

173. *Id.*, at 88–90. This is an imperfect solution given that the majority of people who file sexual harassment complaints with the EEOC are given “right to sue” letters to bring litigation on their own, as opposed to the EEOC pursuing litigation on the complainant’s behalf. *Charges Alleging Sex-Based Harassment*, *supra* note 23.

174. *See supra* section II.A. *See also* Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561 (2009); Langton, *supra* note 43 (arguing for Title VII coverage for volunteers); Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. ON C.L. & C.R. 159 (2004).

175. Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 88–89 (2005).

176. *Id.* at 99–105, 115.

environment and being sanctioned for not fulfilling their work requirement.

Some may argue that these policies will incentivize workfare participants to claim that they were sexually harassed in order to get out of work. But complainants can be given some time to recover and attain medical treatment if needed, and then be transferred to a safer worksite. Such temporary reprieve would hardly be an incentive to go through the personal and strenuous process of reporting sexual harassment. Further, the societal stigma surrounding people who have been sexually harassed will continue to prevent false allegations, as it already stops many who have truly been harassed or assaulted from reporting what they have been through.<sup>177</sup> Most importantly, the issue of *not reporting* sexual misconduct is already many times greater than the issue of false reporting,<sup>178</sup> and the consequences of unchecked sexual harassment<sup>179</sup> are worse than the consequences of a false report.

### B. Administrative Recommendations

Administrative agencies can also provide more direct solutions to the problem. At the federal level this would come mainly in the form of agency guidance. For example, HHS could issue suggested grievance procedures for states to implement in their TANF and SNAP programs. The EEOC has issued helpful guidelines to employers for preventing sexual harassment in the workplace,<sup>180</sup> but it could tailor those recommendations to the workfare context and send guidance to state social services agencies. Federal agencies like HHS and the EEOC can also use their national reach and resources to study the issue of sexual harassment in workfare so that legislators and regulators have a better idea of how prevalent the issue is and how to remedy it.

State agencies that are responsible for administering welfare programs can address the problem more directly. Regardless of whether they are legally required to do so, state social services agencies could set up easily accessible procedures for workfare participants to report abuse on their work sites. While welfare recipients have frequent contact with their caseworkers, state and local agencies must recognize that many welfare recipients are afraid they will suffer negative consequences if they make a complaint to their caseworkers and might rather

---

177. Shaw et al., *supra* note 27, at 2 (citing embarrassment as one reason only 10 percent of sexual harassment is reported); *see also* MARDOROSSIAN, *supra* note 125, at 25–26 (explaining that “victim” is a gendered term evoking sexual assault targets as weak, negligent, powerless, dependent, and easy to manipulate), MINK, *supra* note 57, at 119–25 (discussing ways in which sexual assault accusers are discredited); Tuerkheimer, *supra* note 108, at 21–25 (discussing ways in which rape laws were written based on the assumption that women who allege rape are liars).

178. *See supra* notes 26–28 and accompanying text (discussing underreporting of sexual harassment); notes 108–14 and accompanying text (discussing false reports of sexual harassment).

179. *See supra* notes 35–44 and accompanying text.

180. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PROMISING PRACTICES FOR PREVENTING HARASSMENT, OLC Control No. EEOC-NVTA-2017-2 (Nov. 21, 2017) <https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment> [<https://perma.cc/65UL-XPBB>].

suffer harassment than risk having their benefits terminated. Thus, there must be an available means of reporting harassment that does not involve caseworkers. And since welfare workers worry that complaints to legal services attorneys (1) may get back to their caseworkers and lead to retaliation, and (2) may go unanswered because those attorneys are also just part of the government bureaucracy,<sup>181</sup> it must be made very clear that the person who receives sexual harassment complaints is independent from the caseworker and required to take affirmative steps in response to complaints, such as securing the complainant a new worksite and investigating their complaint.

State governments could also set up free, confidential hotlines for workfare participants. Individuals would then be able to call into the hotline to ask questions, anonymously report harassment at their worksites, or find out how to file an official grievance. This would help with the issue of workers not knowing what their rights are and what qualifies as sexual harassment. Anyone who is unsure about their situation could call the hotline, describe how they are treated at work, and get preliminary advice as to whether they have any recourse. People who fear retaliation or bystanders who witness harassment could call in and request an investigation of the worksite as a whole. Even if the agency is not able to investigate every anonymous claim it receives, it could keep track of complaints, look for trends over time, and investigate worksites that look most problematic. A hotline number would be easy to distribute on pens, posters, stickers, business cards, and other small trinkets, and welfare recipients who have cell phones can save the number. Noting that not everyone has a phone or feels comfortable directly discussing harassment with someone over the phone, an online chat function could also be available. This is an imperfect solution since those without phones likely only have internet access via public libraries, but it is an additional option that would be easy to implement.

People who are hired to staff hotlines and receive complaints must be specially trained to work with survivors of sexual harassment. Reporting sexual misconduct is a difficult experience, especially for those who are constantly mistrusted and discredited by the government. If they feel that the person to whom they are trying to report an intimate injury is just another cog in a wheel that will not help, harassed workers may give up before fully reporting what has happened. If word spreads that the system set up for reporting is just another dead end, it will go unutilized like fair hearings currently do.<sup>182</sup>

These staff members could also run know-your-rights trainings and in-person legal clinics for the workfare population. This would allow them to build rapport with the community and make them familiar faces among workers who need to report harassment. Trainings tailored specifically to the workfare context would also help ensure more workers know their rights. Trainings should not just

---

181. Sarat, *supra* note 85.

182. See Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 42 (finding that 0.29 percent of TANF recipients in Texas, 0.46 percent in Wisconsin, and 4.6 percent in New York request fair hearings when there is an adverse change in their benefits).

be for workers who are vulnerable to harassment. Training supervisors and permanent coworkers about what conduct is prohibited makes them more likely to identify certain behaviors as sexual harassment and can reduce harassment in the workplace.<sup>183</sup> Even when the entire workforce does not go through sexual harassment training, the impact of such trainings on workplace culture can reduce incidents of sexual harassment extend beyond the portion of the workforce that is trained.<sup>184</sup>

Agencies that administer welfare could also do anonymous surveys to learn more about the prevalence of sexual harassment against their workfare participants. Welfare recipients already have regular meetings with caseworkers, and agencies already collect data to fulfill federal reporting requirements.<sup>185</sup> Welfare agencies could set up stations in their offices where recipients could anonymously fill out surveys. That way, caseworkers could encourage workers to fill out the surveys without being responsible for collecting the responses. This could ensure participants' anonymity and protection from retaliation.

Finally, agencies could make their hearing processes fairer to recipients whose benefits are reduced or terminated after reporting harassment to ensure no one loses their income because they are harassed at work. First, the decisionmaker should not be employed by the same agency that grants and revokes benefits.<sup>186</sup> Second, the process should be easy to navigate for someone without formal education and without legal representation.<sup>187</sup> The process could also be made less adversarial if agency officials and judges took on more investigatory than prosecutorial roles.<sup>188</sup>

All of these solutions will cost some amount of money to implement. I will note here that at the end of fiscal year 2018, states had a combined total of \$3.7 billion in TANF funds that were not set aside for any particular purpose.<sup>189</sup> While much of that must go to paying for benefits, surely some of it could be used to protect recipients from sexual harassment. Further, the federal government provides grants for states to do assessments of their own programs.<sup>190</sup> Given the personal and professional impacts sexual harassment can have on workfare

---

183. Antecol & Cobb-Clark, *supra* note 44, at 831–38; Grant E. Buckner, Hugh D. Hindman, Timothy J. Huelsman & Jacqueline Z. Bergman, *Managing Workplace Sexual Harassment: The Role of Manager Training*, 26 EMP. RESP. & RTS. J. 257, 272–73 (2014) (stating that sexual harassment training made people more likely to label certain conduct as sexual harassment, although not necessarily more accurately).

184. Antecol & Cobb-Clark, *supra* note 44, at 839–41.

185. See 42 U.S.C. § 611 (2018) (requiring quarterly reports from states with extensive disaggregated case information).

186. See generally Brodoff, *supra* note 98, at 143–44, for a discussion of central panel systems, “in which the judges who hear welfare agency appeals are employed by a separate and independent agency.”

187. For example, the judge or arbitrator can take the time to fully explain the hearing process to the welfare recipient and encourage them to provide any documentation and relevant evidence they have. Lens, *Revisiting the Promise*, *supra* note 88, at 72–74.

188. *Id.* at 84–87.

189. FALK & LANDERS, *supra* note 47, at 3.

190. 42 U.S.C. § 613(d) (2018).

participants, it would be highly relevant to the program for states to assess how well they are protecting TANF workers from sexual harassment.

### C. Grassroots Organizing

Grassroots organizations can play a significant role in bringing about these changes. Welfare recipients may generally distrust the government but be more receptive to organizers who are more like them and want to help. Therefore, local organizations can more effectively communicate with welfare workers to both gather and disperse information. Local organizations can collect information about sexual harassment in workfare, and may get higher response rates than government offices.<sup>191</sup> Non-governmental organizations can also run their own hotlines and know-your-rights trainings to empower workfare participants.<sup>192</sup> They can also encourage individuals to make complaints and help walk them through the process, so that it seems less intimidating. Vicki Lens suggests that advocacy groups such as Make the Road by Walking helped increase the use of fair hearings in New York City by setting up stations in welfare centers and running “complaint campaigns” to normalize fair hearing requests.<sup>193</sup> Organizers can also *organize* welfare recipients to advocate for legislative changes. For example, Association of Community Organizations for Reform Now (ACORN) gathered WEP workers in New York City and convinced the city council to create a new grievance procedure, despite Mayor Giuliani’s veto.<sup>194</sup> ACORN also won numerous victories in Los Angeles by mobilizing workfare participants. These victories include everything from securing uniforms and tools for workfare participants to the creation of new non-TANF welfare programs.<sup>195</sup>

### CONCLUSION

The workfare workforce is comprised of people whose socioeconomic status, gender, race, and age put them at a higher risk of being sexually harassed at work—an ugly phenomenon that is already a large issue for the U.S. population as a whole. This harassment not only causes damage to the mental and physical health of its targets, it undermines the goals of the very workfare program that put the target in a situation to be harassed. Members at every level of government—

---

191. See *A DAY’S WORK, A DAY’S PAY* (New Day Films 2001) (showing organizers interviewing WEP workers in parks and on the streets of NYC and getting honest complaints about lack of uniforms, fair pay, etc.).

192. For example, ACORN in Los Angeles runs a hotline that welfare recipients can call into and obtain assistance in challenging negative welfare agency decisions. Fred Brooks, *Innovative Organizing Practices: ACORN’s Campaign in Los Angeles Organizing Workfare Workers*, 9 J. CMTY. PRAC. 65, 80 (2001).

193. Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 52 n.198.

194. *A DAY’S WORK, A DAY’S PAY*, *supra* note 191; see also Lens, *Bureaucratic Disentitlement*, *supra* note 86, at 52 (crediting New York City’s mass organizing campaigns for welfare reform).

195. Brooks, *supra* note 192, at 77–78.

all three branches and all three levels—can and should do something to address this issue. With non-governmental organizations leading the charge, we can change the culture around workfare and protect workers.