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Arbitration in Internal Dispute Resolution Programs: The Scarlet Letter “A” in Sexual Harassment Claims

Sarah Sachs*

I. INTRODUCTION

Allegations of workplace sexual harassment are in the public forefront. The conversation about workplace harassment shifted after the media revealed floods of notable public figures’ accounts of sexual abuse in politics, media, and tech industries. Widespread exposure of unwanted sexual advances in the workplace re-empowered the Me Too campaign and unified employees from a spectrum of industries. This shed light not only on allegations by high-wage earners, but also by lower-wage earners.

Unlike recent media attention to public figures allegations, “[t]he vast majority of [sexual harassment] claims occur out of the [limelight], where public scrutiny and attention is rare.” In fact, most sexual harassment charges were filed by lower-wage earners. The industry with the largest number of charges filed within the fiscal years of 2005 through 2015 was the hospitality and food services industries. Retail trade was the second largest industry. The third largest industry was manufacturing. The fourth largest industry was health care and social assistance.

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2 Id.

3 Id.


5 See generally, id.

6 Id.

7 Id.

8 Id. (Only 5.73% of charges filed in fiscal year 2005 through 2015 were in the professional, scientific, and technical services and 1.61% of charges filed were in the arts, entertainment, and recreation industries).

9 Id.

10 Id.

11 Id.
Data reveals that industries with the most charges filed primarily employ women. While women file most sexual harassment charges, data shows that men also experience workplace sexual harassment. Over time, claims filed by men have risen considerably. Also, as sexual orientation has become more open in society, there has been an increase in charges filed based on sexual orientation. The arena for sex discrimination claims is expanding as industries continue to grow and employ more men and women. Therefore, it is essential to create a strong workplace infrastructure that takes measures to eliminate sexual harassment in the workplace. When a sexual harassment claim arises, industries should implement equitable and effective measures that quickly resolve these workplace disputes.

This Comment evaluates the use of arbitration and mediation as effective alternative dispute resolution mechanisms for resolving workplace sexual harassment claims. Part II discusses the legal development of sexual harassment claims in the workplace. Part III evaluates companies who use internal dispute resolution programs with mediation and arbitration to resolve workplace harassment claims. Finally, Part IV analyzes the advantages and disadvantages of companies designing and implementing internal dispute resolution programs to adjudicate workplace sexual harassment claims.

II. LEGAL DEVELOPMENT

A. Evolution of Workplace Sexual Harassment

President Lyndon Johnson signed into law Title VII of the Civil Rights Act of 1964 ("Title VII"). The law bans discrimination in public accommodations and in all programs funded by the federal government. Title VII also prohibits employment discrimination on the basis of race, color, religion, national origin, or sex, and makes it illegal to retaliate against those

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13 See generally, Frye, supra note 4.
14 Mona Chalabi, Sexual Harassment at Work: More Than Half of Claims in U.S. Result in No Charge, THE GUARDIAN (July 22, 2016, 12:30 PM) https://www.theguardian.com/money/2016/jul/22/sexual-harassment-at-work-roger-siles-fox-news (In 1990, 92% of claims were filed by women and in 2015 only 83% of claims were filed by women).
16 Id.
who seek relief or assist others in their exercise of rights secured by the law.\textsuperscript{19} Title VII created the Equal Employment Opportunity Commission (EEOC) to enforce the Civil Rights Act of 1964.\textsuperscript{20}

In 1980, the EEOC drafted administrative guidelines that established sexual harassment as a violation of gender discrimination under Title VII.\textsuperscript{21} After the guidelines were established, it was not until 1986 that the United States Supreme Court recognized a private cause of action for sexual harassment in the workplace.\textsuperscript{22} Since the Supreme Court initially recognized a private cause of action for sexual harassment in the workplace, federal law has recognized two specific categories of actionable sexual harassment: quid pro quo and hostile work environment.\textsuperscript{23} Many states have enacted civil rights legislation modeled after Title VII, which provide a remedy for employees.\textsuperscript{24} However, “[s]tate courts often look to federal cases under Title VII . . . in interpreting” the state statutes.\textsuperscript{25} Therefore, Title VII remains an important statutory guide for sexual harassment claims.

1. Quid Pro Quo

Quid pro quo sexual harassment claims arise when a supervisor conditions job-related benefits in return for sexual favors.\textsuperscript{26} In these actions, the plaintiff must show that a tangible employment action, such as termination, demotion, or pay cut, “resulted from a refusal to submit to a supervisor’s sexual demands . . . .”\textsuperscript{27} Therefore, some federal courts use the term “tangible employment action” instead of quid pro quo.\textsuperscript{28}

To establish a prima facie case of quid pro quo, under Title VII, an employee must establish: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) the employee’s reaction to the harassment complained of impacted tangible aspects of the employee’s compensation, or terms, conditions, or privileges of employment.\textsuperscript{29} The

\textsuperscript{19} See 42 U.S.C. § 2000e-2(a)(1); see also 29 CFR § 1604.11(a) (officially recognizing harassment on the basis of sex as a violation of Title VII’s prohibition against gender discrimination).


\textsuperscript{24} See Debra T. Landis, Application of State Law to Sex Discrimination in Employment, § 2(b), 87 A.L.R. 3d 93 (1978).

\textsuperscript{25} Id.

\textsuperscript{26} 29 C.F.R. § 1604.11 (2018). The English translation of quid pro quo is “something for something” or “this for that.”

\textsuperscript{27} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753 (1998).

\textsuperscript{28} Id.

\textsuperscript{29} Jones v. Flagship Int’l, 793 F.2d 714, 721-22 (5th Cir. 1986) (citing Henson v. City of Dundee, 682 F.2d 997, 1009 (11th Cir. 1982)).
fourth element is key to the theory of liability for a quid pro quo harassment claim and distinguishes the claim from hostile work environment harassment.

Richardson-Holness v. Alexander demonstrates a successful showing of a quid pro quo claim.30 In Alexander, the plaintiff alleged that her supervisor made sexual advancements by attempting to massage her shoulders and commenting on her physical appearance.31 The plaintiff denied the sexual advances and alleges that her reaction resulted in tangible employment actions due to her denial of defendant’s advances.32 The plaintiff’s summary judgment motion was granted for her quid pro quo claim because the plaintiff established causation of tangible aspects of employment due to the denial of her supervisor’s sexual advances.33

2. Hostile Work Environment

Hostile work environment claims arise from conduct that does not result in a tangible employment action, but is so severe or pervasive that it creates an abusive working environment. In these actions the plaintiff must bear the burden of each element by a preponderance of the evidence.34

To establish a prima facie case of hostile work environment under Title VII, an employee must establish: “(1) the employee belongs to a protected group;”35 “(2) the employee was subject[ed] to unwelcome sexual harassment;”36 “(3) the harassment complained of was based on sex;”37 “(4) the harassment complained of affected a ‘term, condition, or privilege’ of employment” in that it was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment;38 and (5) the employer is liable.39

Three elements in quid pro quo and hostile work environment are the same. The different elements greatly distinguish the two claims. In hostile

31 Id. at 366.
32 Id. at 370 (alleging tangible employment actions: (1) loss of “dean” title; (2) reprimanded for missed study group sessions; (3) unsatisfactory teaching evaluations; (4) denial of pay for “per session” work she performed; (5) termination).
33 Id. at 373.
34 Henson v. City of Dundee, 682 F.2d 897, 908-09 (11th Cir. 1982).
35 Id. at 903. This requires a stipulation that the employee is a man or a woman. Id.
36 Id.; see also Gan v. Kepro Circuit Sys., Inc, No. 81-268 C/5, 1982 WL 166, at *3 (E.D. Mo. Jan. 7, 1982) (In order to constitute harassment, the conduct must be unwelcome in the sense that the employee did not solicit or invite it, and in the sense that the employee regarded the conduct as undesirable or offensive).
37 City of Dundee, 682 F.2d at 903.
39 Whether sexual harassment is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined by the totality of the circumstances.
30 City of Dundee, 682 F.2d at 905; see also Bundy v. Jackson, 641 F.2d 934, 943 (1981) (holding the employer responsible for the plaintiff’s supervisors or co-worker, the employee must show that the employer knew or should have known of the harassment and failed to take prompt remedial action); E.E.O.C. v. Domino’s Pizza, Inc., 909 F. Supp. 1529, 1534 (M.D. Fla. 1995), aff’d, 113 F.3d 1249 (11th Cir. 1997); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 (1986); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987).
work environment claims, the employer is vicariously liable for a supervisor’s actions in cases of harassment.  

If the harasser is not a supervisor, the plaintiff must prove that the employer was negligent because they knew or should have known of the harassment to be liable.  

Whereas, in quid pro quo claims, the employer need not have knowledge of the harassment to be held liable. Further, in hostile environment claims the employer must not only know of the harassment, but also fail to take appropriate remedial steps to eliminate the harassment.  

In quid pro quo claims, the impact on employment is clear once the adverse employment action has been taken. These distinctions in quid pro quo and hostile environment cases are important to properly establish the right claim. Oftentimes both quid pro quo harassment and hostile work environment harassment occur simultaneously. Plaintiffs often bring a hostile work environment claim to provide a potential alternative theory of recovery where a quid pro quo harassment claim cannot be sustained by the evidence.

B. Sexual harassment Claims Under the EEOC

To provide guidelines for establishing the elements in quid pro quo harassment claims and hostile environment harassment claims, the EEOC has refined the meaning of sexual harassment. The EEOC has defined sexual harassment as:

unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or [of] creating an intimidating, hostile, or offensive working environment.

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41 Id. at 448–49.
42 See Webb v. Cardiothoracic Surgery Assoc. of N. Tex., P.A., 139 F.3d 532, 538 (5th Cir. 1998) (holding that an employer’s prompt remedial action to prevent any future harassment by supervisor defeated the employee’s quid pro quo claim).
43 See Vance, 570 U.S. 421, 429 (2013) (“even when a supervisor’s harassment does not culminate in a tangible employment action, the employer can be vicariously liable for the supervisor’s creation of a hostile work environment if the employer is unable to establish an affirmative defense”).
44 29 C.F.R. § 1604.11(a).
45 Id.
The plaintiff bears the initial burden of presenting a prima facie case to the EEOC.\textsuperscript{46} If this burden has been met, then the employee must file a charge of discrimination with the EEOC.\textsuperscript{47} Prior to filing a formal complaint with the EEOC, the employee must contact an Equal Employment Opportunity (EEO) counselor within 45 days of the alleged discrimination.\textsuperscript{48} Counselors must advise individuals of their rights in the EEO process, which includes the right to request a hearing before an EEOC administrative judge or an immediate final decision from the agency after an investigation of the complaint.\textsuperscript{49} Where an agency offers ADR, then the counselor must advise the individual they may choose to participate in the ADR program.\textsuperscript{50} Counseling must be completed within 30 days.\textsuperscript{51} If the matter is not resolved within the 30-day period, then the counselor must inform the individual of his or her right to file a formal complaint within 15 days of the notice.\textsuperscript{52} If the individual chooses an ADR process, and it is not resolved within 90 days, then the individual may proceed with a formal complaint.\textsuperscript{53}

Under Title VII, a federal court does not have jurisdiction over a discrimination case until the employee has exhausted the EEOC administrative process.\textsuperscript{54} If the claim arises in a deferral state,\textsuperscript{55} then the employee must file the claim with the EEOC within 300 days of the alleged unfair employment practice.\textsuperscript{56} However, the claim cannot be filed with the EEOC in a deferral state unless it is first filed with the state agency and either 60 days have elapsed, or the state agency has terminated the proceeding.\textsuperscript{57} The employee must exhaust all available administrative remedies, by filing with any state agency and the EEOC, before a Title VII civil action may go forward.\textsuperscript{58} Exhausting all administrative remedies with the EEOC may take time and delay resolution of workplace sexual harassment claims. Alternative dispute resolution methods such as arbitration and mediation become more

\textsuperscript{46} 42 U.S.C.A. § 2000e-5(b).
\textsuperscript{47} Id.
\textsuperscript{48} 29 C.F.R. § 1614.105(a)(1); see 29 C.F.R. § 1614.105(a)(2) (stating that the time limited can be extended where an employee shows: they were not notified of the time limit and not otherwise aware of them; they did not reasonably know the discriminatory matter occurred; despite due diligence they were prevented by circumstances beyond their control from contacting the counselor within 45 days).
\textsuperscript{49} 29 C.F.R. § 1614.105(b)(1).
\textsuperscript{50} 29 C.F.R. § 1614.105(b)(2).
\textsuperscript{51} 29 C.F.R. § 1614.105(c), (f) (“Counseling may be extended for an additional 60 days: (1) where the individual agrees to such extension in writing; or (2) where the aggrieved person chooses to participate in an ADR procedure.”).
\textsuperscript{52} 29 C.F.R. § 1614.105(d).
\textsuperscript{53} 29 C.F.R. § 1614.105(d).
\textsuperscript{55} A State that has its own agency to adjudicate discrimination cases. Brennan, 881 F. Supp. at 993.
\textsuperscript{56} 42 U.S.C.A. § 2000e-5(e).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
attractive to employees and employers because they circumvent delay of resolution by the EEOC or filing a civil action under Title VII.

III. DEVELOPMENT OF ARBITRATION TO RESOLVE WORKPLACE DISPUTES

A. Brief History of Federal Case Law

In 1991, the Supreme Court held that an age discrimination claim was subject to mandatory arbitration. In *Gilmer v. Interstate/John Lane Corp.*, the Court enforced an arbitration agreement of statutory claims pursuant the Federal Arbitration Act (FAA). The *Gilmer* Supreme Court decision was a landmark case for enforcement of arbitration clauses in employment contracts because the Court held that statutory claims could be compelled to arbitration. However, the Court in *Gilmer* did not fully determine the role of the FAA in enforcing arbitration agreements in employment contracts.

In 2001, the Court answered issues left open by *Gilmer* in *Circuit City v. Adams*. In *Circuit City*, an employee brought a state law claim for employment discrimination. The employee argued that employment contracts were outside the purview of the FAA because the FAA excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The Supreme Court upheld the arbitration agreement and held that except for transportation workers, such as seamen or railroad workers, the FAA covers all contracts of employment and may be used to compel arbitration of all employment-related claims. Under the Supreme Court rulings in *Circuit City* and *Gilmer*, both federal and state statutory claims can be compelled to mandatory arbitration except for employment contracts of transportation workers.

Despite the rulings in *Circuit City* and *Gilmer*, employees may still be able to litigate arbitration agreements terms to find the agreement unenforceable. The Supreme Court left unanswered what rules govern

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60 *Id.*
61 *Id.*
62 *Id.* at 36-27 (Stevens, J., dissenting).
64 *Id.* at 109.
65 *Id.* at 112.
66 *Id.* at 109.
68 See Shankle v. B-G Maint. Mgmt., 163 F.3d 1230, 1235 (10th Cir. 1999) (refusing to enforce mandatory arbitration agreement that required employee to pay for half of the arbitrator’s fee); see also Paladino v. Avnet Comput. Tech., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (holding an arbitration clause that “insulates” the employer from Title VII damages and equitable relief was unenforceable); *Hooters of Am., Inc. v. Phillips*, 173 F.3d. 933, 938 (4th Cir. 1999) (“Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to
arbitration proceedings and the selection process of an arbitrator when an employment contract containing an arbitration agreement fails to specify. At least one federal circuit court of appeals indicated that procedural factors may play a role in the enforceability of arbitration agreements.69 However, most state and federal courts support employer-imposed arbitration agreements that follow the Employment Due Process Protocol administered by the American Arbitration Association (AAA).70 Therefore, escaping mandatory arbitration in an employment contract is very difficult.71

B. Internal Dispute Resolution (IDR) Programs

Following the Gilmer decision upholding an employee contract mandating arbitration, some companies implemented internal dispute resolution (IDR) programs that focused on internally settling conflicts.72 Many IDR programs start informally, with consulting a lower-level manager, and then, if necessary, a higher-level manager.73 If the dispute is not resolved after meeting with management, then the employee may request mediation.74 Again, if a settlement is not reached in mediation, the employee may request arbitration.75 IDR program steps vary based on the company.76 However, most internal programs begin with resolution through meeting with management and then adopt some combination of mediation, peer review boards, and binding arbitration.77 Some company programs are equitable and promote resolving internal disputes efficiently, while other company programs are not as equitable to employees.78

1. General Electric’s Program

General Electric launched its early dispute resolution program in 1998.79 The Resolve Program is a four-step program with two internal steps and two

constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.”).

71 If a court compels mandatory arbitration the EEOC may still bring an independent action against the employer because the EEOC is not a party to the arbitration agreement and not bound by its terms. See EEOC v. Waffle House, Inc., 534 U.S. 279, 291-92 (2002).
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id. at 594
79 Deborah Manucci et al., The Dispute Resolution Program: How Value-Added Corporate Strategies Secure Efficiency and Savings, DISP. RESOL. J., Feb.-April 2012.
external steps.\textsuperscript{80} The Resolve model offers employees a structured internal review and provides an external review for legally protected rights if claims are not resolved through the initial internal review process.\textsuperscript{81} In the internal review, the employee submits in writing a concern to an immediate manager or human resource representative and meets with the manager or human resource representative within fourteen days to formally discuss and to seek a solution to the concern.\textsuperscript{82} If the concern is not settled, then the employee may choose to meet with a higher-level manager, human resources representative, or both.\textsuperscript{83}

If a solution is not reached after internal review, then the employee may request mediation if the concern involves legally protected rights, such as discrimination or sexual harassment claims.\textsuperscript{84} In order to proceed to the external review steps, the covered claim must have been submitted for internal review before the statute of limitations on the claim had expired.\textsuperscript{85} If the claim proceeds to mediation, the employee and company jointly select the mediator.\textsuperscript{86} If an agreement is reached during mediation, then both parties will sign a settlement agreement.\textsuperscript{87} If no agreement is reached, then the company will provide a written response to the employee within seven days of the mediation, and the employee may elect to submit his or her claim to binding arbitration.\textsuperscript{88} The formal request for arbitration requires the employee to submit the amount of damages claimed and the remedy sought.\textsuperscript{89} Both the employee and company will participate in the selection of the arbitrator and schedule the hearing within forty-five days.\textsuperscript{90} The arbitrator’s decision is final and binding. This is the last step in the Resolve program and prevents further recourse through the legal system.\textsuperscript{91}

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\textsuperscript{80} Mark Nordstrom, \textit{General Electric’s Experience with ADR, ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53\textsuperscript{\textregistered}\ ANNUAL CONFERENCE ON LABOR} (2004).

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 213–14. The employee must submit his or her covered claim within seven calendar days after completing and receiving a written response from the internal review. \textit{Id.} at 214.

\textsuperscript{85} Id. at 214–15. A plaintiff has 180 days to file an EEOC charge under Title VII.

\textsuperscript{86} Id. at 215. Once the employee and company agree on a mediator, the mediation takes place in thirty calendar days.

\textsuperscript{87} Id. The company will pay for all administrative fees except for a $50 initiation fee paid by the employee. Each party will pay their own experts’ and attorneys’ fees. If a settlement agreement is reached, the company will reimburse the employee for up to $2,500 for experts’ and attorneys’ fees.

\textsuperscript{88} Id. Employees with a service date prior to October 15, 1998, have the choice to proceed with their claim in court. However, employees with a service date after October 15, 1998 are required to submit their claims to binding arbitration.

\textsuperscript{89} Id. at 216.

\textsuperscript{90} Id. at 216–17. The company will pay for all administrative fees except for a $50 initiation fee paid by the employee.

\textsuperscript{91} Id. at 217.
2. **Morgan Stanley's Program**

Morgan Stanley implemented an IDR program known as Convenient Access to Resolutions for Employees (CARE) program to resolve employees' statutory discrimination claims, including harassment, retaliation, gender, and race claims. Public details of the CARE program are limited. However, the program received much attention from the public after Morgan Stanley expanded their CARE program to include mandatory, binding arbitration as its final step. On September 2, 2015, Morgan Stanley emailed all employee work email accounts with a link containing the expanded arbitration agreement. This expanded CARE program requires all employees to use binding arbitration for disputes and bans class action suits. Previously, the CARE program applied to most workplace claims, but did not require civil rights claims to be forced into arbitration. Since the expansion of its CARE program, Morgan Stanley has faced a class action lawsuit. Prior to the expansion of its program, Morgan Stanley had settled large class action discrimination suits. Many Morgan Stanley employees opposed this expansion that mandated arbitration and banned class action lawsuits because the expansion occurred through a mass email.

General Electric and Morgan Stanley’s programs vary greatly. General Electric’s program provides its employees with a more formal and structured process to adjudicate claims. Morgan Stanley’s recent program change now forces employees into mandatory and binding arbitration with very little internal company review. General Electric’s IDR program provides a more structured and systematic process to internally resolve disputes, which may

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93 Id.

94 Id.

95 See Grant v. Morgan Stanley Smith Barney L.L.C., No. 16-81924-CIV-MARRA, 2017 WL 1044484, at *1-2 (S.D. Fla. Mar. 20, 2017) (the email explained that mandatory arbitration would extend to all employees on October 2, 2015, unless the employee opted out by completing an opt-out form).

96 Antilla, supra note 92.

97 Id.

98 See Frazier v. Morgan Stanley & Co., No. 15-cv-4512-PHI, 2016 WL 368100, at *1 (N.D. Cal. Jan. 29, 2016) (suing of Morgan Stanley by plaintiff for intentional race discrimination and alleging the bars of mandatory arbitration and class actions were implemented to discriminate without accountability in court).


100 See Frazier, 2016 WL 368100, at *1.

101 See Antilla, supra note 92.
foster better resolution of disputes. In contrast, Morgan Stanley’s IDR program does not provide a structured and systematic process to internally resolve disputes, which may foster employee dissatisfaction with the program. Both programs guarantee resolution of the dispute upon completion of the IDR program through binding arbitration. The internal resolution of IDR programs present advantages and disadvantages to both employees and employers.

IV. Advantages and Disadvantages of Internal Dispute Resolution Programs

Many companies have incorporated IDR programs to resolve disputes swiftly and cost effectively. Companies believe implementation of IDR programs maintain working relationships between disputing employees and improve company culture by encouraging employees to problem-solve. Also, companies greatly desire to avoid public vindication of internal employee disputes. IDR programs have advantages and disadvantages for resolving workplace sexual harassment claims.

A. Advantages

IDR programs can be advantageous to employers and employees. A well designed IDR program provides a formal and structured process for informal resolution of most employment disputes. IDR programs provide a clear roadmap for both sides, which promotes enhanced decision-making throughout the dispute resolution process. IDR programs also allow both parties to focus on underlying issues and focus on problem solving solutions. Further, IDR programs give effective “early warning” signs to companies and human resource managers. Early warning signs allow employers to identify poor management practices within the company and

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102 Nordstrom, supra note 80, at 218. General Electric’s IDR program may result in “better” resolution of disputes by creating more employee satisfaction with the dispute resolution process. See id.

103 Morgan Stanley’s CARE program may result in unsatisfied employees and result in an ineffective IDR program. However, the program may be effective from Morgan Stanley’s standpoint. See Nordstrom, supra note 80, at 217; Antilla, supra note 92.

104 See Nordstrom, supra note 80, at 217; Antilla, supra note 92.

105 Jessica Oser, The Unguided Use of Internal ADR Programs to Resolve Sexual Harassment Controversies in the Workplace, 6 Cardozo J. Conflict Resol. 283, 284 (2005).

106 Id.

107 Id.


109 Id.

110 Id.

111 Id.
effectively prevent claims from re-occurring.\textsuperscript{112} Lastly, IDR programs can be highly effective and resolve disputes without resorting to arbitration.\textsuperscript{113}

1. \textit{Empowers Employees}

IDR programs can empower employees because it is in the company’s economic interest to resolve an employee’s sexual harassment allegations to promote greater corporate profitability.\textsuperscript{114} IDR programs promote greater corporate profitability by preserving time and resources.\textsuperscript{115} Resolving an employee’s sexual harassment allegation promotes corporate profitability because an employee may not be productive under such a hostile workplace environment, which may result in economic loss.\textsuperscript{116} Further, a company also has the incentive of maintaining the productivity of other employees. Therefore, a company will have an incentive to address the employees claim to maintain a productive workplace environment and culture.\textsuperscript{117} A company will also have an economic interest to secure employees’ positions that add value to the company.\textsuperscript{118} Therefore, IDR programs empower employee claims and incentivizes companies to implement effective IDR programs.

2. \textit{Avoids Negative Publicity}

The lack of publicity from IDR programs may be especially beneficial in the context of resolving sexual harassment disputes. Many employees feel sexual activity is a private, sensitive subject, and tend to want to avoid publicity when complaining about sexual harassment.\textsuperscript{119} Some studies suggest employees prefer internal grievance procedures for sexual harassment claims as opposed to traditional litigation due to the intimate details of sexual harassment claims.\textsuperscript{120} Utilizing an IDR program to resolve sexual harassment claims allows the employee to feel secure, despite the highly emotional and intimate nature of sexual harassment claims.\textsuperscript{121} Avoiding publicity allows employees a viable alternative, but also protects the accusing employee’s reputation without being stifled by the harasser or the media.\textsuperscript{122} IDR programs

\textsuperscript{112} Id.
\textsuperscript{113} David H. Gibbs, \textit{Employment Survey Says that Major Companies Increasingly Use Tailored Programs and Processes}, 19 Alterative 237 (November 2001) (Finding 85%-95% of all claims are resolved in steps prior to arbitration under IDR programs).
\textsuperscript{114} Oser, \textit{supra} note 105, at 308.
\textsuperscript{115} See \textit{Id}.
\textsuperscript{116} \textit{Id}.
\textsuperscript{117} Id.
\textsuperscript{118} Id. This argument fails for low-skill employees that allege sexual harassment claims because it’s often in a company’s economic interest to simply to replace that employee.
\textsuperscript{120} \textit{Id}.
\textsuperscript{121} Id.
\textsuperscript{122} Oser, \textit{supra} note 105, at 305.
ensure employees will have a secure environment to voice their claim without the pressures of the public.\textsuperscript{125} Lastly, if a public forum is needed, IDR programs do not completely circumvent the public legal system because the EEOC has the power to prosecute Title VII cases.\textsuperscript{124}

3. **Finality in Final Arbitration Step**

Most IDR programs have binding arbitration as their final step.\textsuperscript{125} This allows a company to finalize the dispute upon completing the steps in the program.\textsuperscript{126} Like mediation, arbitrations are typically private and allow the employee, harasser, and employer to move on from the dispute after its proceedings conclude.\textsuperscript{127} The finality of binding arbitration can protect the interests of all parties involved: the accuser, accused, and company.\textsuperscript{128} The privacy shield guaranteed by arbitration can be beneficial to the accusing employee because it prevents potentially negative repercussions from future employers.\textsuperscript{129} The finality of arbitration can also be beneficial to the accused because it often allows the accused to avoid negative repercussions from future employers.\textsuperscript{130} Lastly, the finality of arbitration may be very beneficial for the company because it prevents fear of future legal actions and allows the company to focus on the productivity of the business.\textsuperscript{131}

B. **Disadvantages**

However, IDR programs have disadvantages to employers. IDR programs consume time and resources to properly implement and administer effective programs.\textsuperscript{132} Further, employers must monitor the program closely to ensure it operates with credibility.\textsuperscript{133} The administration and monitoring of IDR programs results in year-round expenses to companies.\textsuperscript{134} Further, IDR programs with arbitration as their final step result in binding decisions.\textsuperscript{135} Employers typically view the finality and binding nature of arbitration as

\textsuperscript{123} Holzman, infra note 119, at 251-52.


\textsuperscript{125} Susan A. FitzGibbon, Arbitration, Mediation, and Sexual Harassment, 5 PSYCHOL. PUB. POL’Y & L. 693, 704 (1999).

\textsuperscript{126} Id. at 704 (concluding that arbitration ensures finality by providing limited grounds for judicial modification).

\textsuperscript{127} Id. at 718.

\textsuperscript{128} Id.

\textsuperscript{129} Id. An employee that decides to seek other employment will be protected from negative connotations of accusing their former employer of sexual harassment claims.

\textsuperscript{130} Id.

\textsuperscript{131} Id. at 724.

\textsuperscript{132} See Ross, supra note 108, at 203.

\textsuperscript{133} See id.

\textsuperscript{134} Id. However, proponents of IDR programs argue that litigation costs exceed the expenses of administering and monitoring IDR programs year round.

\textsuperscript{135} Id.
advantageous. However, companies sometimes disagree with the outcome of binding arbitration, which leaves few forums to appeal the outcome.

1. Empowers the Empowered

IDR programs have significant disadvantages to employees. These disadvantages may result in fewer claims from employees because IDR empowers the already powerful. IDR programs resolving sexual harassment claims empower the employer because the employer implements the program and determines the rules of the proceedings. Creating IDR programs can be dangerous because it allows employers "to transform the large bureaucratic organization from being merely a structurally privileged actor in the public legal order to being a private legal order in its own right." An IDR program that resembles the public legal system allows employers to avoid external scrutiny. Companies that have created their own rules and mechanisms of enforcement can effectively circumvent the courtroom and closely monitor all claims and proceedings through internal resolution. Effectively implementing an IDR program allows companies to internalize any and all sexual harassment disputes. Therefore, companies may avoid publicity from sexual harassment claims stemming from within the company. IDR programs become problematic to employees and the public welfare when IDR programs are used solely to internally silence employees with grievances, rather than using the IDR program to effectively address sexual harassment discrimination.

Silencing employees' claims through an IDR program promotes the repeat player effect. A federal court of appeals for the first time addressed the repeat player effect in Cole v. Burns International Security Service. In Cole, the court used the term "repeat player" when describing the troubling implications of not having structural protections inherent in the collective bargaining context in cases involving mandatory arbitration of statutory

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136 Id.
137 Id.
139 Id. at 1143–44
141 Id. at 965 (noting that courts are more likely to dismiss plaintiff claims that failed to exhaust employer's IDR mechanisms—especially when the IDR program is formal with strict standards and appeals procedures).
142 Id. at 963.
143 Id.
144 Id. at 975.
145 Id. at 962.
146 Id. at 946. The repeat player effect is the proposition that employers attain more favorable outcomes in arbitration because they have more information to gain an advantage in the arbitration process.
The court’s fear from the troubling implication of the repeat player effect was that the employer might gain an advantage from having superior knowledge. The repeat player effect can be highly disadvantageous to an employee forced into arbitration.

2. Removes Deterrence from Publicity

IDR programs allow companies to avoid public scrutiny, which deprives society of useful information to ensure deterrence of workplace sexual harassment through public vindication. Resolving sexual harassment claims internally removes the incentive for companies to act forcefully against the alleged harasser to ensure sexual harassment in the workplace does not reoccur. This is problematic because it allows companies to continue employing a repeat sexual harasser, resulting in more harm to future employees while also depriving future employees of pertinent information about the company. Further, relying on the EEOC to pursue Title VII cases is not promising. The EEOC does not pursue the majority of cases and ultimately sends the majority of its cases to mediation. Therefore, IDR programs allow companies to avoid publicity and the public legal system, which results in lack of legal precedent for future sexual harassment disputes. The need for publicity in sexual harassment claims is essential for deterrence. Further, employees who prefer to avoid the publicity could still bring claims through ADR methods, but should not be forced into a mandatory, binding program at the outset of employment.

3. Unsatisfying Finality in Arbitration Step

There is strong opposition to binding employment arbitration in sexual harassment claims. The attack on mandatory, binding arbitration is largely centered on its coercive and adhesive nature. An employment contract that contains a binding arbitration clause for an individual employee to resolve a statutory employment dispute may lack true choice. The employer demanding binding arbitration at the outset of the execution of an employment contract

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148 Id.
149 Id.
150 Oser, supra note 105, at 305.
151 Id.
152 Id.
153 See Holzman supra note 119.
154 Id.
155 Oser, supra note 105, at 302.
156 Id. at 305.
157 See FitzGibbon, supra note 125, at 719.
158 Id. at 720.
159 Id. Critics argue that employees have no real choice when signing an employment contract containing mandatory, binding arbitration because the arbitration clause is non-negotiable in order to gain or retain employment.
contract has superior bargaining power, which contributes to an employee’s lack of choice. The lack of mutual­ity between the employer and employee is another disadvantage to employees. Typically, the employer unilater­ally drafts the contract that dictates the rules of the arbitration, selects the arbitrator, and demands confidentiality. Further, at the conclusion of binding arbitration, there are few forums for employees to appeal or seek judicial oversight. The finality of decisions that employees had little to no choice to enter in the beginning allows companies to dictate the terms and forum for resolution of sexual harassment disputes. This finality of decisions provides a strong incentive for employers to adopt IDR programs with mandatory arbitration as their final step. The finality of binding, confidential arbitration in IDR programs can be highly unsatisfying to employees because it deprives employees of the ability to speak out when unfairness in IDR programs arises.

V. CONCLUSION

Due to the increased publicity surrounding employee sexual harassment claims forced into binding arbitration, state and federal legislators have taken legislative action. The New York State Senate passed a bill banning mandatory arbitration for sexual harassment claims. In 2017, the United States Senate proposed legislation that prevents sexual harassment claims from being forced into mandatory arbitration. If Congress’s proposed legislation, Ending Forced Arbitration of Sexual Harassment Act of 2017, passes, it would bar employers from forcing sexual harassment claims into mandatory arbitration. The legislation would effectively protect victims of

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160 Id. at 720–21.
162 FitzGibbon, supra note 125, at 704.
163 Silverman, supra note 161; see also FitzGibbon, supra note 125, at 720 (“the EEOC maintains that compulsory arbitration is structurally biased against employees, inter alia, because the private nature of the process allows the employer to set the rules (e.g., limited remedies, restricted discovery) and because the employer gains an advantage as a “repeat player.””).
164 Silverman, supra note 161.
165 See id.
167 N.Y. S.B. 7848A 2017–2018 Leg. Sess. (N.Y. 2018). The bill bans contractual provisions that mandate arbitration of sexual harassment claims; requires court approval of sexual harassment settlements with confidentiality provisions and provides that confidentiality provisions not be included unless the claimant asks for a confidentiality provision; adopts a uniform definition of sexual harassment; and extends employer liability for sexual harassment claims to independent contractors and other non-employees in an employer’s workplace.
168 Ending Forced Arbitration of Sexual Harassment Act, S.B. 2203, Cong. 115 (2017) (proposing that all pre-dispute arbitration agreements of sexual harassment claims be invalid and unenforceable).
workplace sexual harassment by allowing employees to choose to pursue arbitration or another form of ADR to resolve their disputes.

Victims of workplace sexual harassment deserve a fair and impartial forum to redress their disputes. IDR programs can provide victims of sexual harassment the appropriate and proper forum to effectively and efficiently address their claims. However, IDR programs should not force victims of workplace sexual harassment to agree at the outset of their employment to binding, confidential arbitration.

A well-designed IDR program with internal and external review, without binding arbitration as its final step, can protect the accused from false allegations while providing a fair and efficient forum for victims to seek redress. IDR programs that provide formal and structured processes that empower both parties to resolve disputes without bias can be highly effective. However, IDR programs that purely focus on concealing and protecting negative publicity fail to promote justice for employees and prevent future harm by perpetrators. IDR programs can be highly effective in addressing workplace sexual harassment claims when their objective is resolving the dispute, rather than silencing the employee through mandatory, confidential arbitration.