

**TESTIMONY OF JENNY R. YANG
SENATE COMMITTEE ON THE JUDICIARY**

**“CONFRONTING SEXUAL HARASSMENT AND OTHER WORKPLACE
MISCONDUCT IN THE FEDERAL JUDICIARY”**

JUNE 13, 2018

Chairman Grassley, Ranking Member Feinstein, Members of the Committee: Good morning, and thank you for the opportunity to testify today on a subject that is essential to the integrity of our judicial system.

By way of introduction, I am Jenny Yang. I served as Chair of the U.S. Equal Employment Opportunity Commission from September 2014 to January 2017 and as a member of the Commission from 2013 to 2018. Prior to my time at the Commission, I spent 15 years litigating cases on behalf of employees, including challenging sexual harassment and other forms of sex discrimination. In addition, as a former law clerk to a federal district court judge, I appreciate the unique relationship and tradition of confidentiality between judges and their clerks. Since leaving the EEOC, I have been asked to consult on judicial education programs and present training to judges related to workplace harassment and discrimination. As a result, I appreciate the importance of this work and some of the particular needs and inherent challenges in addressing these issues within our nation’s judicial systems.

During my tenure at the EEOC, I was stunned by the sheer number of harassment charges we saw, including egregious systemic harassment. Harassment claims comprised over 30 percent of the charges employees filed with the agency. At the EEOC, we were frustrated with how frequently we were seeing a version of the same case again and again across our 53 offices.

To tackle this issue, as Chair of the EEOC, I asked my colleagues on the Commission, Victoria Lipnic, currently the EEOC’s Acting Chair, and Commissioner Chai Feldblum to lead a bipartisan effort to identify new and innovative solutions to prevent and address harassment. The EEOC Select Task Force on the Study of Harassment in the Workplace engaged a broad range of experts and stakeholders with diverse perspectives, including employers, workers, lawyers, academics and policymakers, to identify the key challenges in preventing and addressing sexual harassment. The Task Force also identified the emerging and promising practices for training and workplace policies. In 2016 the co-chairs of the Task Force issued a detailed report, highlighting risk factors for harassment and gaps in current anti-harassment training. A second 2017 EEOC report identified promising practices to prevent and respond to harassment.¹

I commend Chief Justice John G. Roberts, Jr. for establishing the Federal Judiciary Workplace Conduct Working Group and also applaud James C. Duff, Director of the Administrative Office of the U.S. Courts, and all the members of the working group for their commitment to reforms to strengthen the judiciary’s efforts to prevent and address harassment. Guided by the Report of the Co-Chairs of the EEOC Task Force, the Working Group analyzed the unique environment of the judiciary to develop many valuable recommendations for change. Through the Working Group’s

¹ U.S. Equal Employment Opportunity Commission, *Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace*, (2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; U.S. EEOC, *Promising Practices for Preventing Harassment*, available at <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

efforts, the resolve of the leadership of the Judiciary, and the commitment to provide the necessary funding, we have an unprecedented opportunity to create an effective process that will build public trust and send a clear message that harassment and judicial misconduct will not be tolerated.

My testimony today will focus on the Judiciary's procedures for reporting and correcting inappropriate behavior, which are the cornerstone of an effective anti-harassment process. Ensuring both public and internal trust is vital for the Judiciary to function effectively. Designing systems to empower employees to utilize the complaint process and provide effective organizational responses to complaints are essential to creating a workplace culture where harassment is not tolerated.

Common themes have emerged in the high-profile cases that have captured the nation's attention as well as in the many cases the EEOC has prosecuted. These include: 1) a lack of leadership engagement and accountability; 2) structural problems including insufficient resources and authority as well as inadequate investigations; and 3) retaliation and ineffective responses to complaints. We have seen significant harassment spanning all industries. And unfortunately, as Justice Roberts has observed, the "judicial branch is not immune."

RISK FACTORS FOR HARASSMENT

Indeed, the Judiciary has a number of environmental risk factors – organizational factors that increase the likelihood of harassment. The EEOC Task Force Co-Chair's Report reviewed numerous studies showing that organizational conditions are the most powerful predictors of harassment, developing a list of key risk factors. In the Judiciary risk factors include: 1) significant power disparities and "high value" employees who often operate by their own rules; 2) employees who are new to the workforce, such as law clerks just starting out in their career; 3) isolated workplaces where workers are physically separated, and there may not be witnesses to inappropriate conduct; and 4) workforces lacking diversity where men historically dominate leadership posts, which can discourage women from coming forward out a belief that leadership may brush aside allegations of sexual improprieties.²

Understanding these risk factors and the hurdles employees may face in reporting misconduct are essential to building an effective and trusted complaint mechanism. The Working Group recognized the need to strengthen the Judiciary's complaint and reporting process and identified some specific areas for improvement. However, the Judiciary must ensure that it has a full understanding of the issues and barriers to accessing the existing complaint process in order to ensure changes effectively address the root causes of the problems. Further study of this issue may be warranted.

PUTTING THE COMPLAINT NUMBERS IN CONTEXT

Although the Working Group recognized potential risk factors, the report concludes that inappropriate conduct -- including sexual and other workplace harassment -- is "not pervasive in the Judiciary."³ This conclusion appears to be based on the low number of formal complaints, and the feedback obtained from current and former employees and other stakeholders. The report

² See *EEOC Task Force Co-Chairs Report* at 25-30.

³ *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (June 1, 2018) at 6.

stated the Working Group did receive anecdotal reports of harassment that was not addressed, but the number of incidents was not further described or qualified.

I would caution against using the small number of formal complaints to draw any conclusions about the overall rate of harassment or other inappropriate conduct. The number of formal complaints is usually the “tip of the iceberg.” About 70 percent of individuals experiencing harassment never report it.⁴

Although the Judiciary receives relatively few complaints of harassment, this does not mean the problem is insignificant. A low number of complaints is not necessarily a positive indicator – it may be a sign that the existing complaint mechanisms do not have the trust of employees. Research by Louise Fitzgerald and others suggests that many individuals choose to “manage” harassing behavior rather than report it – and they may have good and rational reasons to do so.⁵ Many reporting systems require individuals to establish an adversarial relationship with supervisors or co-workers. Indeed, the act of reporting a complaint can be more traumatic in some situations than the conduct at issue.

As the EEOC Task Force Co-Chairs Report found, as many as three out of every five women will experience some form of sexual harassment over the course of her working career.⁶ Unfortunately, in many work environments, employees are understandably afraid of being discredited or viewed as disloyal or even worse, being blamed for the conduct or retaliated against.

Many reporting systems invariably lead to retaliation. As many as 75% of individuals who spoke out about workplace mistreatment also reported experiencing retaliation.⁷ In addition, many employees have not seen effective action taken in response to concerns, so they often believe that nothing will change if they report it. Where there is not real accountability, harassment will flourish.

It is important to keep in mind that if the work of the Working Group and the interventions adopted by the Judiciary lead to an increase in the number of complaints that may be a sign that employees feel safer and more empowered. It would not necessarily mean that the actual level of harassment has gone up.

ESTABLISHING A BETTER BASELINE TO MEASURE PROGRESS

Given the difficulty in knowing the true incidence rate, or all of the potential barriers to reporting or limitations on existing interventions, it will be hard for the Working Group to monitor the effectiveness of its reforms. The Judiciary should consider further study through an external assessment to provide a baseline to measure progress – and to identify additional barriers to reporting and intervention. Measurement and accountability are some of the most effective mechanisms to address workplace harassment and discrimination.⁸

⁴ EEOC Task Force Co-Chairs Report at 16.

⁵ Louise F. Fitzgerald and Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, Journal of Social Issues (1995).

⁶ See EEOC Task Force Co-Chairs Report at 8-10.

⁷ EEOC Task Force Co-Chairs Report at 16.

⁸ Iris Bohnet, *Gender Equality by Design* (2016); Frank Dobbin and Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, Harvard Business Review (2017),

Although the Working Group went beyond reported incidents and complaints and solicited broader information, they still may not have enough information to draw a clear conclusion about the incidence and prevalence of workplace harassment in the federal judiciary. The Working Group made a substantial effort to obtain feedback from current and former employees, including inviting submissions to an anonymous mailbox, meeting with constituent groups and conducting interview with a selection of law clerks and other employees. However, because the Working Group was made up of senior leaders who solicited and handled the feedback, individuals may still have been reluctant to share information. And a request that individuals take the initiative to post messages to a mailbox maintained by the employer, even if it promises anonymity, depends on employees to volunteer information.

An alternative approach is to undertake a formal assessment led by an external entity or expert team with credibility and experience talking to employees. Using an outside assessment increases trust, because it permits employees to share experiences and perceptions much more confidentially. An outside assessment can increase the rate and quality of participation in feedback.

The assessment should make an effort to obtain feedback from a broad and representative group of participants, using multiple methods. The report does not provide any specifics about the number of people who submitted anonymous messages, or participated in interviews or meetings, or any breakdown as to their levels, functions, or demographic characteristics. An assessment will typically report participation rates and other summary information about participants.

A typical methodology includes a survey instrument – often referred to as a climate or culture survey. It would solicit responses from all employees based on multiple requests or invitations to participate, along with other feedback mechanisms such as interviews or focus groups. The assessment should include specific questions about experiences and perceptions of workplace harassment and inappropriate behavior, as well as the extent to which employees are aware of and feel comfortable utilizing existing reporting mechanisms, concerns about retaliation and more open-ended opportunities to discuss leadership, climate and culture.

Finally, the assessment should encompass a broader lens than sexual harassment or gender bias - indeed harassment based on criteria other than sex make up the majority of charges.⁹ The challenges in reporting workplace harassment also include the impact of intersectional forms of discrimination and structural bias. I recommend ensuring these mechanisms advance a broad perspective on equal opportunity and inclusion at work.

An assessment provides a clear baseline to measure progress and the impact of any interventions such as training or policy changes. Further, it would provide additional information on whether and how employees use existing avenues to seek assistance and respond to workplace harassment and discrimination. That information could add to the current ideas for reforming the formal and informal complaint procedures provided in the Working Group report.

COMPLAINT PROCEDURES

available at <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will>.

⁹ In 2015, 45% of federal complaints alleging harassment involved claims based on sex, the majority involved claims based on other issues. *EEOC Task Force Co-Chairs Report* at 7.

The Working Group report identifies two options for making formal complaints and no clear existing option for seeking informal remedies – and recommends improvements in both areas. I agree with the concerns identified in the Working Group report and want to offer some additional best practices reforms that could strengthen formal and information procedures.

The two existing avenues for reporting require complainants to go through a very formalized, adversarial process. Individuals can file a formal complaint under the Judicial Conduct and Disability Act procedures, or they can seek assistance through the Employment Dispute Resolution (EDR) plans. The first option is a formal, adversarial process akin to an administrative complaint. The second option is akin to filing a federal sector EEO charge – it starts with counseling and mediation, with an option to then file a complaint, have a hearing and get a decision.

According to the Working Group, these programs are not widely known or used, these procedures may be difficult to understand, and their coverage has limitations. To build trust and increase access, I recommend considering the use of outside investigators in appropriate cases. I also propose a further expansion of the individuals covered by these programs. And I encourage the Working Group to continue evaluating barriers to access and limitations on effectiveness of these formal procedures.

I would be remiss if I did not address a topic the Working Group did not engage, namely the lack of full Article III remedies or any external review or appeal process. The reality is that it is difficult to create a trusted and independent process to address issues of harassment when the Judiciary is regulating itself. To strengthen the integrity of the process, the Judiciary should explore holding itself to the same standards as other employers, including developing an Article III judicial process where an employee has a right to file suit in another federal court and adjudicate her claim with the right to a trial by jury rather than having a judge serve as factfinder.

In 1972, Congress entrusted the EEOC with oversight of anti-discrimination laws covering the federal workforce. The Commission has established procedures for reporting and resolving harassment claims internally within the federal sector, but importantly, federal employees retain the right to file suit in federal court and can exit the administration process at several points including: 1) After 180 days have passed from the date a complaint was filed, if the agency has not issued a decision and no appeal has been filed; 2) Within 90 days from the date the agency's decision on a complaint is received, so long as no appeal has been filed; 3) After 180 days from the date an appeal was filed, if the EEOC has not issued a decision; or 4) Within 90 days of receipt of the EEOC's decision on an appeal. A similar process could be developed to provide judicial employees with this same right to a full Article III judicial proceeding.

Outside Investigators: To strengthen trust in the fairness of the EDR process, one recommendation for the Judiciary is to create a process to conduct high-quality third-party investigations designed to fully evaluate workplace harassment and discrimination complaints using a process that is fair to all parties. In certain situations, an outside review is needed. For example, some courts may not have in-house investigators or individuals with experience investigating complex matters. And even where organizations have experienced and highly trained investigators, an outside investigation may be warranted in situations such as allegations against a judge or senior level individual, cases that involve significant media attention, or any time there is concern about the objectivity or capacity of the existing internal process. Rather

than relying solely on an internal process, outside investigators can provide a credible and trusted assessment of the evidence and a trauma-informed approach to interviews.

Internal human resources teams must also be empowered with the resources and authority that will assist them in building trust internally, supporting the safety of individuals who have experienced harassment, and ensuring confidentiality of the process.

Broaden Definition of Employees to Protect all Workers from Harassment: The Working Group recommends that EDR Plans’ scope of coverage be consistent throughout the judiciary and that the definition of “employee” under the model plan should be broadened to include interns and externs who may be at higher risk of harassment since they are new to the workforce.¹⁰ In addition, I would recommend that the Judiciary draft an inclusive policy that makes clear that it protects workers, such as independent contractors and temporary employees who perform the work that keeps the Judiciary operating, to ensure there are not gaps in protections or incentives to avoid responsibility.

INFORMAL PROCEDURES AND PROPOSAL FOR A JUDICIAL OMBUDS PROGRAM

The Working Group recognized the need to develop multiple mechanisms to provide a range of methods and points of contact to support employees who encounter misconduct.¹¹

As an alternative to formal complaint mechanisms, the Working Group recommends the establishment of offices at both the national and circuit level to provide employees with an informal avenue to raise concerns at an early stage and obtain advice and assistance with concerns of judicial misconduct.

In most public, private sector and nonprofit workplaces, employees can engage human resources officials informally to request that their employer investigate their concerns, without having to participate in any kind of formal dispute resolution procedure. While those systems can have many limitations,¹² they do provide another option – especially when paired with ombuds programs or other safeguards that provide multiple avenues to seek assistance and ensure safe and respectful workplaces.

An informal mechanism to raise concerns requires clear structures, resources and support. Offices at multiple geographic points can play a critical role in encouraging people to come forward to understand their options and resolve disputes early. To be successful these offices must engender trust within the organization and offer a confidential process to educate employees about their options, such as confronting a harasser, making an informal report or formal complaint. This includes training, coaching and capacity building with existing human resources functions and offices so that they provide accessible and effective resources to employees who may not be ready or willing to engage any of the dispute resolution or formal complaint procedures – and clear, accurate guidance on how to file a complaint or access the EDR program if that is what they wish to do.

In addition to robust informal complaint options through the human resources function, I recommend establishing an ombuds office as a separate mechanism for employees to raise

¹⁰ *Working Group Report* at 34.

¹¹ *Working Group Report* at 37.

¹² Lauren B. Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (2016).

concerns. Many federal agencies and some private companies and higher education institutions have successfully used an ombuds office to provide a safe and respectful case manager approach, offering credible options in a manner that builds trust within the organization. The ombuds office helps to brainstorm and identify potential solutions, yet the process does not constitute a formal complaint that puts the employer on notice or trigger an investigation that will likely notify the harasser of the nature of the allegations. This type of confidential process enables the employee to be the driver of the process in determining the approach she or he is most comfortable pursuing.

This model could be a useful approach for the Judiciary to provide a mechanism to uncover significant issues and patterns that may not be well known or have been ignored. These offices can aid in resolving issues early before a formal complaint is filed.¹³ Federal ombudspersons share three core standards of practice—independence, confidentiality, and impartiality.¹⁴ They also share common characteristics: (1) they do not make decisions binding on the employer or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving, reviewing, and assisting in the resolution of issues.¹⁵ These criteria also align with the international standards of practice for ombuds programs.¹⁶

An ombuds office should report directly to the Chief Judge of the court or the highest level of senior leadership and bypass existing human resource structures to preserve its independence and build support at the highest level of the organization. Leadership must clearly message in communications their respect for the independence, confidentiality, and impartiality of the ombuds office. Those serving in an ombuds role should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and the ombuds function should not be housed in an office that has a prosecutorial or investigatory role, as that would be at odds with the ombuds function. Most importantly, it must be clear to employees through multiple forms of notice that contact with an ombuds office does not serve as notice to the agency, and alternative formal complaint mechanisms exist that will trigger an investigation and appropriate action by the organization.

A trusted confidential process can encourage more people to come forward to share workplace concerns. It does not mean forgoing transparency and an informal process need not become a mechanism to hide problems within an organization. To ensure accountability and transparency, the ombuds office should provide annual or other regular reporting of the nature and location of complaints without revealing the identity of the parties involved. The ombuds office may also regularly brief the Chief Judge or senior official on patterns or significant issues uncovered to prompt preventive action while still maintaining individual confidentiality.

Ultimately, a credible process is one that the workforce believes has methodological integrity as evidenced by documentation of its purpose and process. The process must be repeatable with consistency and not just personality driven, and should offer transparency so the workforce should know the aggregate results achieved.

¹³ See *The Use of Ombuds in Federal Agencies* (December 15, 2016), available at <https://www.acus.gov/recommendation/use-ombuds-federal-agencies>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *International Ombuds Association Standards of Practice*, available at <http://www.ombudsassociation.org/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices.aspx>.

The Judiciary may also want to consider the creation of an 1-800 number as another reporting mechanism that is housed and serviced externally and then interfaces with the independent ombuds office. This form of intake services could be charged with providing advice to employees, somewhat analogous to an Employee Assistance Program.

OVERSIGHT AND ACCOUNTABILITY

One final recommendation is to bolster the Working Group's internal perspective with external oversight and accountability using an independent Task Force. The Judiciary could create an oversight Advisory Committee or Task Force of, for example, five individuals from outside the agency with credibility and expertise. This outside entity would be charged with overseeing the internal complaint process, and also could provide a mechanism for employees to raise significant concerns, which they do not believe will be appropriately addressed if raised internally with the courts.

The Task Force model provides a structure for stakeholders and outside experts to work together to identify and implement reforms that can be tailored to a particular workplace or industry. An effective Task Force provides the kind of external oversight and accountability that is essential to large-scale organizational change and that research shows is one of the most effective tools for equity and inclusion.

Typically, the Task Force members and any staff, consultants and experts will make an initial assessment of needs, establish the measures of success, and then tailor best and emerging practices to those needs. After a period of testing potential interventions, the Task Force can then evaluate the results over time and make any adjustments that are needed. Through periodic reporting, the Task Force can provide transparency and help rebuild trust in previously failed systems. The Task Force could retain and oversee the individuals or entities used to conduct the climate assessment I proposed.

CONCLUSION

I applaud the Working Group for its commitment to studying and improving its processes, and I commend this Committee for your thoughtful oversight of this process. I offer my assistance as a resource to this Committee and the Working Group to identify specific steps that build on the recommendations in the Working Group's report to ensure real change.

JENNY R. YANG

Jenny R. Yang served as Chair of the U.S. Equal Employment Opportunity Commission from September 2014 to January 2017 and as Vice-Chair and a member of the Commission from 2013 to 2018. Under her leadership, the Commission launched the Select Task Force on the Study of Harassment in the Workplace to identify innovative solutions to prevent harassment at work, strengthened tools for equal pay enforcement, and issued updated retaliation guidance.

Currently, Ms. Yang serves as a Strategic Partner with Working Ideal where she advises employers in applying evidenced-based research in the design and implementation of employment practices to prevent harassment, foster respectful workplaces, and promote inclusion and equality of opportunity. In addition, as an Open Society Foundations Leadership in Government Fellow, and as a Fellow with the Urban Institute in the Center on Labor, Human Services, and Population, Ms. Yang is studying the impact of structural changes in the workplace on employment protections – including anti-harassment protections – for the growing number of Americans working as independent contractors, subcontractors, temporary workers, and in the gig economy.

Prior to joining the EEOC, Ms. Yang spent a decade representing workers in civil rights actions nationwide as a partner at Cohen Milstein Sellers & Toll PLLC. From 1998 to 2003, she served as a Senior Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section. Prior to that, Ms. Yang was a fellow at the National Employment Law Project. Ms. Yang clerked for the late U.S. District Judge Edmund Ludwig in the Eastern District of Pennsylvania. A graduate of Cornell University, she earned a B.A., with distinction, in Government. She received her J.D., cum laude, from New York University School of Law, where she served as an editor of the Law Review and a Root-Tilden Public Interest Scholar.

Jenny R. Yang is a fellow at the Open Society Foundations (OSF) and the Urban Institute. However this testimony is not a product of OSF or the Urban Institute. The views expressed are those of the author and should not be attributed to OSF, the Urban Institute, its trustees, or its funders.