

AMERICAN BAR ASSOCIATION

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE
COMMISSION ON DISABILITY RIGHTS
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON WOMEN IN THE PROFESSION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges legal employers not to require pre-
- 2 dispute mandatory arbitration of claims of unlawful discrimination, harassment or
- 3 retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual
- 4 orientation, gender identity or expression, marital status, or status as a victim of domestic
- 5 or sexual violence.

REPORT

Introduction

In August 2018, this House of Delegates passed Resolution and Report 300 (“Resolution 300”), urging legal employers not to require mandatory arbitration of sexual harassment claims.¹ The report detailed the perception among employees that mandatory pre-dispute agreements to arbitrate sexual harassment claims contribute to the perpetuation of an atmosphere of fear and isolation in the workplace.

Resolution 300 tracks the trend among many legal employers, including Munger, Tolles & Olson; Orrick, Herrington & Sutcliffe; and Skadden Arps Slate Meagher & Flom, to eliminate mandatory pre-dispute arbitration agreements. Its report details the many times that this House of Delegates has voted to limit mandatory pre-dispute arbitration in a variety of contexts.

However, Resolution 300 is limited both in the wrongs that it covers and who it protects. First, while it covers sexual harassment, it does not cover discrimination or retaliation, the two other wrongs encompassed within Title VII of the Civil Rights Act of 1964,² and parallel state statutes.³ This proposed resolution covers all three basic wrongs in this area: discrimination, harassment and retaliation. Though different in proof and legal theory, these serious categories of misconduct often, though not always, occur together. Accordingly, all three should be subject to the same arbitration rule as matter of policy and practicality.

Secondly, while Resolution 300 covers illegal harassment on the basis of sex, it does not cover the other categories encompassed within the major Federal Statutes (Title VII, Age Discrimination in Employment Act of 1967 (ADEA),⁴ Americans with Disabilities Act (ADA) of 1990,⁵ Violence Against Women Act of 1994 (VAWA)⁶) and/or in parallel state statutes: race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

Therefore, this proposed resolution begins with the text of Resolution 300 regarding sexual harassment and broadens it to cover illegal discrimination, harassment or retaliation, on the basis of the above-referenced categories that are already protected by law.

¹ ABA Resolution, 18A300, <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf>.

² 42 U.S.C. § 2000e *et seq.*, available at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

³ Cf, California Fair Employment and Housing Act (“FEHA”), CAL. GOV’T CODE §§ 12940 *et seq.*

⁴ [29 U.S.C. §§ 621-634](#) (1967).

⁵ [42 U.S.C. §§ 12101 *et seq.*](#) (1990).

⁶ [42 U.S.C. §§ 13701-14040](#).

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Victims of Unlawful Employment Discrimination Deserve the Same Access to Justice As Victims of Harassment⁷

The last two years have seen an increased focus on sexual harassment, and rightfully so. However, discrimination is the wrong at which these employment statutes first took aim and remains a serious issue today.

Unlawful discrimination is often defined as a

refusal to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of a category protected by law.⁸

Different from harassment, employment discrimination is unequal job opportunity, compensation, assignment and the like, because one is female, or a person of color, or has a disability or is otherwise in a legally protected class.

One of the greatest legislative achievements of the modern civil rights era, Title VII was devised to outlaw discrimination in the workplace on the basis of race, color, religion, sex and national origin.⁹ Arguing the need for Title VII, President Kennedy stressed that “the relief of [African American] unemployment required ... eliminating racial discrimination in employment.”¹⁰ This was central to the objectives of Title VII, but the legislative history emphasized that discrimination in employment needed to be eradicated on all grounds.

The wage gap by which women make 82 percent of the wages of men, and women of color make far less,¹¹ constitutes discrimination. According to the Equal Employment Opportunity Commission (EEOC), “[d]espite longstanding prohibitions against compensation discrimination under the federal EEOC laws, pay disparities persist between workers in various demographic groups. Other studies find that, women earn, on average, about 75 cents for every dollar that men earn.”¹² The President’s Council of

⁷ This Resolution does not expand the scope of substantive legal protections as it only covers *unlawful* discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.

⁸ California fair Employment and Housing Act (“FEHA”), Govt. Code §§ 12940(a),

⁹ 42 U.S.C. § 2000e *et seq.*, available at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

¹⁰ Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L.Rev. 432(1966), available at http://lawdigitalcommons.bc.edu/bclr/vol7/iss3/3_

¹¹ Pew Research Center, Nikki Graf et al., *The narrowing, but persistent, gender gap in pay*, available at <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>.

¹² EEOC, *QUESTIONS AND ANSWERS: COMPLIANCE MANUAL SECTION ON COMPENSATION DISCRIMINATION*, <https://www.eeoc.gov/policy/docs/qanda-compensation.html>.

Economic Advisors found that after taking factors like education, family responsibilities and experience into consideration, the pay gap between men and women is still disproportionate and could be the result of discrimination.¹³

The ABA Diversity and Inclusion Center, in its own research, found that “[w]omen lawyers of color were eight times more likely than white men to report that they had been mistaken for janitorial staff, administrative staff, or court personnel.”¹⁴ As ABA President Hilarie Bass wrote last year, “Women have to work just a little harder than their male colleagues to get recognition for their achievements . . . [and] when it comes to becoming an equity partner or managing partner — the highest levels of law firm leadership — it’s still much less common for women to reach that level of success.”¹⁵ These are examples of employment discrimination.

Discrimination charges are statistically more common than harassment charges. In 2017, the EEOC received 6,696 charges of employment harassment and obtained \$46.3 million in relief. That same year 84,254 workplace discrimination claims were filed with the agency, which secured \$398 million in relief for the charging parties.¹⁶

As *The New Yorker* reported on November 20, 2017, women make up only a quarter of employees and eleven percent of executives in the technology industry.¹⁷ In a survey of 200 senior level women in Silicon Valley, eighty-four percent of the participants reported that they had been told they were “too aggressive” in the office, sixty-six percent said that they had been excluded from important events because of their “gender.”

For the past five years, Google has responded to reports that it hires few women and fewer people of color, especially in leadership and engineering roles. After five years of progress, Google reported in June 2018 that the U.S. workforce is 2.5 percent African American and 3.6 percent Latino; globally, black women comprise barely one percent of the workforce, and Latina women less than two percent.

In FY 2017, the EEOC received approximately 84,000 total charges for any type of discrimination. Of those, approximately 29,000 were race-based charges; 27,000, disability-based charges; and 26,000, sex-based charges. From FY 1997 to FY 2017,

¹³ Council of Economic Advisers Issue Brief, April 2015, Gender Pay Gap: Recent Trends and Explanations, available at https://obamawhitehouse.archives.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf.

¹⁴ American Bar Association, *Bias Interrupters*, available at https://www.americanbar.org/groups/diversity/women/initiatives_awards/bias-interrupters/.

¹⁵ Media Planet, The Future of Business and Tech, “How we can Reverse the Trend of Women Leaning Out of Law,” available at <http://www.futureofbusinessandtech.com/business-solutions/how-we-can-reverse-the-trend-of-women-leaning-out-of-law>.

¹⁶ <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm>.

¹⁷ Sheelah Kolhatkar, “The Tech Industry’s Gender-Discrimination Problem,” *The New Yorker*, Nov. 20, 2017, available at <https://www.newyorker.com/magazine/2017/11/20/the-tech-industrys-gender-discrimination-problem>.

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charges of discrimination based on retaliation (all statutes) and retaliation (Title VII only) have increased.¹⁸

The failure to assign clients and cases to people of color, the reality that they must outperform their colleagues in order to get an equal shot at success, and the failure to be treated equally in partnership evaluation and decisions are all examples of unlawful discrimination.¹⁹

On February 12, 2018, the National Association of Attorneys General wrote to Congressional leadership noting that “access to the judicial system ... is a fundamental right of all Americans”, but that mandatory arbitration imposes relief from decision makers who are not trained as judges, are not qualified to act as courts of law” and a “veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.” In the words of the Attorneys General, ending mandatory pre-dispute arbitration of these important claims “would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.” Just as the House found that sexual harassment ought to be removed from the shadows and given the light of day, that is no less true of unlawful categorical discrimination.

Claims of Unlawful Retaliation Deserve the Same Public Airing As Claims of Unlawful Discrimination or Harassment

Unlawful retaliation provides the fertile ground required for unlawful employment discrimination and harassment to flourish. Much of what has been labeled sexual harassment is actually unlawful retaliation. The implicit or explicit threat that rejection of a sexual overture would be a career ending act is retaliation, rather than pure harassment.

Retaliation occurs when an employer unlawfully takes action against an individual in punishment for exercising rights protected by any of the EEO laws. The EEO anti-retaliation provisions apply to ensure that individuals are free to raise complaints of potential EEO violations or engage in other EEO activity without retribution or punishment.²⁰

The fear of retaliation prevents victims from complaining and coworkers from speaking out. As *The New Yorker* wrote on October 23, 2017, “Multiple sources said that [Harvey] Weinstein frequently bragged about planting items in media outlets about those who

¹⁸ EEOC, CHARGE STATISTICS (Charges filed with EEOC), FY 1997 - FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹⁹ American Bar Association, Bias Interrupters, *supra* note 14; EEOC, DISCRIMINATION BY TYPE, <https://www.eeoc.gov/laws/types/>.

²⁰ EEOC 2016 ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, No. 915.004, Aug. 25, 2016, <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

spoke against him; these sources feared similar retribution.”²¹ Without that fear of retaliation, unlawful discrimination and harassment would be far easier to eliminate.

While retaliation is often closely connected with unlawful discrimination and harassment, it is often a separate act, which must be addressed separately. A supervisor who warns a victim not to file a complaint of harassment to protect a powerful superior, or who fires her for having done so, engages in retaliation, rather than harassment. Indeed, serious instances of retaliation often occur in the absence of actionable harassment, for example, when a vindicated supervisor punishes an employee for raising a good faith complaint.

The EEOC tracks the total number of retaliation charges filed and resolved under all statutes alleging retaliation-based discrimination, and retaliation claims have increased significantly from FY 1997 to FY 2017; it is the most frequently alleged basis for a federal employment law charge, followed by race and disability.²² In FY 1997, there were 18,198 new charges received, and \$41.7 million dollars paid in monetary benefits. In FY 2017, there were 41,097 new charges received, and \$192 million paid in monetary benefits.²³

In a retaliatory atmosphere, discrimination and harassment run rampant. In some ways, retaliation may be the most serious unlawful employment practice of all, as it is an intentional misuse of power designed to chill and prevent the exercise of important legal rights. It is no less deserving of access to the courts than is harassment itself.

The Same Protections Should Extend to All Protected Categories Covered by ABA Model Rule 8.4²⁴

In August 2018, the ABA House of Delegates wisely recommended that law firms should not require, as a condition of employment or continued employment, that sexual harassment claims be forced into arbitration. The same protections should extend to the other groups protected by the major federal civil rights in employment acts, and in the general scope of Model Rule of Professional Conduct 8.4: Misconduct²⁵ —race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, and marital status. Some jurisdictions prohibit discrimination, harassment or retaliation on the basis of status as a victim of domestic or sexual violence (e.g., Cal. Lab. Code § 230) and

²¹ Ronan Farrow, “From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories,” *The New Yorker*, Oct. 23, 2017, available at <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

²² EEOC, FACTS ABOUT RETALIATION, available at <https://www.eeoc.gov/laws/types/retaliation.cfm>.

²³ EEOC, RETALIATION-BASED CHARGES (Charges filed with EEOC), FY 1997 - FY 2017, available at <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> (noting that the monetary benefits in millions does not include benefits obtained through litigation).

²⁴ This Resolution does not expand the scope of substantive legal protections as it only covers *unlawful* discrimination, harassment or retaliation. If there is no substantive wrong, there is nothing to arbitrate.

²⁵ Model R. Prof. Conduct 8.4 (ABA 2018), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

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House Resolution urges those protections as a matter of ABA policy.²⁶ They are each subject to venal harassment, discrimination, and retaliation.

This Proposal Covers Only Pre-Dispute Arbitration

This proposal recognizes the value of voluntary arbitration of disputes. In many instances, two parties to a dispute will want to arbitrate it for a variety of good reasons. This Resolution does not address any such post-dispute agreement to arbitrate. It addresses only mandatory **pre-dispute** agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Such agreements are often required as a condition of employment.²⁷ The report to Resolution 300, pp. 8-9, catalogues the House's concern with agreements to arbitrate in several contexts, including "a condition of initial or continued employment." The proposed resolution is consistent with current House policy, and is supportive of informed post-dispute agreements to arbitrate.

This Proposal Calls Only for Voluntary Compliance

The proposed resolution does not propose new laws or legal obligations, but rather urges all legal employers to forego mandatory pre-dispute agreements to arbitrate claims of unlawful categorical discrimination, harassment or retaliation. Compliance is fully voluntary, with the only enforcement mechanism being the competition of the legal marketplace and the respect of one's peers. The ABA is urging, not mandating, legal employers not to require such pre-dispute arbitration agreements.

Conclusion

This resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex. This resolution is in furtherance of the ABA's goal of ensuring justice for all. We are committed to eliminating illegal employment discrimination, harassment or retaliation based upon legally protected characteristics—because of who an employee is, not what he or she does—in our profession and in our society. Following Justice Louis Brandeis' maxim that "Sunlight is ... the best of disinfectants; ... light the most efficient policeman,"²⁸

²⁶ ABA Resolution, 14A112A, https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/2014_hod_annual_112a.aut_hcheckdam.pdf

²⁷ "... [I]n the case of pre-employment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Ramos v. Superior Court* (Cal. Ct. App., First Dist., Div.1) Slip Opinion, p.0 14 (Nov. 2, 2018) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 115 (Cal. 2000)).

²⁸ Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (1914).

claims of those unlawful job actions should not be forced unilaterally out of the courts and into the privacy of arbitration.

Respectfully submitted,

Wilson Adam Schooley
Chair, Section of Civil Rights and Social Justice
January 2019

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GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson Adam Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s).

This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

2. Approval by Submitting Entity.

Approved by Section of Civil Rights and Social Justice on October 13, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

This builds upon Resolution 300 passed by the House in August 2018, which prohibited mandatory arbitration in sexual harassment cases.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In 2018, the ABA passed a resolution urging legal employers not to require mandatory arbitration of claims of sexual harassment. ABA Resolution, 18A300, <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/300.pdf>.

This proposed resolution represents the logical extension of Resolution 300 urging legal employers not to require arbitration of sexual harassment claims; it broadens the same protection to discrimination and retaliation claims, and to legally protected classes other than sex: race, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status and status as a victim of domestic or sexual violence.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. None at this time.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None

10. Referrals.

- Commission on Domestic and Sexual Violence

- Commission on Disability Rights
- Commission on Homelessness and Poverty
- Commission on Sexual Orientation and Gender Identity
- Commission on Hispanic Rights and Responsibilities
- Commission on Racial and Ethnic Diversity in the Profession
- Section of State and Local Government Law
- Entities that Comprise the Center for Public Interest Law
- Section of Alternative Dispute Resolution
- Commission on Women in the Profession
- Tort Trial & Insurance Practice Section
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Labor and Employment Law

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or status as a victim of domestic or sexual violence.

2. Summary of the Issue that the Resolution Addresses

The legal community is currently discussing the propriety of mandatory pre-dispute, agreements to arbitrate employment disputes in general, and disputes over statutory protections in particular. Many law students and recruiting offices are requesting that requirement to be dropped, and many law firms are considering that change. This policy urges that, with respect to unlawful categorical discrimination, harassment and retaliation, an applicant or employee should not be forced to give up the right to a jury trial as a condition of employment.”

3. Please Explain How the Proposed Policy Position will address the issue

Adoption of this policy will allow the ABA to oppose mandatory pre-dispute arbitration agreements as a condition of employment in the legal profession. It will apply to claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence. It does not bear on voluntary agreements to arbitrate after the dispute arises.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None as of this writing.