

Beyond #MeToo: How Asian Americans Can Challenge Sexual Harassment in the Workplace

NAPABA Annual Convention
November 10, 2018

Littler

MINAMI



TAMAKI LLP



napawf

NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM

TIME'S
LEGAL DEFENSE FUND
UP

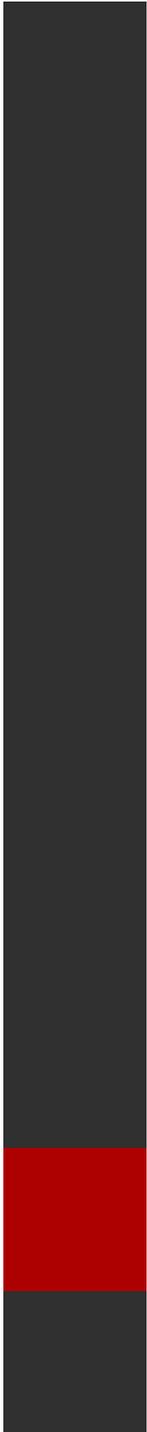
WORKING
IDEAL

Introductions

Moderator: Jane Liu, National Asian Pacific American Women's Forum

Speakers:

- Lisa Mak, Minami Tamaki LLP
- Emily Patajo, Littler Mendelson
- Sharyn Tejani, TIME'S UP Legal Defense Fund
- Jenny Yang, Open Society Foundations and Working Ideal



Where Have We Been?

- 1986: Meritor Savings Bank v. Vinson
- 1998: Faragher–Ellerth
 - Liability if supervisor takes tangible employment action
 - Affirmative defense



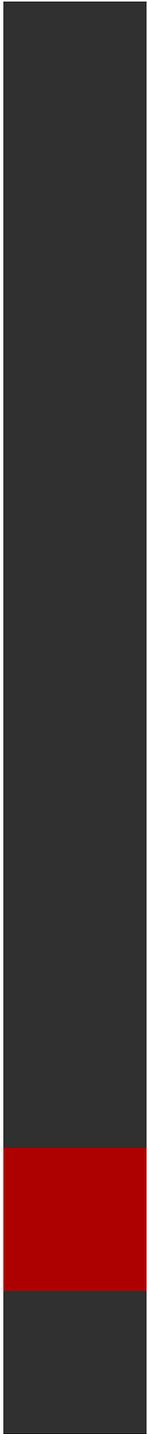
Anita Hill
October 1991



- 2006: Tarana Burke founded the Me Too Movement

Where are we now?

TIME'S
= UP

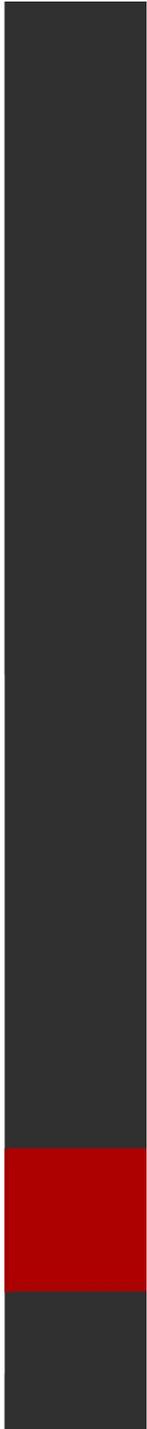


What is Sexual Harassment?

Sexual harassment is an expression of power used to exert control over people with less power and status.

Harassment occurs across all economic sectors. Most, but not all, of the victims are women.

- Industries where harassment is more frequent or severe:
 - Low-wage jobs, such as food service, hospitality, and agriculture
 - Male dominated workplaces
 - Jobs with large power imbalances



The Impact of #MeToo

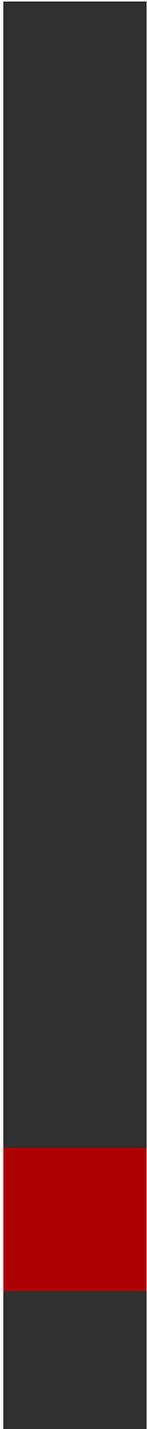


- 13.6 % increase in sexual harassment charges filed with EEOC this past year
- 50% increase in sexual harassment lawsuits (66) brought by EEOC
- 43% increase (498) successful conciliations
- Nearly \$70 million recovered for sexual harassment victims up from \$47.5M

Developments in Litigation

Perspectives from plaintiff-side litigation:

- Uptick in awareness and conversations, but may not necessarily lead to more litigation
- Challenges remain in litigating these cases
- Reverse discrimination / backlash mentality



Developments in Litigation (cont.)

Perspectives from employer-side litigation:

- Increase in harassment charges filed with the EEOC
- Increase in civil litigation filed and seeing additional internal complaints reported
- Additional factors considered when assessing cases
- Re-evaluating and updating anti-harassment policies and internal reporting procedures
- Increase in requests for training across all levels



New Realities for Employers



- Internal pressure from employees
- #MeToo Social Media posts
- Consumer & reputational concerns
- Time urgency of response
- Sunlight on complaints
- Confidential Sexual Harassment Settlements No Longer Tax Deductible
- Companies rethinking NDA's
- Mandatory Arbitration Agreements
- New state and local legislation



Risk Factors for Harassment

- Homogenous workforce
- “Rough and tumble” or single-sex-dominated
- Cultural and language differences
- Coarsened social discourse outside
- Young workforce
- Significant power disparities
- Superstar or “High value” employees exempt from rules
- Monotonous work
- Isolated or decentralized workplaces
- Workplaces that tolerate or encourage alcohol consumption
- Reliance on customer service or client satisfaction

Broader Strategy to Advance Equity

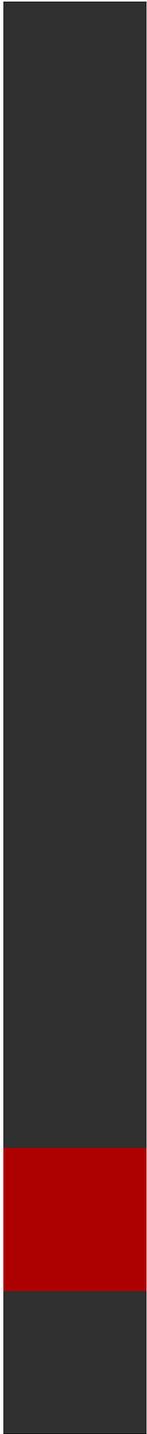
A culture that has allowed harassment to operate is often a warning of larger equity issues:

- Unequal pay
- Barriers to promotion
- Recruitment and hiring barriers
- Performance evaluations lacking fairness
- Obstacles to inclusion and psychological safety at work



Developments in Legislation

- Federal and state
- Expanding protections
 - ME TOO Congress Act
 - California SB 1300
- Training
- Record-keeping
 - Re: complaints & settlements; public reporting requirements
- Settlement agreements
 - Limiting confidentiality requirements & secret settlements
- Forced arbitration of claims
 - New York Senate Bill S7507C



Sexual Harassment in the Legal Industry

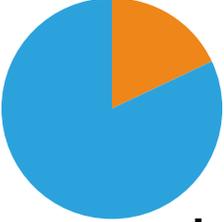
	<u>Women</u>	<u>Men</u>
Unwanted sexual conduct or contact	49%	6%
Demeaning communications	74%	8%
Mistaken for lower-level employee	81%	0%

(2018 Survey of Lawyers at Am Law 200 Firms by ABA)

Many do not report sexual harassment and cite the following reasons:

- not wanting it to negatively impact their career
- not wanting to be viewed as difficult employee
- fear of retribution
- reporting would not be kept confidential

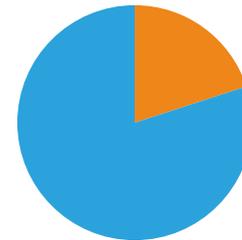
Women's Experience in the Courts



Female attorneys argued 17-18% of all arguments before U.S. Supreme Ct. (2012-2016).

Female attorneys' win rate higher than males at 59% v. 51%.

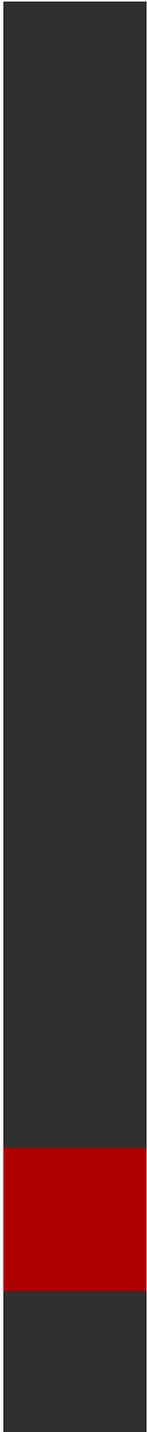
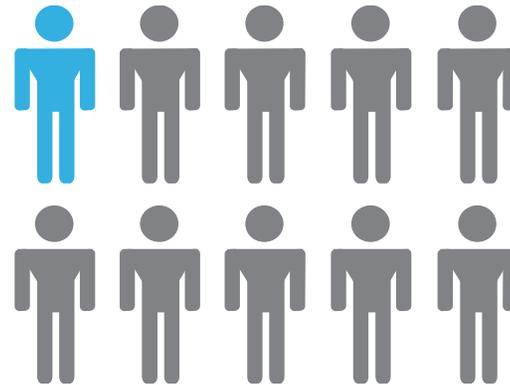
Women were lead lawyers in civil cases 24% of time (federal & state courts).



(ABA Commission "First Chairs at Trial" Report 2015).

Differing Views by Gender

- 35% of women do not think law firms take harassment seriously enough
- Only 10% of men say the same

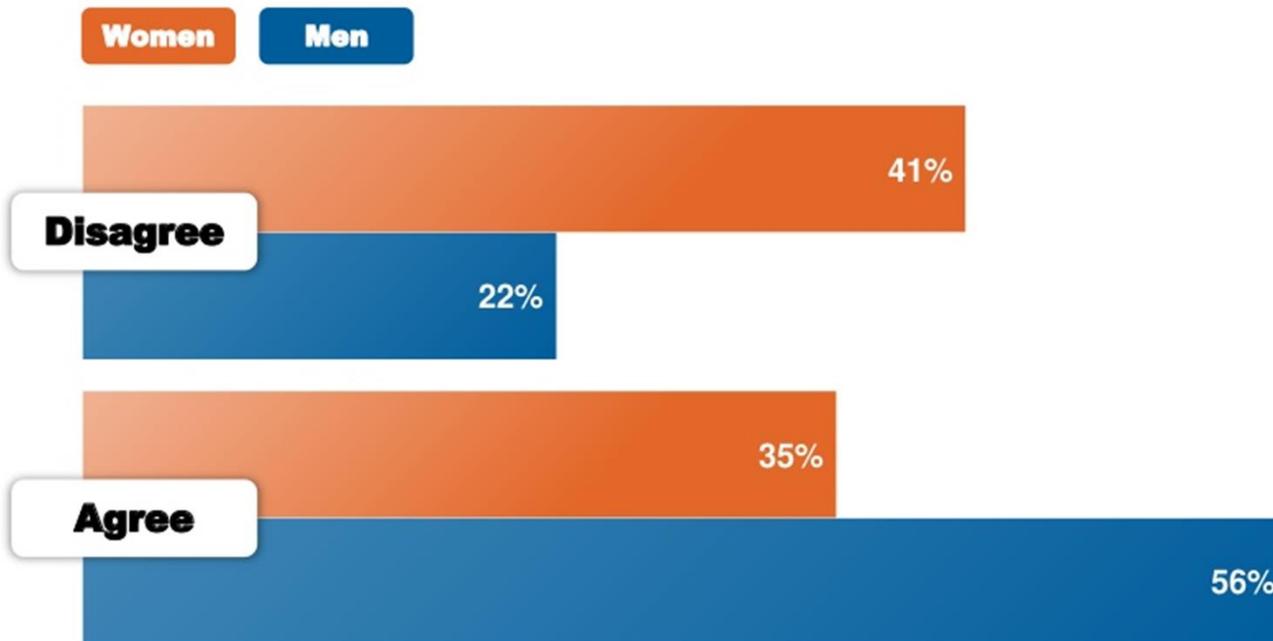




MAJOR FINDINGS

Mentoring and Sponsorship Relationships

Mentoring and sponsorship relationships requiring one-on-one interaction run the risk of a heightened perception of unacceptable behavior



(does not include respondents who neither agree nor disagree)

Working Mother Research Institute #MeToo survey

Asian American Lawyers and Sexual Harassment

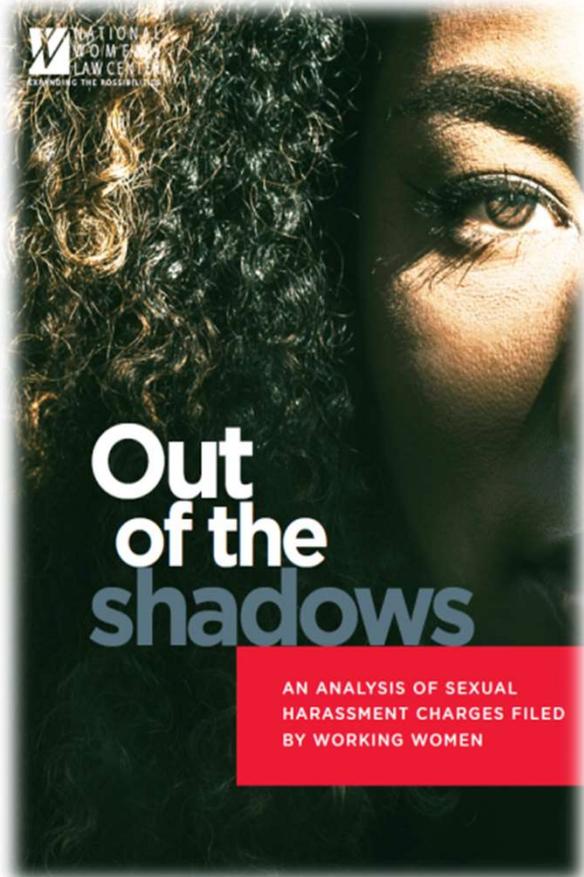
- 25% women of color attorneys and 11% men of color attorneys at law firms or in-house report sexual harassment (unwanted romantic or sexual attention and/or touching) at work (2016 Survey)
- 1 in 10 report lost work opportunities because they rejected sexual advances at work

The Bigger Picture – Racial and Gender Bias

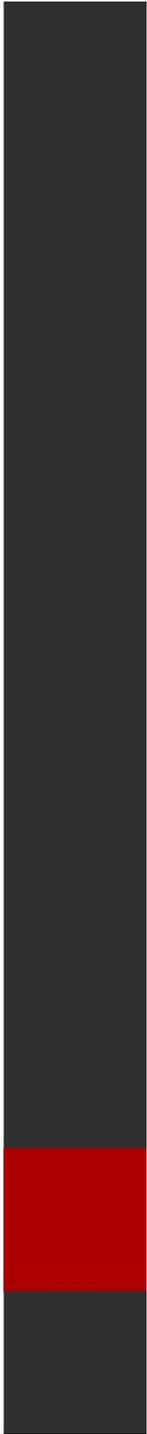
- 2016 survey: racial and gender bias pervasive in law firms, with women of color reporting highest levels of bias of all
- Asian American women attorneys report overt and implicit racial discrimination at higher rates than Asian American men attorneys



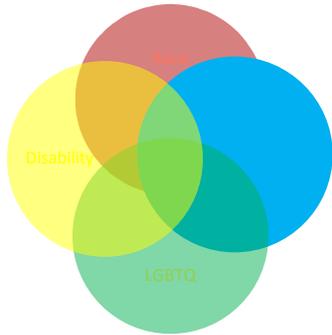
Women of Color File More Sex Harassment Charges



A recent study of EEOC charges found that women of color filed **56%** of the sexual harassment charges filed by women. These women make up only **37%** of the workforce.

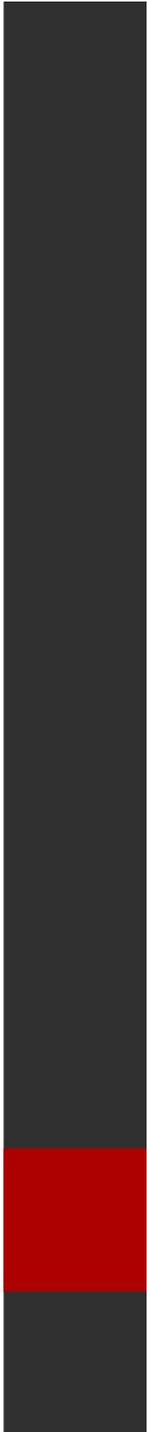


Intersectional Discrimination



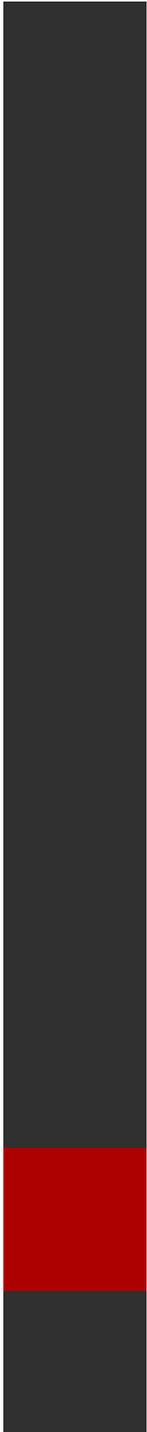
Women of color, women with disabilities, LGBTQ individuals, immigrant women and others who face multiple forms of oppression frequently experience sexual harassment that is intertwined with other forms of prejudice.

- *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (“Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination ‘even in the absence of discrimination against [Asian] men or white women’”).
- *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F. 2d 1025, 1034 (5th Cir. 1980) (“discrimination against black females can exist even in the absence of discrimination against black men or white women”).



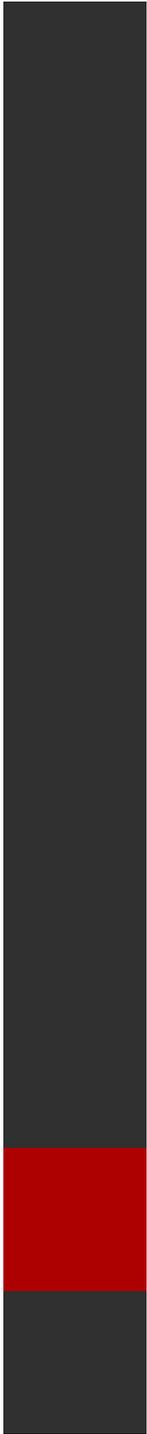
#MeToo Challenges for AAPI Women

- Model minority myth
- Glass & bamboo ceiling / intersectional stereotypes
- Fear of further marginalization
- Cultural barriers & stigma
- Power dynamics
- Access & awareness issues
- Lack of representation



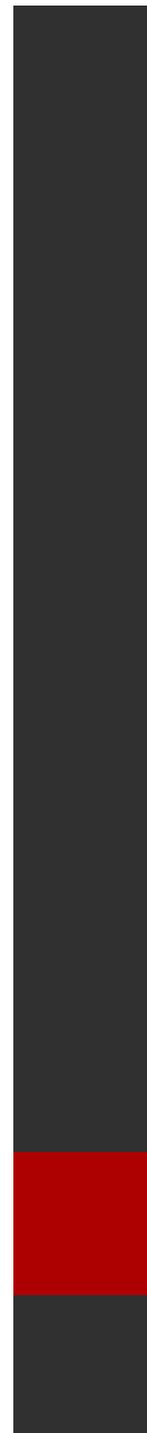
Challenges for AAPI Women in the Low-Wage Workforce

- Socially isolated work, e.g., domestic workers
- Working conditions, nature of compensation, e.g., tips
- Language barriers
- Immigration status
- Retaliation
- Lack of knowledge of employment protections



Strategies for Victims & Allies

- Know your rights and options – attorneys, agency materials, online resources
[BetterBrave, Lean In]
- Call out inappropriate behavior. Strength in numbers.
- Document and keep related evidence
- Engage HR and upper management
- Support victims. Cultural sensitivity.
- Self-care





Since January 1st:

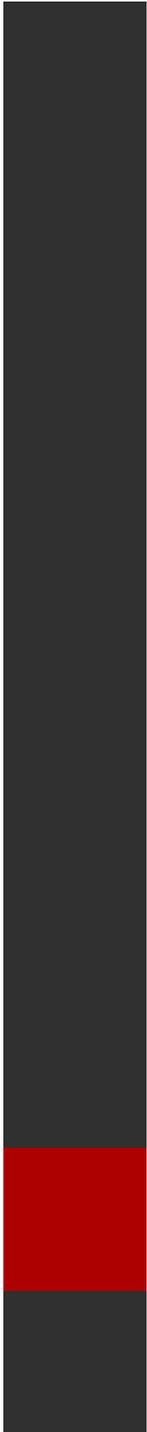
Responded to over 3,500 requests for assistance from workers facing sexual harassment and retaliation.

Recruited 700+ attorneys to join the Legal Network

Committed 5 million dollars to fund over 70 cases of workplace sexual harassment and related retaliation.

Join the Legal Network/TIME'S UP Legal Defense Fund

www.nwlc.org - look for the
links for TIME'S UP Legal
Defense Fund



Q&A

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