

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

NINE TO FIVE

Nine to Five provides a lively and accessible introduction to the laws and policies regulating sex, sexuality, and gender identity in the American workplace. Contemporary cases and events reveal the breadth and persistence of sexism and gender stereotyping. Through a series of essays organized around sex discrimination, sexual harassment, pregnancy discrimination, and pay equity, the book highlights legal rules and doctrines that privilege men over women and masculinity over femininity. In understanding the law – what it forbids, what it allows, and to what it turns a blind eye – we see why it is far too soon to declare the triumph of working women’s equality. Despite significant gains for women, gender continues to define the work experience in both predictable and surprising ways. A witty and engaging guide to the legal terrain, *Nine to Five* also proposes solutions to the many obstacles that remain on the path to equality.

Joanna L. Grossman is the Sidney and Walter Siben Distinguished Professor of Family Law at the Maurice A. Deane School of Law at Hofstra University. An expert in sex discrimination law, she has coauthored numerous books, including *Inside the Castle: Law and the Family in 20th Century America*, winner of the David J. Langum, Sr. Prize in American Legal History, and *Gender Equality: Dimensions of Women’s Equal Citizenship*.

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

Nine to Five

HOW GENDER, SEX, AND SEXUALITY CONTINUE TO
DEFINE THE AMERICAN WORKPLACE

JOANNA L. GROSSMAN



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107589827

© Joanna L. Grossman 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

Printed in The United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Grossman, Joanna L., author.

Nine to five : how gender, sex, and sexuality continue to define the American workplace / Joanna L. Grossman, Maurice A. Deane School of Law, Hofstra University.
New York NY : Cambridge University Press, 2016.

Includes bibliographical references and index.

LCCN 2015039156 ISBN 9781107133365

LCSH: Sex discrimination in employment – United States. Sex role in the work environment – United States. Labor laws and legislation – United States.

Sex discrimination against women – Law and legislation – United States.

LCC KF3467.G76 2016 DDC 344.7301/4133–dc23

LC record available at <http://lcn.loc.gov/2015039156>

ISBN 978-1-107-13336-5 Hardback

ISBN 978-1-107-58982-7 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

*For my parents, Mary Hengstenberg Grossman and Joel Grossman,
who started me on this path by sending me to
elementary school with a T-shirt that read:*

“A woman’s place is in the house . . . and in the Senate.”

– J. L. G.

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

Contents

<i>Foreword</i>	<i>page</i> xi
<i>Acknowledgments</i>	xiii
<i>Introduction</i>	xv
PART I WHAT IS SEX DISCRIMINATION?	1
1 Sexual Jealousy	6
2 Too Hot to Be a Dental Hygienist?	10
3 A Twist on the Problem of Sex Inequality in Coaching	17
4 Mixed Motives	22
5 Sex Stereotyping and Dress Codes	28
6 A Victory for Transgender Employees	34
7 How Fast Must Female Transit Officers Run?	39
8 Who Is Protected by Antidiscrimination Laws?	45
9 Punishing the Coach Who Stood Up for His Female Athletes	51
10 Broader Protection against Workplace Retaliation	58
11 The Supreme Court Protects Retaliation Victims but Still Leaves Gaps in the Law	64

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

PART II	SEXUAL HARASSMENT	71
12	Workplace Affairs and Sexual Favoritism	78
13	Lolita at the Office	83
14	Sex Talk in the Writers’ Room	88
15	Sex Behind Bars	96
16	When the Supervisor Bullies Only Women	101
17	The Equal Opportunity Harasser	106
18	Periodontal Perils	109
19	Punishing Effeminacy	112
20	Late-Night Affairs with David Letterman	119
21	Why Herman Cain Has Not Been Able to Talk His Way Out of His Exploding Sexual Harassment Scandal	125
22	Why Hostile Environment Harassment Is a “Continuing Violation”	130
23	When Sexual Extortion Is Successful	136
24	The Consequences of Failing to Complain about Harassment	140
25	Who Is Responsible for Sudden, Severe Harassment?	146
26	Chinks in the Harassment Law Armor	151
27	Do Employer Efforts Prevent Harassment or Just Prevent Liability?	157
28	Who’s the Boss?	162
29	Costly Mistakes	168
30	Hands Off the Merchandise	174
	PART III PREGNANT WOMEN AND MOTHERS AT WORK	181
31	Pregnant Truckers and the Problem of Light-Duty Assignments	190

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

	<i>Contents</i>	ix
32	A Big Win for Pregnant Police Officers	194
33	Undue Burden	199
34	Hard Labor: New Pregnancy Discrimination Guidance from the EEOC	204
35	Forceps Delivery: The Supreme Court Narrowly Saves the Pregnancy Discrimination Act in <i>Young vs. UPS</i>	208
36	The Pregnancy Discrimination Act Reaches Advanced Maternal Age	216
37	The Pregnant Workers’ Fairness Act: A Time for Change?	220
38	The Supreme Court Deals a Blow to Once-Pregnant Retirees	225
39	If She Does Not Win It Is a Shame	230
40	Must Employers Who Cover Prescriptions Cover Contraception?	235
41	Fertile Ground for Discrimination	241
42	Can a Woman Be Fired for Absenteeism Related to Fertility Treatments?	245
43	Is Lactation Related to Pregnancy?	249
44	A Victory for Families, but Hardly a Panacea	254
45	A Small Step in the Right Direction: The Family and Medical Leave Act at Twenty	259
46	“Best Practices” to Promote Work-Family Balance	267
	PART IV FEMALE BREADWINNERS AND THE GLASS CEILING	273
47	The Supreme Court Slams the Door on Pay Discrimination Claims	277
48	A Call for Congressional Action to Remedy Pay Inequality	285
49	The Lilly Ledbetter Fair Pay Act of 2009	291
50	Taking Stock: Is the Ledbetter Act Working?	294
51	The Lady in Red	298

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

x	<i>Contents</i>	
52	Unfinished Business	304
53	Will ABA’s Proposed Solutions for Gender Inequity Work?	309
54	Equality Still Elusive for Women in the Federal Workforce	314
55	“Girlie Men”	319
56	Playing “Too Womany” and the Problem of Masculinity in Sport	324
57	Binders for Women, Blinders for Romney	330
	Conclusion	336
	<i>Notes</i>	339
	<i>Index</i>	377

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

Foreword

Joanna Grossman wrote the essays collected in this book during fifteen years as a biweekly columnist for the online legal publications Justia's *Verdict* and FindLaw's *Writ*. Of the 350 columns she produced during those years, she has selected 57 dealing with the law of women in the workplace. Each one combines a lively presentation of the facts of an actual legal case decided by an American court with an exemplary analysis of its implications for the law of sex discrimination in employment.

Because the chapters were written under deadline and in the moment, they have the immediacy of the best journalism. Yet taken together, they could well serve as part of a scholarly history of the legal women's movement in the opening years of the twenty-first century. The reader can follow the law's development from earlier cases that raise questions about the fundamental nature of sex discrimination to later ones that wrestle with conflicting sophisticated theories about the functioning of workplaces and markets.

Perhaps the most interesting part is the one on sexual harassment, a form of discrimination first recognized in modern times, though a feature of women's experience from the earliest days of their regular employment outside the home. Many of the cases combine dramas arising in the increasingly gender-integrated workplace with the repeated challenge of resolving competing claims of "That's sexism!" and "No, it is just life!"

For instance, a stenographer in the writers' room of the wildly successful and mildly raunchy sitcom *Friends* complained that the flood of sexual allusions and crude language that saturated her workaday world made it inhospitable to her as a woman. The employer responded that such loose talk was inevitable among comedy writers and indeed a "creative necessity" if they were to do their work successfully. The plaintiff lost, but the court left open the possibility that such a barrage of sex talk, if aimed at a particular woman, could indeed be a basis of a sex discrimination claim. Hovering over the case, but barely to be found in the lawyers' arguments or

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

the judges' opinion, was the real-life fact that comedy writing was at the time (as it may be still) mostly a man's game, and a lucrative one, too.

Producing these regular topical columns requires special knowledge and skill wedded to authorial commitments to inform more than to impress, to simplify more than to complicate. It also means staying on track and signaling the reader about the next turn. Professor Grossman is a respected legal scholar with plenty of traditional law review articles and books to her credit; in this work she stakes her claim to pioneering a new form of legal scholarship for the digital age.

I read it with special pleasure because Professor Grossman began her legal career as a favorite student and research assistant of mine. Knowing as I do that her decade and a half's worth of column essays include many on other subjects, such as sex discrimination and family law, I am looking forward to more books like this one by her hand.

Barbara Babcock
Stanford Law School
July 2015

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

Acknowledgments

As this project has spanned several years, it has benefited from a long line of wonderful research assistants, who are now blazing trails as part of a new generation of women lawyers: Brianne Richards, Jacqueline Smith, Caitlyn Steinke, Jaclyn Waters, and Katie Weitzman. I also owe a debt of gratitude to Patricia Kasting, a reference librarian at Hofstra Law School, who never shies away from a wild goose chase for a key source. This book would not exist without FindLaw, the website that provided my fellow columnists and me the forum for online commentary for more than a decade, nor without Justia, the terrific website that gave our commentary a new and wonderful home beginning in 2011. Julie Hilden, a longtime friend and brilliant writer, edited hundreds of my columns from 2000 to 2014, and David Kemp has seamlessly taken up where she left off. In turning these essays into a book, I have been grateful for feedback from Deborah Brake, a dear friend and fellow traveler in gender law, and Grant Hayden, my loving husband, co-equal parent to our amazing three sons (Luke, Ben and Milo), and most ardent supporter. Linda McClain, a former colleague and mentor, and Deborah Brake have graciously permitted me to reprint columns they coauthored in this collection. And for piquing my interest in gender issues, I gratefully credit Barbara Babcock, who was kind enough to write a preface for this book. She suggested during my second year of law school that I write my law review note on the history of women's jury service. At the time, I couldn't imagine why this would be of any interest to anyone. But it was, most definitely to me, and the eye-opening research launched me on a decades-long (and continuing) excursion into the world of gender law and policy. Finally, I greatly appreciate the support of my editors at Cambridge, John Berger and Stephen Acerra, and the anonymous reviewers who helped the manuscript come together more fluidly.

Cambridge University Press
978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the
American Workplace
Joanna L. Grossman
Frontmatter
[More information](#)

Cambridge University Press
 978-1-107-13336-5 - *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace*
 Joanna L. Grossman
 Frontmatter
[More information](#)

Introduction

INTRODUCTION

In the 1980 movie *Nine to Five*, Dabney Coleman plays the perfect feminist foil. He’s *that* boss. The one who propositions his secretary, takes credit for the work of his female subordinates, and never met a sex-based stereotype he didn’t pick over the truth staring him in the face. Coleman’s character, Mr. Hart, unleashes his sexism most intensely on three women at the office – Lily Tomlin (Violet), a long-suffering widow who has inched up the ladder while raising four kids on her own; Jane Fonda (Judy), a middle-aged divorcée returning to work after years as a housewife; and Dolly Parton (Doralee), the buxom secretary whose southern mix of sweetness and sass forces Mr. Hart to work for his gropes and advances. And he relies on the most unwomanly of women – Roz – to be his eyes and ears, especially in the ladies’ room where the others might meet and complain.

Fast-paced dialogue and short cuts of the physical and hierarchical layout of Consolidated, a business of an unspecified nature, make clear in just a few minutes that this is a man’s world. No “personal items left in view” on the cubicle desks, Roz chastises, because Mr. Hart says an “office that looks efficient is efficient.” When showing Judy around on her first day, Violet tells her that she has “never seen anyone leapfrog so fast to the top,” and that she has “the bad back to prove it.” He is now Violet’s boss, but he was once her trainee.

Showing off his managerial skills to the very green Judy, Mr. Hart describes his “philosophy of business” as “teamwork.” But it is not a concept he thinks they’ll ever fully understand. “You girls, of course, never got a chance to play football or baseball . . . and I’ve always felt that’s unfortunate, because I think it is the best place to learn what teamwork is about.” He promises not to bore them with a “long harangue,” but just asks for their faith in his philosophy and leadership. “If we all work together, we can cut the balls off the competition and be sitting pretty.” Judy politely says she’s happy to be working there, and he compliments her on being

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

“a welcome addition, and a damn pretty one, too.” Then he turns to Violet, one of two managers who reports directly to him, and asks her to buy a present for his wife – how about “a nice scarf,” he suggests. She starts to say that it is not her place to run personal errands, but he interrupts her gruffly: “Violet, goddamn it. I’ve been here talking about teamwork, and you’re not there for the handoff.” She talks about her job description; he says he likes people who are “flexible,” especially when they want to be “promoted.” From those employees, he expects “cooperation. Savvy?” Flash to the dead deer head hanging on his wall, and a wistful look on Mr. Hart’s face as he recalls the “lucky shot” that brought them together.

As Judy and Violet turn to leave, Mr. Hart asks if Doralee is back yet. When told no, he directs Violet, a manager, to get him some coffee. Luckily, she runs into Doralee as she is leaving the office and tells her “your boss wants coffee.” “I was just gassing up his car,” she says. “If I’m not filling one tank, I’m filling another.” Violet fills Judy in on the office gossip as they return to their desks. “Rumor has it that [Doralee] has been banging the boss.” This hits a sharp chord for Judy, who was herself left by a husband who ran off with his secretary. Meanwhile, back at Mr. Hart’s office, he asks Doralee to “bring your pretty face in here,” asks her to turn around so he can check out her backside, and then purposely knocks something on the floor so he can ogle her more invasively when she bends over to pick it up. He feigns regret over an advance he made earlier and apologizes; he “got a little carried away.” She tells him not to worry – she’s “been chased by swifter men” and “ain’t been caught yet.” She tells him not to worry about what he describes as his “mistake about the convention in San Francisco”; she’ll “just make sure that the next time I’m asked to a convention that there is a convention.” But his apology is short-lived, and he returns to his quest for sex. He tries flattery: “You know, you mean so much more to me than just a dumb secretary.” He tries kindness and gives her the scarf that Violet has picked out for his wife. He tries a quid pro quo: “I’m a rich man. I’ve got a checkbook on that desk. You just say the word, and you can write your own figure.” (She’s not impressed, promising him that she can sign his name better than he can.) He tries pragmatism, telling her that it is perfect that she’s married, because he is, too. He begs, he lunges, and then he ultimately ends up on the floor after she successfully fights him off. His wife shows up unexpectedly, and Doralee is spared the next escalation.

The plot thickens as Violet suffers ever more indignant slights at the hands of her sexist boss. She asks him if he has had a chance to read her report outlining a way to improve efficiency by 20 percent; he demurs and says he “looked into it, but it needs work.” He changes the subject by asking if she has read his memo and then reminds her to “clamp down hard on any signs of unionization.” But Mr. Hart secretly had passed Violet’s proposal off to the higher-ups as his own. Violet learns this when the head of the company walks by and tells Mr. Hart that they will be implementing *his* proposal for color-coded accounts forthwith. The boss praises Mr. Hart as a “fine piece of manpower,” while Violet turns to her female coworkers and bemoans his

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)*Introduction*

xvii

complete lack of shame. She explains that she didn't call him on his deceit because he will decide the fate of her long-awaited promotion. She soon finds out, though, that she has been passed over for the promotion; he has given it to Bob Enright instead, who is lower down the ladder than Violet. However, Mr. Hart explains to the single mother of four, Bob has "a family to support." He also concedes that the "company needs a man . . . Clients would rather deal with men when it comes to figures." An exasperated Violet complains that she has lost "a promotion because of some idiot prejudice," but Mr. Hart interrupts and warns her to "spare me the women's lib crap." She warns him never to call her "girl" again. "I'm no girl. I'm a woman. Do you hear? I'm not your wife or your mother or even your mistress."

Hearing talk of a mistress, and understanding the accusing looks being shot in her direction, Doralee finally figures out why her coworkers have ostracized her. Or, in her southern slang, have treated her "like some dime-store floozy." She confronts Mr. Hart and says she's had it. She has put up with the "pinching and staring and chasing." Despite having a gun in her purse, she's "been forgiving and forgetting." But no more, she promises: "If you ever say another word about me or make another indecent proposal, I'm gonna get that gun and change you from a rooster to a hen with one shot!" Mr. Hart is unfazed, moving quickly to a conversation with Roz, who had overheard a woman violating the company's ban on pay secrecy. Mr. Hart quickly retorts with "get rid of her," and then escalates to "fire the bitch" when Roz doesn't react quickly enough to his order.

At the end of this scene, the three leading women have had it. They storm out, get drunk, light up a joint, and fall quickly into a sisterhood, bound by their hatred of Mr. Hart and their consignment to a "pink-collar ghetto" with economic circumstances that make them need the jobs they have come to loathe. They share their fantasies about how each would torture and murder Mr. Hart. In Judy's fantasy, she tells Mr. Hart she can't save him from a lynch mob because he's a "sexist, egotistical, lying, hypocritical bigot." Doralee fantasizes that she would sexually harass him first – to give him a taste of his own medicine – before turning the gun on him. Violet considers the poetic irony of putting poison in the coffee she is so tired of bringing him.

The next morning, the bond of the new sisterhood is palpable in the office. The sharing of fantasies was cathartic, and the women steel themselves for more rounds with Mr. Hart. The movie plot then shifts quickly, as fantasy becomes reality. Violet goes to the store at her lunch hour to pick up "Skinny and Sweet" for the office coffee station, and a few things for home, including rat poison. But the artificial sweetener and the rat poison are both contained in big yellow boxes, and when Mr. Hart sends Violet to get him coffee, she accidentally sweetens his java with poison. He ends up in the hospital, and a wild plot ride ensues.

At a key point, Mr. Hart tells the women he knows they poisoned him and plans to call the police. They figure out that he might be embezzling, but need time to get paperwork from headquarters to prove it. They hold him prisoner in his own

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

house for weeks (while his wife is on an extended cruise) and do his job so he won't be missed at work. Doralee's penchant for signing Mr. Hart's name comes in handy as they remake the office in a kinder, gentler form. Across the screen flash company memos first allowing personal items and plants back on the desks, then flextime, then job sharing, then on-site child care, then a substance abuse program, and then the pièce de résistance – equal pay for equal work. When Mr. Hart finally escapes his in-home prison and comes back to work, he is greeted by the company president, who compliments him on the new policies and the “very splendid environment” they have helped create. He gives a nod to Violet as his “right arm” but takes full credit for the happier and more productive workplace. (The boss objects to only one component of the new workplace; “the equal pay thing, though, that's got to go.”) Violet quietly accepts the quid pro quo – Mr. Hart gets credit, again, for her transformative ideas, but at least he now has an incentive to keep quiet about the false imprisonment and assorted other crimes. But karma haunts Mr. Hart. The president is so impressed with Mr. Hart's decisive yet creative management style that he sends him to Brazil on a two- to three-year assignment to oversee a new office. When Mr. Hart hesitates to embrace the move, he is reminded of the importance of “teamwork” and told to start packing his bags.

To be sure, aspects of this movie can seem dated to a twenty-first-century viewer. The mannish blouses and faux ties worn by the women trying hardest to assimilate into a man's world. The hairstyles (ouch). The polyester. But what of the gender dynamics in the workplace? The openness with which Mr. Hart expresses his “traditional” views about women in the workplace have a passé ring to them. But the issues that drive Violet, Judy, and Doralee into a murderous rage (or at least a fantasy of such a rage) still very much define the American workplace. Unequal pay. Sexual harassment. Sexual favoritism. Inflexible work schedules. Sex stereotyping. Unfair promotion practices. These problems are, regrettably, not a thing of the past. To the contrary, working women in the United States are likely to face most of these issues, along with some others, at some point during their careers. This is so despite the development over the past fifty years of antidiscrimination laws that purport to make all these things illegal. The Equal Pay Act of 1963 requires that employers pay men and women equally for equal work. Title VII of the Civil Rights Act of 1964 prohibits employers from making employment decisions based on sex, from engaging in sex stereotyping, and from adopting neutral rules that disproportionately disadvantage women. The Pregnancy Discrimination Act of 1978 prohibits employers from discriminating against women on the basis of “pregnancy, childbirth, or related medical conditions.” The Family and Medical Leave Act (FMLA) of 1993 requires employers of a certain size to give employees unpaid leave when necessary to care for newborn or newly adopted children, or to tend to their own serious health conditions. In addition, the Equal Protection Clause of the U.S. Constitution has been interpreted to forbid sex-based classifications by public employers

Cambridge University Press

978-1-107-13336-5 - *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace*

Joanna L. Grossman

Frontmatter

[More information](#)

Introduction

xix

in most circumstances. And layered on top of these federal laws are a set of state antidiscrimination laws that are often even more protective of women's rights than federal law is, requiring employers to accommodate pregnancy-related disability or funding paid parental leave through state disability insurance or applying general antidiscrimination norms to even smaller employers.

To hear the story told by some, the fight for gender equality in the workplace has been won. A 2009 headline in the *Economist* announced, "We did it!" The story reported that women were poised, for the first time, to compose more than 50 percent of the American workforce.¹ The article, accompanied by the classic image of Rosie the Riveter, the woman who symbolized women's participation in the industrial labor force during World War II, cited "women's economic empowerment" as "the biggest social change of our times." Women, it claimed, have gone from a world of being "routinely subjected to casual sexism" and "expected to abandon their careers when they married and had children" to "running some of the organizations that once treated them as second-class citizens." And this revolution, the article claimed, was "achieved with only a modicum of friction." Men, for their part, have "by and large, welcomed women's invasion of the workplace." The article noted that women's progress has come with a few minor "stings" – that women lead only 2 percent of the largest companies and are paid "significantly less than men on average." They also have significant difficulties "juggling work and child-rearing" and despite early career successes in their twenties often "drop out in dramatic numbers in their 30s and then find it almost impossible to regain their earlier momentum."

This article is one of many that judges workplace equality by an overly simplistic measure. It is true that women's workforce participation has improved relative to men's and also true that women fared much better in the recession that began in 2008 than men did. But those numbers tell us very little about continuing forms of workplace inequality or the ways in which women still do not have the benefit of a level playing field. One might watch the movie *Nine to Five* and note that many of the employees, including those at the managerial level, were women. But that would of course be a meaningless observation about a film depicting not their numerosity, but the quality (and inequality) of their working conditions.

Other headlines tell a different story – or at least complicate the story of women's workplace equality. "Twenty-seven countries that trump the U.S. when it comes to gender equality: Report shows U.S. moving backwards in closing gender gap."² This disturbing headline reports on the 2015 Global Gender Gap report, which ranks countries by gender equality in economy, politics, health, and education. Ranking only twenty-eighth worldwide, the U.S. has never made it into the top 15, and its rank is dropping rather than rising, due in large part to significant gaps in labor force participation and wage equality.³

"Among 38 nations, U.S. is the outlier when it comes to paid parental leave," is the lead-in to a story about a 2013 Pew Research Center report concluding that the U.S. ranks dead last in government-supported time off for new parents.⁴ This

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)

is particularly damaging for women, as another headline reminds us that “Men do more at home, but not as much as they think.”⁵ “The Gender Pay Gap Widens as Men’s Earnings Grow Twice as Fast as Women’s,” reports a *Wall Street Journal* article, one of many showcasing the many facets of the gender wage gap, all bad for women.⁶ “Twenty-one harrowing stories of harassment on the job,” is just the most recent of headlines to remind us of the continuing prevalence of workplace harassment.⁷ And there are countless headlines to remind us of the entrenched problem occupational segregation, which is at the root of so many aspects of gender inequality. But the clear winner is this one: “Mustaches Outnumber Women Among Medical-School Leaders.”⁸

These headlines are not the end of the story, but rather the beginning, a reminder that gender inequality might not be everywhere but can be anywhere. And while a recent poll found that most Americans say they believe in women’s equality, it also concluded that they have little understanding of its prevalence or effects and, as the conventional wisdom would tell us, have a negative view of “feminism” as a both a word and a concept. But 79 percent agreed there is “still more work to be done” to achieve “equality for women in work, life, and politics.”⁹ It is in the spirit of this last sentence that I have undertaken this project.

Federal antidiscrimination laws were central to opening the doors of the American workplace to women and to eradicating the most common and overt forms of sex discrimination that consigned women to traditional female (and lower-paying) jobs or excluded them from work altogether. But real questions remain about what women find once they cross those thresholds and join the ranks of working men. Rather than ask how many women *have* jobs, we should ask how many women are paid less than their male counterparts for doing the same work; how many women work in jobs that are paid less than comparable jobs predominated by men; how many women have faced difficulties when they try to work in traditionally male-dominated fields; how many women are sexually harassed or assaulted by coworkers or bosses; how many women are denied positions or promotions they deserve because of bias against female workers or false assumptions about their economic needs; how many pregnant women are forced out of work despite their ability to do the job, or denied minor accommodations necessitated by short-term disability that would enable them to keep their jobs – and paychecks – when they need them most; how many mothers are stifled by inflexible work schedules that force them to choose between work and motherhood, or work and caring for aging parents; how many mothers are assumed to prioritize child rearing over work or presumed to be less competent than non-mothers; how many workers are treated poorly because of their sexual orientation or gender identity; or how many women are sabotaged or undermined simply because someone resents their presence in the workforce.

In many cases, numbers like these are available, at least in broad brush. The gender wage gap remains stark and stagnant. Women experience sexual harassment at quite alarming rates, especially in certain types of jobs (the military, to take just

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)*Introduction*

xxi

one example). The glass ceiling is real in virtually every field, leading to a “pyramid” formation for women in many of them. (Women hold 4.6 percent of CEO positions in Fortune 500 companies.¹⁰) Stereotypes persist. Gay, lesbian, and transgender individuals experience especially high rates of discrimination and harassment, and they benefit from the least robust protections against it. Pregnant women are routinely forced out of jobs because of short-term incapacity, or fired because the leave available to them is not long enough to cover recovery from childbirth.

One indicator of women’s lives at work – which are no longer cabined between the hours of nine and five – and the real state of the gender revolution in the American workforce comes from the stories they tell (and prove) to judges and juries when they sue to enforce their rights against workplace discrimination. And in understanding the law – what it forbids, what it allows, and things to which it turns a blind eye – we see why it is far too soon to pronounce the end of the battle of sexes. Or to pretend that the workplace is gender blind so long as we can count an equal number of male and female heads.

This book is a collection of essays about the laws and policies that regulate sex, sexuality, and gender identity at work. For more than fifteen years, I have written an online column that focuses on, among other issues, sex equality in the workplace. These columns were published from 2000 to 2010 by FindLaw’s *Writ* and, since 2011, by Justia’s *Verdict*, both Internet sources for legal commentary on contemporary issues.¹¹ Over this period of time, I have written about federal and state law, major and minor cases, proposed and existing legislation, and new data and reports that together represent contemporary controversies over gender in the workplace. For some issues, the columns show the stubbornness of old problems, or the reticence of policy makers to be more aggressive in their efforts to eradicate them. For others, the columns trace the development of new laws, or reformed laws, and the impact of the changes. For still others, we see initial grappling with new problems and frustration with the complexity of finding solutions. The columns have been largely preserved in their original form to show the law’s development over time, but they are tied together through introductions to each of the book’s four parts and made current with chapter-by-chapter epilogues.

Together, these essays explore the gendered workplace in all its modern glory. Overt sexism may be old-fashioned, but covert sexism is not. Nor is a workplace that is designed in every respect for men – and stubbornly resistant to change. Nor the maternal wall that impedes the ability of women to form labor force attachments that are as strong and long lasting – and as lucrative – as men’s. The Dabney Coleman of today might be embarrassed to chase a secretary around a desk, but he might fire her so his wife doesn’t get jealous. The range of issues tackled in these essays – all drawn from real and contemporary cases and events – shows the breadth of sexism and stereotyping in the American workplace today and the complex forms it sometimes takes. These more nuanced and complex iterations are no less damaging, and no easier to eliminate, than the 1970s style of yore. The resilience of sexism may even

Cambridge University Press

978-1-107-13336-5 - *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace*

Joanna L. Grossman

Frontmatter

[More information](#)

explain the resurgence of interest in *Nine to Five* itself, which was reinvigorated as a Broadway musical in 2009.

The book is divided into four parts. Part I takes up the question, “What is sex discrimination?” This is not a simple question. Is it discrimination when a male boss fires his female employee because she is “too hot” and he fears he might harass her? What about when a transit police department requires its officers to run at a speed that is more commensurate with men’s average ability than women’s? What if a school refuses to hire a man to coach female athletes? Or if a school punishes a male coach who was not himself discriminated against but spoke up for his female athletes who received far inferior resources than the school’s male athletes? What if an employer requires women to wear makeup and tease their hair, but requires men holding the same jobs only to be clean and neat? Or if an employer fires an employee who wears a skirt because he was born a man but lives life as a woman? Is it discrimination to retaliate against someone who complains of discrimination? These are just some of the cases discussed in this first set of essays. And each bears on this basic question of what we mean when we say it is illegal to discriminate on the basis of sex.

Part II considers the law of sex and sexuality in the workplace. Its primary focus is sexual harassment, a problem with a long pedigree that has proved fungal in its resistance to remediation. Essays in this part consider a wide variety of cases that bear on the question of what constitutes unlawful harassment. Is it harassment for a correctional officer to show favoritism toward the subordinates with whom he is having sex? Can a teenage employee consent to sexual conduct at work when the age of consent generally is eighteen? Does a bisexual harasser “discriminate” when he makes sexual advances toward both male and female subordinates? How do we know when same-sex harassment conduct is “because of sex”? Is it sex discrimination when coworkers pepper an effeminate gay waiter with girly insults? What about a gay dentist who makes sexual advances toward his straight male employee? Does a supervisor sexually harass when he says nothing sexual but bullies only women at work? Is extremely graphic sex talk off-limits for a comedy-writing team of a famous sitcom? This part also takes up the equally important issues surrounding employer liability for sexual harassment. Harassment is like the proverbial tree in the forest – if it happens, but no one is legally responsible, then there is no remedy. Several essays thus focus on the increasingly complicated law of vicarious liability for employers. Should a victim lose her redress if she waits too long to complain? Is it the employer’s fault if a supervisor commits a sudden, severe act of harassment without warning? When a supervisor threatens to fire a subordinate if she does not submit to sexual conduct, can she sue if she submits and keeps her job? Do the incentives created by antidiscrimination law reduce the amount or severity of harassment in the workplace? What happens to employers that ignore obvious problems of harassment?

Part III tackles the thorny and very much unresolved issues related to pregnancy and motherhood in the workplace. Eighty-five percent of working women will

Cambridge University Press

978-1-107-13336-5 - Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace

Joanna L. Grossman

Frontmatter

[More information](#)*Introduction*

xxiii

become pregnant at some point during their careers. Although Congress passed the Pregnancy Discrimination Act of 1978 to end the forced exclusion of pregnant women from many jobs and employment benefits, as well as the rampant stereotyping about their abilities, women continue to struggle with conflicts between pregnancy and work and doctrine that increasingly is not meeting their needs. Likewise, women at other stages of the reproductive process – struggling with infertility, breast-feeding a child, recovering from childbirth – confront workplace structures that are based on male bodies and lifestyles and are often unforgiving. The essays in this part first consider the nature of the protection against pregnancy discrimination. Can employers refuse to grant light-duty assignments to pregnant employees while granting them to some other employees? Can a company pay lower retirement benefits to once-pregnant retirees because they took unprotected leave before the Pregnancy Discrimination Act (PDA) was passed? Why are pregnancy discrimination complaints on the rise thirty-five years after the PDA was passed? What are the effects of refusing to accommodate pregnancy-related disability on women's ability to participate in society as equal citizens? Should Congress amend the PDA to provide a right of reasonable accommodation for pregnancy-related disability? The essays then turn to the question of what it means to discriminate on the basis of pregnancy. Can an employer offer comprehensive health insurance to its employees but exclude coverage for contraception used only by women? Can it refuse to cover the cost of fertility treatments? Can it fire a woman because of absenteeism related to fertility treatments? Is firing a woman for breast-feeding a type of pregnancy discrimination? Finally, the essays in this part consider the FMLA, with a focus on its shortcomings, and the related problem of caregiver discrimination.

Part IV focuses on the female breadwinner and the persistence of the glass ceiling. Recent news reports have focused on the rising number of female breadwinners – in 40 percent of households today, a woman is the primary breadwinner. But less is said about how women are still paid less than their male counterparts, or about how the median income in a household with a female primary earner is less than one with a male one. Or about how many women, especially single mothers, live in poverty despite engaging in paid labor. The central focus of this part is the persistent problem of pay inequity and the failure of current law to provide sufficient remedies. The essays trace the story of Lilly Ledbetter, the sole female manager at a tire and rubber plant in Alabama, who proved to a jury that she was the victim of egregious pay discrimination. Her legal story had many chapters – through every level of federal court culminating in a loss at the U.S. Supreme Court and a new federal law in her name to overturn the Court's ruling, followed by a new life as a civil rights folk hero who stood up for her rights and brought national attention to the problem of pay inequity. This part concludes with an eclectic selection of essays that consider, with a broader brush, the continuing challenges for gender equality in the workplace and beyond.