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THE FAITHLESS SERVANT DOCTRINE: AN EMPLOYER'S REMEDY FOR WORKPLACE SEXUAL HARASSMENT

*Elizabeth McKelvy**

I. INTRODUCTION

In May 2018, the Metropolitan Opera (the Met) sued their longtime music director, James Levine, for the entire salary paid to him during his forty-one years of employment.[1] The Met claimed that the famed conductor "engaged in sexually abusive and harassing conduct both before and during the period when he worked at the Met" and sought recoupment of the $5.8 million salary as a remedy for his breach of loyalty to the company.[2] In its suit, the Met invoked the faithless servant doctrine, which allows employers to recover damages measured by the compensation paid to disloyal employees during periods of misconduct.[3]

The Levine story came in the wake of a recent spike in public attention for workplace sexual harassment across the country.[4] Reports of prominent figures like Harvey Weinstein, Kevin Spacey, and Matt Lauer allegedly engaging in sexual harassment in (and out of) the workplace have littered news headlines almost daily.[5] In 2018

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1. Ellie Kaufman, *Met Opera Sues Former Conductor for $5.8 Million Over Sexual Misconduct Allegations*, CNN (May 19, 2018, 1:18 AM), https://www.cnn.com/2018/05/18/us/met-opera-sues-conductor/index.html [https://perma.cc/SR3H-KR4K].
2. *Id.*; *see also Statement from the Metropolitan Opera Regarding James Levine*, METROPOLITAN OPERA (Mar. 12, 2018), https://www.metopera.org/about/press-releases/statement-from-the-metropolitan-opera-regarding-james-levine/ [https://perma.cc/MRF4-AY4L].
3. Kaufman, *supra* note 1; *see also* Barbara J. Van Arsdale, Annotation, *Application of "Faithless Servant Doctrine"*, 24 A.L.R.6th 399, 410 (2007).
4. 2018 EEOC PERFORMANCE & ACCOUNTABILITY REP. 8 [hereinafter EEOC REP.].
5. Sandra Gonzalez et al., *The Year Since the Weinstein Scandal First Rocked Hollywood*, CNN (Oct. 4, 2018, 5:47 PM), https://www.cnn.com/2018/04/05/entertain

alone, the amount of workplace sexual harassment lawsuits rose by a staggering fifty percent and reports of workplace sexual harassment rose by a considerable thirteen percent.[6]

Many of these stories end like Levine's—with termination.[7] While ousting a sexual harasser from a company stops the misconduct from occurring, an employer in this situation is typically left with an unsolved and ongoing financial mess.[8] Companies that experience sexual harassment within their walls undergo extreme monetary losses.[9] The effect of workplace sexual harassment on other employees is also a great expense, as lowered morale, employee turnover, and litigation costs are all at play.[10] Publicly, reputation effects following these types of claims render extraordinary financial losses as well, causing companies to drop in value at alarming rates.[11] Even still, while these effects of workplace sexual harassment are systematic and widespread, damages can often be difficult for employers to definitively and directly prove.[12]

The faithless servant doctrine is a solution for similarly situated employers who need an adequate remedy to cure the severe harm levied by disloyal sexual harassers.[13] The doctrine not only punishes faithless employees but also deters future sexual harassment within the workplace.[14] The doctrine is unique in that it does not require a showing of damages linked to the disloyal act;[15] this is key to its application in the arena of sexual harassment where damages can be

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ment/weinstein-timeline/index.html [https://perma.cc/7AQQ-C5D9]; *see also #MeToo: A Timeline of Events*, CHI. TRIB. (Sept. 27, 2019, 3:20 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/KL3C-YKF9].

6. EEOC REP., *supra* note 4, at 32, 35.
7. Kaufman, *supra* note 1; *#MeToo: A Timeline of Events*, *supra* note 5.
8. *Sexual-Harassment Scandals Are Hurting Companies' Reputations and Balance Sheets*, ECONOMIST (Sept. 27, 2018), https://www.economist.com/graphic-detail/2018/09/27/sexual-harassment-scandals-are-hurting-companies-reputations-and-balance-sheets [https://perma.cc/6KQD-7SB6].
9. *Id.*
10. *American Business and #MeToo*, ECONOMIST (Sept. 27, 2018), https://www.economist.com/business/2018/09/27/american-business-and-metoo [https://perma.cc/6KQD-7SB6].
11. *Id.*
12. Charles A. Sullivan, *Mastering the Faithless Servant? Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777, 778–81.
13. Kaufman, *supra* note 1.
14. Manning Gilbert Warren III, *Equitable Clawback: An Essay on Restoration of Executive Compensation*, 12 U. PA. J. BUS. L. 1135, 1139 (2010).
15. Sullivan, *supra* note 12, at 779–80.

difficult to prove.[16] This leaves the faithless servant doctrine as a unique mechanism for some employers to combat sexual harassment.[17] While case law applying the faithless servant doctrine to sexual harassment is undeveloped at this time,[18] the courts must strictly adhere to the doctrine in these cases in order to protect employers by preserving the option of the remedy.[19]

States have taken various approaches to the faithless servant doctrine.[20] Some have stripped the option from desperate employers looking for an avenue to fix the harm exacted by former employees, and, in doing so, effectively punish employers when it is their employees who have acted unfaithfully and should be punished.[21] Other states have embraced the doctrine and, heralding its interests in fairness and equity, have applied it strictly.[22] Others have employed different standards and set varying limitations, which can create uncertainty and confusion in the courts.[23]

Because the issue of sexual harassment as related to the faithless servant doctrine is in its infancy, coupled with the fact that lawsuits of this type have sharply increased in the past year,[24] courts will likely be faced with questions about how the doctrine should be applied in such cases.[25] A clear approach applying the doctrine strictly in cases of sexual harassment is imminently imperative in order to deter the behavior and provide businesses with predictability.[26] This can be accomplished through a model statute that states can codify, which will provide the necessary clarity and

16. *Id.* at 778–81.
17. *Id.*
18. *See* Pozner v. Fox Broad. Co., 74 N.Y.S.3d 711, 714 (N.Y. Sup. Ct. 2018) (noting the infrequency of cases in New York addressing the application of the faithless servant doctrine regarding sexual harassment).
19. *See id.* (denying remedy to Fox Broadcasting Company for a faithless servant claim that was based solely on sexual harassment allegations).
20. Van Arsdale, *supra* note 3, at 411.
21. *See id.*
22. *Id.*
23. *Id.*
24. EEOC REP., *supra* note 4, at 8, 32.
25. *See id.* at 32 (discussing the drastic increase of workplace sexual harassment allegations over the past few years); *see also* Pozner v. Fox Broad. Co., 74 N.Y.S.3d 711, 711 (N.Y. Sup. Ct. 2018) (providing an example of the courts already having to address how to apply the faithless servant doctrine in the context of a sexual harassment case).
26. *See infra* notes 135–37 and accompanying text.

afford maximum preservation of an equitable remedy for employers who suffer from the actions of disloyal employees.[27]

This Comment looks to explore the viability of such a model statute in the context of workplace sexual harassment. Part II of this Comment provides a background of the faithless servant doctrine's roots in agency and contract law.[28] Part III explores different jurisdictional approaches to the doctrine, including the limitations set forth thereto, and will demonstrate the benefits of strict construction.[29] Part IV outlines why the doctrine is necessary by examining the harmful effects of sexual harassment allegations on business entities,[30] while Part V explores how the doctrine has been applied and utilized in these types of cases specifically.[31] Finally, Part VI looks at the benefits, which far outweigh the costs, of the faithless servant doctrine and provides a recommendation for a much-needed model statute designed for application to sexual harassment cases.[32]

II. BACKGROUND

The faithless servant doctrine draws on various areas of law, most prominently, agency and contract law.[33] Although the doctrine has been described as "excessively harsh" by some,[34] these roots demonstrate that the strictness of the doctrine grows out of a strong basis in fundamental areas of law that are widely accepted.[35] Today, the faithless servant doctrine can be invoked to clawback compensation from a disloyal employee in conjunction with a breach of fiduciary duty claim, a breach of contract claim, or both.[36]

A. Agency Law

The principles of agency are central to the doctrine's justification of the compensation clawback remedy, which at first blush may

27. *See infra* Part VI.
28. *See infra* Part II.
29. *See infra* Part III.
30. *See infra* Part IV.
31. *See infra* Part V.
32. *See infra* Part VI.
33. Sullivan, *supra* note 12, at 781.
34. *See* Pearl Zuchlewski & Geoffrey A. Mort, *"Faithless Servant" Doctrine Still Followed by Some States, but Rejected as Overtly Punitive by Others*, A.B.A. 1, 6 (2011), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/027.pdf [https://perma.cc/6W49-R8QK].
35. Sullivan, *supra* note 12, at 781–83.
36. Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 187–88 (2d Cir. 2003).

sound unfounded.[37] For example, in their case against Levine, the Met sought $5.8 million in salary that had already been paid out over a forty-one year period.[38] Once it is understood that in return for that salary, Levine agreed to a legal obligation to conduct himself with a high standard throughout his employment with the Met, the fairness of the faithless servant doctrine becomes undeniable.[39]

After laying out the allegations of Levine's misconduct, the Met claimed that Levine "unquestionably violated his duty of loyalty" through "repeated acts of sexual misconduct during his association with the Met, including during the period that [he] was responsible for the Young Artist Program."[40] The duty of loyalty obligates an employer's agent "to exercise the utmost good faith and loyalty in the performance of his duties."[41] Levine's duty of loyalty flowed from his fiduciary relationship with the Met, which "creates the highest duty of loyalty known to the law," and can be created through the terms of a contract or as a matter of law based on the relationship between the parties.[42] The faithless servant doctrine's roots in agency law explain the doctrine's high regard for the duty of loyalty and the extreme disdain for a breach thereof.[43]

The high standard that agency law sets for the duty of loyalty also provides the remedy known as "equitable clawback" upon breach.[44] It is "restitutionary" in nature and "is generally referred to as *restoration* of compensation or *forfeiture* of compensation."[45] The faithless servant doctrine thus "establishes a mandate that an agent who engages in activities that breach his fiduciary duties to his principal is not entitled to and must forfeit any compensation for services rendered during the period of his breach."[46] This means that if the Met established that Levine had breached his duty of loyalty, he would have been required to pay back the Met $5.8 million under

37. Warren, *supra* note 14, at 1136.
38. Kaufman, *supra* note 1.
39. *Id.*
40. *Id.*; *see also* Bruce Haring, *Metropolitan Opera Counter-Sues Former Conductor James Levine, Raises New Allegations*, DEADLINE (May 18, 2018, 7:28 PM), https://deadline.com/2018/05/metropolitan-opera-counter-sues-former-conductor-james-levine-raises-new-allegations-1202394453/ [https://perma.cc/6NHK-ZSKC].
41. W. Elec. Co. v. Brenner, 360 N.E.2d 1091, 1094 (N.Y. 1977).
42. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 20 (AM. LAW INST., Tentative Draft 2018).
43. *See* Warren, *supra* note 14, at 1136.
44. *Id.* (emphasis omitted).
45. *Id.*
46. *Id.*

the theory that by engaging in sexually harassing behavior at his workplace, he at that point forfeited his salary and was never owed it at the outset.[47]

1. Agency Law and Equitable Clawback

The beauty of the faithless servant doctrine as applied to cases of sexual harassment is that it not only compensates the injured employer but is also a tool for deterring future acts, a concept rooted in agency law as well.[48] "Like all other fiduciary remedies, the equitable clawback remedy was developed to serve a prophylactic function, deterring fiducial misbehavior through the imposition of a risk of forfeiture that could far exceed the proceeds, if any, derived from the fiduciary's misconduct."[49] The risk of a disgorgement of profits is an invaluable tool that agency law gifts to the faithless servant doctrine.[50] This risk would not only deter the breaching party, Levine, in our example, but possibly other parties as well.[51] A $5.8 million bill may have deterred not only Levine from sexually harassing in the future, but also other Met employees, as they now know of their employer's strict position on the matter.[52] On a larger scale, the deterrent effects would only grow if states codified this rule, as it would clearly indicate the consequences of workplace sexual harassment at *any* place of employment.[53]

2. Agency Law and Punitive Damages

Although an award of punitive damages may be available in certain cases under an agency theory, this remedy is not a sufficient alternative to the faithless servant doctrine.[54] While "[t]he purpose of punitive damages 'is not so much to compensate the [injured] but to punish the wrongdoer and to warn others,'" it does not follow that employers will be adequately protected by the existence of punitive damages.[55] Virginia, for example, limits the availability of punitive damages only to cases involving "misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of

47. *Id.*
48. *Id.* at 1137.
49. *Id.*
50. *See id.*
51. Kaufman, *supra* note 1.
52. *See* Warren, *supra* note 14, at 1137.
53. *See infra* Part III.
54. S. Pierre Assocs. v. Meyers, 820 N.Y.S.2d 485, 488–89 (N.Y. Civ. Ct. 2006).
55. Banks v. Mario Indus. of Va., Inc., 650 S.E.2d 687, 699 (Va. 2007).

the rights of others."[56] Further, although the faithless servant doctrine does have "a punitive purpose, it also furthers other ends and its roots are in equity, not law."[57]

Additionally, some courts believe "that the disgorgement of compensation received by a faithless servant, under the faithless servant doctrine, is proper and not tantamount to the imposition of punitive damages or unconscionable."[58] The availability of punitive damages does not eliminate the need for compensatory damages under the faithless servant doctrine, as a contract claim may be the employer's only option (where punitive damages are usually unavailable), or the disloyal employee's actions may not rise to the requisite level for an award of punitive damages.[59]

B. Contract Law

As discussed, a faithless servant doctrine claim could also be invoked following a breach of contract.[60] Any disloyal transgressions clearly "arise[] out of and relate[] to the contract which is the genesis of the relationship and the consequent duty."[61] In other words, using Levine as an example, the Met's employment contract with him established a relationship that imposed upon Levine certain duties that he contracted to uphold, and if he did not do so, then he would be in breach of his contract.[62] Much like

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56. Hamilton Dev. Co. v. Broad Rock Club, 445 S.E.2d 140, 142 (Va. 1994).
57. Sullivan, *supra* note 12, at 812 n.203.
58. Van Arsdale, *supra* note 3, at 411.
59. Sullivan, *supra* note 12, at 812 n.203. Sullivan asserts that the ruling by the Supreme Court in *BMW of North America, Inc. v. Gore* about the constitutionality of punitive damages may also affect the faithless servant doctrine, which "must give way to statutory enactments." *Id.* *BMW* held that "due process limits uncapped punitive damages awards," and gave three constitutional guideposts: "(1) the degree of reprehensibility of a defendant's conduct; (2) the ratio between punitive and actual and potential damages; and (3) a comparison of the punitive damages figure and other civil and criminal penalties imposed for comparable conduct." *Id.* Sullivan argues that these cases deal with straightforward awards of punitive damages by juries, and that the faithless servant doctrine has differing purposes and is based on a concept of equity, not law. *Id.*
60. *See* Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 187 (2d Cir. 2003). In *Phansalkar*, the employer brought action against an employee for breach of contract, breach of fiduciary duty, and conversion. *Id.* at 187–88. The court applied the faithless servant doctrine and ordered the forfeiture of the disloyal employee's salary and his interest in certain investments. *Id.* at 211.
61. CARCO Grp., Inc. v. Maconachy, 718 F.3d 72, 85 (2d Cir. 2013) (quoting Bravo Knits, Inc. v. DeYoung, 35 A.D.2d. 932, 932–33 (N.Y. App. Div. 1970)).
62. *See Phansalkar*, 344 F.3d at 200.

agency law's high standard for the duties of an employee,[63] contract law has a strong interest in preserving contractual employment relationships and remedying a breach, which further bolsters the faithless servant doctrine's compensatory purpose.[64]

The faithless servant doctrine also expands upon certain principles of contract law, which traditionally would not allow an employer to "directly recover the gain realized by the employee from [his] breach."[65] The doctrine applies, in contrast, "regardless of whether 'the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent.'"[66] Levine, therefore, under the faithless servant doctrine, would be denied the opportunity to recover under a quantum meruit defense for the value of *any* services he provided, even those done faithfully or properly.[67] In other words, even if Levine was able to prove that the Met made a profit from his services, the Met would still be able to clawback his compensation without the offset of the value he provided to the company.[68]

1. Contract Law and Damages

Further, under the faithless servant doctrine, the Met did not need to prove that it suffered any damages whatsoever arising out of Levine's sexual harassment and breach of his employment duties.[69] "[F]orfeiture of compensation can be awarded based on the employee's disloyalty itself."[70] This distinctive relaxation of traditional contract rules in the application of the faithless servant doctrine is grounded in the deterrent purpose of the doctrine: "[I]t makes no difference whether the result of the agent's conduct is injurious to the principal or not, as the misconduct of the agent affects the contract from considerations of public policy rather than

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63. *See* Warren, *supra* note 14, at 1135–36.
64. *See* Sullivan, *supra* note 12, at 781–82.
65. *Id.* at 792.
66. COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 94:53, at 1160 (Robert L. Haig ed., 4th ed. 2015) (quoting *Feiger v. Iral Jewelry, Ltd.*, 363 N.E.2d 350, 351 (N.Y. 1977)).
67. Sullivan, *supra* note 12, at 779. Further, it is the disloyalty, not its consequences to the employer or principal, which is condemned. *See id.* at 791. The disloyalty itself bars the agent from compensation, and the failure of the principal to prove direct damage to its business may not bar recovery of such compensation. *See id.* at 791, 798 & n.115.
68. *See id.* at 794.
69. *See* Van Arsdale, *supra* note 3, at 415.
70. *Id.*

of injury to the principal."[71] The public policy concerns in deterring sexual harassment in the workplace are paramount in the modern climate; a model code which clearly lays out these rules and principles would be extremely beneficial to courts in applying the faithless servant doctrine.[72]

Additionally, as a practical matter, damages in many faithless servant cases are difficult to quantify, as the disloyal acts are often sporadic and can occur over long periods of time, just as in the Levine case.[73] Alone, contract law limited the Met to "expectation damages,"[74] and agency/tort law employs various limitations on the imposition of damages.[75] Without the faithless servant doctrine, if the Met was unable to prove that it suffered harm as a direct result of Levine's disloyalty, it would not have been able to recover under these traditional avenues of law.[76] Regardless, the negative effects of workplace sexual harassment have been strongly proven and exist across the spectrum.[77] Without the exception the faithless servant doctrine allows, employers who suffer these damages but are unable to prove them as a direct result of the sexual harassment would have no protection under the law in the way of compensatory remedies, which means no deterrent effects on other employees.[78] The faithless servant doctrine protects employers by preserving a remedy that would be otherwise unavailable due to merely practical deficiencies.[79]

III. JURISDICTIONAL APPROACHES TO THE FAITHLESS SERVANT DOCTRINE

There are many variations in the application of the faithless servant doctrine from one state to another.[80] States that embrace the doctrine recognize the importance of the public policy concerns behind it and are responsible in their construction to protect the equitable remedy

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71. Steinmetz v. Kern, 32 N.E.2d 151, 154 (Ill. 1941) (citing Sidway v. Am. Mortg. Co., 78 N.E. 561 (Ill. 1906)).
72. *See* EEOC REP., *supra* note 4, at 31–34.
73. Kaufman, *supra* note 1; Sullivan, *supra* note 12, at 780–81.
74. *See* Sullivan, *supra* note 12, at 781.
75. *See id.* at 781–82.
76. *See id.* at 779–81.
77. *See infra* Part IV.
78. *See* Sullivan, *supra* note 12, at 779–81.
79. *Id.* at 779–80.
80. *Id.* at 806.

as an option for employers.[81] Other states have rejected the doctrine, leaving employers limited.[82] While some restrictions on the doctrine are necessary, all states should adopt a model statute that will allow the faithless servant doctrine's application in cases of sexual harassment.[83]

A. Strict Construction of the Doctrine

New York is the birthplace of the faithless servant doctrine and remains the state where it has been most developed and "robustly" applied.[84] In 1971, "[t]he term 'faithless servant' was coined . . . in *Herman v. Branch Motor Express Co.*," but was derived from New York precedent and principles that dated back to the nineteenth century.[85]

In New York, conduct that has been classified as that of a faithless servant has included "theft or embezzlement, failure to pay to the employer compensation received for outside work, misappropriation of trade secrets, misappropriation of the employer's opportunity, involvement in a transaction in which the employee had an interest adverse to his employer, and competing with the employer while still employed."[86] In New York, neither intent to defraud the employer nor actual damage to the employer as a result of the disloyal actions need to be proven in order to warrant a clawback of compensation.[87]

Presumably with employers' interests in mind, New York courts employ two standards in determining whether an employee's disloyal

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81. *See generally id.* at 808–09, 812 (citing Herman v. Branch Motor Express Co., 323 N.Y.S.2d 794 (N.Y. Civ. Ct. 1971)) (discussing the common ways in which courts in various jurisdictions employ the faithless servant doctrine so as to limit the severity of its implication while still allowing employers to recover damages).
82. *See* Van Arsdale, *supra* note 3, at 421–22 (examining New Mexico law and the limited availability of remedial measures in jurisdictions where the faithless servant doctrine is not recognized).
83. *See infra* Part VI.
84. Sullivan, *supra* note 12, at 796, 806.
85. *Id.* at 796–99 ("[An agent] is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the employee or agent account to his principal for secret profits, but he also forfeits his right to compensation for services rendered by him if he proves disloyal." (quoting Lamdin v. Broadway Surface Advert. Corp., 5 N.E.2d 66, 67 (N.Y. 1936))).
86. *Id.* at 803.
87. Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 200 (2d Cir. 2003) ("It does not 'make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent.'" (quoting Feiger v. Iral Jewelry, Ltd., 41 N.Y.2d 928, 928–29 (N.Y. App. Div. 1977))).

actions rise to the necessary level for that employee to be considered a "faithless servant" for purposes of the doctrine.[88] New York courts have declined to explicitly choose one standard over the other, which greatly preserves the use of the faithless servant doctrine for employers by giving them the ability to satisfy either standard to apply the doctrine to their case.[89]

The first standard says that forfeiture is available when a disloyal employee's "misconduct and unfaithfulness . . . substantially violates the contract of service" and "permeates the employee's service."[90] For example, in *Phansalkar v. Andersen Weinroth & Co.*, the court found that the disloyalties "substantially violated" the terms of the employee's service when they occurred in "four out [of] five of an employee's primary areas of responsibility and continue[d] over many months."[91] Further, the court noted that the disloyalty had only been found not to meet the "substantial" level "where the disloyalty consisted of a single act, or where the employer knew of and tolerated the behavior."[92] This suggests that the "substantial" requirement is a lower standard that can be met more easily than the alternate standard the court later delineates.[93]

The second standard outlines that misconduct which "rises to the level of a breach of a duty of loyalty or good faith is sufficient to warrant forfeiture."[94] The *Phansalkar* court also found that this standard was met when the employee "acted in a manner inconsistent with his agency by withholding . . . cash, stocks, and other interests that belonged to" his employer.[95]

There are, however, some limitations that even the New York courts have imposed on the application of the doctrine, but these

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88. *Id.* at 201 (applying New York law).
89. *See id.* at 202.
90. *Id.* at 201 (quoting Turner v. Kouwenhoven, 2 N.E. 637, 639 (N.Y. 1885)).
91. *Id.* at 202.
92. *Id.*
93. *See id.* at 201–02 (discussing the fact that there are only limited circumstances where the "substantial" level is not found, which makes the "substantial" level easier to obtain than other standards).
94. *Id.* at 202 ("An agent is held to the *uberrima fides* in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal, as to forfeit any right to compensation for his services." (quoting Murray v. Beard, 7 N.E. 553, 554 (N.Y. 1886))).
95. *Id.* at 203.

limitations only apply in the narrowest of circumstances.[96] The *Herman* court held that "the bar to a faithless servant's recovery applies only to the period of his faithlessness."[97] The *Phansalkar* court later clarified that this period of faithlessness begins on the date the disloyalty started and extends to the last date of employment.[98] For example, the employee in *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, who was employed for about seven years, was only ordered to forfeit his compensation from fourteen months, starting on the date he began acting disloyally and ending on the date of his resignation.[99]

The doctrine has also been relaxed when it comes to certain circumstances involving task-based employment; in *Design Strategy, Inc. v. Davis* the employee at issue was only disloyal in some of the tasks performed, and the court ordered forfeiture of compensation for only those tasks performed disloyally.[100] This modification, however, is very strict and only applies in specific circumstances,

> [W]here: (1) the parties had agreed that the agent will be paid on a task-by-task basis (e.g., a commission on each sale arranged by the agent), (2) the agent engaged in no misconduct at all with respect to certain tasks, and (3) the agent's disloyalty with respect to other tasks "neither tainted nor interfered with the completion of" the tasks as to which the agent was loyal.[101]

Further, when an employment agreement outlines "general compensation," rather than "limit[ing] compensation to specific amounts paid for the completion of specific tasks," it is inappropriate to limit the forfeiture.[102] Levine's compensation, for example, would not be limited in the Met's case against him, as he was paid on a salaried basis, rather than for each performance or teaching session.[103]

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96. Sullivan, *supra* note 12, at 804.
97. Herman v. Branch Motor Express Co., 323 N.Y.S.2d 794, 795 (N.Y. Civ. Ct. 1971).
98. *Phansalkar*, 344 F.3d at 208.
99. Mar. Fish Prods., Inc. v. World-Wide Fish Prods., Inc., 100 A.D.2d 81, 90–91 (N.Y. App. Div. 1984). Compensation available for forfeiture is also a very broad category in New York, including "salary or wages, bonuses, pension benefits, post-retirement insurance, and vacation pay." Sullivan, *supra* note 12, at 803.
100. Design Strategy, Inc. v. Davis, 469 F.3d 284, 300–02 (2d Cir. 2006) (applying N.Y. law).
101. *Id.* at 301 (quoting *Phansalkar*, 344 F.3d at 205).
102. *Phansalkar*, 344 F.3d at 208.
103. *See* Kaufman, *supra* note 1.

New York maintains a very strict construction of the faithless servant doctrine, an approach which is desirable in cases of sexual harassment, and its limitations would probably not apply in most situations.[104] The Met, for example, would most likely have been subject only to the restriction delineated in *Maritime Fish*, limiting forfeiture of Levine's compensation to a start date of the day the disloyalty began.[105] New York is strongly against limiting forfeiture of compensation, finding it appropriate only in extreme circumstances.[106] The state's approach maintains their interest in public policy as: "The primary purpose of . . . the 'faithless servant doctrine,' is to deter disloyal conduct, so 'that all temptation shall be removed from one acting in a fiduciary capacity to abuse his trust.'"[107] New York's strict approach would serve the faithless servant doctrine's two main goals as applied to workplace sexual harassment: protection of employers and deterrence of bad behavior.[108]

B. Other Approaches to the Doctrine

Many other states have followed in New York's footsteps of strictly applying the faithless servant doctrine, including South Carolina, Michigan, Kansas, Massachusetts, Florida, Oregon, and Alabama.[109] Others, however, have taken a more relaxed approach, and some have rejected it completely.[110]

Colorado and Wisconsin employ a balancing test that considers "the nature of the employment relationship, the specific kind of disloyal action engaged in and the benefits received by the employer from the individual during the period of disloyalty."[111] Colorado, in particular, looks at the severity of the disloyal conduct to determine

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104. *See generally Phansalkar*, 344 F.3d at 206 (stating that limitations of the faithless servant doctrine are limited and only apply in specific situations).
105. *See* Mar. Fish Prods., Inc. v. World-Wide Fish Prods., Inc., 100 A.D.2d 81, 91 (N.Y. App. Div. 1984).
106. *Phansalkar*, 344 F.3d at 202. The court expressed a "concern that we should not relax New York's rule of forfeiture any further." *Id.* at 206.
107. Tyco Int'l, Ltd. v. Kozlowski, 756 F. Supp. 2d 553, 559 (S.D.N.Y. 2010) (citing Robert Reis & Co. v. Volck, 151 A.D. 613, 615 (N.Y. App. Div. 1912)).
108. *See infra* Part IV.
109. Zuchlewski & Mort, *supra* note 34, at 3–5.
110. *Id.* at 5–7.
111. *Id.* at 5.

the amount of compensation forfeiture,[112] while Wisconsin examines "the difference between the harm suffered by the employer and the benefits the employer received during the period of disloyalty."[113] Although some favor the balancing test approaches for their "flexibility" and consideration of a disloyal employee's "achievements or contributions to the company," [114] the New York bright-line rule should be applied in cases of sexual harassment. The relaxed approaches do not provide the necessary punitive effects to deter future similar behavior.[115] Additionally, these relaxed approaches may adequately operate in other contexts, but strict construction is needed in cases of sexual harassment where the benefits to the employer may be great, but the damages suffered are difficult to quantify.[116]

Other states have left employers with nothing by rejecting the faithless servant doctrine completely, "in part because they view it as excessively harsh, unbalanced and punitive."[117] In New Mexico, the Court of Appeals declined the opportunity to adopt the doctrine, concluding that application of the doctrine would "go beyond the intention of the parties" and under the circumstances, would "be . . . inequitable and unjustified."[118] New Hampshire likewise has denied the chance to adopt the doctrine.[119] Yet, the rigidity of the doctrine that these states reject is exactly what makes the doctrine a perfect tool for employers when a disloyal employee's conduct involves sexual harassment.[120] Although states such as New Hampshire and New Mexico may very well reject the faithless servant doctrine in circumstances involving other employment issues, the doctrine should be adopted nationwide when sexual harassment claims arise.[121] The risk of compensation forfeiture is a necessary deterrent that is neither inequitable nor unjustified in the context of sexual harassment.[122]

112. *Id.* (citing Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 494 (Colo. 1989)) ("[T]he court ruled that there should be a total bar on the compensation where an employee's conduct is as serious as soliciting the employer's customers.").
113. *Id.* at 5–6 (citing Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 287 (Wis. 1980)).
114. *Id.* at 6.
115. *See supra* notes 85–114 and accompanying text.
116. *See infra* Part IV.
117. Zuchlewski & Mort, *supra* note 34, at 6.
118. *Id.* (quoting Woods v. Collins, 533 P.2d 759, 761 (N.M. 1975)).
119. *Id.* at 6–7 (citing Gen. Insulation Co. v. Eckman Constr., 992 A.2d 613, 621 (N.H. 2010)).
120. *See infra* Part IV.
121. *See infra* Part IV.
122. *See infra* Part IV.

IV. THE NEED FOR THE DOCTRINE: EFFECTS OF SEXUAL HARASSMENT ON A BUSINESS

The effects following a sexual harassment allegation on an organization are harder to quantify than other forms of a breach of loyalty, such as a self-dealing fiduciary realizing a material benefit belonging to his employer.[123] As effects related to sexual harassment are proven to be present in both the public arena and internally within organizations plagued by sexual harassment, a solution for employers is necessary in order to compensate their losses.[124] Because damages from these effects can often be difficult to prove, the faithless servant doctrine is of vital importance in the context of sexual harassment to ensure employers have a solution to recoup losses exacted by unfaithful employees.[125]

A. Effects on Employer Image Following Sexual Harassment Allegations

A company's public image is at risk following a sexual harassment allegation.[126] Even just one claim can lead the public to believe the organization is "structural[ly] unfair" in its entirety regarding gender equality.[127] Further, research has shown that these claims hurt an organization's public image of financial equity:

> [W]hen people learn that a sexual harassment claim has been made in an organization, they not only see that organization as less equitable than an organization where no such claim was filed, but also less equitable than an organization where a claim of a different transgression, such as financial misconduct, was made.[128]

These negative reputation effects can, in turn, hurt the financial standing of a company, as "headline costs of a scandal are clear:

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123. Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1057 (2007).
124. *See Sexual-Harassment Scandals Are Hurting Companies' Reputations and Balance Sheets, supra* note 8; *see also* Serena Does et al., *Research: How Sexual Harassment Affects a Company's Public Image*, HARV. BUS. REV. (June 11, 2018), https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image [https://perma.cc/KD5S-BWUM].
125. *See* Sullivan, *supra* note 12, at 780–81.
126. *See* Does et al., *supra* note 124.
127. *Id.*
128. *Id.* ("[W]e also find that people see a sexual harassment claim as more indicative of a culture problem than a bad apple problem – even compared to a claim of fraud.").

shares of several big firms have fallen sharply after executive departures" involving sexual harassment claims.[129]

B. Internal Effects of Workplace Sexual Harassment

Workplace sexual harassment also creates costs to employers within the walls of their companies.[130] Even surpassing litigation costs, the largest economic detriment to companies following sexual harassment relates to employee turnover, as "targets of harassment [are] 6.5 times as likely as non-targets to change jobs."[131] Estimates show that it then costs an average of sixteen to twenty percent of an employee's annual salary to replace an employee.[132] Additionally, sexual harassment in the workplace has been proven to reduce motivation as well as both individual and team performance.[133] Reports estimate that the cost in lost productivity of a member of a team affected by sexual harassment averages $22,500 per person.[134]

The costs to an organization following actual or alleged sexual harassment are so widespread and hard to definitively prove on a case-by-case basis; therefore, allowing an employer the ability to invoke the faithless servant doctrine to clawback compensation is of paramount importance.[135] Not only does the remedy of compensation forfeiture give the employer the opportunity to obtain actual monetary damages, it is also a powerful tool for deterring sexual harassment in the first place.[136] The threat of clawback "serves to deter corporate officers and other agents from committing acts of disloyalty given the risk of forfeiture of all compensation and

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129. *See Sexual-Harassment Scandals Are Hurting Companies' Reputations and Balance Sheets*, *supra* note 8.

130. Elyse Shaw, Ariane Hegewisch & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs*, INSTIT. FOR WOMEN'S POL'Y RES. (Oct. 15, 2018), https://iwpr.org/publications/sexual-harassment-work-cost/ [https://perma.cc/HY9R-Z9UY].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* "Assuming this was calculated using 2007 dollars, this would now be $27,345 per person in 2018 dollars." *Id.* (citing Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Anaylsis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 151 (2007)).

135. *See generally id.* (discussing possible costs to companies, including reduced productivity, employee turnover, increased absences, and legal costs).

136. DeMott, *supra* note 123, at 1060. Further, the existence of the forfeiture remedy assures "that some remedy will be available against a disloyal agent even when the agent has realized no material benefit for which the agent must account." *Id.*

not just that portion that relates to misconduct" and promotes responsibility in the workplace.[137]

V. THE FAITHLESS SERVANT DOCTRINE AS APPLIED TO SEXUAL HARASSMENTS IN THE COURTS

Courts have had minimal opportunities to explore the faithless servant doctrine as applied to cases involving sexual harassment by disloyal employees; however, there have been a few cases that have analyzed the issue.[138] One such case was *Astra USA, Inc. v. Bildman*, where the Supreme Judicial Court of Massachusetts, applying New York law, awarded Astra, the employer, almost $6 million in salary and bonuses already paid to a former CEO, Lars Bildman, for the period of disloyalty where he repeatedly engaged in sexual harassment.[139] Evidence showed that over approximately fifteen years, Bildman authorized multiple settlements to be paid to his sexual harassment accusers, entered into a "consulting agreement" with his secretary who later testified she was forced into having sexual relations with him, and engaged in extensive efforts to cover-up related allegations, including threats to employees and destruction of company property.[140] Astra's image was tarnished as a result of Bildman's indiscretions when *Business Week* published a cover story exposing the allegations.[141] It attracted both national and international attention and was picked up and published by 150 other publications worldwide.[142]

The court in *Astra* found that New York law "require[d] forfeiture" of all of Bildman's compensation during the period of his disloyalty to Astra upon a finding that Bildman "had committed numerous and

137. Warren, *supra* note 14, at 1151–52 ("The corporation's recovery rights constitute a significant asset that should not be wasted by ignorance or indifference . . . [b]y posing a substantive threat to executive wealth, the equitable clawback remedy, if stringently applied, should secure a higher level of executive responsibility.").
138. *See* Van Arsdale, *supra* note 3, at 399, 411.
139. Astra USA, Inc. v. Bildman, 914 N.E.2d 36, 39 (Mass. 2009).
140. *Id.* at 40–43.
141. *See generally id.* at 43 (discussing the publicity around Bildman's indiscretions and mentioning some of the consequences that followed).
142. *Id.* The article was titled, *Abuse of Power: The Astonishing Tale of Sexual Harassment at Astra USA*, and "reported that it had interviewed 'more than 70 former and current employees' and found 'a disturbing pattern of complaints during much of Bildman's 15–year tenure,' including 'a dozen cases of women who claimed they were either fondled or solicited for sexual favors by Bildman or other [Astra] executives.'" *Id.*

substantial breaches of his fiduciary duties to Astra."[143] The court opined that the forfeiture law in New York "has been described as harsh . . . however, the harshness of the remedy is precisely the point."[144]

A subsequent case, *Pozner v. Fox Broadcasting Co.*, reached a different result than that of *Astra*.[145] In finding that Pozner, a former executive, did not violate his duty of loyalty after engaging in multiple and repeated sexually harassing actions, the court opined that the duty of loyalty "has only been extended to cases where the employee 'act[s] directly against the employer's interests."[146] The court failed to outline the application of either of the faithless servant standards set forth by New York precedent, stating only that no cases had been presented "in which sexual harassment, without more, forms the basis for a breach of the duty of loyalty claim."[147] The court, however, arguably erred in its failure to apply the applicable standards in their faithless servant doctrine analysis.[148]

Although the Court found that Pozner did not breach his fiduciary duty,[149] the standards announced by the same court previously required only either a breach of loyalty or good faith, or in the alternative standard, disloyalty that substantially violates the employment contract and which permeates the service.[150] Pozner's actions "substantially violated" his contract of service under the *Phansalkar* definition: the actions were repeated and continued over many months.[151] These continuous instances of sexual harassment violated his employment in his capacity as an executive and leader of the Fox Broadcasting Corporation.[152] For example, these continuing sexual harassing acts most likely led to the resignation of employees and the reduction in productivity within the organization.[153] The

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143. *Id.* at 50–51.
144. *Id.* at 51.
145. Pozner v. Fox Broad. Co., 74 N.Y.S.3d 711, 715 (N.Y. Sup. Ct. 2018).
146. *Id.* at 714 (alteration in original) (quoting Veritas Capital Mgt., L.L.C. v. Campbell, 82 A.D.3d 529, 530 (N.Y. App. Div. 2011)).
147. *Id.*
148. *Compare id.* (holding that sexual harassment alone is insufficient to support a finding of breach of an executive's fiduciary duties), *with* Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 188 (2d Cir. 2003) (stating that New York law allows for a breach of loyalty, a breach of good faith, or a disloyalty that violates an employment clause to be sufficient for a breach of loyalty claim).
149. *Pozner*, 74 N.Y.S.3d at 714.
150. *Phansalkar*, 344 F.3d at 201–02.
151. *Id.*
152. *See Pozner*, 74 N.Y.S.3d at 713.
153. *See supra* text accompanying notes 131–34.

allegations presumably also contributed to negative reputation effects resulting in a loss of Fox finances.[154] The consequences of Pozner's actions, had the Court considered them, could have supported a finding of acts of disloyalty, as they are akin to "acts directly against the company's interests."[155] While his actions may not rise to the level of breach of fiduciary duty, the Court should have applied the faithless servant doctrine to find a breach of good faith or loyalty that permeated his service during the time period of the sexual harassment, which is a sufficient finding to award forfeiture of his compensation under the faithless servant doctrine.[156]

VI. CONCLUSION

Because of the recent boom in workplace sexual harassment allegations and lawsuits, courts will presumably continue to experience an influx of litigation relating to such misconduct.[157] Sexual harassment in the workplace presents a unique problem for employers, as it is difficult to quantify from a damages standpoint, but the effects of such incidents are felt throughout multiple levels of a company.[158] These employers require a remedy that justly compensates their losses while deterring future bad behavior.[159]

The faithless servant doctrine provides employers with an adequate remedy through compensatory forfeiture, but it must be applied strictly in cases of sexual harassment to be effective.[160] A model code should be written and then adopted nationwide that would codify New York's strict construction of the doctrine specifically in cases of sexual harassment.[161] This model code should give the option of both standards for requisite employee misconduct, including a substantial violation that permeates service, as well as a breach of a duty of loyalty or good faith.[162] A breach of fiduciary duty is too high a standard as applied to cases of sexual harassment, and it fails to consider the purpose of the doctrine in deterring future bad behavior.[163] The New York rule limiting recovery to the period

154. *See supra* notes 126–29 and accompanying text.
155. *Pozner*, 74 N.Y.S.3d at 714–15.
156. *See* discussion *supra* Section III.A.
157. EEOC REP., *supra* note 4, at 8, 32.
158. *See supra* notes 130–35 and accompanying text.
159. *See supra* notes 135–37 and accompanying text.
160. *See supra* notes 104–08 and accompanying text.
161. *See supra* notes 72, 104–08 and accompanying text.
162. Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 201–02 (2d Cir. 2003).
163. *See* Pozner v. Fox Broad. Co., 74 N.Y.S.3d 711, 714–15 (N.Y. Sup. Ct. 2018).

of disloyalty is the only limitation that should be included, as those involving task-based employment and defining compensation do not further the doctrine's goals in the context of workplace sexual harassment.[164]

Under the proposed model for the faithless servant doctrine as applied to sexual harassment and based upon the alleged facts, Levine would most likely have been ordered to forfeit his compensation to the Met for the entirety of his 40-year employment, provided that the Met could have substantiated its claim that the harassment continued throughout the employment relationship.[165] Levine breached his duty of loyalty to the Met by hurting the company and abusing his position to engage in sexual harassment and misconduct.[166] His repeated actions also undoubtedly satisfied the definition of substantial violations that permeated his service as music director and artistic director of the Young Artists program.[167] The faithless servant doctrine is a strong and necessary tool that must be applied in the sexual harassment context to equitably compensate employers and deter employees, like Levine, from engaging in future bad behavior.[168]

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164. *See supra* notes 97–103 and accompanying text.
165. Kaufman, *supra* note 1.
166. *Id.*
167. *Id.*; *see supra* notes 150–51 and accompanying text.
168. *See supra* notes 104–07 and accompanying text.