

**Testimony of Dianne Avery, Professor Emerita  
University at Buffalo School of Law, The State University of New York  
Before the House Committee on General, Housing and Military Affairs  
State of Vermont General Assembly  
April 12, 2018**

**RE: S.40, An Act Relating to Increasing the Minimum Wage**

Good morning Chairwoman Head and Members of the Committee. My name is Dianne Avery and I am Professor Emerita, University at Buffalo School of Law, The State University of New York. I am addressing the Committee today in my individual capacity as a legal scholar and not as a representative of the Law School or the University.

I thank the Committee for the opportunity to comment on the relationship between the tipped minimum wage and sexual harassment in the restaurant industry. For thirty years, from 1984 to 2015, I taught labor law, employment law, employment discrimination law, and sexual harassment law at SUNY Buffalo Law School. My scholarly publications have focused on labor law, labor history, employment discrimination law, women's rights, and gender stereotypes. I also co-authored three editions of a casebook on employment discrimination law. Since 2006, I have presented talks at conferences and published scholarship on sexualized labor in frontline service jobs. My most recent publication focused on the relation between the tipped subminimum wage and the sexualization of female servers in the so-called breastaurant industry.<sup>1</sup>

The Committee is considering S.40, an act relating to increasing the minimum wage, which would increase the minimum wage in Vermont to \$15.00 an hour by 2024.<sup>2</sup> Significantly, this proposed bill leaves in place the current provision of the Vermont minimum wage law that requires that "[a]n employer in the hotel, motel, tourist place, and restaurant industry shall not employ a service or tipped employee at a basic wage rate less than one-half the minimum wage."<sup>3</sup> The General Assembly's Minimum Wage and Benefits Cliff Study Committee recommended increasing the minimum wage to \$15.00, but "[d]ue to time constraints, took virtually no testimony on the issue of the tipped minimum wage[,] and made no recommendation "with respect to whether the General Assembly should amend the statutory language governing Vermont's tipped minimum wage."<sup>4</sup>

Legislation to eliminate or raise the tipped minimum wage is a controversial issue in the restaurant industry. Seven states have eliminated the tipped minimum wage entirely.<sup>5</sup> Eighteen states require tipped workers to receive a subminimum wage of \$2.13 an hour, the minimum required by the federal law.<sup>6</sup> Governor Cuomo has recently proposed eliminating the tipped minimum wage in New York.<sup>7</sup> In Massachusetts, a coalition of citizen activists, Raise Up Massachusetts, has a petition to place an initiative on the 2018 ballot that would

raise the Commonwealth's \$11.00 minimum wage to \$15.00 by 2022 and gradually increase the current \$3.75 tipped minimum wage to \$9.00 by 2022.<sup>8</sup> New Hampshire's tipped minimum wage is set at 45% of its minimum wage, which remains at the current federal minimum wage of \$7.25.<sup>9</sup> The Maine legislature recently rolled back its tipped minimum wage to one-half the minimum wage, after voters in November 2016 had approved a ballot measure to eliminate the tipped minimum wage entirely. Many Maine restaurant servers testified in opposition to eliminating the tipped minimum because of their belief that "customers tip less when they know servers are being paid more."<sup>10</sup>

For purposes of consideration of raising the minimum wage in Vermont, Legislative Counsel Damien Leonard has outlined six "Legislative Options for the Tipped Minimum Wage."<sup>11</sup> Vermont employers in the restaurant and hospitality industry who have testified regarding S.40 have opposed any increase in the minimum wage and particularly the tipped minimum wage. Nevertheless, industry concerns about the negative effects of the minimum wage on employment and prices may be overblown.<sup>12</sup> More importantly, there is compelling evidence that low minimum wages and the preservation of the tipped minimum wage may be significant contributors to the gender wage gap (and consequently female poverty) and sexual harassment in the restaurant industry.<sup>13</sup>

Nationally, the gender wage gap is smaller and women's poverty rates are lower in states that have eliminated the tipped subminimum wage as compared to states that have a tipped minimum cash wage of \$2.13 an hour (the federal minimum).<sup>14</sup> In Vermont, in the third quarter of 2017, women held 54% of the jobs in the accommodation and food services industries, and women's average wages were 79% of men's wages.<sup>15</sup> A recent study reported that uneven wage growth in Vermont between 1979 and 2016 has produced substantial income inequality and has increased the number of families living below the poverty line, including many female-headed single-parent households with children.<sup>16</sup> The livable hourly wage in Vermont in 2016 was \$13.03 for a 40-hour workweek, and \$14.89 per hour for a 35-hour workweek.<sup>17</sup> Although the 2016 mean hourly wage for Vermont waiters and waitresses in the 90<sup>th</sup> percentile was \$23.53, for servers in the 10<sup>th</sup> percentile, the mean hourly wage was \$9.61 and the 25<sup>th</sup> percentile was \$9.78.<sup>18</sup> As of January 1, 2018, the minimum hourly wage in Vermont is \$10.50 and the tipped minimum wage is \$5.25.

The tipped minimum wage has also been linked to the high incidence of sexual harassment in the restaurant industry. This is not new news. In 2014 the Restaurant Opportunities Centers United (ROC) and Forward Together published *The Glass Floor: Sexual Harassment in the Restaurant Industry*, reporting on their survey of 688 current and former restaurant servers in 39 states.<sup>19</sup> They concluded that restaurant servers were twice as likely to experience sexual harassment—from managers, co-workers, and customers—in a state with a tipped minimum wage than in a state that had eliminated a subminimum wage for tipped workers. ROC also concluded that waitresses experienced more sexual

harassment when their employers or managers required them to dress and groom themselves to appear sexier.

The issue of sexual harassment in the restaurant industry and other low-waged occupations has gained renewed interest from journalists, labor activists, and researchers following the recent sexual harassment allegations brought against high-profile individuals in media, the entertainment industry, academia, and politics that have led to the #MeToo movement. Headlines in the news highlight the issue. From *The Washington Post*: “Rape in the storage room. Groping at the bar. Why is the restaurant industry so terrible for women.”<sup>20</sup> From *The New York Times*: “The Tipping Equation: At restaurants across America, servers calculate how far is too far, weighing harassing behavior against the tips they need to make a living wage.”<sup>21</sup> From *The Atlantic’s CityLab*: “Why Sexual Harassment Rates Are So High in the Restaurant Industry: Where working for tips means the customer is always right, waitresses, bartenders, and other tipped-wage workers endure stunning rates of sexual harassment.”<sup>22</sup> From *Rewire.News*: “The Tipped Minimum Wage is Fueling Sexual Harassment in Restaurants.”<sup>23</sup>

Research published just a few months ago in *The Harvard Business Review* reinforces the worker narratives behind these news stories, noting that “[m]ore sexual harassment claims in the U.S. are filed in the restaurant industry than in any other, where as many as 90% of women and 70% of men reportedly experience some form of sexual harassment.”<sup>24</sup> A 2016 survey of the Boston restaurant industry illustrates the effects of a substantial gap between the minimum wage and the tipped minimum wage on the incidence of sexual harassment and wage theft.<sup>25</sup> This report observes, “One of the most striking findings from our survey results is that tipped restaurant workers suffer much higher rates of sexual harassment than workers who don’t rely on customer’s tips for their income.”<sup>26</sup>

My own research into the role of employment discrimination law in frontline service industries began with my exploration of the legal and social aspects of a 2006 federal court of appeals case that denied the sex discrimination claim of a female bartender who lost her job at a Nevada casino because she refused the employer’s demands that she wear specified makeup at work pursuant to a new gender-based grooming policy.<sup>27</sup> My more recent scholarship has explored the effects of tipping laws and customs in the restaurant industry where scantily clad female servers may have a financial incentive to accept sexual harassment by customers (or co-workers and managers) as just part of the job and not as an unlawful employment practice that must be reported and remedied.<sup>28</sup> I wrote, “By hiring only attractive young female servers who embody a certain ‘branded,’ sexualized—and predominantly racialized—image, restaurants enable some young women to turn an occupational gender-based wage penalty into a gender-based wage premium.”<sup>29</sup> But at what cost? Although the overwhelming majority of female servers are not very young, scantily clad waitresses working in

breastaurants, sexual harassment of servers occurs throughout the food and beverage industry.

Sexual harassment is only one of the harms to workers that is exacerbated by the tipped minimum wage in the restaurant industry. Racial discrimination is also pervasive in restaurants, not only in the racial disparities in hiring, promotion, and earnings between front-of-the-house and back-of-the-house employees, but also in racial disparities in the tips customers leave for servers. Although the wage and hour laws require employers to top-off the wages of tipped workers who do not earn sufficient tips to cover the gap between the tipped hourly cash wage and the minimum wage, enforcement of these laws may be difficult, particularly when tipped workers have incentives not to complain. To address these issues, some restaurants have abandoned tipping altogether, with mixed success.<sup>30</sup> Arguing that “the movement against tipping is ill-advised,” two legal scholars have recently proposed eliminating legal restrictions on tip pooling among front-of-the-house and back-of-the-house workers.<sup>31</sup> While tip pooling among “customarily tipped” workers may reduce intrafirm competition among servers for premium shifts and desirable restaurant sections, it is not clear how either voluntary or mandatory tip-pooling affects the incidence of sexual harassment. These issues warrant further study.

I am not suggesting here that the practice of tipping restaurant servers causes sexual harassment in the restaurant industry. Sexual harassment claims come from nontipped and salaried employees throughout the economy, as well as from tipped workers. Rather I believe attention should be paid to evidence that the preservation of the tipped subminimum wage contributes to both the gender wage gap and sexual harassment in the restaurant industry. Employees who seek legal redress for wage and hour or employment discrimination violations face numerous substantive and procedural barriers. Even successful claims may take years to produce limited remedies. For low-wage workers in the restaurant industry, who are unlikely to have union or legal representation, quitting work and moving on may be the easiest option. But for restaurant owners, high turnover and disgruntled employees imposes unwelcome costs in a tight labor market.<sup>32</sup>

In closing, I note that this Tuesday, April 10, was Equal Pay Day. In a just-published opinion in an Equal Pay Act case, a federal court of appeals judge observed, “Although the [Equal Pay] Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy.”<sup>33</sup> We have become all too aware that workplace sexual harassment—a violation of federal employment discrimination law for over thirty years—is also “an embarrassing reality of our economy.” Will One Fair Wage mitigate these harms? As Sylvia Allegretto and David Cooper suggested in 2014, “perhaps we should simply eliminate the tipped minimum wage altogether, and give tipped workers the same basic protection afforded to other workers.”<sup>34</sup>

Thanks again for the opportunity to speak to you today. My goal has been to bring to light an aspect of the tipped minimum wage discussion that until recently has been ignored or hidden from view. Those hidden costs deserve to be part of any deliberations on the subject. I would be happy to respond to any questions you might have.

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<sup>1</sup> Dianne Avery, *The Female Breast as Brand: The Aesthetic Labor of Breastaurant Servers*, in *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* 171-92 (Marion G. Crain, Winifred R. Poster & Miriam A. Cherry, eds., University of California Press, 2016).

<sup>2</sup> See generally *The Minimum Wage: Background, History, and S.40*, Prepared by Damien Leonard and Joyce Manchester (Mar. 20, 2018), S.40, Damien Leonard, Minimum Wage Background Presentation, 3-21-2018.

<sup>3</sup> 21 V.S.A. § 384.

<sup>4</sup> Report of the Minimum Wage and Benefits Cliff Study Committee, December 2017, at 22.

<sup>5</sup> Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. See National Women's Law Center and Restaurant Opportunities Centers United, *Women and the Tipped Minimum Wage, State by State: Tipped Workers State by State Table* (July 2017), available at <https://nwlc.org/resources/tipped-workers/>; U.S. Department of Labor, Wage and Hour Division, Minimum Wages for Tipped Employees (Jan. 1, 2018), <https://www.dol.gov/whd/state/tipped.htm>.

<sup>6</sup> See tables on tipped workers, *id.*

<sup>7</sup> New York State, Office of the Governor, News: Governor Cuomo Unveils 5th Proposal of 2018 State of the State: Examine Eliminating the Minimum Wage Tip Credit to Strengthen Economic Justice in New York State (Dec. 17, 2017), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-hearings-potentially-eliminating-subminimum-wage-tipped-workers/>.

<sup>8</sup> See Massachusetts \$15 Minimum Wage Initiative (2018), available at [https://ballotpedia.org/Massachusetts \\$15 Minimum Wage Initiative \(2018\)](https://ballotpedia.org/Massachusetts_$15_Minimum_Wage_Initiative_(2018)).

<sup>9</sup> New Hampshire RSA 279:21.

<sup>10</sup> Scott Thistle, *Maine House Passes Bill to Restore Tip Credit to Minimum Wage Law*, PRESS HERALD, June 13, 2017, available at <https://www.pressherald.com/2017/06/13/maine-house-passes-bill-to-restore-tip-credit-to-minimum-wage/>.

<sup>11</sup> (1) "No Change to Existing Tipped Minimum Wage Law"; (2) "Increase Tipped Minimum Wage by CPI or 5%, whichever is less"; (3) "Freeze the Tipped Minimum Wage at \$5.25"; (4) "Reduce the Difference between the Minimum Wage and Tipped Minimum Wage"; (5) "Eliminate the Tipped Minimum Wage"; and (6) "Reduce the Tipped Minimum Wage." S. 40, Damien Leonard, *Background on the Tipped Minimum Wage and Legislative Options*, 3/29/2018, at 1-2, , VT LEG #329586 v.2. See also S.40, Damien Leonard, Side-by-Side Potential Approaches to Tipped

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Minimum Wage, 3-29-2018. A bill introduced in the House last year, H.313, proposed gradually eliminating the tipped minimum wage by 2022 in tandem with increasing the minimum wage to \$15.00.

<sup>12</sup> Michael Lynn and Christopher Boone, *Have Minimum Wage Increases Hurt the Restaurant Industry?: The Evidence Says No!*, 15 (22) CORNELL HOSPITALITY REPORT (Dec. 2015).

<sup>13</sup> See generally Sylvia Allegretto and David Cooper, *Twenty Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage*, ECONOMIC POLICY INSTITUTE (July 10, 2014), available at <http://irle.berkeley.edu/files/2014/Twenty-Three-Years-and-Still-Waiting-for-Change.pdf>.

<sup>14</sup> National Women's Law Center & Restaurant Opportunities Center United, *Raise the Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, WORKPLACE JUSTICE (Fact Sheet, Oct. 2016).

<sup>15</sup> Vermont Department of Labor, *Earnings by Jobs and Gender—Private Ownership*, Quarter: 2017 Q3, NAICS Title: Accommodation and Food Services <http://www.vtlni.info/genderjob.cfm>.

<sup>16</sup> Public Assets Institute, *State of Working Vermont, 2017*, 9-11 (Montpelier, VT: 2017), available at <http://publicassets.org/wp-content/uploads/2017/12/SWVT17final.pdf>.

<sup>17</sup> S.40: Joyce Manchester, Vermont Legislative Joint Fiscal Office, Responses to Questions Raised During Hearing, Mar. 21, 2018.

<sup>18</sup> Vermont Department of Labor, Vermont Occupational Employment Survey, *2016 Occupational Employment and Wage Estimates, Vermont State*, pp. 9 & 26. See S.40, Dirk Anderson, Occupational Wage Estimates (Waitstaff on line 348) – 2016, 3-29-2018.

<sup>19</sup> The Restaurant Opportunities Centers United and Forward Together, *The Glass Floor: Sexual Harassment in the Restaurant Industry* (Oct. 7, 2014), available at [http://rocunited.org/wp-content/uploads/2014/10/REPORT\\_TheGlassFloor\\_Sexual-Harassment-in-the-Restaurant-Industry.pdf](http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf).

<sup>20</sup> Maura Judkis and Emily Heil, *Rape in the storage room. Groping at the bar. Why is the restaurant industry so terrible for women*, WASHINGTON POST (Nov. 21, 2017), available at [https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e\\_story.html?utm\\_term=.3a95c682a49f](https://www.washingtonpost.com/lifestyle/food/rape-in-the-storage-room-groping-at-the-bar-why-is-the-restaurant-industry-so-terrible-for-women/2017/11/17/54a1d0f2-c993-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.3a95c682a49f).

<sup>21</sup> Catrin Einhorn and Rachel Abrams, *The Tipping Equation: At restaurants across America, servers calculate how far is too far, weighing harassing behavior against the tips they need to make a living wage*, NEW YORK TIMES, Business Day, Mar. 12, 2018, available at <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>.

<sup>22</sup> Lauren Kaori Gurley, *Why Sexual Harassment Rates Are So High in the Restaurant Industry*, CITYLAB (Nov. 21, 2017), available at <https://www.citylab.com/equity/2017/11/sexual-harassment-and-tipped-wage-workers/546314/>.

<sup>23</sup> Bryce Covert, *The Tipped Minimum Wage Is Fueling Sexual Harassment in Restaurants*, REWIRE.NEWS (Feb. 13, 2018), available at <https://rewire.news/article/2018/02/13/tipped-minimum-wage-fueling-sexual-harassment-restaurants/>.

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<sup>24</sup> Stefanie K. Johnson and Juan M. Madera, *Sexual Harassment Is Pervasive in the Restaurant Industry. Here's What Needs to Change*, HARVARD BUSINESS REVIEW (Jan. 18, 2018), available at <https://hbr.org/2018/01/sexual-harassment-is-pervasive-in-the-restaurant-industry-heres-what-needs-to-change>.

<sup>25</sup> The Restaurant Opportunities Center of Boston, The Restaurant Opportunities Center United, and the Boston Area Restaurant Coalition, *Behind the Kitchen Door: Promise and Denial in Boston's Growing Restaurant Industry* (Oct. 2016), available at [http://rocunited.org/wp-content/uploads/2016/11/BKD\\_Boston\\_Report\\_W.pdf](http://rocunited.org/wp-content/uploads/2016/11/BKD_Boston_Report_W.pdf).

<sup>26</sup> *Id.* at 18.

<sup>27</sup> Dianne Avery, *The Great American Makeover: The Sexing Up and Dumbing Down of Women's Work After Jespersen v. Harrah's Operating Company, Inc.*, The Jack Pemberton Lecture Series, 42 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 299 (2007); Dianne Avery and Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE JOURNAL OF GENDER LAW & POLICY 13 (2007).

<sup>28</sup> See Avery, *The Female Breast as Brand*, *supra* note 1.

<sup>29</sup> *Id.* at 178-79.

<sup>30</sup> See Michael Lynn, *Should U.S. Restaurants Abandon Tipping? A Review of the Issues and Evidence*, 5 PSYCHOSOCIOLOGICAL ISSUES IN HUMAN RESOURCE MANAGEMENT 120-159, doi:10.22381/PIHRM5120174 (2017); Julia Moskin, *Year of Upheaval for Restaurants That Ended Tipping*, NEW YORK TIMES (Dec. 13, 2016).

<sup>31</sup> Samuel Estreicher and Jonathan Remy Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation*, 59(1) BOSTON COLLEGE LAW REVIEW 1, 3 (2018).

<sup>32</sup> See Jennifer Steinhauer, *A Worker Shortage Is Forcing Restaurants to Get Creative*, NEW YORK TIMES (Apr. 5, 2018).

<sup>33</sup> *Rizo v. Yovino*, No. 16-15372, slip. op. (Apr. 9, 2018) (9th Cir. 2018) (en banc).

<sup>34</sup> Allegretto and Cooper, *supra* note 13, at 19-20.