# SOME THINGS NEVER CHANGE:
# SEXUAL HARASSMENT UPDATE 2010

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### Education

- J.D., Creighton University School of Law, 1987, *with honors;* Student Articles Editor, *Creighton Law Review*
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- Texas
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- U.S. District Court for the Northern District of Texas
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Dean Schaner has exclusively practiced employment and labor litigation for over 21 years, representing employers in all aspects of unfair competition, discrimination, retaliation, whistleblower, ERISA, wrongful termination, and tort/contract claims arising out of the employment relationship. Mr. Schaner has tried a wide variety of cases in the federal and state courts, including the successful defense of an energy company in a class action case in which plaintiffs sought $30 million in damages. He is certified by the Texas Board of Legal Specialization as a labor and employment law specialist. Mr. Schaner has been named as a Texas Super Lawyer in the Super Lawyer issues of Texas Monthly in Employment Litigation Defense (2003-2009). Mr. Schaner is the Editor-in-Chief of the *Texas Employment Law Desk Reference*, 4th Edition.

### Selected Client Representations

Mr. Schaner has successfully tried cases for employers in both Federal and Texas courts, including:

- Obtained numerous temporary restraining orders and injunctions for clients in non-competition agreement, unfair competition, trade secret, Computer Fraud Abuse Act, and inevitable disclosure cases.
- Obtained a defense jury verdict for an oil and gas employer in a Texas state court, class action case in which the class plaintiffs sought $10 million in actual damages and $20 million in punitive damages. A Texas appeals court affirmed the defense verdict.
- Defended class action employment discrimination and employee benefits lawsuits by preventing class certification and obtaining summary judgment on the merits. Several of the class actions sought nationwide class certification for thousands of putative plaintiffs.
- Obtained jury verdicts for banking institutions, energy companies, and other employers on the merits of employee discrimination/wrongful discharge claims.

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## I. SCOPE OF ARTICLE

At almost anytime, you can click on the Equal Employment Opportunity Commission (EEOC) website and read headlines about employers doling out big bucks to settle sex harassment lawsuits. For example, in November 2009, the headlines read: "Cheesecake Factory Settles EEOC Suit in Case of Severe Same-Sex Sexual Harassment" and "Regal Entertainment Group to Pay $175,000 for Sex Harassment of Man by Female Co-Worker."

Indeed, in August 2009, Lowe's Home Improvement Warehouse, Inc. was accused of allowing sexual harassment to run "rampant" in Washington State. Lowe's agreed to pay $1.72 million in settlement to three employees after the EEOC alleged that Lowe's store managers actively engaged in and encouraged sexual harassment of male and female employees and then retaliated against the employees when they objected to the unlawful treatment. When asked about the settlement, the EEOC Acting Chairman stated, "Corporate America should be on notice that sexual harassment and retaliation will not be tolerated by the EEOC."

And during turbulent economic times, it is no secret that the number of discrimination and harassment claims increases exponentially. More people are not only out of work, but they are also financially motivated to explore their legal options. The EEOC Charge Statistics for 2008 are in and, unfortunately, the news is bleak. Private sector sexual harassment filings with the EEOC in 2008 (32,535) surpassed 2007 (27,112) by a whopping 16% - the biggest jump in the EEOC's entire 44-year history. What's more, these numbers do not reflect the further deterioration in the economy during 2009. Now, more than ever, employers must continue to adopt, implement and enforce appropriate measures to prohibit workplace sexual harassment.

Unfortunately, the definition of what constitutes "sexual harassment" continues to evolve. With Americans spending more time at work, the potential for intimate co-worker relationships continues to grow. As these relationships blossom, they also wither, leading to more harassment complaints. The shifting definition of "acceptable" workplace discussion and conduct, mixed with a culture that markets sexuality, contributes to the confusion among co-workers and will likely promote harassment claims.

Given the evolving legal concepts underlying workplace harassment law, this paper analyzes:

- The Supreme Court's liability standard for supervisory harassment and appropriate measures an employer *must* take to implement an effective anti-harassment system;

- What conduct constitutes an "objectively" hostile work environment under Supreme Court precedent;

- New issues arising from same-sex harassment claims;

- The numerous forms of sexual harassment outside the context of sexually intimate overtures;

- Whether an isolated incident can ever constitute sexual harassment;

- Off-site sexual harassment, third party conduct, and the new wave of Internet, text messaging and e-mail harassment.

## II. THE TRADITIONAL SEXUAL HARASSMENT APPROACH: *QUID PRO QUO* VERSUS "HOSTILE WORK ENVIRONMENT"

Sexual harassment claims have developed under two distinct theories: *quid pro quo* and "hostile work environment." *Quid pro quo* sexual harassment evolved first and is a Latin phrase used to describe those situations in which an employee must choose between submission to sexual demands and losing (or at least not receiving) job benefits, promotions or employment. In short, the employee suffers an adverse employment consequence *because* of the harassment. To prove a *quid pro quo* case, an employee must demonstrate:

- Membership in a protected class. Women and men are protected under Title VII against employment discrimination on the basis of gender;

- Exposure to unwelcome sexual harassment: advances, requests for favors, and other verbal or physical conduct of a sexual nature, which were unsolicited and undesirable or offensive to the employee;

- The harassment was based on sex. If it were not for the employee's sex, the employee would not have been the object of harassment; and

- Reaction to the harassment affected tangible aspects of the employee's compensation or other terms and conditions of employment.

The second category of sexual harassment claims is more complex and is known as a hostile or offensive work environment claim. Years ago, the courts ruled that employers have a duty to provide a "safe" work environment. A sexually hostile workplace is not a "safe" one – a work environment tolerant of sexual harassment is discriminatory and, therefore, prohibited by Title VII. Hostile work environment cases often begin with a resignation followed by a claim of constructive discharge.

Moreover, hostile work environment sexual harassment may take on a wide variety of forms including, without limitation, physical, verbal, visual, and even virtual (email, Internet, texting) harassment. Some of the factors courts consider when evaluating these claims are:

- Was the conduct complained of verbal, physical or both?;

- How frequently was it repeated?;

- Was the conduct "hostile" or "patently offensive?";
- Was the alleged harasser a coworker or a supervisor?;
- Did others join in perpetrating the harassment?; and
- Was the harassment directed at more than one individual?

## III. THE SUPREME COURT'S LIABILITY STANDARD FOR SUPERVISORY SEXUAL HARASSMENT

In the summer of 1998, the U.S. Supreme Court clarified and dramatically changed the scope of employer liability in supervisory sexual harassment cases. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). These cases presented two pivotal questions: (i) under Title VII, when is an employer liable for a supervisor's alleged sexual harassment?; and (ii) what standard of liability applies in Title VII harassment cases – strict liability or liability subject to an employer's defense?

*The Faragher Facts*

*Faragher* involved a lifeguard who alleged that her supervisors subjected her to offensive and uninvited touching and sexually-related comments. While attending college, Beth Ann Faragher worked as an ocean lifeguard for the City of Boca Raton, Florida. She alleged that two male supervisors created a sexually hostile atmosphere by touching female employees, making demeaning references to women, and propositioning female lifeguards for sexual favors. Faragher and other female employees spoke to a third "friend-supervisor" about the other supervisors' behavior. The friend-supervisor, however, did not report the complaints to any city official. Two months before Faragher resigned in June 1990, a former lifeguard wrote to the city's personnel director complaining that the two supervisors had been harassing female lifeguards. The city investigated the complaint and ultimately reprimanded the two men for improper behavior. After Faragher resigned, she sued both supervisors and the city for sexual harassment.

*The Ellerth Facts*

In *Ellerth*, Kimberly Ellerth also alleged that her supervisor had made sexually offensive comments toward her. In a factual twist distinguishing Ellerth's claim from Faragher's, a supervisor supposedly *threatened* to deny Ellerth tangible job benefits if she did not succumb to his advances. On one occasion, the supervisor told Ellerth to "loosen up" and that he "could make [her] life very hard or very easy at Burlington." The supervisor, however, did not carry out the threats and Ellerth did not lose any tangible job benefits. The supervisor even gave Ellerth a promotion, but he qualified the announcement by telling her that "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." Ellerth finally quit her job, yet never told anyone in authority about the alleged harassment until three weeks after leaving Burlington. She then sued the company for engaging in sexual harassment and forcing her constructive discharge.

*The Liability Standard*

Analyzing these cases together, the Court developed a new liability standard in supervisor sexual harassment cases. The Court concluded that when a supervisor has taken a tangible employment action, namely, the classic *quid pro quo* case, the employer is strictly liable. Absent any tangible employment action, the employer is *subject to* liability for the supervisor's harassing conduct, but the employer can rebut the liability presumption with an affirmative defense. This defense is in large part based on the existence and effectiveness of an employer's sexual harassment prevention system, including its policies, procedures, and employee training programs. These cases do not modify the "negligence" liability standard in nonsupervisory, coworker sexual harassment cases – the harassment plaintiff must still prove that the employer knew or should have known of the harassment and failed to take prompt remedial action.

*Tangible Action Cases*

Under traditional sexual harassment analysis, employment law practitioners and human resource professionals reviewed harassment allegations within the so-called, black and white categories of *quid pro quo* or hostile work environment. As harassment law evolved, however, the line between these traditional harassment categories blurred. Recognizing this gray area, the *Faragher* and *Ellerth* courts concluded that *liability* for sexual harassment is no longer determined by a simple label, namely, whether the factual allegations fit snugly within the *quid pro quo* or hostile work environment category.

*Quid pro quo* denotes those cases involving a *tangible* employment action. The obvious example: Supervisor John demotes subordinate Mary because she refuses to sleep with him. In the Court's words, tangible employment actions, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits "become, for Title VII purposes, the act of the employer." The supervisor's tangible employment action is considered the *employer's* action, similar to a case in which a supervisor discharges an employee because of his race. The company may not have known or had reason to know about the particular supervisor's race discrimination, but it is nevertheless liable for the supervisor's act. None of this is surprising – the Supreme Court reaffirmed the well-established principle that an employer is strictly liable when a supervisor takes a tangible employment action against a subordinate employee. The real debate focuses on what conduct constitutes a "tangible" employment action. Expect plaintiff's attorneys to try to fit their fact patterns under the rubric of a "tangible" action.

*No Tangible Employment Action -- The Employer's Two-Part Defense*

In cases involving the absence of a tangible employment action, the harassment plaintiff initially must prove that an immediate (or successively higher) supervisor's unwelcome sexual behavior was either pervasive or severe enough to create an objectively abusive work environment. Given the lower courts' widely divergent views about employer liability for a supervisor's harassment in the "hostile work environment" context, the Supreme Court adopted a "brighter line," burden-shifting test. First, absent a tangible employment action, if the supervisor

creates a hostile work environment, then the employer is subject to liability for the supervisor's conduct. Second, the employer's liability is subject to an affirmative defense. This means that an employer is subject to an initial *presumption of liability* for the supervisor's abusive conduct, but the employer may defend against or rebut the liability presumption. The affirmative defense has two parts: (i) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; *and* (ii) the employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the employer or to avoid harm otherwise. The employer must satisfy both parts to prevail under the "reasonable care" defense.

The first part of the defense focuses on the employer's anti-harassment "system" to prevent and remedy sexual harassment. The second part focuses on the harassment plaintiff's purported failure to use her employer's existing policies and procedures to allow the employer to investigate and take prompt remedial action in response to the alleged harassment. In its two opinions, the Supreme Court offered little guidance about the particular elements of an effective sexual harassment prevention system that would satisfy part one of the defense. The dissenting opinion predicted that the inherent vagueness of the two-part defense would lead to substantial litigation over what constitutes an "effective" anti-sexual harassment system to satisfy the defense. That prediction proved to be true.

## IV. NEW ISSUES IN LIGHT OF *FARAGHER* AND *ELLERTH*

Both *Faragher* and *Ellerth* clarify the liability standard for supervisory harassment; however, these cases and their progeny have raised several additional issues that the lower courts have struggled to address.

### A. What is a "Tangible Employment Action"?

While fundamental employment actions, such as hiring, discharging, refusing to promote, and reassigning someone to a position with substantially different responsibilities, constitute tangible employment actions, other employment decisions fall within a gray area. For example, the Supreme Court has opined that no employer defense is available when the harassment ends in an "undesirable reassignment." The Court uses this term to exemplify a tangible employment action, yet fails to define the boundaries of the word "undesirable." What constitutes an undesirable reassignment? Since the court decided *Ellerth* and *Faragher*, lower courts have grappled with the meaning of "tangible employment action" and have reached varying results. Nevertheless, courts consistently have focused on one pivotal factor to determine if an employer's action is a tangible one: significant economic harm to the employee.

For example, in *Pueschel v. Slater*, No. 97-2503, 1999 U.S. App. LEXIS 2467 (4th Cir. Feb. 18, 1999), Pueschel, an air traffic controller, alleged that the Federal Aviation Administration ("FAA") discriminated against her because of her sex and an asthmatic disability by proposing a change in her work schedule. Asserting that her supervisor discriminated against her, Pueschel claimed that the FAA destroyed her personnel record and interfered with her ability to file a claim with the Office of Workers' Compensation Programs. The district court granted summary judgment for the defendant and the Fourth Circuit Court of Appeals affirmed. The circuit court held that the FAA's actions did not rise to the level of a tangible employment

action as contemplated in *Ellerth* and *Faragher*. The evidence revealed that the FAA did not destroy Pueschel's personnel records and never obstructed her ability to file any claims. Moreover, the appeals court reasoned that an unrealized proposal for a new work schedule was neither a significant change in employment status, nor an adverse employment action.[1]

Likewise, in *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54 (2d Cir. 2004), the Second Circuit Court of Appeals held that an unexpected reduction in hours promised, disciplinary notice, and being called back early from vacation did not constitute a tangible employment action. Jessica Mormol, a part-time employee in Costco's Bakery Department, alleged that Ziermann, her department manager, sexually harassed her. First, according to Mormol, Ziermann told her that he would not approve her vacation request if she did not have sex with him. Second, Mormol insisted that Ziermann phoned her while she was on unpaid vacation in Santo Domingo and told her to return to work earlier than she had planned or risk losing her job. Third, Ziermann again asked Mormol to have sex with him and, when she refused, reduced her schedule from the seven (7) days he had originally promised to only three (3) days. Finally, Ziermann supposedly "wrote up" Mormol for being five minutes late from a break, stating that the "next writeup will result in suspension and or termination."

The appeals court observed that these actions did not cause Mormol to suffer a significant change in employment status. Mormol conceded that the disciplinary notice did not result in any further consequences to her and was not valid under Costco policy because it did not contain the signature of a General Manager or Assistant General Manager. In turn, Ziermann's decision to call Mormol back from a month-long unpaid vacation did not result in a significant change in benefits. Moreover, the reduction in promised hours, in relation to her typically scheduled hours, did not result in any economic harm. Accordingly, whether taken singly or in combination, these actions did not rise to the level of a "significant change in employment status," as described by the Supreme Court in *Ellerth*.

If, however, an employer removes negotiated conditions of employment, that action may be a "tangible" one. *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) presented just such a case. Evans worked as a successful life insurance salesperson with Metropolitan Life Insurance Company. Durham Life Insurance Company lured her away from Metropolitan. In negotiating her employment terms, Durham gave Evans an office and a secretary. During the first two years of her employment, Evans was more successful than she had been at Metropolitan. Evans asserted that when new management took over Durham, the company resented her success because she was a woman. The new Durham managers began to harass her and took exception to her receiving special treatment – she had her own office and

[1] *See also Spencer v. Commonwealth Edison Co.*, No. 97 C 7718, 1999 U.S. Dist. LEXIS 261 (N.D. Ill. Jan. 5, 1999). In *Spencer*, the court concluded that an alleged failure to grant short term assignments and training does not constitute a tangible employment action. Spencer, a female technician at a nuclear power plant, maintained that her employer refused to grant her request for short-term work in a specific area, while granting her male counterparts' requests. Spencer also complained that male technicians with less seniority received specialized training that she did not receive. After filing her sex discrimination suit, Spencer asserted that denying her training and work assignments constituted tangible employment actions. The trial court disagreed. Citing *Ellerth* and the Supreme Court's statement that most tangible employment actions involve direct economic harm, the appeals court held that Spencer could not establish a discrimination case because no tangible adverse employment action existed.

secretary. The managers fired Evans' secretary and assigned her a different type of work that had a severe negative impact on her performance bonuses. Further, the managers told Evans that they had transferred her to a new location. The day after she had cleaned out her office and assembled her files, her supervisor informed her that she would not be leaving. The supervisor also told Evans that she had lost her office, which the managers had turned into a conference room. Evans then discovered that all of her files were missing. She resigned three days later.

Affirming the district court's award of more than $400,000 for lost earnings, fringe benefits and intentional infliction of emotional distress, the Third Circuit held that Durham's conduct constituted a tangible employment action. Reasoning that Evans had demonstrated her need for a secretary and private office to maintain her success level, the appeals court determined that Durham had stripped these negotiated conditions of employment from Evans and that action had affected her earning potential. Further, Evans' missing files prevented her from performing her job duties. The circuit court concluded that "the loss of [her] office, the dismissal of her secretary, the missing files, and the lapsed assignments that led to a fifty percent pay decrease are tangible adverse employment actions under [*Ellerth*] and *Faragher*."

In *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004), the Supreme Court answered the question whether a constructive discharge qualifies as a tangible employment action.[2] Nancy Drew Suders quit her job with the police force after a three month period in which she claimed that three of her supervisors subjected her to continuous sexual comments, gestures and advances. She resigned after being set-up by her supervisors and arrested for stealing. The Supreme Court held for the first time that Title VII includes employer liability for constructive discharge. The Court also concluded that a constructive discharge may constitute a tangible employment action under *Faragher/Ellerth* if an employee shows that "the abusive working environment became so intolerable that her resignation qualified as a fitting response."[3] The Court, however, reasoned that an employer may not invoke the affirmative defense if the offending supervisor's behavior did not involve an "official act" resulting in a change to an employee's employment status or situation. Thus, the Court's ruling in *Suders* only imposes strict liability if a supervisor acts under some agency authority and on behalf of the employer.

Since *Suders*, courts have rarely found tangible employment action liability based on constructive discharges. In *Neely v. McDonald's Corp.*, No. 07-2186, 2009 U.S. App. LEXIS

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[2] Before *Suders*, lower courts reached different conclusions in determining whether a "constructive discharge" constituted a "tangible employment action." *See, e.g., Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587 (D.S.C. 1999) (concluding that no tangible employment action occurred because the employer took no "official action" against employee); *Montero v. AGCO Corp*., 192 F.3d 856 (9th Cir. 1999) (holding that employee failed to establish any tangible employment action when employee resigned three months after the harassment had ended and the harassing supervisor had already been dismissed); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999) (concluding that constructive discharge is not a tangible employment action); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138 (D. Nev. 1999) (noting that constructive discharge is not an action taken by a supervisor). *But see, Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 n.5 (3d Cir. 1999) (recognizing constructive discharge in proper context as a tangible employment action barring *Faragher* defense); *Galloway v. Matagorda County*, 35 F. Supp. 2d 952, 957 (S.D. Tex. 1999) (concluding that constructive discharge qualified as a tangible or adverse employment action).

[3] *Suders*, 124 S. Ct. at 2347.

17747, *9 (3rd Cir. Aug. 10, 2009), for example, the Third Circuit emphasized that for a constructive discharge to constitute a tangible employment action, the plaintiff must show that she resigned based on conduct that constitutes "something more" than a hostile work environment.[4] Courts also focus on whether an employee complained of harassment *before* tendering her resignation. In *Williams v. Barnhill's Buffet, Inc.*, 290 F. App'x 759, 762 (5th Cir. 2008), the Fifth Circuit rejected the plaintiff's constructive discharge claim, despite plaintiff's evidence that she was subjected to sexually charged conduct. In reaching its conclusion, the Fifth Circuit emphasized that the plaintiff did not complain about the alleged conduct until *after* she resigned, giving the employer no opportunity to correct the conduct. The appeals court explained that, "An employee who resigns without affording the employer a reasonable opportunity to address her concerns has not been constructively discharged."

The following chart is a compilation of court decisions that have defined what conduct constitutes a tangible employment action.

| **Tangible Employment Action** ..... ✓ | **No Tangible Employment Action** ..... ✖ |
|---|---|
| Hiring, firing, failing to promote,..... ✓ reassignment with significantly different duties, or a decision causing a significant change in benefits.[5] | Work schedule changes[11]..... ✖<br>Assignment of extra or unpleasant work.[12] ……..... ✖ |
| Being suspended without pay.[6]..... ✓ | Screaming, extending probation or scrutinizing work performance.[13]…..……. ✖ |
| Removing conditions of employment[7]…… ✓ | Failure to grant short term assignments and training.[14] ..... ✖ |
| Demoting an employee or giving the employee an objectively worse transfer.[8]... ✓ | Changes to informal policies, such as |

[4] *See e.g., Aryain v. Wal-Mart Stores Texas LP*, 534 F.3d 473, 480 (5th Cir. 2008); *McCoy v. City of Shreveport*, 492 F. 3d 551, 557 (5th Cir. 2007); *see also Baugham v. Battered Women, Inc.*, 211 F. App'x 432, 440 (6th Cir. 2006) (holding that in addition to a hostile work environment, plaintiffs must show that the working conditions were so intolerable that a reasonable person would have resigned).

[5] Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2268–69 (1998); see Volovsek v. Wis. Dep't of Agr., Trade & Consumer Protect., 344 F.3d 680, 688 (7th Cir. 2003).

[6] *Howington v. Quality Rest. Concepts, LLC*, 298 F. App'x 436, 442–43 (6th Cir. 2008) (finding that sending plaintiff home was a tangible employment action because it caused her to lose compensation from tips); *Schrean v. Chi. Transit Auth.*, No. 97 CV 3455, 1999 WL 977068, at *7 (N.D. Ill. Oct 22, 1999).

[7] *Durham Life Ins. Co. v. Evans*, No. 97-1683, 1999 U.S. App. LEXIS 587 (3rd Cir. Jan. 15, 1999).

[8] *Green v. Adm'rs of the Tulane Educ. Fund*, 285 F.3d 642 (5th Cir. 2002); *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999).

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|---|---|
| Loss of job duties coupled with reduction in pay.[9] ..... ✓<br><br>Shift transfer resulting in pay decrease[10].... ✓ | delegating work assignments.[15] ..... ✖<br><br>Failure to promote to a job which is not available and for which employee is not qualified.[16] …….....✖<br><br>Reassigning to a comparable office on a different floor.[17]……. ✖<br><br>Giving low performance ratings and evaluations.[18] ..... ✖ |

[11] *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54 (2d Cir. 2004); *Watts v. The Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999).

[12] *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 597 (6th Cir. 2009) (holding that requiring plaintiff to pick up trash for a few weeks was not a tangible employment action); *Williams v. Barnhill's Buffet, Inc.*, 290 F. App'x 759, 761–62 (5th Cir.2008) (finding no tangible employment action based on claims that plaintiff was assigned to "the bad sections" of the restaurant); *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172, 175 (4th Cir. 1998).

[13] *Thompson v. Naphcare, Inc.* 117 F. App'x 317 (5th Cir. 2004) (unpublished) (finding no actionable ultimate employment decision when supervisor screamed at employee, extended her probationary period, and subjected employee to increased scrutiny).

[14] *Griffin v. CITGO Petroleum Corp.*, No. 08-31139, 2009 U.S. App. LEXIS 19365, **2-3 (5th Cir. 2009) (holding that denial of training was not a tangible employment action where collective bargaining agreement demonstrated that it was not relevant to promotions); *Shackelford v. DeLoitte & Touche, LLP*, 190 F.3d 398 (5th Cir. 1999) (finding no tangible employment action when employee was denied training peripheral to her main duties); *Spencer v. Commonwealth Edison Co.*, No. 97-7718, 1999 U.S. Dist. LEXIS 261 (N.D. Ill. Jan. 6, 1999).

[9] *Welch v. Jim Aartman, Inc.*, No. 8:06-cv-2100-T-27MSS, 2008 U.S. Dist. LEXIS 29158, **21–22 (M.D. Fla. Apr. 8, 2008) (plaintiff's loss of her cleaning job and accompanying reduction in pay constitutes a tangible employment action).

[10] Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501 (11th Cir. 2000).

[15] *Morris v. Southeastern Pa. Transp. Auth.*, No. 98-3414, 1999 WL 820457, at *3 (E.D. Pa. Sept. 28, 1999) (supervisor forging roll call records and manipulating patrol times in favor of black officers over white officers were changes to informal policies).

[16] *Jordan v. City of Gary*, 396 F.3d 825, 833 (7th Cir. 2005).

[17] *Savino v. C.P. Hall Co.*, 199 F.3d 925 (7th Cir. 1999).

[18] *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1059–60 (10th Cir. 2009) (rejecting plaintiff's claim that she was given lower performance evaluations to groom her for sexual favors and fired when she did not comply); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 597 (6th Cir. 2009) (holding that "write-ups," delay in evaluating plaintiff and low pay raise (which was later reversed) were

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| | Snide remarks or unfulfilled threats of tangible employment actions.[19]……. ✖<br><br>Meeting with management which results in an alleged reprimand.[20] ..... ✖ |

### B. Does Strict Liability Apply to High Level Executives?

In addition to the strict liability imposed on a company for tangible employment action harassment, several courts have held that an employer may be strictly liable for a supervisor's hostile environment sexual harassment if the employee-supervisor is sufficiently high in the organizational chain to be considered the "proxy" for the organization. In *Ackel v. National Communications, Inc.*, 339 F.3d 376 (5th Cir. 2003), the Fifth Circuit Court of Appeals concluded that a fact issue existed whether the employer, National Communications, could assert the *Faragher/Ellerth* affirmative defense based on the sexually harassing conduct of its President, Hardesty. Citing *Johnson v. West*, 218 F.3d 725–30 (7th Cir. 2000), the Fifth Circuit explained that an employer is vicariously liable for an employee's hostile environment activities in two situations: (i) the existence of a tangible employment action; *or* (ii) the harassing employee is a proxy for the employer.

Eschewing any bright line definition of a "proxy" supervisor or executive, the Fifth Circuit concluded that at least a fact question existed whether Hardesty was within the class of National Communications' officials who could be treated as the organization's proxy, such that Hardesty's actions were imputable to National Communications and the *Faragher/Ellerth* affirmative defenses would be unavailable. In reaching its conclusion that summary judgment was inappropriate on the "proxy" issue, the appeals court emphasized that Hardesty was in charge of all aspects of the company's business, and National Communications had presented no evidence that anyone within the company exercised control over Hardesty. Simply because the Board of Directors could remove the President did not negate Hardesty's possible proxy status; the Board could remove any corporate officer. Finally, the appeals court determined that a fact

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not tangible employment actions); *Silk v. City of Chicago*, 194 F.3d 788, 802–03 (7th Cir. 1999); *Jones v. Wright State Uni.*, 194 F.3d 1312 (6th Cir. 1999).

[19] *Anderson v. Family Dollar Stores of Ark, Inc.*, 579 F.3d 858, 863 (8th Cir. 2009) (supervisor's threat that he could "make or break" plaintiff was not a tangible employment action because it was not followed by an adverse employment action); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 597 (6th Cir. 2009) (holding that statements that plaintiff stole medicine and recommendation to Board that plaintiff be placed on probation (which did not occur) were not tangible employment actions); *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1183, *amended* by 433 F.3d 672 (9th Cir. Jan. 6, 2006) and 436 F.3d 1050 (9th Cir. Feb. 8, 2006).

[20] *Johnson v. E.A. Miller, Inc.*, No. 97-4200, 1999 WL 94827, at *2 (10th Cir. Feb 25, 1999).

issue was presented even though Hardesty owned only 2% of the company's stock and consulted with the company's outside CPA before awarding raises to employees.[21]

Under the *Ackel* analysis, employer-side counsel can expect plaintiffs' attorneys to attempt to shoehorn supervisory harassment cases within the "proxy" liability theory. This would allow the employee-plaintiff to defeat the employer's affirmative defense under *Faragher/Ellerth*.

### C. Who is a Supervisor?

In *Ellerth* and *Faragher*, the U.S. Supreme Court did not answer the question, "who is a supervisor?," other than to state that an employer may be vicariously liable for a hostile work environment created by a supervisor with immediate (or successively higher) authority over the harassed employee. The circuit courts have since grappled with defining what factual pattern will support a finding that an individual is a supervisor. In general, the majority of courts have held that, to be a supervisor, the alleged harasser must possess the power (it is not necessary to exercise the power) to take tangible employment actions against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.[22] The Fifth Circuit appears to have resolved this issue in *Wooten v. Federal Express Corp.*, No. 07-10555, 325 F. App'x 297 (5th Cir. 2009), holding that a co-worker must have the power to directly affect the terms and conditions of the plaintiff's employment, such as the authority to discipline or evaluate performance.

Likewise, in *Hall v. Bodine Electric Co.*, 276 F.3d 345, 355 (7th Cir. 2002) and *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998), the Seventh Circuit held an employee must have the authority to directly affect the terms and conditions of the plaintiff's employment in order to qualify as a supervisor and render the employer vicariously liable for the employee's harassing conduct. According to the Seventh Circuit, the authority to merely oversee the plaintiff's work will not satisfy this narrow definition.[23] By contrast, the Second Circuit adopted a broader standard in *Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (2d Cir. 2003), concluding that a supervisor is someone with "authority to direct the employee's daily work activities," even if he otherwise lacked the power to take a tangible employment action against the victim.[24]

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[21] 339 F.3d at 384.

[22] *See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004); *Hall v. Bodine Elec. Co*., 276 F.3d 345, 355 (7th Cir. 2002); *Mikels v. City of Durham*, 183 F.3d 323, 333–34 (4th Cir. 1999).

[23] *See also Noviello v. City of Boston*, 398 F.3d 76, 95 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004); *Mikels v. City of Durham*, 183 F.3d 323, 333–34 (4th Cir. 1999).

[24] *See also Kent v. Henderson*, 77 F. Supp. 2d 628, 634 (E.D. Pa. 1999) (considering whether the employee had the authority to "affect [the plaintiff's] daily work activities" in determining whether the employee could be considered the plaintiff's supervisor); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) (ruling an employee is a supervisor when the employee has "actual authority to take tangible employment actions, or to recommend tangible employment actions if his [or her] recommendations are given substantial weight by the final decision-maker, or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or

### D. Is an Employer's Prompt Remedial Action Still a Defense in Supervisory Harassment Cases?

*Faragher* and *Ellerth* arguably did not abrogate the prompt and effective remedial action defense in a supervisory, no tangible employment action case. In prompt "complaint"/prompt action cases, namely, those in which the harassment plaintiff promptly complains to management, an employer's immediate and appropriate remedial action should negate a liability finding. For example, in *McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004), an employer was not found liable even if it could not prove the second prong of *Faragher* affirmative defense, namely, the employee's unreasonable failure to complain. In its opinion, the Eighth Circuit Court of Appeals held that the employer's prompt remedial action in this one-incident sexual harassment case satisfied the underlying theme of Title VII to nip sexual harassment in the bud. *Id*. at 772.[25]

Nevertheless, in non-single incident sexual harassment cases, other courts have concluded that an employer must establish *both* parts of the *Faragher* affirmative defense to negate a liability finding.[26] Under this analysis, even if an employee has promptly complained about an alleged harassment incident, and the employer swiftly takes remedial action, the employer loses on the affirmative defense because the employee took reasonable steps to complain and, therefore, the employer cannot establish the second part of the affirmative defense. Indeed, the Fifth Circuit Court of Appeals attached a "Supervisor Sexual Harassment Road Map" to its opinion in *Casiano v. AT & T Corp*., 213 F.3d 278 (5th Cir. 2000), which establishes conclusively that the employer must satisfy *both* parts of the *Faragher* affirmative defense to negate a liability finding. This "road map" takes the employer through the two-step affirmative defense, and then draws a line out of the box containing the affirmative defense to

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undesirable tasks."); *Anderson v. Ultraviolet Sys., Inc.*, 2005 WL 1840155, *7 (S.D. Tex. 2005) (ruling that employee was not plaintiff's "supervisor" because he did not supervise plaintiff's daily activities or direct her work assignments).

[25] *See also Pomales v. Celulares Telefónica Inc*., 447 F.3d 79 (1st Cir. 2006) (noting that although plaintiff failed to establish a *prima facie* case of sexual harassment based on single incident, the employer might have established an affirmative defense simply by showing that it had an anti-harassment policy and complaint procedure in place and the plaintiff failed to use it). Moreover, in *Becker v. Saber Mgmt-Kentucky, LLC*, No. 2009 CA-000089-MR, 2009 WL 4060859 (Ky. App. Nov. 25, 2009), the Kentucky Court of Appeals reasoned: "This situation is not one of long-term sexual harassment that was either unreported despite the existence of a complaint procedure, or implicitly ignored by the turning of a blind eye by low-level managers or supervisors." Instead, this situation was one of short duration that the employer immediately addressed. Accordingly, the Kentucky appeals court concluded that the employee unreasonably failed to take advantage of the preventative opportunities the employer offered or to avoid harm otherwise.

[26] *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001) (holding that it is not enough that the employer responded promptly to the employee's complaint, disciplined appropriately, and stopped the harassment because the *Faragher* affirmative defense also requires that the employee acted unreasonably in failing to take advantage of corrective opportunities).

two boxes that illustrate the only possible results: (1) "If yes to *both steps*, then no Title VII liability," or (2) "If no to *either step*, then the employer is vicariously liable for the supervisor's harassment." (emphasis added).[27]

### E. Has The Supreme Court Raised The Bar On What Conduct Constitutes Sexual Harassment?

The line often blurs between what constitutes an actionable sexual harassment claim based on a hostile work environment and what amounts to stray, innocuous comments or behavior that may be inappropriate, but not severe enough to warrant a lawsuit. To establish a hostile work environment, a plaintiff must prove that the sexual harassment was so severe or pervasive that it altered the conditions of employment and created an objectively hostile working environment. *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1000 (1998). In determining whether a plaintiff has established the existence of an objectively hostile work environment, courts look to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.* 114 S. Ct. 367, 368 (1993). If the conduct is not severe or pervasive enough to create an objectively hostile or abusive environment, then no actionable sexual harassment has occurred.

Title VII only prohibits behavior so objectively offensive that it alters the conditions of the victim's employment. In *Oncale*, the Supreme Court admonished the lower courts to review "all the circumstances" to determine whether the conduct is so objectively offensive that it alters the plaintiff's conditions of employment. According to the *Oncale* Court, merely looking at the words used or physical acts performed does not reflect an accurate image, unless viewed in context and against the social backdrop of the surrounding circumstances, expectations and relationships that comprise workplace behavior.

Plainly, the Supreme Court created a more rigorous liability standard in hostile work environment harassment cases, but the Court's *Ellerth*/*Faragher* opinions contain a silver lining for employers. In *Faragher*, the Court described the standards for judging hostile work environment as "demanding," concluding that Title VII is not a "general civility code," and only "extreme" conduct will alter the conditions of employment to create a hostile work environment. Accordingly, the Court raised the bar in determining what conduct is sufficiently severe or pervasive to entitle a plaintiff to a jury trial. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1989) (stating that vulgar remarks and innuendos made by a supervisor on four occasions "were no more offensive than sexual jokes regularly told on major network television programs" and likely did not support a sexually hostile work environment).

Lower courts applying *Faragher* are heeding the high court's pronouncements. For instance, in *Hockman v. Westward Communications*, 407 F.3d 317 (5th Cir. 2004), the Fifth Circuit found the following conduct insufficient to establish severe or pervasive conduct under Title VII: (1) making a remark to plaintiff about another employee's body; (2) once slapping her

[27] As a practical matter, when an employee promptly or immediately complains about alleged harassment, and the employer takes prompt remedial action, the alleged harassment, in most cases, will not rise to the level of an actionable hostile work environment.

on the behind with a newspaper; (3) grabbing and pushing against her breasts and behind; (4) once holding her cheeks and trying to kiss her; (5) asking her to come to the office early so they could be alone; and (6) once standing in the door of the bathroom while she was washing her hands. [28] The appellate court reasoned that the comments were boorish and offensive, but not severe, that the newspaper slap was "simple teasing," and that the attempted kiss and bathroom incident were isolated incidents that were not serious. The appeals court also concluded that the grabbing and touching of the plaintiff's breasts and behind were not severe because the plaintiff could not recall how many times it happened.

Similarly, some touching and rubbing, when accompanied with offensive statements, also failed to constitute an objectively hostile harassment as a matter of law in *Anderson v. Family Dollar Stores of Arkansas, Inc.*, 579 F.3d 858 (8th Cir. 2009). Andrea Anderson brought an action against her former employer, Family Dollar, alleging that her supervisor sexually harassed her. Family Dollar originally hired Anderson as a manager trainee under Sherry Smith. Smith terminated Anderson after only one work day. Anderson complained and was interviewed by Drew White, the district manager. Anderson alleged that during the interview, White's conversation was too personal – he discussed her hair, eyes, and marital status, and mentioned that his wife was sick. White rehired Anderson and placed her in a five-week training program. During this training period, White would see Anderson once a week for a one-hour testing period. During this time, White would rub her shoulders, back or hand until she asked him to stop and, on one occasion, he cupped her chin in his hand in a "flirtatious" manner. He also told her, "You know, how far do you want to go in this company, because it's me that makes you be here anyway . . . I can make or break you."

After her training period, Anderson became a manager and reported to White. According to Anderson, White told her she that she should be with him in bed at his hotel room in Florida drinking a Mai Tai. He also called her "baby doll" and "honey." When Anderson complained that her back was sore after unloading a heavy truckload, White grabbed her arm, pulled her into the storeroom and said, "[N]ow you're telling me your back is hurt? . . .[Y]ou're just nothing but trouble. You're just not going to be one of my girls, are you." He then terminated her employment. The court held that the back rubs, pet names, one-time long-distance suggestion to join him in bed, and insinuations that he would go farther in the company

[28] *See also Scruggs v. Garst Seed Co.*, No. 07-2266, 2009 WL 3878242 (7th Cir. Nov. 20, 2009) (holding that inappropriate comments such as that the employee was "made for the back seat of a car" or looked like a "dyke" did not rise to level of hostile work environment under Title VII); *Burnett v. Tyco Corp.*, 203 F.3d 980 (6th Cir. 2000) (rejecting sexual harassment claim based on three incidents of misconduct by plaintiff Burnett's supervisor: (i) placing a cigarette pack with a lighter inside of Burnett's tank top and bra; (ii) stating when giving Burnett a cough drop, "since you have lost your cherry, here's one to replace the one you lost"; and (iii) commenting about Burnett's "deck the malls" holiday sweatshirt, "dick the malls, dick the malls, I almost got aroused."); *Stevens-Smith v. Geico Ins.*, No. 3-99-CV-1020, 1999 WL 997920, at *3 (N.D. Tex. Nov. 3, 1999) (comments made to plaintiff, Stevens-Smith, that she was a dumb blond, and a co-worker placing his arm around her shoulder and stating "they tell me that this is sexual harassment, and they told me to stop it, but I don't care what they say, I'm just going to keep on doing it," were merely tasteless and improper, not sexually suggestive); *Penry v. Fed. Home Loan Bank*, 155 F.3d 1257 (10th Cir. 1998) (holding that four specific acts of unwanted touching, a gender-based comment about a female employee's "drawers." a comment that a mall roof resembled a woman's breast, and taking the female employee to a business dinner at Hooter's did not constitute actionable sexual harassment).

if she got along with him were not severe or pervasive enough to have altered a term, condition or privilege of her employment.[29]

The Fifth Circuit also applied a rigorous hostile environment analysis in *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871 (5th Cir. 1999). Debra Jean Shepherd brought an action against the Comptroller of Public Accounts for the State of Texas, alleging that for two years, a co-worker, Jodie Moore, sexually harassed her. On one occasion, Moore stood in front of Shepherd's desk and remarked, "your elbows are the same color as your nipples." Shepherd further testified that Moore remarked "you have big thighs," while he simulated looking under her dress. According to Shepherd, Moore touched her arm several times, and rubbed one of his hands from her shoulder down to her wrist while standing beside her. Finally, on two different occasions when Shepherd was looking for a seat when coming into the office late for a meeting, Moore patted his lap and stated, "here's your seat."

The appeals court agreed with Shepherd that these comments were "boorish and offensive." In the court's view, however, the comments were not objectively severe. Rather, the circuit court determined that Moore's statements were the equivalent of mere utterances engendering offensive feelings, not actionable harassment. Similarly, the touching incidents, while occurring over a period of time, were not sufficiently severe to constitute harassment -- none of these incidents physically threatened Shepherd, interfered with her work, or undermined her workplace competence.

Likewise, in *Butler v. Ysleta Independent School District*, 161 F.3d 263 (5th Cir. 1998), the Fifth Circuit concluded that two school teachers who had received anonymous, harassing letters at home from their principal had not been subjected to a hostile work environment. The letters criticized the teachers' dress, talked about their romantic life, and one letter had a picture of naked women. Some of the letters had a sexual content, but the appeals court ruled that in view of the entire context, the letters did not create an abusive work environment. According to the appeals court, the letters were infrequent, the conduct was less severe because it was not done publicly, and the statements were not threatening. The appeals court also noted that the teachers received the letters at home and the correspondence would not unreasonably interfere with a person's work performance. Finally, the appeals court reasoned that the principal's conduct did not undermine the teachers' workplace competence and, thus, could not constitute sexual harassment.

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[29] *See also Devin v. Schwan's Home Serv., Inc.*, 491 F.3d 778, 788 (8th Cir. 2007*); Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004) (holding that repeated requests for dates and late night phone calls by the station manager that made a subordinate uncomfortable were immature and unprofessional, but not actionable under Title VII); *Erenberg v. Methodist Hosp.*, 357 F.3d 787, 792–93 (8th Cir. 2004) (holding that back rubs and sexual jokes in the workplace in the moderate amounts alleged were not actionable as sexual harassment). *But cf. Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761–62 (8th Cir. 1998) (holding a borderline prima facie case was made where a supervisor had asked the plaintiff about a coworker's penis size, told the plaintiff she looked better than other women in her uniform, and often told her she smelled good, patted her on the back, or brushed up against her during the plaintiff's 2 1/2 years of employment).

The Fifth Circuit, however, in *Lauderdale v. Texas Department of Criminal Justice Institutional Division.*, 512 F.3d 157, 164 (5th Cir. 2007), concluded that ten to fifteen nightly phone calls for nearly four months from the plaintiff's supervisor amounted to pervasive harassment. According to the appeals court, though each phone call may not have carried sexual overtones, the frequency of unwanted attention amounted to pervasive harassment. Given the pervasiveness, the level of severity necessary to establish an altered work environment was diminished and the supervisor's invitation to "snuggle" in Las Vegas, the physical act of pulling the plaintiff into the his body, and the repeated requests to get coffee after work satisfied the hostile environment "pervasive *or* severe" prima facie element.[30]

Nevertheless, even constant inappropriate behavior, if insufficiently sexual in nature, will not support a finding that the behavior objectively altered an employee's terms and conditions of employment. For example, in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (en banc), Red Mendoza complained that her supervisor in a milk processing plant constantly watched and followed her, looking at her "up and down" and, on two instances, "looked me up and down and stopped in my groin area and made a sniffing motion." Given the normal office interaction among employees, the Eleventh Circuit reasoned that the following, staring, and sniffing were not severe or physically threatening. The appeals court also reasoned that the conduct did not unreasonably interfere with Mendoza's performance even though constant and frequent.

Similarly, Texas state courts have applied a demanding standard in hostile work environment cases. In *Cox & Smith Inc. v. Cook*, 974 S.W.2d 217 (Tex. App.—San Antonio 1998, pet. denied), for example, a Texas appellate court held that five incidents of offensive and sexually-charged behavior did not constitute sexual harassment. Cook, a former law firm employee, sued the firm after her employment was terminated because of personality conflicts with her supervisor. She claimed that the supervisor had sexually harassed her on five occasions. The supervisor had told Cook that she should quit her job and work for the Clinton campaign and that she resembled Hillary Clinton. The supervisor also told an offensive joke at a wedding and made an inappropriate comment in a social setting at a bar. Finally, the supervisor stated in a legal newsletter profile that what he disliked in people the most was a "bitchy attitude."

The appeals court held that these alleged events did not support a jury's finding of a hostile work environment; Cook's belief that the supervisor had engaged in sexual harassment was not objectively reasonable. According to the court, the references to Hillary Clinton and the Clinton campaign would not lead a person to perceive in good faith that she had been harassed. The court noted that the joke and bar comment were made outside the work setting and would not support a sexual harassment claim even though the comments were sexual in nature. In turn, the court concluded that the newsletter comment was not directed toward the plaintiff and was not sexual in nature. *See also Garcia v. Schwab*, 967 S.W.2d 883 (Tex. App.—Corpus Christi

[30] *See also Harvill v. Westward Commc'ns*, 433 F.3d 428 (5th Cir. 2005) (fact issue raised on severe or pervasive element of hostile work environment claim); *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998) (holding that allegations that a male officer conducted inspections of plaintiff's body, commented on how she looked in different outfits, touched her body, pulled her hair, stuck his tongue in her ear, whistled and purred at her, and tried to look up her skirts and down her shirts over 18 month period raised a fact issue on the severe or pervasive element of her hostile work environment claim).

1998, no writ) (affirming summary judgment in favor of the employer on a hostile work environment claim even though the company president allegedly: (i) looked at and commented about plaintiff's breasts; (ii) touched his genitals; (iii) discussed sex with plaintiff; (iv) made comments about other females' appearances; and (v) made sexual references with the intent to sexually arouse plaintiff).

While some courts have applied a more rigorous hostile work environment standard after *Faragher*, others have not. In *Rorie v. UPS*, 151 F.3d 757 (8th Cir. 1998), for instance, the Eighth Circuit reversed a lower court's decision dismissing an employee's hostile work environment claim. Rorie, a UPS driver, claimed that a supervisor sexually harassed her by patting her on the back, brushing up against her, and telling her she smelled good. The court observed: "While we concede that the facts of this case are on the borderline of those sufficient to support a claim of sexual harassment, we cannot say that [the supervisor's actions] do not constitute sexual harassment as a matter of law."[31]

Likewise, the Austin Court of Appeals, applying a less demanding standard, upheld a jury verdict on an employee's sexual harassment claim against Wal-Mart. *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30 (Tex. App.—Austin 1998, pet. denied). The jury awarded Wendy Davis $712,000 after finding that her supervisor, Thomas Patterson, had created a sexually hostile work environment. When Davis worked at Wal-Mart, Patterson made inappropriate comments about how she looked and would find reasons for her to climb a ladder on days when she wore a dress. Additionally, the supervisor held her knees together by grabbing her upper thighs on two occasions of employee performance counseling. Wal-Mart eventually transferred Patterson to another store, but did not train him on sexual harassment or note in his file that Wal-Mart moved him based on Davis' claims.

On appeal, Wal-Mart maintained that no harassment had occurred and it had taken prompt remedial action against Patterson. The appeals court upheld the jury's finding that the supervisor's conduct had a severe impact on Davis and constituted sexual harassment. The appeals court also concluded that Wal-Mart's action in response to Davis' complaint was insufficient. According to the appeals court, the store did not follow its own policies and procedures in dealing with Patterson, Wal-Mart did not counsel or discipline him, and his transfer resulted in a salary increase. The appeals court reasoned: "Wal-Mart's failure to enter a written reprimand in Patterson's file and its violation of its own coaching and promotion policies suggests that Patterson's transfer to San Antonio was not a disciplinary measure at all."

In summary, despite the U. S. Supreme Court's attempts to draw bright lines and clear up the "sexual harassment" confusion, both the lower courts and employers continue to struggle with hostile work environment or no tangible employment action claims. A statement one person considers a compliment or humorous may be offensive to another and could lead to a harassment complaint. As the post-*Faragher* decisions demonstrate, no clear-cut formula exists

[31] *Howington v. Quality Rest. Concepts, LLC*., 298 F. App'x 436 (6th Cir. 2008) (reversing lower court's decision that plaintiff's allegations that male supervisor asked her to have sex with him every day that Plaintiff worked with him, frequently yelled at her while she was working and sent her, on more than one occasion, text messages threatening to fire her if she did not submit to his advances did not amount to hostile working environment).

to determine whether a certain behavior or instance constitutes actionable sexual harassment. To deter potential litigation, employers must continue to take all employee complaints seriously and nip in the bud potentially inappropriate behavior.

**PRACTICAL ADVICE:**

- Adopt a zero-tolerance policy toward sexual harassment and address each complaint quickly, thoroughly, and effectively.[32]

- Take all employee complaints seriously, no matter how innocuous or harmless they may seem at the time. One complaint could be the reaction of an oversensitive employee or it could be a valid charge of sexual harassment.[33]

- Cover all forms of protected status harassment, including gender, race, age, disability, religion and national origin, when implementing an anti-harassment system.[34]

- Conduct comprehensive employee anti-harassment training for both supervisory and rank and file employees.[35].

### F. Punitive Damages for a Supervisor's Harassing Behavior: What is the Standard?

Based on *Faragher/Ellerth*, an employer may be liable for punitive damages when a supervisor harasses an employee. In *Deffenbaugh-Williams v. Wal-Mart*, 182 F.3d 333 (5th Cir. 1999) (en banc),[36] for example, the Fifth Circuit held that a direct supervisor's malicious or recklessly indifferent acts of harassment are imputed to the employer and sufficient to permit

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[32] *See, e.g.*, Adams v. O'Reilly Automotive Inc., 538 F.3d 926 (8th Cir. 2008); *Neely v. McDonald's Corp.*, No. 07-2186, 2009 WL 2431294 (3d Cir. Aug. 10, 2009) (not designated for publication).

[33] *Loughman v. Malnati Org. Inc.*, 395 F.3d 404 (7th Cir. 2005) (noting that employer did not investigate until after employee's third complaint).

[34] *EEOC v. Preferred Mgmt. Corp.*, 226 F. Supp. 2d 957 (S.D. Ind. 2002).

[35] *Dominic v. DeVilbiss Air Power Co.*, 493 F.3d 968 (8th Cir. 2007); *Howard v. Winter*, 446 F.3d 559 (4th Cir. 2006).

[36] The en banc court reinstated a prior panel decision, 156 F.3d 581 (5th Cir. 1998), but remanded on the award of punitive damages in light of the Supreme Court's decision in *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526 (1999). Under *Kolstad*, an employee is entitled to punitive damages under Title VII if the employee establishes (i) that the employer acted with "malice or reckless indifference," (ii) the person causing the discrimination worked in a "managerial capacity," (iii) the managerial employee was acting "within the scope of employment," and (iv) the managerial employee's unlawful discrimination was not "contrary to the employer's good faith efforts to comply with Title VII." *Id.* at 537. Consistent with *Kolstad*, the *Deffenbaugh-Williams* panel reinstated the jury's punitive damages award, but reduced the amount from $100,000 to $75,000. 188 F.3d 278 (5th Cir. 1999).

exemplary or punitive damages. *Deffenbaugh-Williams* involved racial harassment and not sexual harassment, but the appeals court concluded that the Supreme Court's new standards applied to both types of harassment actions.

Nevertheless, an employer may avoid punitive damages liability by demonstrating that it engaged in good faith efforts to *implement* an anti-harassment policy. For example, in *Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164 (1st Cir. 2009), the First Circuit held that an employer's written policy, "without more, is insufficient to insulate an employer from punitive damages liability." Because the employer did not provide sufficient proof that it had an "active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials," or ever trained their supervisors, the appeals court concluded that the employer failed to establish the affirmative defense and upheld the punitive damages award.[37]

### G. What Must an Employer's Anti-Harassment System Contain Before the Employer may Assert the Affirmative Defense?

A complaint-based anti-harassment system that an employer actively implements and enforces should satisfy the *Faragher/Ellerth* affirmative defense. Employers should have a (i) widely-disseminated anti-harassment policy; and (ii) procedures to conduct prompt and thorough investigations of all complaints. The employer should designate at least one official to whom an employee may complain and who is outside of the complaining employee's "chain of command."

Similarly, the EEOC recommends that a harassment policy contain, at a minimum, the following: (1) a clear explanation of prohibited conduct;[38] (2) assurances that employees who

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[37] *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526 (1999) (employer may not be vicariously liable for discriminatory employment decisions of managerial agents, for purposes of imposing punitive damages, when those decisions are contrary to employer's good-faith efforts to comply with Title VII); *see also Heaton v. The Weitz Co.*, 534 F.3d 882 (8th Cir. 2008) (a reasonable jury could find the employer's response to its vice president's actions failed to demonstrate a good-faith effort to comply with Title VII); *Parker v. Gen. Extrusions, Inc.*, 491 F.3d 596 (6th Cir. 2007) (employer's good faith effort defense failed based on testimony that its human resources manager had never in twenty-one years disciplined a foreman for not reporting an incident of sexual harassment); *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129 (10th Cir. 2006) (employer failed to make good-faith efforts to enforce any antidiscrimination policies it adopted, such that employer was not entitled to avail itself of the good-faith-compliance standard); *Bryant v. Aiken Reg'l Med. Cntrs, Inc.*, 333 F.3d 536 (4th Cir. 2003) (hospital was not liable for punitive damages because it undertook wide-spread good-faith anti-discrimination efforts, and thus it could not be vicariously liable for its managerial employees' discriminatory decisions that were contrary to its good faith efforts).

[38] *Shaw v. Autozone, Inc*., 180 F.3d 806, 811–12 (7th Cir. 1999) (explaining that Autozone's anti-harassment system was effective because the prohibited conduct was contained in a policy that was distributed to every employee); *but see Frederick v. Sprint/United Mgmt Co.*, 246 F.3d 1305 (11th Cir. 2001) (denying summary judgment because all employees did not receive the revised policy). In 2007, the Seventh Circuit denied the application of the *Faragher/Ellerth* defense in two cases involving the restaurant industry, finding that the anti-harassment policies were ineffective because they were not designed for the specific understanding of the teenage workforce typically found in that industry. *Doe v. Dairy*, 456 F.3d 704 (7th Cir. 2006); *EEOC v. V & J Foods, Inc*., 507 F.3d 575, 578 (7th Cir. 2007).

make complaints of harassment complaints or provide information related to such complaints will be protected from retaliation;[39] (3) a clearly described complaint process that provides accessible avenues to complain;[40] (4) assurances that the employer will protect the confidentiality of harassment complaints to the extent possible;[41] (5) a complaint process that provides for prompt, thorough, and impartial investigations;[42] and (6) assurances that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[43]

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[39] *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139 (8th Cir. 2007); *Montero v. AGCO Corp*., 192 F.3d 856 (9th Cir. 1999) (commenting that anti-retaliation provision of AGCO Corporation's policy was necessary for a complete anti-harassment system); *Schmidt v. Medicalodges, Inc.*, No. 07-3347, 07-3354, 2009 WL 3358486, at *4 (10th Cir. Oct. 20, 2009) (not designated for publication).

[40] *Lauderdale v. Tex. Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157 (5th Cir. 2007); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 412 (5th Cir. 2002) (concluding it was unreasonable for the plaintiff not to report the harassment to another person listed in the defendant's reporting policy once her initial complaint to her supervisor — who also began harassing her after she complained — was clearly ineffective); *Madray v. Publix Supermarkets*, 208 F.3d 1920 (11th Cir. 2000); *Lissau v. S. Food Serv., Inc*. 159 F.3d 177, 182–83 (4th Cir. 1998) (holding that complaint procedures must be effective); *Shaw*, 180 F.3d at 811–12 (describing Autozone's policy as complying with the requirements of *Ellerth* and *Faragher* because it provided multiple channels for the prompt resolution of complaints).

[41] *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d (N.D. Iowa 2000) (explaining that for any harassment policy to be effective, there must be assurances that the complaints will be handled with a minimum amount of adverse treatment directed at the complaining employee).

[42] *See Collette v. Stein-Mart, Inc*., 126 F. App'x 678, 686 (6th Cir. 2005) (stating that " '[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation.' ") (*quoting Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001)); *Ward v. Dep't of Veterans Affairs*, No. 97-8024, 1999 WL 1045208 (N.D. Ill. Nov. 12, 1999) (finding that Department of Veterans Affairs reasonably responded to allegations of sexual harassment when it promptly investigated complaints, held meetings with all of those involved, and suggested transfers for the appropriate parties).

[43] The EEOC rescinded the subsections of the Sex Discrimination Guidelines, found in 29 CFR 1604.11(c), and the National Origin Discrimination Guidelines, found in 29 CFR 1606.8(c), that address employer liability for harassment by supervisors. The standard set forth in those subsections is no longer valid in light of the Supreme Court's rulings in *Ellerth* and *Faragher*. Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), provides detailed guidance interpreting those decisions and explaining the circumstances under which the EEOC believes that employers are vicariously liable for unlawful supervisory harassment.

The EEOC guidelines provide that if a fact-finding investigation is necessary, it should be launched immediately. The EEOC places the burden on the employer in making credibility assessments. among witnesses with varying accounts of events. If the employer has a difficult time making such a determination based on the lack of eye-witness corroboration or direct contradictions between parties, the credibility assessment can form the basis for the employer's final determination. The EEOC recommends that an employer consider the following factors when making credibility determinations:

- Inherent plausibility: is the testimony believable on its face?
- Demeanor: did the person seem to be telling the truth or lying?
- Motive to falsify: did the person have a reason to lie?

An effective sexual harassment policy should provide for both formal and informal complaints of sexual harassment to be made.[44]

### H. What Constitutes an Unreasonable Failure to Complain or Avoid Harm Otherwise?

Even if the employer has implemented its anti-harassment system properly, the employer must also prove that the complaining employee unreasonably failed to use the system. Since the Supreme Court's *Faragher* and *Ellerth* decisions, various courts have examined what types of employee action or inaction constitutes an unreasonable failure to complain or to avoid harm.

#### 1. Lying to the Employer.

An employee who gives false information to an employer fails to avoid harm. In *Scrivner v. Socorro Independent School District*, 169 F.3d 969 (5th Cir. 1999), for instance, the school district, after receiving an anonymous letter, investigated allegations that the principal had been sexually harassing teachers. The school interviewed Scrivner, who denied that the principal had sexually harassed her even though she believed otherwise. Following the investigation, the school determined that no tangible "harassment" evidence existed, but warned the principal to refrain from unprofessional jokes and innuendo. A year and a half later, Scrivner filed a formal harassment complaint with the district and alleged continued harassment by the principal. Again, the school promptly investigated. The school concluded that the principal's conduct may have created a hostile work environment and reassigned him within the district. The principal resigned within the year. Despite the school's actions, Scrivner sued for sexual harassment. Ruling against Scrivner, the appeals court determined that she had failed to reasonably avail herself of the school's sexual harassment policies. According to the court, Scrivner acted unreasonably when she lied during the first investigation of the principal. The circuit court refused to "sanction such deceptive conduct" because it frustrated the school's attempt to remedy past misconduct.[45]

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- Corroboration: is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged events, or people who discussed the incidents with him or her at or around the time the events occurred) or physical evidence that corroborates the party's testimony?

- Past record: Did the alleged harasser have a history of similar behavior in the past?

Additionally, the EEOC guidelines suggest that the anti-harassment policy contain information about the time frames for filing charges of unlawful harassment with the EEOC or the state fair employment agency. Under this requirement, the employer must also explain that the time deadlines run from the last date of the unlawful harassment, not from the date that the complaint to the employer is resolved. This suggestion, however, is not supported by *Faragher* or any post - *Faragher* court decisions.

[44] *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 456 (6th Cir. 2008).

[45] Under the June 18, 1999 EEOC Guidelines on vicarious employer liability, a complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provides no information to support his or her allegation, gives untruthful information, or otherwise fails to cooperate in the investigation, the complaint would not qualify as a reasonable effort to avoid harm.

### 2. Failure to Complain Timely.[46]

An employer may also prove its affirmative defense when the complaining employee waits too long to complain about the alleged harassment. In *Moayedi v. Compaq Computer Corp.*, 98 F. App'x 335 (5th Cir. 2004) (unpublished), for example, Moayedi knew about Compaq's workplace harassment policies because she had previously used them to stop a former harassing co-employee. After receiving a notice of termination as part of a reduction in force, Moayedi made allegations that a supervisor had been sexually harassing her for over two years. When Moayedi finally complained, Compaq's response was swift; the company fired Moayedi's supervisor three weeks after her first complaint. According to the court, Compaq successfully established the second prong of the *Faragher/Ellerth* defense by showing that Moayedi had unreasonably failed to take advantage of the company's preventive and corrective opportunities when she did not report the alleged harassing conduct until after receiving a layoff notice.

### 3. Embarrassment and Fear of Retaliation.

Under most circumstances, an employee's alleged embarrassment and unfounded fear of retaliation are not legitimate reasons for failing to use an employer's complaint procedure. In *Watkins v. Professional Security Bureau, Ltd.*, No. 98-2555, 1999 WL 1032614 (4th Cir. Nov 15, 1999), Watkins did not report a supervisor's harassment under PSB's anti-harassment policy, which required that she contact the director of human resources. And, while Watkins told her site supervisor that her immediate supervisor had fondled her breasts and placed his hands down her pants, she repeatedly expressed her unwillingness to pursue the matter. Watkins testified that her failure to report the incident promptly and fully resulted from embarrassment and fear of reprisal. The Fourth Circuit concluded that Watkin's generalized fear was insufficient, as a matter of law, to raise a triable issue that Watkins acted reasonably in failing to report her supervisor under the anti-harassment policy's terms.[47]

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[46] *See, e.g.*, *Baldwin v. Blue Cross/Blue Shield of Ala*., 480 F.3d 1287 (11th Cir. 2007) (plaintiff failed to timely report because her complaint came three months and two weeks after the first proposition and three months and one week after the second); *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009) (holding that five month delay in reporting sexual harassment claim to EEO counselor entitled the employer to summary judgment on its affirmative defense to the plaintiff's sexual harassment claim. *See Lauderdale v. Tex. Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157, 164 (5th Cir. 2007) (female employee's failure to file subsequent complaint, after her immediate supervisor failed to act on her initial complaint regarding sexual harassment on the part of her ultimate supervisor, was unreasonable; former employer established the *Ellerth/Faragher* defense and avoided vicarious liability for employee's Title VII claim).

[47] The Fourth Circuit relied on *Shaw v. AutoZone*, Inc., 180 F.3d 806, 811–12 (7th Cir. 1999) (holding that embarrassment and fear of retaliation do not justify failure to report harassment, reasoning that "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms.")

### 4. Complaining Would be Futile.[48]

Rejecting a harassment plaintiff's "fear of retaliation" excuse for not complaining, a Virginia federal district court also rejected her "futility" claim. *Barrett v. Applied Radiant Energy*, No. 98-00069, 1999 WL 1009698 (W.D. Va. Nov. 4, 1999). After a supervisor supposedly harassed Barrett during a business trip, Barrett spoke to several friends and coworkers about the harassment, but never formally complained to management. Barrett argued that because two of the company's executives engaged in the alleged harassment, she was led to believe that management would not respond to her complaints. The court, however, concluded that neither actual prior incidents of harassment, nor a well-founded (but factually false) belief that prior incidents of harassment took place, could justify a failure to report stemming from concerns about unresponsiveness. The court reasoned that speculative concerns about management's inaction are insufficient to justify a failure to report – harassment victims must step forward and at least give management an opportunity to provide a remedy.

Barrett also insisted that complaining would have been futile because several of ARCO's managers, including the President, Wayne Zeigler, were friends with the harasser. This did not alter the court's analysis. Rather, the court reasoned that in many small companies, like ARCO, managers are likely to be friends. Accordingly, unless the Title VII affirmative defense is to be construed differently for small companies when compared to large ones, the level of management's friendliness does not constitute an objectively reasonable basis for failing to use a company's complaint procedures. The court determined that even if Barrett could complain only to the harassing supervisor's friend and President, Zeigler, she had everything to gain if he responded to her complaint, but nothing to lose if he refused to rectify the situation because of his friendship with the harasser.[49]

## I. Does the *Faragher/Ellerth* Liability Standard Apply to Supervisors Who are Not in the Employee's Reporting Chain or to Harassment by an Employee's Peers?

The *Ellerth/Faragher* opinions limit the new liability standard to immediate supervisors or those successively higher. The question is still open regarding non-upper echelon supervisors and managers who do not have direct authority over the harassed employee. The *Ellerth* Court

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[48] *See Taylor v. Solis*, 5571 F.3d 1313 (D.C. Cir. 2009) (holding that harasser's statement's that "no one would believe her [victim]" did not excuse employee's five-month delay in reporting the alleged harassment).

[49] An employer, however, could be exposed to liability when an employee reports the alleged harassment to someone with delegated or imputed authority to act as a supervisor. The Eighth Circuit addressed this issue in *Sims v. Health Midwest Physician Servs. Corp.*, No. 99-1627-WM, 1999 U.S. App. LEXIS 29528 (8th Cir. Nov. 10, 1999). Vera Sims complained about the alleged harassing conduct of a Health Midwest doctor to the office coordinator, Michelle Aman, not her supervisor, Kay Hensley, as mandated by the anti-harassment policy. The issue: Whether Health Midwest delegated supervisory authority to Ms. Aman at the clinic where Sims was working. When Hensley appointed Aman to office coordinator, Hensley held a staff meeting to explain that because she was supervising three clinics and could only be at that clinic once a week, employees were to address all problems to Aman. Given these facts, the appeals court found that Hensley had delegated her authority to receive sexual harassment complaints to Aman, and because Sims had complained to Aman properly, Health Midwest was vicariously liable when Aman failed to act on the information.

plainly stated, however, that the "knew or should have known" standard for vicarious liability usually applies in co-worker, peer harassment cases.[50]

For instance, the Third Circuit has held that the individual team leaders who were aware of certain harassing behavior were not the "management level personnel" referred to in Title VII and, therefore, the employer liability did not attach to the employer. *Huston v. Proctor & Gamble Paper Prods. Corp.*, No. 07-2799, 2007 WL 1521234 (3rd Cir. June 30, 2009).

Priscilla Huston was employed by Proctor & Gamble for more than 10 years. In 2004, Huston allegedly heard that some of her male co-workers exposed themselves to other male employees. She reported those incidents to her team's "process coach" and a "machine leader", but not senior management. According to Huston, she later witnessed two similar incidents herself. She reported those two incidents to a senior-level manager and a human resource manager. The company began an investigation and ultimately disciplined all team members—including Huston—after the Company discovered that the entire team had been using inappropriate language. The company later terminated Huston because she had fabricated data for machine data logs. Huston then filed a complaint, maintaining that she had been subjected to a sexually hostile work environment and that she had put the company on notice of the hostile work environment when she complained to the process coach and machine leader.

The Third Circuit held that the process coach and machine leader did not qualify as supervisors and, therefore, the company was not on notice of the hostile work environment until Huston reported it to senior management. According to the Court, "[a]lthough an employer has a duty to be reasonably diligent in attempting to discover co-worker harassment, an employer is not expected to know every instance of harassment that may occur between co-workers."

The appeals court noted that unlike salaried managers, the process coach and machine leader were paid on an hourly basis and had no actual authority to hire, fire, or discipline other employees. Rather, the machine leader and process coach performed essentially the same functions as the remaining team members, with a few general oversight functions. According to the Court, an employee's knowledge of sexual harassment may be imputed to the employer only when (1) that employee is sufficiently senior in the employer's governing hierarchy so that such knowledge is important to that person's general managerial duties; or (2) the employee is specifically employed to report or respond to sexual harassment.[51]

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[50] *See, e.g.*, *Harvill v. Westward Commc'ns*, 433 F.3d 428 (5th Cir. 2005) (citing Fifth Circuit precedent requiring a plaintiff to establish her *prima facie* case for co-worker sexual harassment by proving (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition or privilege of the employment;" and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002) (finding that an employer is only liable for co-worker harassment if it is negligent in discovering or remedying the harassment); *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295 (5th Cir. 2001) (holding that an employer cannot be held liable for conduct for which it had no knowledge); *Star v. West*, 237 F.3d 1036 (9th Cir. 2001) (holding that once an employer knows or should know about sexual harassment by a co-worker, it must take adequate remedial measures to avoid liability).

[51] This clarifies an earlier decision by the Third Circuit, *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999), in which the court held that merely because a manager cannot act on the employer's

## J. Can an Employer's Intervening Action Cut Off an Employee's Claim?

In *Stewart v. Mississippi Transportation Commission*, No. 08-60747, 2009 WL 3366930 (5th Cir. Oct. 21, 2009), the Fifth Circuit held that an employer's intervening act of reprimanding the alleged harasser and reassigning the complaining female employee cut off the employee's continuing violation claim. Jelinda Stewart initially reported that her supervisor was harassing her in October 2004. Following this complaint, the company took prompt remedial action and transferred her to another supervisor. The Fifth Circuit held that the transfer's remedial effect was not negated when the company later placed her, once again, under the alleged harasser's supervision in 2006. Thus, Stewart could not rely on the continuing violation doctrine to hold the company liable for any action that occurred before the company's intervening action. The Fifth Circuit also determined that the supervisor's 2006 conduct toward her—including his telling her that they should be "sweet" to each other and his repeated statements that he loved her—was unwanted and offensive at most and was not sufficiently severe to support her harassment claim.

## K. Best Practices in the New Era

Based on the *Faragher* and *Ellerth* decisions, employers should audit their existing anti-harassment "system," including anti-harassment policies, acknowledgment forms, procedures, postings, reporting mechanisms, and supervisory/rank-in-file training programs.

After conducting a comprehensive audit, employers should take the following steps:

- Adopt and implement a comprehensive and effective anti-harassment system to prevent, investigate and remedy sexual harassment in the workplace (if you have not already done so). Make sure supervisors or other company officials to whom harassment is reported understand and follow the guidelines established in the policy for handling a complaint. *See, e.g., Chaloult v. Interstate Brands Corp.*, 540 F.3d 64 (1st Cir. 2008) (concluding that knowledge of a co-worker with the title of supervisor, who was in fact a peer of the plaintiff's and who also reported to the harasser did not defeat the *Faragher/Ellerth* defense); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998) (holding that the employer had direct knowledge of an employee's complaint of harassment because the supervisor failed to relay the complaint to the human resources department in violation of the company's sexual harassment policy).[52]

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behalf without the agreement of others did not necessarily mean that he was without supervisory authority over the plaintiff.

[52] A comprehensive anti-harassment system is the best method to comply with the *Ellerth* and *Faragher* requirements; however, according to the EEOC guidelines, it may not be necessary for an employer of a small workforce to implement the type of formal complaint process required by larger corporations. In a small business environment, the EEOC suggests that an informal mechanism may suffice. For example, an employer's failure to disseminate a written policy against harassment would not undermine the affirmative defense if the employer effectively communicated the prohibition and the mechanisms for complaining at employee staff meetings. Nevertheless, even small employers should

- Ensure that the touchstone of your prevention system is an understandable, user-friendly, and widely disseminated anti- harassment policy to prohibit and remedy harassment. Employers should require employees to sign an acknowledgment that they have read and understand the policy. *See, e.g. Adams v. O'Reilly Automotive Inc.*, 538 F.3d 926 (8th Cir. 2008) (holding that "once a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company."); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253 (10th Cir. 1998) (stating that the lower court should consider whether the company had a reasonable policy in place to prevent and promptly correct sexual harassment and whether the employee had unreasonably failed to avail herself of that policy).

- In implementing an anti-harassment policy, make sure employees realize that all forms of discrimination and harassment will not be tolerated. Adopt a policy that encompasses all forms of discrimination. *See, e.g., Wright-Simmons v. City of Okla. City*, 155 F.3d 1264 (10th Cir. 1998) (stating that the principles in the two cases can "apply with equal force" to a case of racial harassment."); *Wallin v. Minnesota Dep't of Corrs.*, 153 F.3d 681 (8th Cir. 1998) (assuming, but not deciding, that a claim for hostile work environment can be based on disability harassment and would be modeled after a Title VII claim); *EEOC v. Preferred Mgmt Corp.*, 226 F. Supp. 2d 957 (S.D. Ind. 2002) (upholding the jury's punitive damage award because the employer "had no anti-harassment policy concerning religion and ... no management personnel had any training, or conducted any training, in religious discrimination or harassment.")

- Ensure that the anti-harassment policy contains an easily understood reporting procedure, no-retaliation statement, and supervisory bypass mechanism, namely, the employee may bypass his or her supervisor or reporting chain and report the alleged harassment to named individuals in the human resources department, a company grievance hotline, or some other designated individual within the company. Employers should clearly identify designated individuals; do not state broadly that an employee may complain to "any member of management." *Hockman v. Westward Commc'ns*, 407 F.3d 317 (5th Cir. 2004) (holding that employee unreasonably failed to take advantage of corrective opportunities offered by the company because she did not report the alleged harassment to human resources after she was dissatisfied with her supervisor's response as required by the employee handbook). [53]

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adopt, implement and vigorously enforce anti-harassment policies.

[53] Additionally, the Third Circuit has held that the individual team leaders who were aware of certain harassing behavior were not the "management level personnel" referred to in Title VII and, therefore, the employer could not be held liable for the claims of harassment made by the plaintiff. *Huston v. Proctor &*

- Conduct mandatory sexual harassment training for both supervisors and rank and file employees. Given the breadth and uncertainty of the Supreme Court's "reasonable care" language, it is prudent to conduct the training not only with supervisors, but also with non-supervisory employees. *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052 (10th Cir. 2009) (holding that company established that it exercised reasonable care and to prevent harassment, noting that company requires its employees to take a four-hour sexual harassment course, which identifies what behavior constitutes harassment and highlights the employee's obligation to report harassment

- Review and analyze your investigation procedures to ensure that you conduct immediate and thorough investigations of alleged harassment and implement appropriate remedial action. Remember, employers who act in good faith and conduct appropriate investigations may rely on the results of their investigations in making employment decisions adverse to the alleged harasser. *See, e.g.*, *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412, 423–24 (Cal. 1998) (when an employer discharges an employee for harassment and the employee later sues the employer for wrongful discharge, the jury only decides whether the employer relied in good faith on investigation results, not whether harassment actually occurred); *Jones v. Costco Wholesale Corp.*, 34 F. App'x 320 (9th Cir. 2002) (not designated for publication). Depending on the size of your company and/or the severity of the allegations, you may want to use an outside consulting firm or other independent firm to conduct the investigation.

- Make it clear that you will undertake immediate and appropriate corrective action, including discipline, whenever you determine that harassment has occurred. Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by individuals with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. If, however, the harassment was severe or persistent, then suspension or discharge may be appropriate. *See, e.g.*, *Mufti v. Aarsand & Co., Inc.*, No. C.A. 08-314, 2009 WL 3415136 (E.D. Pa. Oct. 22, 2009) (commenting that employer's remedial measure need not include discipline but must be "reasonably calculated" to end the harassment).

## V. SAME-SEX SEXUAL HARASSMENT CLAIMS

During its 1997-1998 term, the U.S. Supreme Court also expanded the definition of actionable sexual harassment. The Fifth Circuit Court of Appeals (covering Texas, Mississippi, and Louisiana) had concluded that same-sex sexual harassment was not actionable under Title

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*Gamble Paper Prods. Corp.*, No. 07-2799, 2007 WL 1521234 (3rd Cir. June 30, 2009).

VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998). Disagreeing, the Supreme Court concluded that same-sex sexual harassment is a valid cause of action under Title VII. Rejecting the Fifth Circuit's approach, the Court reviewed its former decisions holding that: (i) Title VII protects men as well as women; (ii) people sometimes discriminate against members of their own protected class; and (iii) sexual harassment need not be based on sexual desire. The Court concluded that a male could bring sexual harassment claims against his former employer based on conduct by other males, but cautioned that Title VII is not a "general civility" code designed to prevent "male-on-male horseplay or intersexual flirtation."

Lower courts interpreting *Oncale* are heeding the Supreme Court's mandate that Title VII is not a general civility code. For example, in *Corbitt v. Home Depot U.S.A., Inc.*, No. 08-12199, 2009 WL 4432654 (11th Cir. Dec. 4, 2009), Dave Corbitt and Alex Raya, store managers at two Home Depot stores, alleged that they were sexually harassed by a gay regional human resources manager, Lenny Cavaluzzi. The Eleventh Circuit affirmed the district court's ruling that Corbitt and Raya could not demonstrate that Cavaluzzi's behavior was sufficiently severe or pervasive to alter the terms and conditions of employment. Citing precedent from the United States Supreme Court and the Eleventh Circuit, the court noted that only statements and conduct of a sexual or gender-related nature can be included in the analysis. "Flirtation is part of ordinary socializing in the workplace and should not be mistaken for discriminatory conditions of employment." Thus, Cavaluzzi's telling Raya that he liked how Raya dressed, that he liked his pants, that his hair was beautiful, and that he liked his green eyes "is not actionable conduct under Title VII." Nor were Cavaluzzi's statements to Corbitt that he liked Corbitt's "baby face" or that he was small and cute; "those are simply flirtatious compliments." The appeals court further reasoned that statements such as "I know you're not gay, but you've probably thought about it, I could show you how, I know you'll like it," may be offensive, but are not sufficiently severe when viewed under the totality of the circumstances. Many of the comments were made during phone calls.

The court recognized that Cavaluzzi also engaged in sexual conduct toward the plaintiffs: five touchings and one comment that were sexual in nature toward Raya; and four touchings and four comments that were sexual in nature toward Corbitt. But the court held that such conduct was neither severe nor pervasive. Corbitt and Raya conceded that most of the touchings were "quite brief" and, according to the court, the same-sex nature of the touching did not make it more severe. Thus, the Eleventh Circuit held that Cavaluzzi's alleged harassment was not sufficiently severe or pervasive to support a hostile work environment claim.

Additionally, in the majority of cases, Title VII does not protect employees against harassment based solely on their sexual orientation. In *Higgins v. New Balance Athletic Shoe Inc*., 194 F.3d 252 (1st Cir. 1999), for example, Higgins alleged that he was subjected to sexual harassment because of his homosexuality. For ten years, Higgins worked on the production line at New Balance's factory in Maine. Over the course of his employment, Higgins was subjected to a variety of objectionable conduct: co-workers squirted him with condiments, snapped rubber bands at him, poured rubber cement on him, and one colleague grabbed him from behind in the lavatory and shook him violently.

The First Circuit conceded that Higgins toiled in a "wretchedly hostile environment," but concluded that this was not enough to support a liability finding under Title VII: "We regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."

By contrast, the Third Circuit, in *Prowel v. Wise Business Forms*, 579 F.3d 285 (3rd Cir. 2009), held that there is no basis in the statute or case law "to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim, while an effeminate homosexual man may not." *Prowel* involved a homosexual male who alleged that he was harassed and laid off based on gender stereotyping. In contrast to other men at the company, Brian Prowel testified that the adverse actions taken against him were because he had "a high voice and did not curse; was very-well groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit;" walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; and talked about things like art, music, interior design and décor."

In support of its motion for summary judgment seeking to have the case dismissed without a trial, the company argued that Prowel's lawsuit was merely a claim for sexual orientation discrimination repackaged as a gender stereotyping claim to avoid dismissal. The trial court agreed and granted the company's motion. The Third Circuit reversed, concluding that the "line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."

In a recent 2-1 decision, the Fifth Circuit held in *Love v. Motiva Enterprises LLC*, No. 08-30996, 2009 WL 3334610 (5th Cir. Oct. 16, 2009), that a plaintiff must first show that the alleged harasser is homosexual and that the harassment was motivated by sexual desire in order to assert a same-sex harassment claim. Connie M. Love and Jeanne Sirey worked at Motiva Enterprises LLC. According to Love, Sirey often derided Love, calling her "stupid bitch," "fat cow," and "disgusting." Sirey also allegedly told Love that she was a "sorry excuse for a woman" and asked her, "you think that's a body you have; you should be ashamed." Love further alleged that Sirey touched Love with her hands on two occasions. The first incident occurred in the changing room where Sirey allegedly touched Love under her bra strap and underwear on her hip while calling Love "fat" and "disgusting." On the second occasion, Sirey allegedly rubbed Love's shoulders. The court held that these incidents, while offensive and inappropriate, were more indicative of bullying behavior and do not support an inference of sexual attraction and implicit proposals for sex in light of Sirey's consistent derogatory comments. The court further concluded that Love failed to provide credible evidence that Sirey was a homosexual. According to the court, failure to show that Sirey was a homosexual was fatal to Love's claim.

The *Oncale* ruling also has implications in cases involving the bi-sexual or "equal opportunity harasser"—a person who sexually harasses both male and female employees. While some courts have ruled that the equal opportunity harasser cannot escape liability for harassment that is sexual in content, other courts refuse to allow these claims to proceed in the wake of *Oncale*. In *Holman v. Indiana*, 24 F. Supp. 2d 909 (N.D. Ind. 1998), for example, a husband

and wife alleged that their supervisor, a male shop foreman, sexually harassed both of them. The wife claimed that the foreman touched her, asked her to have sex, and made sexist comments. The husband claimed the foreman grabbed his head while asking for sexual favors. Both employees alleged that the foreman retaliated against them when they refused his requests. After the plaintiffs sued, the court dismissed their case because they could not prove that their harassment was based on sex. Relying on the *Oncale* decision, the court held that no discrimination existed because neither the husband nor the wife was subjected to disadvantageous terms or conditions of employment to which members of the other sex were not exposed. In short, the foreman treated the employees equally with his harassing behavior and, therefore, he escaped liability for his actions. Realizing that its ruling defies common sense, the court noted: "Certainly, the court is cognizant that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be."

**PRACTICAL ADVICE**

- The Supreme Court made clear that same sex sexual harassment is actionable, therefore, claims of same sex sexual harassment should be investigated and treated with the same degree of confidentiality and respect as claims of opposite sex sexual harassment.[54]

- Take every sexual harassment complaint seriously. What one person considers male on male horseplay or merely flirtatious behavior may actually be actionable same sex harassment.[55]

- Sexual harassment policies should not make sexual orientation or gender distinctions, unless it is protected by state or local law.[56]

## VI. SEXUAL HARASSMENT DOES NOT ALWAYS INVOLVE "SEXUALLY INTIMATE" OVERTURES

Contrary to popular belief, sexually intimate invitations or proposals are not prerequisites to a valid sexual harassment claim. Many forms of conduct, depending on their frequency and severity, can constitute actionable sexual harassment. Examples of this conduct are:

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[54] *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 118 S. Ct. 998 (1998).

[55] *Prowel v. Wise Bus. Forms*, 579 F.3d 285 (3rd Cir. 2009).

[56] On June 24, 2009, Rep. Barney Frank (D-Massachusetts) introduced the Employment Non-discrimination Act of 2009, which would prohibit discrimination based on sexual orientation and gender identity. Currently, sexual orientation is not a protected class under current federal law; however, some states and municipalities prohibit sexual orientation discrimination.

- √ distributing or posting sexually explicit pictures;
- √ creating sexually offensive drawings or graffiti;
- √ telling sexually-related jokes;
- √ making offensive sexually-related comments;
- √ making derogatory references regarding members of the opposite sex;
- √ sexual assault;
- √ touching;
- √ staring;
- √ holding company functions at strip clubs;
- √ inviting strippers to attend company functions; or
- √ giving sexually-related gifts.

This list is not all-inclusive. The lesson here: any unwelcome conduct *of a sexual nature* or *based on sex* could constitute actionable sexual harassment, depending on its frequency and severity.[57] The following cases involve fact patterns in which no "sexually intimate" invitation was necessary for the plaintiff to state a valid sexual harassment claim.

In *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997), the Department Chairman (Schweiss) did not make any "sexually intimate invitation," but Smith, an anesthesiology resident, argued that the pervasiveness and severity of the Chairman's comments created a hostile work environment. Smith complained that Schweiss regularly referred to her and other female residents (in front of other colleagues, patients, nurses, and guest lecturers) by their first name, without the title "Doctor," while referring to male residents as "Doctor." Smith also maintained that Schweiss referred to her and another female resident as the "anesthesia babes" and that colleagues told her she was selected to fulfill a female quota. Schweiss referred to Smith as an attractive and "beautiful young lady" and supposedly told her she should consider a career in modeling. When working with Smith, Schweiss supposedly said "he was stuck with Vicki again" and "had to work with another female resident." In the operating room with Smith, Schweiss asked her why she had gone into medicine rather than nursing or getting married. In another incident, Schweiss told Smith that women ought to be married and home nursing babies, and compared her unfavorably to the wife of another doctor who stayed home to raise their

[57] For instance, In *Williams v. GMC*, 187 F.3d 553 (6th Cir. 1999), the Sixth Circuit observed that "harassing behavior that is not sexually explicit, but directed at women and motivated by discriminatory animus satisfies the 'based on sex' requirement." The circuit court then noted that all the harassing incidents—sexual and nonsexual—should be viewed in context to determine whether a hostile work environment existed.

children. Schweiss further suggested that Smith, because of her age and medical training, would not be able to find a husband. Smith also alleged that Schweiss altered his rotation schedule to be around her, to subject her to additional ridicule or, as another doctor put it, "to get to" her. Smith eventually sued.

The district court dismissed the lawsuit, finding that the alleged conduct was "not sufficiently severe or pervasive . . . and that the absence of sexually explicit comments lessened the severity of the harassment." The district court also noted that Schweiss's comments "were not threatening, but that they were merely offensive and not gender-based." The Eighth Circuit Court of Appeals reversed the district court, determining that Schweiss's comments and conduct were sufficient to entitle Smith to a jury trial. The appeals court specifically rejected the district court's finding that the harassment was not pervasive because it was not sexually explicit, noting that many of Schweiss's comments included gender conscious terms that could reasonably have been directed at Smith because of her sex, a proper question for a jury to decide.

Moreover, *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996), did not involve "sexually intimate" overtures, but the Fifth Circuit affirmed a jury award of $7,500 in compensatory damages. Crosby, a nursing home treatment nurse, alleged that the facility's Director of Nursing repeatedly subjected her to a hostile work environment. She maintained that he made frequent comments of a sexual nature -- testimony suggested that these comments were repeated multiple times weekly and were so frequent that each instance could not be recalled. The comments, many of which were delivered in the presence of coworkers, alluded to Crosby's proclivity to engage in sexual activity because she had seven children. The Director repeatedly commented that he "'knew what she liked to do'. . . and that she 'must not have a television.'" Other alleged comments focused on Crosby's inability to use condoms and her sexual activities. The Director allegedly asked other female employees about off-duty activities and whether they "got any." Crosby also asserted that the Director repeatedly threatened her with termination when she complained about his behavior and would ask him to stop. The Director admitted to "asking [Crosby] about her personal life, but claimed that he did so because he believed the lack of sleep resulting from sexual activity could affect her work performance."

On appeal, the employer alleged that this evidence was insufficient to support a finding that the harassment affected a term, condition, or privilege of Crosby's employment. The appeals court rejected the argument, finding "substantial evidence from which the jury could have concluded that [the Director's] comments and questions were sufficiently severe and pervasive as to alter the conditions of her employment and create an abusive working environment." The court also noted that Crosby had reported the offensive conduct to two company human resource directors, who both testified that this action constituted a report to the company under its sexual harassment policy.

Finally, in *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994), Stacks, a female employee, was exposed to various forms of harassing conduct. Several employees showed a pornographic videotape at a party following a company golf tournament. The videotape portrayed a male sales representative in a car full of bare-breasted female sales representatives. Also, a female stripper performed at a sales meeting, and married male sales representatives sponsored "closed" parties where they brought "dates," "passed [them] around,"

and berated them. The court concluded that Stacks had a valid claim for hostile work environment sexual harassment.[58]

**PRACTICAL ADVICE**

- Sexual harassment takes many forms. "Come-ons," touching, and rude comments are not the only types of conduct for which an employer may be held liable.[59]

- An employer should investigate any inappropriate conduct that could be perceived as sexual harassment.[60]

- An employer should update its policies and procedures to prohibit all forms of sexual harassment in the workplace.

## VII. WHETHER ISOLATED INCIDENTS CONSTITUTE ACTIONABLE HARASSMENT

In *Faragher*, the Supreme Court commented that unless isolated incidents are "extremely serious," they will not constitute sexual harassment. Many other courts have concluded that "stray remarks" or occasional isolated episodes of harassment are not actionable. Relying on these statements, some employers may conclude that an isolated incident of sexual harassment can *never* constitute actionable hostile work environment sexual harassment. Not so: several courts have stated that a single incident, if severe enough, may form the basis of an actionable hostile work environment claim. "While a single, unsolicited physical advance or comment may be inappropriate, such conduct does not automatically amount to a Title VII violation." *Fowler v. District of Columbia*, 404 F. Supp. 2d 206, 211 (D.D.C. 2005). Rather, such " 'isolated incidents' " must be extremely serious in order to 'amount to [a] discriminatory change[ ] in the terms and conditions of employment.'" *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (rejecting sexual harassment claim based on single incident) (quoting *Faragher*, 524 U.S. at 788).[61]

For instance, in *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 992–93 (8th Cir. 2003), the Eighth Circuit held that a single incident in which a co-worker grabbed the

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[58] Similarly, male employees may also have an actionable harassment claim based on female coworkers who hire "strippers" at a company function. In *Lahey v. JM Mortgage Servs., Inc.*, No. 99-6-4074, 2000 WL 420851 (N.D. Ill. Apr. 18, 2000), the court concluded that a mortgage loan processor could proceed with his lawsuit charging that his female coworkers created a hostile work environment in violation of Title VII by making sexual comments, hiring a stripper for an office Christmas party, and posting pictures of the stripper at work.

[59] *Prowel v. Wise Bus. Forms*, 579 F.3d 285 (3rd Cir. 2009).

[60] Chaloult v. Interstate Brands Corp., 540 F.3d 64 (1st Cir. 2008).

[61] *Johnson v. Jung*, Nos. 02 C 5221, 04 C 6158, 2009 WL 3156743 (N.D. Ill. Sept. 28, 2009) (holding that single-incident in which supervisor showed an employee a sexually explicit video did not create a hostile work environment).

plaintiff-employee's buttocks and later joked about it in front of her and another co-worker did not rise to the level of actionable sexual harassment. In *Taylor v. National Group of Companies, Inc.*, 872 F. Supp. 462 (N.D. Ohio 1994), however, the court concluded that an incident in which Taylor was struck on the buttocks with a board wielded by National's president was so severe that it constituted sexual harassment. The lesson is clear: if the harasser is a company president or other high-level manager, and the incident involves a serious assault or other serious inappropriate conduct, the "isolated" incident is sufficient to constitute actionable sexual harassment.

Similarly, in *Huitt v. Market Street Hotel Corp.*, 62 Fair Empl. Prac. Cas. (BNA) 538 (D. Kan. 1993), a single serious incident constituted actionable sexual harassment. The court stated that it:

> [H]as no difficulty concluding that even a single incident of rape, if proven, constitutes sexual harassment of a type sufficiently severe to support a claim of hostile work environment sexual harassment. It would be absurd, to say the very least, to require a woman to submit to repeated incidents of work-related rape before she could successfully claim that her working environment had become abusive.

Nevertheless, not all isolated instances of alleged sexual misconduct will rise to the level of actionable sexual harassment. For example, in *Septimus v. University of Houston*, 399 F.3d 601 (5th Cir. 2005), the court determined that a two-hour "harangue" was insufficient to constitute sexual harassment. Septimus, a former Assistant General Counsel at the University of Houston, alleged that she was subjected to a hostile work environment when the General Counsel frightened her and made her feel useless and incompetent during a two-hour "harangue" in her office. Septimus alleged the General Counsel used a "mocking tone" when questioning her about one of her presentations and told her she "was like a needy old girlfriend." The appellate court concluded that these incidents were collectively insufficient to establish that Septimus had suffered severe or pervasive harassment. Significantly, the court also rejected Septimus's attempt to rely upon alleged harassing conduct by the General Counsel toward other female employees. The Fifth Circuit explained that in assessing the "totality of the circumstances," a plaintiff can rely only on conduct that she *personally experienced*. Because Septimus had not personally experienced most (if not all) of the conduct complained of by other women, Septimus could not piggyback on the "second hand" harassment incidents of other employees.

**PRACTICAL ADVICE**

- Employers must be aware that a single incident of inappropriate behavior may create an actionable claim of sexual harassment, especially if the incident involves a sexual assault or other gross misconduct.[62]

[62] *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052 (10 Cir. 2009) (stating that "one statement may be sufficient in a given situation to constitute actionable harassment").

- Employers should investigate and take remedial action in response to an isolated incident of harassment -- even if it involves a relatively minor form of harassment. An isolated incident may turn out to be just one in a series.[63]

## VIII. EMPLOYER LIABILITY FOR "OFF SITE" HARASSMENT INCIDENTS

Despite the prevailing wisdom, employers do not escape liability for sexual harassment that occurs outside the office or plant. Indeed, some courts have held employers liable for conduct that occurs far away from the workplace.

*Ferris v. Delta Air Lines Inc.*, 277 F.3d 128 (2nd Cir. 2001), a male flight attendant drugged and raped Ferris, a female flight attendant, in a hotel room paid for by Delta during a crew layover. The district court dismissed the case, holding that the hotel room was not a work environment for which the employer was responsible. However, the appellate court reversed, finding that the hotel room was part of the work environment.

Similarly, in *Huitt v. Market Street Hotel Corp.*, 62 Fair Empl. Prac. Cas. (BNA) 538 (D. Kan. 1993), the sexual assault took place after-hours and far away from the hotel where Huitt worked:

> [I]t is irrelevant that the supervisor's sexual advances may have taken place outside of the context of the work place, because the focus is on the retaliatory act of firing the employee for rejecting those [sexual] advances.

. . . .

> the court cannot exclude from its consideration those allegations of sexual conduct which occurred after work hours . . . the question, rather, is whether there are sufficient facts from which to infer a nexus between the sexual conduct and the work environment.

Huitt alleged that her supervisor raped her while driving her home immediately after her shift. The court reasoned that Huitt's supervisor placed himself in a position to drive her home by using his authority to make it difficult for Huitt to make other arrangements for a ride. Thus, the context in which the rape took place was so related to Huitt's work that the two were causally connected.

Likewise, in *Himaka v. Buddhist Churches of America*, 917 F. Supp. 698 (N.D. Cal. 1995), the court reasoned that off-premises conduct might form the basis for an actionable sexual harassment claim. Himaka, National Director of the Department of Buddhist Education for the Buddhist Churches of America, began receiving "heavy breathing" phone calls at home even though her telephone number was unlisted and had been changed several times. Two years after

[63] Brannum v. Mo. Dep't of Corrs., 518 F.3d 542 (8th Cir. 2008).

the calls began, while attending the annual meeting of the Buddhist Minister's Association, she received a heavy breathing phone call in her hotel room. Hotel management traced the call to a Buddhist minister's hotel room. Himaka reported the incident to her Bishop who conducted an investigation and eventually disciplined the offending minister.[64] The court concluded that the minister's conduct did not rise to the level of actionable hostile work environment sexual harassment, but stated that it "does not reject outright the idea that conduct of a sexual nature which occurs outside of the workplace . . . might contribute to a hostile work environment for the plaintiff."

*Doe v. Capital Cities*, 50 Cal. App. 4th 1038 (Cal. Ct. App. 1996), involved a particularly troubling fact pattern. "John Doe" was an aspiring actor. A casting director for ABC told Doe that ABC was developing programs that might be suitable for his "look." The director invited Doe to brunch at his home. Doe accepted, believing that he was going to meet with entertainment industry executives at the brunch; unfortunately for the young man, however, the casting director and four others drugged, bound, beat and raped him. Several months later they assaulted and stabbed Doe in front of his home and poisoned his dogs. Although the sexual assault occurred "off site," the court noted that the director and Doe often worked at home or at various other locations. The court, therefore, had no problem holding that Doe stated a cause of action for sexual harassment under the California Fair Employment and Housing Act.

**PRACTICAL ADVICE:**

- Courts may hold employers liable for sexual harassment that occurs outside the place of business.[65]

- Employers should adopt policies and procedures to prohibit off-site sexual harassment and inform their employees that employee sexual harassment will not be tolerated, regardless of whether it occurs on company premises.[66]

- Employees should be held to the same standard of conduct during work-related trips and off-site events as on company premises.[67]

## IX. EMPLOYER LIABILITY FOR THIRD PARTY CONDUCT

What is an employer's duty when the alleged harasser is a customer or independent contractor? Several courts have concluded that employers are liable when third parties sexually

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[64] During the course of the investigation, the Church discovered that the minister had also been harassing Himaka's roommate.

[65] *Ferris v. Delta Air Lines Inc.*, 277 F.3d 128 (2nd Cir. 2001).

[66] Id.

[67] *Crowley v. L.L. Bean*, 303 F.3d 387 (1st Cir. 2002) ("Courts, however, do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace as well as to establish that the conduct was motivated by gender.").

harass employees. These courts have determined that employers must investigate and take remedial action against all forms of sexual harassment, even when the alleged harasser is a "non-employee."

In *Read v. The Scott Fetzer Co.*, 990 S.W.2d 732 (Tex. 1998), the Texas Supreme Court held that an employer who requires independent distributors to hire independent contractors to perform in-home demonstrations of products owes a duty to exercise reasonable control over the contractor. The company manufactured vacuum cleaners and related products. As required by the company, independent distributors would recruit door-to-door salespeople to give in-home demonstrations to prospective customers. These salesmen operated as independent contractors subject to the company's independent dealer agreement. In 1992, a distributor hired Mickey Carter as a salesman, but failed to check his references. Had he done so, the distributor would have learned that Carter had a history of sexually inappropriate behavior and an arrest record for indecency with a child. Carter ultimately raped a female customer in her home.

The customer sued the company, the distributor, and Carter for negligence and gross negligence. The jury awarded $160,000 in actual damages and $800,000 in punitive damages. The court of appeals affirmed the actual damages award, but reversed the punitive damages award. The Texas Supreme Court affirmed the court of appeals' judgment and held that the company retained control over the distributor's work because of the in-home demonstration requirement. According to the court, "[s]ending a sexual predator into a home poses a foreseeable risk of harm to those in the home."

In addition to its employees' conduct, an employer must also be mindful of its customers' conduct. An employer may be liable for the harassing behavior of customers toward an employee. In *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998), for example, two male customers harassed their waitress. One of the men pulled the waitress' hair. When she told her supervisor that she did not want to wait on the men, the supervisor told her, "You wait on them. You were hired to be a waitress. You waitress." When she returned to the men with a pitcher of beer, one grabbed her hair again and put his mouth on her breast. The waitress told her supervisor she was quitting and called her husband to come get her. She sued Pizza Hut and the franchisee, A&M Food Service, Inc., for creating a hostile work environment. The jury awarded her $200,000 in compensatory damages. On appeal, the Tenth Circuit reversed the judgment against Pizza Hut because the company did not have centralized control over the franchisee's labor relations. The court, however, upheld the award against A&M because the conduct by the two male customers was sufficiently severe to create an abusive environment. The court also ruled that an employer may be liable for its customer's harassing behavior. According to the court:

An employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a nonemployee, since the employer ultimately controls the conditions of the work environment.[68]

[68] *See, e.g., Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005) ("the employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what does matter is how the employer handles the problem.")

Likewise, in *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992), a casino dealer alleged that customers made sexually explicit comments, stared at her body, and made rude gestures. Powell complained to management, but the hotel refused to take any action against the customers. Recognizing that this case was "one of first impressions" the trial court denied the hotel's motion for summary judgment based on the EEOC's sexual harassment guidelines that hold an employer liable for the acts of "non-employees" if the employer *knew or should have known* about the harassing conduct and failed to take immediate action. *See* 29 C.F.R. § 1604.11(e) of the e-mail policy.

A federal court in Alabama reached a similar conclusion in *Sparks v. Regional Medical Center Board*, 792 F. Supp. 735 (N.D. Ala. 1992). Sparks was a medical secretary and histotech. She claimed that an independent contractor doctor sexually harassed her. The doctor supposedly harassed Sparks by teasing her about her breasts, calling her apartment a "sex pad," swearing, and other conduct. Referencing the EEOC's guidelines, the court noted that this was a "close" case, but reasoned that the doctor's independent contractor status was irrelevant in determining the hospital's liability.

**PRACTICAL ADVICE:**

- Allegations of third-party sexual harassment should be taken seriously.[69]

- Employers who learn about third-party harassment allegations should investigate and take prompt remedial action.[70]

## X. VIRTUAL HARASSMENT

Social media or social networking sites, the Internet and electronic mail systems ("e-mail") are powerful tools for accessing information and facilitating communications. Employers are placing these valuable resources at their employees' disposal and contributing to the already blurred lines between employees' professional and personal lives. Therefore, employers should understand that these technological innovations may become powerful media for sexual harassment and other inappropriate conduct. Employees sometimes misuse these resources by sending sexual propositions, jokes, pornography, and other inappropriate sexual commentary to their co-workers via the company e-mail system. Moreover, company employees may be "sexting" or sending other inappropriate text messages to co-workers, supervisors may be "poking" their subordinates on Facebook during or after work hours, and someone may be "tweeting" about all of this conduct on Twitter. The Internet and Social Media encourage the sharing of personal information and employees may forget that professional standards of conduct should apply to all interaction with co-workers. Given the potential for misuse, companies must adopt clear policies for social media or social networking sites, the Internet and e-mail usage.

[69] *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

[70] *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992)

Some courts have held that employees who receive inappropriate materials over an e-mail system may bring sexual harassment claims predicated on the inappropriate e-mail. In *Petersen v. Minneapolis Community Development Agency*, 1994 WL 455699 (Minn. Ct. App. Aug. 23, 1994), the court concluded that an alleged male sexual harassment victim was entitled to a jury trial based on his female co-worker's e-mailed love letters: she said that she would continue pursing him and wanted "more than a friendship." After the alleged victim rebuked her advances, the Agency's Executive Director took five projects away from him. The court denied the Agency's motion for summary judgment, holding that a material fact issue existed on the sexual harassment claim.

The Seventh Circuit, however, held in *Swinney v. Illinois State Police*, 332 F. App'x 316 (7th Cir. 2009), that an employee who complains about the inappropriate material in an e-mail must also make clear that she is being mistreated because of sex or gender. In *Swinney*, Rhonda Swinney sued the Illinois Police Department, her employer, based on four e-mails sent by her supervisor, Sandra Robinson. The first e-mail contained a joke about "why women are crabby," that ended with "women are the 'weaker sex'? Yeah right." The second and third contained sexually-themed jokes. The fourth, sent three weeks after the first two, contained four pictures of men in sexually-themed Halloween costumes.

Swinney complained that she felt "harassed and intimidated" by Robinson, pointing to two of the inappropriate e-mails. Swinney said that she was not sure why they had been sent to her, but that she thought Robinson might have been trying to harass and intimidate her with the emails. Swinney then sued the Illinois Police Department, alleging that the department retaliated against her after she lodged these complaints. In dismissing Swinney's claims, the court held that Swinney failed to produce evidence from which a reasonable jury could have concluded that her employer was aware that her complaint concerned sexual harassment. Swinney did not need to use any "magic words," but she needed to communicate that her sex was an issue. The court noted that at least one of the e-mails was also sent to Robinson's male supervisor, demonstrating that the e-mails were not sent to Swinney based on her sex.

Additionally, when employers learn of inappropriate e-mails, they should be aware that this conduct may be the "tip of the iceberg." In *Yamaguchi v. United States Department of the Air Force*, 109 F.3d 1475, 1479 (9th Cir. 1997), for example, a pattern of eventually severe sexual harassment began with inappropriate e-mail messages. The Ninth Circuit held that the alleged harassment entitled the victim to a jury trial.

Nevertheless, the alleged harassment must still be objectively severe or pervasive enough to alter the employee's work environment. For example, sexually harassing comments on the company's e-mail system did not rise to this level in *Schwenn v. Anheuser-Busch, Inc*., No. 95-CV-716, 1998 U.S. Dist. LEXIS 5027 (N.D.N.Y. Apr. 7, 1998). Deborah Schwenn complained to her supervisors that she was receiving sexually harassing messages on her computer terminal attached to her forklift truck. The next day, Schwenn's shift supervisor conducted a meeting at which he told the warehouse workers that the company's policies, including its sexual harassment/e-mail policy, prohibited such comments, and that the company would begin auditing the e-mail messages, disciplining -- with the possibility of discharge -- any employee who violated the policy. The court concluded that even if Schwenn was given the

benefit of every inference raised in these e-mails, a reasonable jury could not conclude that these events created an actionable hostile work environment claim.

Further, when employers discover inappropriate e-mail messages, they may use them to further their sexual harassment investigations. In *Knox v. Indiana*, 93 F.3d 1327 (7th Cir. 1996), a male police captain sent several e-mail messages to a female subordinate. He often asked her, in graphic ways, for sex. Although the jury held that this conduct did not amount to sexual harassment, the Seventh Circuit's analysis in this case is revealing -- it demonstrates how an employer can use the new technology to investigate sexual harassment complaints:

> [The Captain] initially denied any knowledge of why Plaintiff would have filed a complaint against him, but his tune changed when he found out that the investigator had copies of the e-mails he had sent to [her]. He then admitted that he understood how his behavior could be interpreted as sexual harassment.

Information posted on the Internet or social media sites may be considered public information; however, companies should be wary of the information acquired and how the employer acquired it. For example, employees may share information about their religious views, political affiliations, family responsibilities, medical status, or sexual orientation. The problem escalates when employees post information about their religious views, political affiliations, family responsibilities, medical status or sexual orientation. Knowledge of this information could open an employer up to liability under Title VII, GINA, FMLA, or ADA.

Although Internet and social media information is arguably public, at least one court has determined that an employer's improper access to an employee's MySpace profile violated the federal Stored Communications Act, 18 U.S.C. § 2510 et seq. (SCA). In *Pietrylo v. Hillstone Restaurant Group*, No. Civ. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009), two employees were fired after posting sexual remarks about managers and customers on a password protected MySpace account. The employer gained access to the site through a third employee who gave the employer her password. If the third employee perceived that she would lose her job if she did not comply, then the labor laws would have been violated. In *Pietrylo*, the jury found that the third employee was impermissibly pressured into giving her password, thus violating the SCA.

Moreover, in *Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009), a company was ordered to pay more than $200,000 in punitive damages and attorneys fees after the owner improperly accessed a former employee's America Online (AOL) e-mail account. After her employment was terminated, the employee sued the company and alleged that she had been sexually harassed by the company's owner during her employment with the company. During discovery, the employee discovered that the company's owner had gained access to her AOL password when she logged into the account using her company computer and had accessed her account numerous times without her authorization. The employee later brought suit under the SCA, seeking damages for the improper access. After trial in the SCA case, a jury awarded the employee more than $400,000 in compensatory and punitive damages, as well as attorney's fees.

Because an employer's outright ban on social media or social networking sites, the Internet and e-mail is not practical, employers must develop comprehensive electronic communications policies and incorporate social media or social networking, the Internet and e-mail issues into their employee training. The key is to ensure that employees use their best judgment on and off-line.

**PRACTICAL ADVICE:**

- Employers should adopt clear policies regarding the use of social media, the Internet and company e-mail systems.[71]

- Copies of employee e-mail may be useful in sexual harassment investigations. Nevertheless, before using employee e-mail and at the inception or during an employee's employment, employers should obtain an acknowledgment from their employees that the employees understand they have no privacy interest in their voicemail, e-mail or text-messages and that employee e-mail and text messages are the employer's property and can be reviewed or used by the employer at any time and for any reason. Employers should obtain employee acknowledgments of the company's voicemail, e-mail and text message policy and keep these acknowledgments in the employee's personnel file.[72]

## XI. CONCLUSION

In the ever-changing realm of sexual harassment law, an employer's best defense against liability is awareness -- awareness that long-held myths no longer ring true. Employers must familiarize themselves with the new era of sexual harassment issues and modify their responses to sexual harassment complaints to reflect these new issues. Knowledge about current sexual harassment trends will help employers avoid costly litigation and hefty verdicts.

[71] *Pietrylo v. Hillstone Rest. Group*, No. Civ. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

[72] Van Alstyne v. Elec. Scriptorium Ltd., 560 F.3d 199 (4th Cir. 2009).