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# SOME THINGS NEVER CHANGE

## SEXUAL HARASSMENT UPDATE 2010

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- Dean Schaner has exclusively practiced employment and labor litigation for over 21 years, representing employers in all aspects of FLSA, 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.
- Mr. Schaner has been named as a Texas Super Lawyer in the Super Lawyer issues of Texas Monthly in Employment Litigation Defense (2003-2009).

**haynesboone**  
Setting precedent.

# Corporate America On Notice

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## ***Lowe's \$1.7 Million Settlement***

- EEOC Statistics (2008)
  - Sexual harassment charges up 16%
  - Largest increase in entire 44-year history
- Current Economy

# Harassment

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- Connected to protected category
- Unwelcome
- Harm
  - Severe and pervasive
  - Tangible employment action (quid pro quo)
  - Hostile work environment
  - Knew or should have known (co-worker, customer, third-party harassment)

# Employer Liability

- Did harassment occur (either quid pro quo or hostile work environment)?
  - If NO, no liability.
  - If YES, did the harasser have immediate or successively higher authority over the employee?
    - If NO, did the employer know or should it have known of the harassment?
      - If NO, no liability.
      - If YES, did the employer take appropriate remedial action?
        - If NO, employer *IS LIABLE* for harassment.
        - If YES, no liability.
    - If YES, was there a tangible employment action?
      - If NO, did the employer exercise reasonable care to prevent the harassment and eliminate it?
        - If NO, employer *IS LIABLE* for harassment.
        - If YES, did the employee exercise reasonable care to take advantage of employer's corrective safeguards?
          - \*If NO, probably no liability or reduced damages.
          - \*If YES, employer *IS LIABLE* for harassment.
      - If YES, employer *IS LIABLE* for harassment.

# Tangible Employment Action

<b><u>TANGIBLE</u></b>	<b><u>NOT TANGIBLE</u></b>
Hiring, firing, failing to promote, reassignment with significantly different duties.	Work schedule changes.
Suspending without pay.	Assignment of extra or unpleasant work.
Removing conditions of employment.	Screaming, extending probation or scrutinizing work performance.
Demoting or giving objectively worse transfer.	Failure to grant short term assignments and training.
Removing job duties coupled with pay reduction.	Changes to informal policies, such as delegating work assignments.
Shift transfer resulting in pay decrease.	Failure to promote to a job which is not available and for which the employee is not qualified.
Sending home employee who receives compensation from tips.	Reassignment to comparable office on different floor.

# Tangible Employment Action

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*Pinkerton v. Colo. Dept. of Transp.*

563 F.3d 1052 (10th Cir. 2009)

- Receiving poor evaluation—despite receiving relatively good evaluations in prior years—did not amount to tangible employment action.
- Nor did these poor evaluations evidence that supervisor was “grooming” her for sexual favors.

# Faragher/Ellerth Affirmative Defense

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- Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; *and*
- Employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the employer or to avoid harm otherwise.



# Preventative Measures

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- Draft a written policy against workplace harassment.
- Ensure protection against retaliation.
- Create multiple and accessible avenues of complaint.
- Protect confidentiality to extent possible.
- Conduct a prompt, thorough and impartial investigation.
- Provide appropriate relief.

# Employer's Response

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## *Neely v. McDonald's*

2009 WL 2431294 (3d Cir. Aug. 10, 2009)

- Adequacy of employer's response to employee's harassment complaint is determined at the time the remedy is put in place, not by whether harassment actually ends.
- Need only be "reasonably calculated" to end the harassment.

# Punitive Damages

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## *Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*

554 F.3d 164 (1st Cir. 2009)

- A written policy, “without more, is insufficient to insulate an employer from punitive damages liability.”
- Need to show “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 training of supervisors.

# Employer's Intervening Act

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## *Stewart v. Miss. Transp. Comm'n*

2009 WL 3366930 (5th Cir. Oct. 21, 2009)

- Remedial effect of employer's transfer of employee who complained that supervisor sexually harassed her was not negated when company subsequently placed her, once again, under alleged harasser's supervision.
- No continuing violation.
- Conduct that occurred after the transfer was not sufficiently severe or pervasive.

# Hostile Work Environment

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*Anderson v. Family Dollar Stores of Ark., Inc.*,  
579 F.3d 858 (8th Cir. 2009)

- Employee alleged that supervisor sexually harassed her by:
  - Giving her back rubs
  - Calling her long-distance and asking her to join him at his hotel room in Florida
  - Using pet names: “honey” and “baby doll”
- Court held that this conduct was not severe and pervasive enough to have altered a term, condition or privilege of her employment.

# Hostile Work Environment

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## *Corbitt v. Home Depot U.S.A., Inc.*

2009 WL 4432654 (11th Cir. 2009)

- Store managers alleged harassment by gay regional HR manager.
- Flirtation ≠ harassment (five touchings and one comment toward one manager and four touchings and four comments toward the other).
- Fact that they were same sex touchings did not make them more severe.

# Who Knew or Should've Known

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## *Huston v. Proctor & Gamble*

568 F.3d 100 (3d Cir. 2009)

- To maintain suit based on co-worker harassment, employee must show that a “management level” employee was on notice.
- “Management level”
  - must have significant authority over the employment status of other employees (management), or
  - be specifically employed to deal with sexual harassment complaints (human resources).

# Failure to Complain or Avoid Harm

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- Lying to the Employer.
- Failure to Timely Complain.
- Embarrassment and Fear of Retaliation.
- Complaining Would be Futile.



# Failure to Complain or Avoid Harm

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## *Taylor v. Solis*

571 F.3d 1313 (D.C. Cir. 2009)

- Court held that a complaint to employee’s friend, who was a manager but not Plaintiff’s supervisor, did not defeat *Faragher/Ellerth* defense because company’s complaint procedure clearly stated employee should notify “EEO Counselor or EEO Manager.”
- Statement that “no one would believe her” if she complained did not explain why 4-month delay in reporting the alleged harassment was reasonable.

# “Gender Stereotyping” Harassment

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## *Prowel v. Wise Business Forms*

579 F.3d 285 (3d Cir. 2009)

- Adverse actions taken because employee
  - had a high voice and did not curse
  - was very-well groomed and wore dressy clothes
  - crossed his legs with tendency to shake his foot
  - drove a clean car with a rainbow decal
  - liked to talk about art, music, interior design and décor
- No basis in law “to support notion that effeminate heterosexual man can bring gender stereotyping claim, but effeminate homosexual man may not.”

# Same-Sex Harassment

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## *Love v. Motiva Enterprises, LLC*

2009 WL 3334610 (5th Cir. 2009)

- Plaintiff alleged female supervisor:
  - called her “stupid bitch” and “fat cow”
  - touched her once under her bra strap underwear on her hip and said that she was “fat” and “disgusting”
  - rubbed her shoulders
- Must first show that alleged harasser is homosexual and that the harassment was motivated by sexual desire.

# Virtual Harassment

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## *Swinney v. Ill. State Police*

332 Fed. Appx. 316 (7th Cir. 2009)

- Female employee complained when her supervisor allegedly sent four e-mails regarding:
  - “Why women are crabby” which ended with “Women are the ‘weaker sex’? Yeah right.”
  - Two e-mails contained sexually-themed jokes.
  - Four pictures of men in sexually-themed Halloween costumes.
- Court noted that at least one e-mail was sent to the alleged harasser’s male supervisor, indicating e-mails were not sent based on sex.

# Faithless Servant

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## *Astra USA, Inc. v. Bildman*

Case No. SJC-10361, (Mass. Oct. 5, 2009)

- Massachusetts Supreme Court, applying New York law, held that employee's misconduct caused his employer to pay nearly \$10 million as a result of widespread sexual harassment.
- Court required employee to forfeit \$6.7 million —compensation during period of misconduct—under New York's "faithless servant" law.