UNDERSTANDING & PREVENTING SEXUAL HARASSMENT AND OTHER FORMS OF ILLEGAL HARASSMENT

by

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Table of Contents

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I. EARLY HISTORY OF SEXUAL HARASSMENT AS A CAUSE OF ACTION UNDER TITLE VII

A. Enactment Of Title VII

When Title VII of the Civil Rights Act of 1964 was being debated on the floor of Congress, Representative Howard Smith of Virginia, who was Chairman of the House Rules Committee and was personally opposed to the bill's passage, proposed an amendment to the Act that would add "sex" to the list of protected classes covered by Title VII. This amendment to Title VII was Smith's last minute attempt to block its passage. However, Representative Smith's plan backfired, and not only was Title VII passed into law, but it also covered sex as a protected class.

Consequently, today's most powerful weapon against sexual harassment in the workplace, as well as against sex-plus discrimination, owes its very existence to a political maneuver designed to kill Title VII. However, as a result, the courts were left with very little legislative history regarding sex discrimination and sexual harassment to turn to for guidance.

II. THE FIRST TYPE OF SEXUAL HARASSMENT: QUID PRO QUO

A. Quid Pro Quo Sexual Harassment: The Original "Tangible Action" Claim

The quid pro quo cause of action was the first type of sexual harassment claim under Title VII.

Basically, under a quid pro quo claim, which is a Latin phrase meaning "this for that," a violation occurs when an employee is forced to submit to sexual advances from her supervisor as a condition of employment, which is basically any

employment decision made regarding a tangible aspect of the victim's job, such as the victim's hiring, promotions, demotions, benefits or wages.

The primary question to answer in quid pro quo cases was simply whether the employee had been threatened with losing any tangible aspects of her job in exchange for requests of a sexual nature, or in the alternative, if she was promised any tangible benefits or rewards for granting sexual favors. If so, a quid pro quo cause of action exists and the employer was held strictly liable (automatically) for the actions of its offending supervisor.

In Jin v. Metropolitan Life Ins. Co., No. 01-7013 (Cir. 2nd 2002) Min Jin sued her former employer claiming sexual harassment in violation of Title VII. A jury returned a verdict in favor of the employer; the 2nd Circuit reversed.

Jin's evidence included proof that her supervisor had forced her to engage in weekly sessions in which he ordered her to submit to demeaning sexual acts under the threat of discharge if she did not submit, and that her supervisor withheld her paycheck after she refused to attend these weekly meetings. The jury returned a special verdict in which it found that Jin had not suffered a tangible employment action, and that the employer had exercised reasonable care and that Jin failed to take advantage of preventive or corrective opportunities provided by the employer. Under the US Supreme Court's decisions, if there is no tangible employment action, then the employer has an affirmative defense; if there **was** a tangible employment action, **then there is no affirmative defense**.

Submitting to sexual acts and withholding paychecks **IS** a tangible employment action. (a) An employee's acquiescence in a supervisor's sexual abuse under a threat of discharge is a tangible employment action **even if the threat is never carried out, and even if there is no direct economic harm**. The supervisor's use of his supervisory authority constituted an act of the employer or "a company act."

Message To Employees…

NO ONE HAS THE AUTHORITY TO CONDITION ANY ASPECT OF YOUR EMPLOYMENT ON SEXUAL FAVORS!!!!

III. RIGHT/WRONG and LEGAL/ILLEGAL

PROTECTED CLASS STATUS:

In order to be illegal discrimination, the adverse action taken against the person must be based on that individual's "protected class status". (i.e., Age, Race, Sex, National Origin, Disability, Color, Pregnancy, etc.)

Before 1964, employers could just about do whatever they wanted as far as Employment Law or Civil Rights was concerned. They could hire, fire, demote people, transfer people and harass their people all for any reason. There was really no such thing as "Employment Law." Even though firing people because they were pregnant, or because of their age, or their race, or religion was wrong, it was all perfectly legal.

However, Congress then passed Title VII of the Civil Rights Act of 1964, which made it illegal to base an employment decision on someone's race, color, religion, national origin and sex. In 1967, Congress passed the Age Discrimination in Employment Act. In 1978, Congress passed the Pregnancy Discrimination Act of 1978. Later, Congress passed the Americans With Disabilities Act of 1990.

Today, those are our major groups of protected classes.

Of course, there other groups of protected classes that exist, such as military status, but those are the protected classes that we commonly refer to when discussing "illegal discrimination or harassment."

Therefore, today, in order to be <u>illegal</u> discrimination, the adverse action taken against the person must be based on that individual's "protected class status". (i.e., Age, Race, Sex, National Origin, Disability, Color, Pregnancy, etc.) If a company discriminates against someone and it is not because of their protected class, then even though the discrimination might be viewed as being "unfair" by some, it is still legal.

For instance, Coca Cola has adopted a very stringent rule regarding employees who "consort with the enemy":

If you drink a Pepsi product…
even on your own time, you are FIRED!

(Of course, if you test positive for "crack," you go into rehab.)

Is this fair? Fairness has nothing to do with it. From a legal perspective…

"Fair" is where you show PIGS!

This is why the courts have ruled again and again that there is no doctrine of "fairness" in employment law. Why? Because people's opinions differ on what is "fair." An employee's definition of what is "fair" does not trump its employer's ability and right to run its workplace as it sees fit. Employers are allowed to exercise their "business judgment" and make decisions…even if employees view these decisions that affect their employment as being "unfair."

"Fairness" is an **EMPLOYEE RELATIONS** consideration…**NOT A LEGAL ONE!**

Employers have the right and responsibility to set the direction of the organization. This is referred to as the ... **"Business Judgment Rule"**

In short, the more you know about the law, the more you tend to appreciate your employer.

While we are concerned with what is legal and illegal, we are MORE concerned with maintaining a positive atmosphere and good employee relations. There are many things an employer can do that are legal but are highly unethical and "wrong," as you will see in this training. Maintaining positive employee relations is the highest priority when it comes to keeping harassment out of the work environment.

IV. THE SECOND TYPE OF SEXUAL HARASSMENT: HOSTILE ENVIRONMENT

A. What Meritor Decided: The U.S. Supreme Court's First Sexual Harassment Case

In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a female employee, Mechelle Vinson, claimed that her supervisor, Sidney Taylor, had sexually harassed her. Taylor had repeatedly asked Michelle Vinson to go out with him. Vinson refused Taylor's advances at first, but then consented out of fear of losing her job, even though such threats were never explicitly made against her.

After they started dating, Taylor began to fondle her in front of other employees. He began following her into the women's restroom. He then began exposing himself to her, and he even forcibly raped her on several occasions. Vinson estimated that she and Taylor had sexual intercourse between 40 and 50 times over the next few years.

Vinson's charges were admitted without objection.

The Supreme Court's decision in Meritor did much to establish many aspects of the hostile environment cause of action for sexual harassment under Title VII. Therefore, the various holdings of the Meritor Court should be examined individually.

Specifically, The U.S. Supreme Court in Meritor held:

1. Hostile environment is a bona fide cause of action for sexual harassment under Title VII.

First, the Supreme Court held that the hostile environment cause of action is a bona fide claim for sexual harassment under Title VII.

In making its decision, the Court relied on the 1980 EEOC Guidelines on Sexual Harassment in forming its opinion (29 C.F.R. § 1604.11). These guidelines clearly state that sexual misconduct constitutes sexual harassment when such conduct has the purpose or effect of **unreasonably interfering with an individual's work performance or it creates an intimidating, hostile, or offensive working environment, regardless of whether or not the conduct is directly linked to the employee's economic or tangible employment benefits commonly associated with**

quid pro quo claims.

The Court therefore held that "hostile environment" in the workplace is a bona fide cause of action for sexual harassment under Title VII.

2. In order to be illegal, the offensive conduct "unwelcome."

According to the Court, if the "offensive" behavior is welcome…it is not illegal under Title VII.

3. The harasser's conduct must be "sufficiently severe or pervasive" so as to affect a term, condition or privilege of employment.

The Meritor Court held that in order for sexual harassment to be actionable under Title VII:

> **"…the offensive conduct must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment."**

The Meritor Court also stated that **not all** offensive conduct or harassment may be described as "harassment" that affects a "term, condition, or privilege" of employment within the meaning of Title VII. For guidance, the Court looked to Rogers, which stated that the **mere utterance of an offensive epithet is not sufficient to affect the conditions of one's employment to a degree that would violate Title VII.**

In other words, a few isolated instances will not constitute a hostile environment under Title VII.

In Vance v. Southernbell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989), the trial court granted Southernbell's motion to dismiss Vance's lawsuit on the grounds that a noose hung over a black employee's desk on **two different occasions was not enough**, as a matter of law, to establish a hostile environment based on race.

Therefore, merely being "offended" in the workplace does not violate Title VII.

4. Employers must have an effective policy and grievance procedure in place.

The Court stated that employers are expected to first adopt a nondiscrimination policy **specifically** directed against sexual harassment. Therefore, **a general nondiscrimination policy will not satisfy this requirement**.

Secondly, employers are required to adopt a grievance procedure that is calculated to **encourage** the victims of sexual harassment to come forward and provide the company with notice of the offensive conduct. Also, this grievance procedure must allow employees **multiple avenues** through which to complain of illegal harassment.

In Meritor, the employer's grievance procedure required the plaintiff to first report the offensive conduct to her supervisor, who was also the harasser. No alternative reporting process existed. The Court was therefore not at all surprised that Vinson failed to invoke the company's grievance procedure and report her supervisor's offensive behavior.

Consequently, since the employer's grievance procedure was not calculated to effectuate the reporting of such harassment, the Court did not allow the employer to defend itself by claiming it did not have any notice of the harassment. Constructive notice was therefore imposed against the employer.

Employers must take **REASONABLE MEASURES TO PREVENT ILLEGAL HARASSMENT IN THE WORKPLACE**. So, what are "**REASONABLE MEASURES**"?

- **Proper Grievance (Complaint) Procedure in place (by-pass procedure for REPORTING!)**
- **A PROPER POLICY in place which specifically addresses and prohibits sexual harassment and**
- **TRAIN YOUR EMPLOYEES! (Depending on jurisdiction.)**

Once an employer has taken these three steps to **PREVENT ILLEGAL HARASSMENT**, the employee is "**IT**." That means if the employee feels comfortable, the employee should speak up and say…

"I don't appreciate that."

Many simple misunderstandings can be cleared up that way.

If the employee feels uncomfortable doing that, or if that does not work with the alleged harasser, then the employee …

MUST REPORT THE OFFENDING BEHAVIOR!

Who Can You Call … *ANYONE IN MANAGEMENT!*

B. What Harris Decided: The U.S. Supreme Court's Second Sexual Harassment Case

In Harris v. Forklift Systems, 510 U.S. 17 (1993), a female manager, Teresa Harris, received numerous unwanted sexual comments and offensive innuendoes from Charles Hardy, the company president.

In front of others, Hardy would suggest that he and Harris go to the Holiday Inn and "negotiate" her raise, he would ask Harris and other female employees to get coins out of his front pants pocket, he would call her a "dumb-ass woman," he would throw objects on the ground in front of Harris and other female employees, then ask them to pick these items up, and he would make sexual comments about Harris' and other women's clothing.

The final straw came one day after Harris had secured business from a customer. Harris introduced the new customer to Hardy. Hardy looked at the customer, then at Harris, and asked her, "What did you do, promise the guy...some [sex] Saturday night?"

Specifically, The U.S. Supreme Court in Harris held:

THE LAW WILL NOT PROTECT HYPERSENSITIVE EMPLOYEES

A "SUBJECTIVE/OBJECTIVE" test is to be used to determine the severity or pervasiveness of the offensive acts.

One of the Court's most important holdings in Harris was that a **"subjective/objective" test** is to be used to determine whether or not the harasser's offensive conduct was severe or pervasive enough to substantiate a claim of sexual harassment

The first prong of this formula is the **subjective test**. Under the subjective test, the question to ask is **whether or not this particular victim subjectively perceived the environment to be so abusive or so hostile that the conditions of her employment were actually altered.** If the answer to this question is "no," then the inquiry stops there. No hostile environment exists. However, if the answer to this question is "yes," then the plaintiff must also pass the second prong of the test.

The second prong of this formula is the **objective test**. Under this test, according to the Harris Court, the first question to ask is **whether or not the offensive conduct was so severe or pervasive that a "reasonable person" would consider the work environment to be so abusive or so hostile that it altered the employee's conditions of employment.** If so, then a hostile environment under Title VII will be viewed as having been created. If "no," then the plaintiff's sexual harassment claim based on hostile environment would fail.

(In Harris, based on the preceding facts, the Court held that both tests had been met. Even

though the Court felt this case was a "close call," the Court ruled that both Teresa Harris (subjective test) and a reasonable person in the community (objective test) would have been was so offended by this conduct that her conditions of employment were in fact negatively affected, thus creating a Title VII violation of sexual harassment.)

Important Lessons Under Harris

THE HARASSER'S INTENT IS IRRELEVANT

&

"Would the REASONABLE PERSON in the community be so offended they couldn't function properly in their job."

IF NOT … IT IS YOU!

KEY POINT: What is Your Reputation In The Workplace?

How Are You Being Perceived By Others When You Act And Speak?

Does this include nonverbal harassment, such as leering? Visual harassment, such as nude posters? Gestures? Etc.?

Therefore, merely being "offended" in the workplace does not violate Title VII.

V. THE CRITICAL ELEMENTS OF THE PRIMA FACIE CASE FOR HOSTILE ENVIRONMENT

The Prima Facie Case:
Hostile Environment Claims

In establishing a prima facie case, the plaintiff must prove all of the following:

1. **The Plaintiff belongs to protected class of persons (sex, race, national origin, religion, age, etc.),**

2. **The victim was subject to unwelcome harassment,**

3. **The harassment complained of was based on the plaintiff's protected class ("but for" or "because of" test),**

4. **The harassment complained of was so severe or pervasive that it adversely affected a "term, condition, or privilege" of the victim's employment, and**

The employer can be held liable for this harassment under a respondeat superior ("The Superior Is Responsible") theory.

VI. WHAT ARE THE KEYS TO CREATING A HOSTILE ENVIRONMENT UNDER TITLE VII?

- **UNWELCOME** conduct that occurs
- **BECAUSE OF** the victim's PROTECTED CLASS STATUS that is so
- **SEVERE OR PERVASIVE** that it alters the victim's terms or conditions of employment.

THIS IS THE LEGAL STANDARD THAT CREATES A HOSTILE ENVIRONMENT

VII. THE "UNWELCOMENESS" REQUIREMENT

A. Introduction Of The Welcomeness Requirement

In order to be illegal under Title VII, the behavior exhibited by the alleged harasser must be unwelcome by the alleged victim, which means that the plaintiff **did not solicit or incite and that the plaintiff personally found to be undesirable and offensive.**

In Redman v. Lima City School District, 889 F.Supp. 288 (N.D. Ohio 1995), when the harasser forced the plaintiff up against a wall in the basement, and then proceeded to fondle and rub up against her in a sexual manner, ***the plaintiff promptly vomited***. The court held that such a response indicated that the advances of the harasser were indeed unwelcome.

In Wilson v. Wayne County, 856 F.Supp. 1254 (M.D. Tenn. 1994), the court found that a male supervisor's sexual advances toward a female employee were indeed unwelcome where the female employee refused to reciprocate his fondling of her, which included his attempt to put her hand on his crotch as he wrestled her to the floor. ***The court reasoned that it should have become apparent to even the "most optimistic" middle-aged man at least at that point that his advances were unwelcome by this 18-year-old girl.***

B. Relationships/Conduct Inside The Workplace

In Perkins v. General Motors Corporation, 709 F.Supp. 1287 (W.D. Mo. 1989), the court attempted to devise a list of factors that should be examined in trying to determine whether or not the behavior directed toward the "victim" was unwelcome. In doing so, the court looked to see what factors other courts have used in their analysis as they have attempted to determine whether a harasser's conduct was unwelcome, which included such questions as:

1. Did the plaintiff by her own conduct indicate that the alleged sexual advances were unwelcome?

2. Did the plaintiff substantially contribute to the alleged distasteful atmosphere by her own profane and sexually suggestive conduct?

3. Can the plaintiff, in response to evidence that she had willingly participated in such conduct, identify when she made it known to her co-workers or supervisors that she considered such conduct offensive?

4. Did the plaintiff report or complain about any of the offensive incidents at issue, and if she did, when did she complain, and

5. Is the plaintiff's account of the "unwelcome" sexual conduct sufficiently detailed and consistent so that it is plausible?

If you tell a co-worker an off-color joke every day,
then the co-worker tells one to you,
you have created the reasonable expectation that it was "welcome."

In Strausbaugh v. Ohio Dept. of Trans., No. 02AP-03, (Dist. Ct. of App. Franklin Cty. 2002), Beemon Strausbaugh worked at a maintenance facility for the Ohio Department of Transportation (ODOT). Paul Corcoran was his direct supervisor.

Strausbaugh and Corcoran got along well for many years. However, in the summer of 1999, Corcoran began to swear at him regularly, call him names, and do sexually suggestive things to him. Strausbaugh claims that the supervisor blew kisses at him, patted him on the buttocks, and pulled his head toward his crotch to simulate sexual acts. According to Strausbaugh, Corcoran continued this behavior in spite of repeated requests for him to stop.

Strausbaugh sued for sexual harassment. The Franklin County Court of Appeals threw his case out.

The court found that Strausbaugh was a "prime player in using foul language and crude gestures. . . . He would commonly grab his crotch and make comments such as 'I've got something for you to s*ck on' 'I got your lunch right here, big boy' and 'you want some of this?'"

Witnesses said that the "f-word" was Strausbaugh's favorite word. In short, the evidence showed that Strausbaugh was a major contributor to this environment.

Strausbaugh's offensive conduct was often aimed at Corcoran, his supervisor. Witnesses said that he called his supervisor a "%&#!@head," flipped him "the bird," and said "#*!* you" when Corcoran gave him orders.

As a result, the court found that the harassment directed toward Strausbaugh was not unwelcome.

Therefore, the victim's conduct inside the workplace plays a large part in determining whether or not the harassing behavior was welcome.

In other words…

If you are going to dish it out, you'd better be ready to take it!

C. Off Duty Conduct

1. Off-Duty Private Life Conduct Is Not Admissible To Show Welcomeness

In considering such factors as the victim's dress, speech and so on in determining whether the offensive conduct was unwelcome, several courts have held that the victim's private life **MAY NOT** be considered as factors in making this determination.

In Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), the Fourth Circuit specifically stated that **the victim's private life and her private consensual activities will not constitute a waiver of her legal protections against unwelcome or unsolicited sexual harassment IN THE WORKPLACE.**

In the Eighth Circuit, the courts have also held that focusing on a victim's private life outside the workplace in an effort to determine whether the offensive conduct was unwelcome **is an error as a matter of law**.

In Burns, supra, the employer tried to prove that the harassment directed toward a female employee was not really all that offensive to her **due to the fact that she had posed nude in a national magazine. The employer claimed that the treatment she received at work was therefore not entirely unwelcome, nor did it have the severe or pervasive affect on her personally (subjective test) as she claimed.**

However, the Eighth Circuit Court of Appeals dismissed this argument entirely. The circuit court held that the plaintiff's choice to pose nude for a magazine is not material to the issue of whether she found her harasser's conduct offensive or if she welcomed it.

The plaintiff's private life, regardless of how reprehensible the trier of fact may find it to be, is not an appropriate factor of consideration in determining whether the treatment she received at work was either offensive or unwelcome. To hold otherwise, the court held, would be contrary to Title VII's goal of ridding the workplace of any kind of unwelcome sexual harassment.

2. Only the Victim's Conduct WITHIN THE WORKPLACE that is KNOWN TO THE HARASSER May Be Considered.

People live "double" sometimes "triple" lives. Just because you discover something juicy about something someone does outside of the workplace, that does not mean that you can start treating them differently at work.

How they conduct themselves with you at work is the key.

D. Employee Dating: "No" Means "No"

If a supervisor becomes aware of two employees dating, the supervisor should bring the two in and address the issue. (Some will tell you to ignore it…it will go away. This is stupid. NEVER ignore an issue!)

I suggest you bring them in and ask if everything is "welcome". If it is welcome … it is **NOT** sexual harassment. I would then remind the happy couple of two things:

- First…**PUBLIC DISPLAYS OF AFFECTION (PDA) DO NOT COME IN HERE** and
- If the relationship goes south … **IT DOES NOT COME IN HERE**! Right now, everything is fine. However, if the relationship goes south, and if one employee starts trouble for the other, **WE NEED TO HEAR ABOUT IT IMMEDIATELY!!!**

In short…right now, the behavior is welcome and we do not have any notice that any harassment exists…so we cannot be blind-sided. However, if this behavior changes, we have placed the employees on notice to **TELL US IMMEDIATELY!**

REMEMBER: This is how Meritor started.

E. Employees' Obligation To "Speak Up" When They Find Something Offensive

Once an employer has lived up to its obligations (discussed later in the Faragher case), then employees have an **obligation** to speak up and say when something is unwelcome or offensive and to report the incident to management.

VIII. ON THE JOB *AND* OFF THE JOB CONDCUT BY COWORKERS IS ACTIONABLE

NOTE: The language and harassing acts in the following Hawkins case are extremely disturbing. I left this language in this handout since it demonstrates a tremendous change in 6th Circuit law. If you are bothered by truly horrendous language and harassing acts, please skip this case and move on to the next. However, if you do read the case, you will better understand why the court expanded Title VII Retaliation Law the way it did.

In Hawkins, et. al. v. Anheuser-Busch, No. 07-3235 (6th Circuit February 19, 2008) Diana Chiandet, an employee at the Anheuser-Busch's plant in Columbus, Ohio, reported sexually harassing behavior from one of her co-workers, Bill Robinson, while working on

Production Line 75. Chiandet complained to brewery management in July of 1993 that she had received three harassing and threatening anonymous notes. The first note stated:

> "Are you looking for a real good hot time with a real hard body man? [I]f so I'm your man. Call my line to nite [sic] for some read [sic] hot sex talk. 1-800-334-1256. I'll be waiting."

The second note read:

> "Hi - Are you lonely and looking for a real hot time? [I]f so I'm the man for you. If you want something Hot and Hard call meat 1-800-335-666. They call me Mr. Big Daddy."

The final note stated:

> "What's up sexy. So are your ready for something nice and hard because I think it's about time we got together so we can have a good time all nite [sic] long. I no [sic] you like it *long and* Hard. And I have tools to do that all nite [sic] thing. P.S. Don't worry I will make real good to you. I no [sic] what you like *PAIN*."

On August 4, 1993, shortly after reporting these notes to management, Chiandet told her supervisor that her car had been "sideswiped" at work.

The brewery concluded that the notes were "inappropriate, lewd, suggestive and threatening," and launched an investigation into the incident. A handwriting expert promptly determined that Robinson was the author of the notes. Although Robinson originally denied writing them, he later admitted to being the author after he was confronted with evidence from the handwriting expert. This caused Anheuser-Busch to terminate Robinson's employment in early September of 1993. Robinson pursued a union-backed grievance.

Under the collective bargaining agreement at the brewery, management may terminate employees only for "just cause." Employees who wish to challenge a disciplinary action taken against them can file a grievance. Grievances are first heard by a department head, then by a human resources manager, and finally by a Multi-Plant Grievance Committee. The Grievance Committee is composed of two company representatives, two union representatives, and a mutually agreed-upon arbitrator.

Following Robinson's appeal, the Grievance Committee reinstated him after a six-month suspension.

Jackie Cunningham was hired by Anheuser-Busch in May of 1996. In 1999, Cunningham began working with Robinson on line 75. Cunningham became concerned about Robinson's conduct after she saw him near her residence and believed that he was following her. She alleged that, shortly after she saw Robinson near her home, he began to harass her at work.

Specifically:

- Cunningham said that during a training session in 1999, Robinson sang a rap song to her with the lyrics: "Baby, won't you back that thing up," and then held money in his hand and said: "Is that what it's gonna take?"

- Robinson also tried to put his hand on her shoulder, but she moved away.

- Robinson then said to her: "I will suck your !#@@ but you got to suck my !@#@."

- Robinson later caressed her back and she responded by screaming at him: "Don't touch me."

- Robinson told Cunningham to come over to his vehicle at work and, when she refused, he chased her around and tried to grab her as she ran away.

- Robinson asked Cunningham: "Why don't you just suck my !!@#?"

- Robinson told Cunningham that he was getting rid of his girlfriend, and asked her: "Why don't you just make up your mind?" while trying "to feel on her." Cunningham also said that she could not remember every instance of harassing behavior, but that Robinson would harass her "on and off" and would "push on and on."

She allegedly complained to her supervisor, Eric Steinberg, "a few times" about Robinson's behavior and contacted the plant operations manager Richard Sambecki to request a transfer. Cunningham also asserted that she told her supervisors that life was "unbearable" working with Robinson since he was "really trying to make [her] job difficult."

She also talked with her union steward, Leslie Schoenian, about Robinson's behavior. Schoenian advised Cunningham of the things that Robinson "was capable of" and suggested that the best solution would be to simply move to another brewery line.

Shortly thereafter, Cunningham told Schoenian that she wanted to move lines, and Schoenian discussed the matter with management. The brewery then transferred Cunningham to a new line. Even after the transfer, however, Cunningham alleged that she felt harassed by Robinson's friends and said that "stuff still followed [her]" to her new position.

Cherri Hill began working at the brewery in August of 1999. In January of 2000, she started working with Robinson. She alleged that Robinson began harassing her in November of 2000. In her deposition, Hill recounted numerous instances of touching—stating that Robinson touched her arms, rubbed her shoulders, and walked up close behind her—and that he regularly made "lewd and explicit" comments. When Hill asked Robinson to stop, he said that he knew she "liked it" and that he "wanted to have sex" with her. Hill stated that Robinson would walk close to her, touch her on the backside, and that on one occasion he rubbed against her with "his private area" and grabbed her

around the waist. Hill also said that on three or four occasions Robinson told her "she had big breasts" and a "big butt." On another occasion, Robinson told her "he wanted to @!#!" her and said, "I bet you have some good !@#!$ and I know that you would like this. You should let me take you away from your boyfriend." In addition to recalling theses specific incidents, Hill testified that Robinson made lewd and sexual comments "all the time."

Hill told a coworker in November of 2000 that Robinson was bothering her. She also contacted Schoenian, her union steward, to complain about Robinson's conduct. Hill then asked her supervisor, Don Schlarman, if she could transfer lines after telling him that Robinson "had been touching her and talking dirty to her." Donald Manley, the brewery's human resources manager, was informed of Hill's complaint and ordered Cortlin Davidson, a human resources investigator and assistant manager, to look into Hill's allegations.

Davidson interviewed Robinson as part of his investigation into Hill's original allegations of harassment. When Robinson was informed of Hill's complaint, he denied harassing her. Robinson was apparently never asked about the fire.

At the end of his report, Davidson concluded: "Based on the interviews conducted, I believe that Bill Robinson did behave in a sexually inappropriate manner with both Cherri Hill and Jackie Cunningham."

Despite the report's conclusion, the brewery did not discipline Robinson.

Across the next few years, Robinson continued to harass several female coworkers. Again and again, Anheuser-Busch would simply transfer the victim to another position and move another female employee into her place. In order to intimidate anyone who complained, Robinson would key their cars, threaten them, assault them and slash their tires. Even the supervisors knew that Robinson was dangerous and had regularly harassed and retaliated against women.

On June 2, 2003, Robinson was terminated. Robinson's termination became final on July 21, 2003 after a grievance was field by the union. Robinson later shot his girlfriend and then killed himself.

Amanda Grace-Hawkins, one of Robinson's victims, along of several other of his victims, filed suit in the Franklin County Common Pleas Court against Anheuser-Busch in June of 2005.

The district court granted summary judgment in favor of Anheuser-Busch. The employees appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that in order to actionable, **the harassment must consist of more than words that simply have sexual content or connotations**. Instead, the workplace must be permeated with "discriminatory intimidation, ridicule or insult" sufficiently severe or pervasive to alter the conditions of employment. **A non-exhaustive list of**

factors for the court to consider include "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."

This court also held that harassment involving an "element of physical invasion" is more severe than harassing comments alone.

As for the retaliation claims set forth by the plaintiffs, the court held that Robinson's alleged involvement in setting fire to Hill's car, as well as other off-duty retaliatory acts he committed, could be considered in relation to Hill's retaliation claim under the United States Supreme Court's ruling in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) (holding that employers may be held liable for off-premises acts of retaliation under Title VII's anti-retaliation provision).

In reaching its decision, the Sixth Circuit reasoned that when determining whether retaliatory acts committed outside the work area or directed towards others counts towards making a case of retaliation, the courts may consider such factors as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff.

The court then reasoned that more weight should be given to acts committed by a ***serial harasser*** if the plaintiff knows that the same individual committed offending acts in the past. If a serial harasser is left free to harass employees, then everyone gets the clear impression that this harassment is tolerated, which supports a plaintiff's claim that the workplace is both objectively and subjectively hostile.

In order to hold an employer liable for the illegally harassing acts between co-workers, the employer must have known of the harassment or should have known. In this case, the court held that management at Anheuser-Busch either knew or should have known that Robinson was sexually harassing its employees. It was common knowledge on this production line that Robinson was sexually harassing these women. Furthermore, several of these women reported this illegal conduct over a 10-year period.

Contrary to Anheuser-Busch's assertion, simply separating the harasser and his victim is insufficient to preclude liability. Instead, companies must take affirmative steps reasonably calculated to prevent and put an end to a pattern of harassment—such as personally counseling harassers, sending them letters emphasizing the company's policies and the seriousness of the allegations against them, training, and threatening harassers with serious discipline if future allegations are substantiated—are more likely to be deemed to have responded appropriately.

Other reasonable responses calculated to end harassment might include:

(1) Formulating an "observation network" designed to monitor the harasser,

(2) Checking in with the victim daily to ensure that she had not been further bothered by the harasser, and

(3) If further complaints arise, meeting with the harasser the next day to give him written notice that this was his "one and only" warning, that further harassment would result in immediate termination, and that harassment "absolutely will not be tolerated."

The court then noted that in this case, the brewery did not do ***anything*** other than take the most remedial steps by removing the victims from Robinson's production line ... and then putting someone else in their place.

Ever since the U.S. Supreme Court's decision in Burlington Northern, under Title VII, the "adverse employment action" requirement in the retaliation context is not limited to an employer's actions that solely affect the terms, conditions or status of employment, or only those acts that occur at the workplace. The retaliation provision instead protects employees from conduct that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Sixth Circuit held that an employer will be liable for the retaliatory acts of a coworker if:

(1) The coworker's retaliatory conduct is sufficiently severe so as to "dissuade a reasonable worker from making or supporting a charge of discrimination,"

(2) Supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and

(3) Supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

The court therefore held that Anheuser-Busch's failure to investigate the complaint of Robinson's violent acts of retaliation was both indifferent and unreasonable.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case was a "Goat Rodeo" from the beginning.

First of all, union employees need to understand that they pay union dues for a reason:

For representation.

Therefore, when Robinson was committing all of these unspeakable acts, the union not only represents Robinson, but it also represents those women who are being harassed. It is absolutely vital that union members pursue their rights with the union, which means filing grievances against the harassers with the union. If the union fails to represent the union member, which includes the victims, they can file suit against the union.

Think of it this way: If you paid a lawyer $50 a month to protect your interests, and the lawyer then failed to defend your interests, and actually defended the person who is harassing you, **WHAT WOULD YOU DO?**

This case typifies why so many companies are anti-union: The Teamsters did nothing to protect their good members and did ***everything*** to protect a "serial harasser" like Robinson ... even though the Teamsters knew Robinson was dangerous and a harasser.

Next, there are several members of management that should have been terminated. Robinson had been making threats in the workplace, he was stalking his coworkers at their homes and he had even admitted to setting fire to Hill's car to his coworkers. What in the world was management waiting for?

In my "Preventing and Understanding Workplace Violence" class, we draft a definition of "workplace violence." Understanding this definition is vital if you expect your employees to recognize it when it occurs. So, what is workplace violence?

"Any actual or threatened physical, verbal or nonverbal abuse occurring in or outside the work setting."

Had this definition been followed, the employer would have addressed this situation MUCH earlier.

IX. THE "BUT FOR" OR "BECAUSE OF" TEST

A. Did The Offensive Treatment Occur "But For" Or "Because Of" The Plaintiff's Gender?

Title VII states that it is **"an unlawful employment practice to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."**

In applying this "but for" standard, the courts generally examine how the plaintiff was treated and determine if an employee of the opposite gender would have been treated differently. If so, then discriminatory treatment is presumed.

1. Differences In Physical Treatment

In Kopp v. Samaritan Health Systems, Inc., 13 F.3d 264 (8th Cir. 1993), the employer claimed that Title VII had not been violated since it treated both its male and its female employees in an offensive manner. However, the court reasoned that not only did the offensive conduct involve more females than males **(ten females as compared to four males)**, but the offensive incidents involving the female employees were **much more serious in nature than those involving male employees**.

For example, several of the incidents involving women included actual

physical contact and harm being inflicted, whereas the incidents involving the male employees consisted of only a raised voice or a verbal insult. The court concluded that since the offensive treatment directed toward the female employees was far worse than the offensive treatment directed toward the male employees, the female plaintiffs had met their burden of proving that the offensive treatment they received was indeed inflicted "but for" or "because of" their gender.

2. Verbal Abuse: Insults Based On One's Protected Class

In Steiner v. Showboat Operating Company, 25 F.3d 1459 (9th Cir. 1994), the employer also argued that no Title VII sexual harassment violation existed where a **supervisor consistently abused both his male and female employees**. However, while the court agreed that the supervisor did indeed abuse all of his employees, the court found that **the supervisor did not abuse all of his employees in the same manner**.

For example, although the offending supervisor would typically call his male employees "jerks" and "assholes," the epithets he used toward his female employees were more gender-related by referring to them as "dumb-f*cking blondes" and "f*cking c*nts." Also, on one occasion when this supervisor was angry, he sarcastically suggested to one of his female employees that she should have sex with the customers.

In reaching its decision, the court reasoned that while it is one thing to call a woman **"worthless,"** it is quite another to call her a **"worthless broad."** Therefore, even though the supervisor abused both his male and female employees, again, **the abuse directed toward his female employees was different since it was gender-related, so the "but for" requirement of Title VII was met.**

In Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959 (8th Cir. 1994), the employer claimed that no sexual harassment case existed, arguing that a co-worker's verbal assault on a female employee would have occurred even if the victim had been a man since the offensive conduct resulted from a personality conflict between the two. However, the court saw it differently.

In reaching its decision, the court was not nearly as concerned with the source of the conflict as it was with the vulgar gender-related insults that the harasser used to insult his female counterpart. Consequently, due to the gender-related insults directed against the plaintiff, the harasser created a "but for" the victim's sex situation, regardless of the origin of the dispute. Several other courts have agreed with this logic and have adopted this same reasoning into their decisions.

B. Does The Abusive Treatment Have To Be Sexual In Nature In Order To

Support A Sexual Harassment Claim? No.

In King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994), the Federal Circuit specifically held that **when the offensive conduct is based on the sex of the victim, regardless of whether or not the conduct is of a sexual nature, then an abusive or hostile environment may have been created.** Therefore, according to the Federal Circuit, incidents that occur "but for" the employee's sex can be used to support a sexual harassment claim based on a hostile environment theory **even** if the conduct is not sexual in nature.

In Hall v. Gus Construction Company, 842 F.2d 1010 (8th Cir. 1988), male co-workers on a construction crew called one female employee by the nickname "Herpes" due to the skin condition she had developed from the sun, they urinated in the gas tank of a female employee's car, and they intentionally failed to repair a pilot truck that gave off fumes while the other female employees were using it. Even though the employer agreed that such conduct was cruel, it also contended that these incidents could not be used to support a sexual harassment claim of hostile environment since this conduct was not sexual in nature. However, the court disagreed and **held that the offensive acts used to support a claim of sexual harassment need not be sexual in nature but instead need only be based on or occur "but for" the plaintiff's sex.**

The Hall court therefore concluded that intimidating and hostile acts that are not purely sexual in nature but are directed toward women solely because they are women can be used to support a sexual harassment claim based on a hostile environment theory.

In Williams v. General Motors, Inc., 1999 Fed. App. 0289P, 1999 WL 587199 (6th Cir. 1999) in addition to committing with harassing conduct and insults of a sexual nature, the harassers glued a box to the victim's desk, they "misplaced" her equipment, she was denied overtime, she was the only person at her level in the area not to be given a key to the office, she was the only person to be denied a break, she was padlocked into different areas as she entered them and her accesses in and out of areas were blocked.

The Sixth Circuit Court held that in the "totality of the circumstances," even though these offensive acts were not sexual in nature, they certainly can be considered in determining if the victim was subjected to a sexually harassing environment. Specifically, the court stated, "**any** unequal treatment of an employee that **would not occur but for the employee's gender** may, if sufficiently severe or pervasive under the Harris standard, constitute a hostile environment in violation of Title VII."

Due to the logic presented in these cases across the various federal circuits, the majority of jurisdictions now hold that offensive treatment need not be sexual in nature in order to support a claim of sexual harassment based on a hostile environment theory under Title VII. Instead, if an employee is treated differently

on the job simply on the basis of sex, or "but for" her sex, and a sexually hostile environment is created, a valid Title VII claim of sexual harassment may exist.

X. "BUT FOR" REQUIREMENT: "SAME SEX" SEXUAL HARASSMENT IS ACTIONABLE UNDER TITLE VII

A. "Same Sex" Sexual Harassment

In Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118 (5th Cir. 1996), Joseph Oncale was an employee on an offshore oil rig. On separate occasions, two co-workers physically restrained Oncale while his supervisor placed his penis on Oncale's neck and on Oncale's arm. Oncale's co-workers and supervisor threatened him with homosexual rape, and on another occasion, while Oncale was taking a shower, his supervisor forced a bar of soap into Oncale's anus while a co-worker restrained him.

However, again, the circuit court held that male-on-male harassment with sexual overtones is not sex discrimination without a showing by the plaintiff that the harasser treated the plaintiff differently "because of" his sex, which does not occur in "same sex" harassment. Instead, it is simply viewed as harassment for harassment's sake, which is not covered by Title VII. Oncale then appealed his case to the U.S. Supreme Court.

In March of 1998, the U.S. Supreme Court unanimously held that same sex sexual harassment is indeed actionable under Title VII (Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998)). In reaching its decision, the Court reasoned that in order to constitute actionable sexual harassment under Title VII, the harassing behavior need not be based upon the harasser's sexual **desire**. Instead, the victim need only demonstrate that the harassing behavior occurred "but for" or "because of" his or her sex, **which may be accomplished by showing that the harasser was motivated by a general hostility toward the victim's sex**.

The Court also stated that its decision in Oncale does not transform Title VII into a "general civility code" for the American workplace. Instead, the Court specifically stated that the source of the harasser's treatment against the victim must still be based upon the victim's sex.

The Court then reiterated that conduct which an objectively reasonable person would not find to be hostile or abusive would be beyond Title VII's purview. **The Court then warned the lower courts and juries not to mistake ordinary socializing, horseplay or flirtation in the workplace with illegal discrimination**. In making this differentiation, the Court held that the **social context** in which the behavior occurred must be considered.

For instance, the Court stated that if a football coach smacks one of his players on the buttocks as the player runs out onto the field, the player's working environment is not considered abusive. However, in other environments, such

conduct may contribute to creating a hostile environment. Common sense and an appropriate sensitivity to the social context and the circumstances in which the behavior occurred, which includes the expectations and relationships of the parties involved, will enable the courts and juries to distinguish between simple teasing or roughhousing among members of the same sex and conduct which the reasonable person in the plaintiff's position would find to be severely hostile or abusive.

B. Same Sex Sexual Harassment and Terrible Investigation Leads To Liability

In Smith v. Rock-Tenn Servs., No. 15-5534, 2016 Fed. App'x 0033P (6th Cir., February 10, 2016), Jeff Smith worked as a support technician at a corrugated box company in Tennessee. About 70% of the employees were male.

Smith alleged that coworker Jim Leonard was sexually harassing only the males in the facility.

Earlier that year, Leonard had been disciplined for touching another worker while they were standing at a urinal.

The first day Smith worked with Leonard, Smith said that he saw Leonard walk up behind another male machine operator, grab his butt and then sniff his finger.

Later, Leonard walked up behind Smith and slapped him on the butt as he walked by him.

Smith claimed he pointed his finger at Leonard and told him not to do that again.

A week later, Leonard came up behind Smith and grabbed him so hard on the butt that it hurt. Once again, Smith told Leonard never to touch him again.

About a month later, Smith was bent over to load boxes on a pallet when Leonard came up behind him and started "hunching" on him so that Leonard's "privates" were up against Smith's "tail." Smith grabbed Leonard by the throat and lifted him off the ground.

Leonard later apologized to Smith, saying, "I didn't know how far I could go with you."

The employer's policy required employees in such situations to directly ask his harasser to stop engaging in the offensive conduct before bringing it to a manager's attention. Smith had done that, but without any success.

Smith then reported these incidents with Leonard at a safety meeting. Smith's supervisor admitted that Leonard had done this type of thing in the past.

Smith then officially reported the incidents to plant superintendent, Scott Keck. Keck told Smith that nothing could be done until the following Friday because the

supervisor was on vacation. At the end of the meeting, Keck sent Smith back out to work with Leonard.

Smith took a week of sick leave and went to counseling due to Leonard's behavior. Smith then took short-term disability leave for a year and a half and never returned to the company.

After Smith's leave began, the company conducted an internal investigation. Leonard denied the allegations, but other employees reported hearing about similar behavior by him. The company didn't take written statements from any employees or prepare a formal investigation report.

General manager David McIntosh decided to suspend Leonard for two days. He based his decision only on the incidents involving Smith. He didn't investigate any allegations of previous misconduct by Leonard.

At the time he imposed the suspension, McIntosh wasn't aware that Leonard had been disciplined earlier that year for touching another worker while they were standing at a urinal. That incident was described as "sexual harassment-horseplay," and Leonard had been instructed not to have contact with any coworker in a way that could be interpreted as sexual harassment.

Smith filed suit in the U.S. District Court for the Middle District of Tennessee on June 15, 2012, alleging sexual harassment, wrongful termination, and retaliation under the Tennessee Human Rights Act. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), he amended his complaint to add claims for hostile work environment and constructive discharge under Title VII of the Civil Rights Act of 1964.

The district court granted the company partial summary judgment (dismissal without a trial) on the retaliation and constructive discharge claims but denied summary judgment on the sexual harassment and hostile work environment claims. The case went to trial, and the jury returned a verdict in favor of Smith. The jury awarded Smith $307,000, but it was reduced to $300,000 to comply with the federal damages cap.

The company appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that the evidence presented to the jury was enough to establish the existence of a hostile work environment. The court concluded the harassment was "based on sex" because a jury could reasonably find that Leonard's activities were directed only toward men, even though female employees also worked at the company.

The court emphasized that harassment involving incidents of "**physical invasion"** are more severe than making harassing comments alone. As a result, it was

important to the court that all of the incidents Smith complained about and/or observed involved an element of physical invasion.

The court also agreed that the trial court properly allowed evidence of Leonard's behavior toward **other men at the workplace**, even though Smith did not directly observe all of the alleged misconduct. This conduct towards other men showed that Leonard had indeed targeted men and such incidents only added to the "hostile environment."

The court also took great issue with the company's investigation of Smith's complaint. The court found that a reasonable jury could conclude that the investigation wasn't conducted in a timely manner because the general manager waited 10 days to begin the inquiry.

The court also found it reasonable that a jury could conclude that the company should have separated Smith and Leonard pending the investigation and should have done more than suspend Leonard for two days because previous complaints had been lodged against him.

WHAT DOES THIS MEAN TO HR?

This case was a disaster by the employer from the very start.

First, it has been clear since 1998 that same sex sexual harassment is a cause of action under Title VII. (Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998))

Next, employees should be required to confront their alleged harasser only if they are comfortable doing so. If not, they should have the option of going directly to a member of management.

Also, the law has been clear for decades regarding when an employer should begin an investigation for alleged harassment: ***IMMEDIATELY!***

Smith should have never been put back into the same area as Leonard. The two should have been separated and the investigation should have started either that very day or the next.

Further, this alleged investigation was an absolute joke. No written statements or digital recordings of these statements were taken. The other offensive acts committed by Leonard against other men were not taken into account. It has been clear for years that in order to substantiate a charge of hostile environment, the alleged harasser's conduct throughout the workplace must be considered. Anything that contributes to the creation of a "hostile environment" must be taken into account.

And to top it all off, to give Leonard only two days off for behavior that could be interpreted as a form of sexual assault is obscene. Such a response shows at best

a perpetuation of the "good old boy network," and at worst … approval of Leonard's behavior.

Employers are required to take "reasonable measures to end the harassing acts." Giving Leonard two days off was an insult to Smith and the other victims.

And finally, the contention that Leonard's conduct was mere "horseplay" is absurd and insulting. In 1993, well over 20 years ago, the U.S. Supreme Court gave us the standard we still use today to see if offensive behavior rises to the level of creating a "hostile environment." (Harris v. Forklift Systems, 510 U.S. 17 (1993))

In Harris, the Court held that a **"subjective/objective" test** is to be used to determine whether or not the harasser's offensive conduct was severe or pervasive enough to substantiate a claim of sexual harassment.

The first prong of this formula is the **subjective test**. Under the subjective test, the question to ask is **whether or not this particular victim subjectively perceived the environment to be so abusive or so hostile that the conditions of her employment were actually altered.** If the answer to this question is "no," then the inquiry stops there. No hostile environment exists. However, if the answer to this question is "yes," then the plaintiff must also pass the second prong of the test.

The second prong of this formula is the real test. It is the **objective test**. Under this test, according to the Harris Court, the first question to ask is **whether or not the offensive conduct was so severe or pervasive that a "reasonable person" would consider the work environment to be so abusive or so hostile that it altered the employee's conditions of employment.** If so, then a hostile environment under Title VII will be viewed as having been created. If "no," then the plaintiff's sexual harassment claim based on hostile environment would fail.

In other words, if Mr. Leonard's behavior was on the front page of USA Today … what would most people think?

I think most people would be so offended they could not function in their jobs properly.

XI. SEVERE OR PERVASIVENESS

A. Severe Or Pervasiveness Defined Under Meritor

The Meritor Court made it clear that **not all sexual harassment is actionable under Title VII.** Instead, in order to prevail on a hostile environment claim, the victim must prove that the harassment was **"sufficiently severe or pervasive" to alter the conditions of the plaintiff's employment to the point that it creates an abusive working environment**. Therefore, according to the Supreme Court, since the mere utterance of an offensive sexual epithet by itself will not constitute

a sexual harassment claim under Title VII, the question to ask at this point is what offensive behavior is sufficiently pervasive or serious enough to constitute a hostile environment?

B. What Is Severe Or Pervasive?

In determining whether a harasser's offensive behavior is sufficiently severe or pervasive to constitute a hostile environment of sexual harassment, no specific formula exists. Instead, the courts have traditionally examined each situation on a **case-by-case basis**. Consequently, to best understand what offensive behavior constitutes a hostile environment in the workplace, it is best to examine the facts of those decisions that have found the offensive behavior to be severe or pervasive.

In Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994), the harasser, a male supervisor with the Sheriff's Department, frequently referred to the plaintiff, a female employee and deputy sheriff, as "honey" and "dear" in front of others. He would also touch her shoulders during roll call, and when she asked him to stop, he then began massaging her shoulders as he stared directly at the plaintiff's husband, who was also an employee and deputy sheriff. The supervisor would also meet with the plaintiff for no apparent reason. He accused the plaintiff of having an affair with one of her co-workers, and on other occasions, he asked the plaintiff what kind of underwear she wore, as well as what kind of birth control she used.

When the supervisor had to pick up his car from being repaired, he insisted that the plaintiff drive him because "it was his turn to make out in the parking lot" with her. When the plaintiff refused, the supervisor ordered her to drive him to get his car. The plaintiff then informed this supervisor that she found his behavior offensive, that she did not think it was funny and that she did not have to put up with it. The supervisor responded by telling the plaintiff that since she had chosen to work in a field dominated by men, she would just have to endure such conduct or find another job.

After the plaintiff complained of the supervisor's behavior, instead of giving her unwanted and offensive attention, the supervisor then began to give her the "cold shoulder." He was curt with her whenever he addressed her in front of others. The supervisor also regularly criticized the plaintiff in public and frequently interfered with the command of her officers by questioning and contradicting her orders. When the plaintiff confronted the supervisor over this conduct, he simply stared at her and told her that she had no sense of humor.

The circuit court found that the supervisor's behavior was clearly severe or pervasive enough to alter the conditions of the plaintiff's employment and therefore would support a hostile environment sexual harassment claim under Title VII.

In Hall, supra, the female employees of a road construction crew were referred to by their male co-workers as "f*cking flag girls," and were given such nicknames as "Herpes," "Cavern C*nt," and "Blond Bitch." The female employees were repeatedly asked by their male co-workers if they "wanted to f*ck" and if they wanted to engage in oral sex. The female employees were also subjected to unwanted touching, such as having their thighs rubbed, their breasts grabbed, and they were even picked up and lifted into the cabs of the trucks so the men working there could touch these female employees as well. Male employees "mooned" and exposed themselves to the female employees, and obscene photographs of couples engaged in oral intercourse were flashed at the female workers.

Additionally, the male co-workers urinated in the women's water bottles and in the gas tanks of some of their cars, causing them to malfunction. When the carbon monoxide fumes from a malfunctioning pilot truck caused the female employees to become drowsy, the male mechanic ignored the women's complaints and refused to repair the truck. The women were then forced to rotate shifts on the pilot truck so that no one female would have to endure the fumes for too long. However, when a male crew member later needed to use the truck, it was fixed immediately.

Male crew members also refused to let the women use the truck to drive into town for a bathroom break. Consequently, the female employees were forced to relieve themselves in a ditch while the male co-workers would observe them through surveying equipment. Again, the court found such offensive conduct to be sufficiently severe or pervasive within the meaning of Title VII.

In Steiner, supra, a male supervisor called his female employees such offensive names as "dumb f*cking broad," "c*nt" and "f*cking c*nt." When one female employee gave a free breakfast to two of her customers for playing blackjack at her table, the supervisor exclaimed, "Why don't you go in the restaurant and suck their d*cks while you're at it..."

The supervisor had also told another female employee that he would hate to see her lose her job since she had "big boobs," and he would hate to have to fire anyone with "big boobs." The court found this offensive behavior to be sufficiently severe or pervasive as well.

In Burns, supra, a supervisor often made sexual comments regarding a female employee, such as asking her if she had been playing with herself in the restroom, stating that the female employee never douched and claiming that she was dating the owner. The supervisor also tried to convince the female employee to date her male co-workers.

Other male employees admittedly berated the plaintiff with "every name in the book," such as by calling her "bitch," "c*nt" and "slut." One male employee stated that he should throw the plaintiff over the conveyor and sodomize her.

However, it appears as if the worse offender in this case was actually committed by the owner of the company himself. The owner would often show the plaintiff advertisements for obscene films in Penthouse Magazine and would ask her to watch these films with him. He would talk about sex with her and would make lewd gestures toward her, such as imitating the act of masturbating in her direction.

The owner also conspicuously spent more time with the plaintiff whenever he visited her plant location. He would ask the plaintiff out on dates at least once a week, as well as for oral sex, claiming it would help her perform her job better. The owner would also ask the plaintiff to pose nude for him in return for overtime pay, and he would pretend to grab the plaintiff's breasts when other employees were present.

Other female employees experienced such harassment as well. The owner was reported to have been seen sitting under the conveyor belt rubbing the legs of the women working on the line, as well as either their fronts or backsides with his hands or a newspaper. The owner had also been overheard on several occasions telling dirty jokes, and he had been known from time to time to drop his pants in front of female employees. Additionally, the owner would ask his female employees if they had gotten their periods yet, and he would tell them that if they didn't have sex all night they wouldn't be so tired at work. Obviously, the circuit court found this behavior to be sufficiently severe or pervasive to constitute a Title VII claim.

In Williams v. General Motors, Inc., supra, Marilyn Williams had worked at the General Motors plant in Warren, Ohio since either 1965 or 1966. From September of 1999 until May of 1996, she had experienced several incidents of sexually harassing conduct.

Specifically, co-workers constantly used the F-word, Williams was referred to as a “slut,” a co-worker once remarked “I’m getting sick and tired of these f*cking women,” and her supervisor once looked at her breasts and said, “You can rub up against me anytime. You would kill me Marilyn. I don’t know if I can handle it, but I would die with a smile on my face.” A few days later, this same supervisor came up behind Williams when she was bending over and said, “Back up; just back up” in a sexually suggestive manner.

On another occasion, Williams’ supervisor came up behind her while she was writing a note to the “Hancock Furniture Company”, put his arm around her neck, leaned his face against her and said, “You left the dick out of the hand.”

The court held that these offenses, combined with those of a non-sexual nature, were enough to constitute a sexually hostile environment.

C. What Is *Not* Severe Or Pervasive?

Since the Meritor Court made it clear that **not all sexual harassment is actionable under Title VII**, it is important to examine how the federal courts have interpreted this holding by analyzing **what offensive behavior has been deemed to be not sufficiently severe or pervasive in hostile environment cases.**

In Scott v. Sears, Roebuck & Company, 798 F.2d 210 (7th Cir. 1986), a supervisor repeatedly propositioned and winked at one of his female employees, slapped her buttocks and told her that he believed she moaned and groaned during sex. Additionally, whenever the plaintiff asked for assistance, the supervisor asked her what he would get for it.

While the court found the supervisor's behavior to be offensive, the court also held that the demeaning conduct was not so debilitating to the plaintiff that her working conditions were actually poisoned within the meaning of Title VII. The court reasoned that in order to constitute a hostile environment under Title VII, the harassment must deny the plaintiff the opportunity and the right to participate with others similarly situated in the company, which did not happen here.

In Carrero v. New York City Housing Authority, 890 F.2d 569 (8th Cir. 1989), **where the harasser kissed the plaintiff twice, stroked her arm three times, and made several degrading comments toward her, the court characterized such conduct as being "trivial" in a Title VII context.** The court reasoned that this offensive treatment simply did not constitute a concerted pattern of harassment that would alter the plaintiff's conditions of employment.

In contrast to these cases, according to the court, the plaintiff's abuse was comparatively sporadic. The court reasoned that this offensive treatment simply did not constitute a concerted pattern of harassment that would alter the plaintiff's conditions of employment, as compared to other cases where the victims were forced to endure years of similar abuse. Of course, the court did suggest that if this offensive behavior had been more severe, the plaintiff would not have had to endure the offensive conduct for such a long period of time, as was required in these previous cases.

In Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir. 1997), on one occasion, one of the plaintiff's supervisors motioned to a plate of donuts and told the plaintiff that he loves "sticky buns," then wiggled his eyebrows at her in a very suggestive manner. Later, another manager asked the plaintiff if she was at a biker bar on Saturday night dancing on the tables. At another meeting of the company's managers, a certain parcel of land was referred to as "Hootersville," “Titsville” and "Twin Peaks" since it was located near a Hooters restaurant. On a different occasion, her co-workers began purposefully mispronouncing a client’s

name as “bosom.

All of this conduct occurred over a four-month period of time.

However, the Sixth Circuit reasoned that while such conduct may be offensive, it was insufficiently severe or offensive to create an objectively hostile work environment.

In Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997), where the victim experienced five separate incidents of sexually offensive remarks over a sixteen month period, while the court felt that such conduct may have been “unpleasant and boorish,” it was not the severe and pervasive enough to constitute a sexually hostile environment.

In Baskerville v. Culligan International, Co., 50 F.3d 428 (7th Cir. 1995), the manager called the plaintiff "Pretty Girl," he made "Um, um, um" noises at her as she walked by in a leather skirt, he told the plaintiff how hot his office became whenever she stepped into it, he told the plaintiff that when an announcement started out, "May I have your attention, please," that was a signal for all the pretty girls to run around naked, and on one occasion he simulated the act of masturbation right in front of the plaintiff.

Altogether, nine of these incidents occurred within a seven-month period of time.

However, the court found no Title VII violation to exist, reasoning that the harassment had not continued over a long enough period of time and that the manager never actually touched the plaintiff.

In Burnett v. Tyco and Grinnell Corp., 203 F.3d 980 (6th Cir. 2001), Jenny Burnett was a 19-year employee with Grinnell when Jim Phillips, the personnel manager for Grinnell, came up to her one day, reached inside of her shirt and placed a pack of cigarettes and a lighter inside of her bra strap. On two other occasions, Phillips made extremely crude sexual remarks toward Burnett. Burnett then sued Tyco/Grinnell for sexual harassment.

At trial, other female employees testified that Phillips would often make rude sexual remarks toward women, so much that one female employee said “Grinnell [was] more like a whorehouse than a plant.”

However, the 6th Circuit Court of Appeals held that the three isolated incidents directed toward Burnett did not constitute sexual harassment under Title VII. In short, these three incidents were not so severe or pervasive enough to create an environment in which Burnett’s terms or conditions of employment would have been altered.

And finally, in Mendoza v. Borden, Inc., No. 97-5121 (11th Cir. Nov. 16, 1999), over approximately a sixteen-month period of time, Ms. Red Mendoza

experienced different sexually offensive behavior from her supervisor, Daniel Page.

On one occasion, Page rubbed his hip against Mendoza's hip while he smiled and touched her shoulder. Mendoza also stated that Page constantly followed and "stared" at her in a very obvious fashion. On three different occasions, Page stared at her and made "sniffing" noises…twice while staring directly at her groin area.

When Mendoza asked Page to stop this behavior, he responded by saying, "I'm getting fired up."

Since these were the only instances that occurred over this sixteen-month period of time, the court held that none of these instances were severe enough to form a hostile environment of sexual harassment, nor were they frequent enough to form a hostile environment.

The court then compared what happened in this case to the facts of Baskerville, Sprague, Black v. Zaring Homes, Inc. The court in this case found the facts of these other cases to be similar in that the offensive conduct was not so severe or pervasive so as to alter the terms and conditions of the employee's employment…even though such conduct may be offensive and boorish.

The court went onto reiterate the U.S. Supreme Court's reasoning that Title VII is NOT a federal "civility code." In Faragher v. City of Boca Raton, 118 S Ct. 2275 (1998)), the Court clearly stated that simple teasing, off-hand comments and isolated incidents will not amount to unlawful harassment that alters the terms and conditions of employment. Although conduct may be offensive, it does not become illegal until it meets this standard.

Simply put, the law does not exist to right every wrong. It exists to address illegal behavior only.

XII. EMPLOYER LIABILITY: CO-WORKERS AND SUPERVISORS

A. Employer Liability For The Offensive Acts Of Co-Workers

In the overwhelming majority of jurisdictions, the courts are in agreement that the proper standard to be used in establishing employer liability for the offensive acts of co-workers in hostile environment claims is to ask whether the employer either **knew or should have known** of the harassment. If the answer to this inquiry is "no," then the employer will not be held liable for the harassing acts of the plaintiff's co-worker.

However, if the answer to this inquiry is "yes," then the next question to ask is **whether the employer took immediate action reasonably calculated to end the harassment once it did become aware of these offensive acts.**

If the employer failed to take appropriate action once it received notice, then again, it can be held liable for the offensive acts committed by the victim's co-worker. On the other hand, if the employer did take appropriate action upon receiving notice of the harassment, then it will be insulated from liability for these acts.

This "knew or should have known" test for determining the liability of employers for the harassing acts of a co-worker is generally accepted as the proper test to apply in hostile environment cases.

According to the Society for Human Resource Management (SHRM), the co-workers of the plaintiff commit almost 43% of all the sexual harassment in today's workplaces. However, supervisors commit almost 31 percent of all the sexual harassment that exists in the workplace.

B. Employer Liability For The Sexually Hostile Environments Created By High Ranking Officials

When a sexually hostile environment is created by a member of the employer's management team who holds a high-level decision making role, such as an **officer of the company, the president, a partner or a part owner**, the U.S. Supreme Court reiterated in its Faragher decision that **these illegal actions will be automatically imputed to the company.** The reason for imputing such automatic liability to the company is clear: Such high-ranking officials ARE the company. Therefore, the company cannot disavow any knowledge of their actions.

The message to employers is to therefore be very careful who they take on as partners, who they promote to officer-level positions and so on, since the company will be held automatically liable for the illegal environments created by these people.

C. Employers May Be Held Liable For Off the Job Harassment Committed By Customers

In EEOC v. Costco, No. 17-2432 (7th Cir 09/10/2018), Dawn Suppo, an employee of Costco Wholesale Corporation, was stalked by Thad Thompson, a customer of Costco, for over a year.

At Costco, Suppo, had the job of "doing 'go-backs,'" which refers to re-shelving items that members decided not to purchase. Go-backs required Suppo to circulate around the large warehouse with a shopping cart, returning items to the sections where they belonged."

In mid-2010, Suppo was approached by a customer named Thompson, who asked her invasive questions, such as where she lived. She put him off, and, a couple of months after the encounters started, she reported it to her direct manager, Don

Currier. He told her to report any future encounters. When Thompson returned once again, he was escorted off the floor and told by Currier and a security officer not to go near Suppo again. As a precaution, Suppo also called the police.

Despite the warning, Thompson continued to appear at the store to follow and talk to Suppo. Though there was a dispute about how often these encounters occurred, the jury could have found that Thompson entered the store far more than the 20 times even though he had made only one purchase over 13 months before. He asked Suppo intimate questions, such as whether she had a boyfriend, he tried to offer her his phone number and card, he talked about her looks, he video recorded her at least once and occasionally made physical contact.

Attempts to involve store management did not end the unwanted contacts. Over a year later, Suppo won a court order on her own to keep Thompson away from her, and then went on medical leave of absence. The company investigated Suppo's complaints.

"On November 23rd, the General Manager of the Glenview store sent an investigation closure letter to Suppo, informing her that although the company could not confirm a violation of its harassment policy, it had instructed Thompson not to shop at the Glenview warehouse." Suppo did not return to work from her leave and was fired "because her unpaid medical leave of absence had extended beyond twelve months."

The EEOC prevailed at trial, obtaining a $250,000 compensatory damages verdict. The district court upheld the verdict over post-trial motions, but did not award Suppo back pay.

The EEOC appealed to the Seventh Circuit, which affirmed the verdict and remands for the award of back pay.

Costco argued that Suppo's encounters with Thompson were too mild, as a matter of law, to constitute severe or pervasive harassment. "Costco insists that they were 'tepid' compared to those that we have held insufficiently severe or pervasive to create a hostile work environment."

Yet the Seventh Circuit, while agreeing that the comments and physical contact were not excessively "vulgar" in isolation, held that harassment need not be "overtly sexual to be actionable under Title VII" (i.e., "consist of pressure for sex, intimate touching, or a barrage of deeply offensive sexual comments").

What pushed the conduct into the extreme range was the stalking. The court then reaonsed:

> "A reasonable juror could conclude that being hounded for over a year by a customer despite intervention by management, involvement of the police, and knowledge that he was scaring

> her would be pervasively intimidating or frightening to a person 'of average steadfastness.'"

While Costco attempted to paint Suppo as unreasonably sensitive to Thompson's conduct, the jury could have found that the conduct was severe enough to support a state-court order, issued on the ground that Suppo legitimately feared for her safety. And the jury could also have held that Costco's investigation and corrective measures were "unreasonably weak."

On the EEOC's cross-appeal, the court upheld the denial of back pay for the post-employment period. The EEOC tried arguing that Suppo was constructively discharged when Costco failed to protect her at work, but the court that this argument fails conceptually:

> Suppo was fired (for being absent) rather than forced to resign, so no claim for constructive discharge could lie.

On the other hand, the court did hold that Suppo may be entitled to compensation for the period when she was on unpaid medical leave before her termination. "If a reasonable person in Suppo's shoes would have felt forced by unbearable working conditions to take an unpaid medical leave in September of 2011, then Suppo is entitled to recover backpay for some period of time following the involuntary leave."

WHAT DOES THIS MEAN FOR HR?

This case reminds employers that Title VII requires that employers exercise due care to prevent sexual harassment of their employees by customers.

XIII. WHO IS A SUPERVISOR?

In Vance v. Ball State University, 570 U.S. __ (U.S. Supreme Court 06/24/2013), both Maetta Vance, a black woman, and Saundra Davis, a white woman, were employed by Ball State University. Vance claimed that Saundra Davis, a catering specialist, had made Vance's life at work miserable through physical acts and racial harassment. Vance sued Ball State for workplace harassment by Davis, whom Vance claimed was a supervisor.

In order to win a lawsuit against an employer for co-worker harassment under Title VII of the Civil Rights Act of 1964, it is necessary to show that the employer is negligent in responding to complaints about harassment.

However, in order to win a lawsuit for harassment committed by a supervisor, the employee does not have to prove that the employer was negligent. Instead, whenever a supervisor commits the harassing acts, Title VII ***imputes*** the supervisor's bad acts to the employer. Therefore, all the employee has to prove when the supervisor is the harasser is that the harassment occurred … not that the employer actually knew about the harassment because the supervisor ***is*** the employer.

Therefore, Vance claimed that Davis, the alleged harasser, was a supervisor. Ball State, on the other hand, claimed Davis was ***not*** Vance's supervisor. The District Court and Court of Appeals for the Seventh Circuit determined that Davis was not Vance's supervisor because Davis did not have the power ***to direct the terms and conditions*** of Vance's employment

Vance appealed to the U.S. Supreme Court. The Court found for Ball State and held that Davis was a co-worker of Vance and was not her supervisor.

The Vance ruling is a significant decision because for the first time the U.S. Supreme Court has defined what the term "supervisor" for the purposes of employment discrimination and harassment litigation.

In reaching its decision, the Court looked to two previous U.S. Supreme Court cases decided in 1998, Faragher v. Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) These cases set forth important legal standards in harassment cases under Title VII.

These two cases established the following:

- Under Title VII, employers are **strictly (automatically) liable** when the harassing or discriminatory actions of a supervisor results in some **"tangible**" harm against the employee. Such actions include hiring, firing, failing to promote, discipline, demotion or effecting significant changes in their working conditions or benefits.

- Employers can also be held liable for harassment by supervisors even if no adverse tangible employment action has occurred if a supervisor has created a hostile work environment and the employer is unable to establish an affirmative defense. In order establish such a defense, employers must show that:

  - That they took reasonable measures to prevent such harassing acts from occurring in the first place (i.e., proper policy, proper complaint procedure, training) and that they promptly corrected any harassing behavior one it occurred

and

  - That the employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer.

- Finally, Faragher and Ellerth established a key distinction between harassing behavior committed by supervisors and harassment committed by co-workers.

1. When the harassment is committed by a **co-worker**, the burden of proving employer negligence lies with the **employee**. (i.e., Did the employee report the harassing behavior? Did the employer act promptly in correcting the harassing behavior?)

2. However, when **supervisors** engage in offensive behavior, the **employer** retains the burden of proving that it took **reasonable measures** to **prevent** such harassment from occurring.

Therefore, in harassment cases, a critical distinction is made based on whether the alleged harasser is a supervisor or simply a coworker.

As the Vance Court stated in its opinion, the Faragher/Ellerth gave great significance to the distinguishing between supervisor and co-worker, but it did not provide a clear definition for the term "supervisor."

Following the Faragher/Ellerth decisions, the U.S. Equal Employment Opportunity Commission (EEOC) published its opinion on what constituted a "supervisor." The EEOC stated that "supervisor" status is synonymous with the ability to exercise "**significant direction over another's daily work.**" However, this was a very loose definition, which was adopted by some courts and rejected by others.

With the majority decision in Vance, the U.S. Supreme Court expressly discarded this open-ended definition, opting instead to draw a bright line around the term "supervisor."

The Vance Court held that true supervisors are management-level employees who "**are empowered**" to take "**tangible employment actions**" against lower-level employees, "**such as**" having the **authority to hire and fire**.

The Court explained that by clarifying the definition of "supervisor" would allow parties to determine "even before litigation begins whether an alleged harasser was a supervisor," positioning parties "to assess the strength of a case and to explore the possibility of resolving the dispute" prior to litigation while preventing jurors from undertaking "nebulous," "murky," and necessarily individualized examinations of the alleged harasser's daily duties on a case-by-case basis.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The practical impact of the Vance decision is quite favorable to employers for two reasons.

First, it adopts a more limited definition of supervisor narrowing the scope of employees for whose conduct a company might be liable even if it is unaware of their specific actions.

Second, it increases the opportunity for lawsuits to be decided early by summary judgment since there is far less subjectivity in determining who is a "supervisor."

Therefore, employers need to consider adopting the following actions:

1. **Review and revise job descriptions** and performance expectations for management-level employees to clarify supervisory responsibilities. Employers want to clarify as much as possible who is a supervisor and who is not.

2. **Adopt and Communicate an Anti-Harassment and Anti-Bullying Policy**

3. **Design and administer Anti-Harassment and Anti-Bullying training** for all employees, particularly those in management-level positions.

4. **Begin investigations immediately whenever** any allegations of harassment, discrimination or retaliation to demonstrate reasonable care in addressing or correcting inappropriate conduct.

XIV. TANGIBLE EMPLOYMENT ACTIONS

A. Tangible Employment Action Definition

The U.S. Supreme Court and the EEOC have stated that a **tangible employment action** is "any significant change in employment status" for the employee.

The Court further stated that this "significant change" does not have to be one that is negative in order to qualify as a tangible employment action. Therefore, **promises of rewards instead of threats will qualify as tangible employment actions as well**.

However, the Court also specifically stated in Faragher that unfulfilled threats are not sufficient to qualify as tangible employment actions. Such threats must actually come to life before a tangible employment action will exist.

Examples of tangible employment actions include any compensation actions inflicting economic harm or rewarding employees, hiring, firing, promotions, failure to promote, work assignments, demotions, reassignment to an undesirable position or shift, a significant change in an employee's benefits or a significant change in duties.

However, other actions will not constitute a tangible employment action, such as a "bruised ego" due to changing one's job title. Of course, if the change in job title so affected the status of the position that it was in fact viewed as a demotion, then the change would become a tangible employment action.

Of course, if the employer can show that the tangible employment action taken against the employee was not related to any discriminatory motives, such as poor performance, then no illegal discrimination will be found to exist. However, the U. S. Supreme Court has ruled that a strong inference exists that the tangible action was based on discriminatory motives whenever a harassing supervisor has significant input into or takes a tangible employment action that affects a victim of sexual harassment.

B. Harassment Committed By A Supervisor That Results In A Tangible Employment Action Affecting The Victim

If a supervisor sexually harasses an employee or a potential employee and then takes some form of tangible employment action that affects the victim based in any way upon these harassing acts, the employer is automatically liable for these

illegal acts regardless of whether the employer knew of the harassment or not. The employer has no defenses available to it to defend itself. It will be held liable for the harassment whether it knew about these illegal acts or not.

This standard of liability adopted by the U.S. Supreme Court in Faragher basically replaces the "quid pro quo" standard of liability formerly imposed against employers.

C. Harassment Committed By A Supervisor That Does Not Result In A Tangible Employment Action Affecting The Victim

1. The Faragher Decision

a) The Facts

In Faragher v. City of Boca Raton, 118 S Ct. 2275 (1998)), Beth Ann Faragher was a college student and a part-time lifeguard during the summer months of 1985 to 1990 for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton, Florida. Throughout this period, Faragher reported directly to David Silverman and Robert Gordon, both of who held the position of lieutenants in the department, but were later promoted to the rank of captain. Both Silverman and Gordon reported to the Chief of the Marine Safety Division, Bill Terry.

Throughout her employment with the City of Boca Raton, Faragher was subjected to numerous and repeated incidents of unwanted and offensive touching and lewd remarks by both Terry and Silverman. On one occasion, Terry told Faragher that he would never promote a woman to the rank of lieutenant. Terry would also put his arm around Faragher and grab her buttocks. Terry would also on occasion make physical contact with the female lifeguards while simulating sex acts.

Silverman committed similar offensive acts. In one incident, Silverman told Faragher, "Date me or clean the toilets for a year."

While Faragher was employed by the City, the City Manager had written an anti-sexual harassment policy. However, **this policy was not disseminated to the employees of the Marine Safety Section**. As a result, neither Terry, Silverman, Gordon or Faragher were ever aware of it.

On one occasion, Faragher reported these harassing acts to Gordon, one of her lieutenants. However, since these incidents involved his superior, Terry, Gordon did not feel it was his place to pass Faragher's complaints onto higher City officials.

In 1990, Faragher had had enough of this treatment and resigned her position. However, two months before Faragher resigned her position, a former female lifeguard wrote to the City's Personnel Director and complained of Terry and Silverman's conduct. Following an investigation, the City found that both Terry and Silverman had behaved improperly. **Both received formal reprimands and were disciplined**.

In spite of these actions taken by the City, Faragher filed suit against the City for sexual harassment and constructive discharge.

Having found that a hostile environment of sexual harassment had indeed been created, the Court then considered the issue of whether the employer, the City of Boca Raton, should be held liable for the harassing acts of its supervisors.

b) The Court's New Test For Employer Liability For a Supervisor's Sexually Harassing Acts When No Tangible Employment Actions Are Involved

The Court reasoned that the presence of a supervisor's authority may act to aid a supervisor in committing harassing acts since **a subordinate cannot check a supervisor's abusive conduct the same way she might confront and deal with such abuse from a co-worker.**

Further, the Court reasoned that **employers generally have a greater opportunity to guard against misconduct by supervisors than by common workers**. Specifically, the Court reasoned that **employers should be better able to screen, train and monitor the performance of their supervisors than rank-and-file employees, which affords a heightened degree of liability for the actions of supervisors.**

However, the Court then stated that even if the victim can prove that she was subjected to a hostile environment of sexual harassment in violation of Title VII, the employer can still avoid liability only if it can show that:

1. **It had exercised <u>reasonable care</u> to prevent the harassment and to eliminate it when it might occur AND**

2. **The complaining employee failed to act with reasonable care to take advantage of the employer's safeguards and otherwise prevent the harm from occurring.**

In establishing the employer's defense, the Court looked to the EEOC's Regulations on Sexual Harassment (29 CFR § 1604.11(f)), which advises employers to **"take all steps necessary to <u>prevent</u> sexual harassment from occurring, such as… informing employees of their right to raise the issue of harassment."**

c) Employer's Affirmative Duty To Prevent Illegal Harassment

The Court therefore concluded that employers have an affirmative duty **to prevent violations of Title VII. Those employers who make reasonable efforts to fulfill this obligation will be recognized for these efforts and will be given due credit by the courts.**

d) The Court's Finding

The Court then found that the City "entirely failed" to disseminate any policy against sexual harassment among the beach employees and it made no attempt to keep track of the conduct of its supervisors. The Court therefore held that the City's avenue of providing any affirmative defense in this case was therefore closed.

1. What Does <u>Faragher</u> And The Circuit Courts Tell Employers Regarding Their Affirmative Duty To Prevent Sexual Harassment?

In hostile environment cases where no tangible employment actions take place and when the harasser is a supervisor, employers will be found liable unless that can assert an affirmative defense that they took **appropriate action necessary to prevent the illegal actions from occurring**.

Evidence that may be used to demonstrate that an employer acted reasonably in trying to prevent and correct such unlawful conduct includes showing that it:

e) **POLICY & GRIEVANCE PROCEDURE**: Instituted an anti-sexual harassment policy with proper grievance procedures in put into place,

f) **TRAINING**: **At least** trained its supervisors, and preferably its employees as well, in sexual harassment and that

g) **COMMUNICATION**: Clearly communicated to all of its employees that such behavior **will not be tolerated**.

If the employer can demonstrate that it took such steps, and if it can show that the victim **unreasonably** failed to take advantage of such protections, then the employer will have an affirmative defense against a claim of sexual harassment

and may not be held liable or these illegal acts. The basis of the employer's defense is that it took **REASONABLE MEASURES** to prevent the harassment from occurring.

However, if the employer cannot show that it took these reasonable measures, then the employer will have no defense to assert. The result:

THE EMPLOYER WILL BE HELD LIABLE FOR THE HARASSING ACTS OF ITS SUPERVISORS REGARDLESS OF WHETHER IT KNEW OF THE HARASSMENT OR NOT.

XV. THE MESSAGE IS CLEAR: TRAIN…TRAIN…TRAIN

A. Leaving Managers In Ignorance Of Basic Discrimination Law Is An "Extraordinary Mistake" Justifying Double Damages

In Mathis v. Phillips Chevrolet, Inc., No. 00-1892 (7th Cir. 2001), Anthony Mathis, a 59-year-old African-American man with over 24 years of experience in car sales, he applied for a job as a salesman at Phillips Chevrolet. Despite his qualifications, he was not even given an interview. Instead, the dealership hired seven younger, white salespeople. Mathis sued the dealership for age and race discrimination.

At trial, Phillips' general manager testified that he was not aware that it was illegal to discriminate on the basis of age.

A jury found for Phillips on the race discrimination claim, but it found for Mathis on the age discrimination claim and awarded him $50,000 in compensatory damages. The jury also found that the dealership's violation of the Age Discrimination in Employment Act, or ADEA, was willful, and so the trial court assessed an additional $50,000 in liquidated damages. Phillips appealed.

The Circuit Court held that leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an "extraordinary mistake" for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference for the law.

Finally, Phillips argued that since its employment applications clearly state that the ADEA "prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age" that it made a good faith effort to comply with the ADEA.

However, this evidence appears more harmful to Phillips than helpful, because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed that law.

The 7th Circuit Court of Appeals allowed the verdict and award to stand.

In another case, Ramano v. U-Haul, Int'l., 213 F.3d 600 (1st Cir. 2001), the court allowed a jury to award punitive damages in a sex discrimination case even though the employer had adopted and disseminated a proper anti-discrimination policy and grievance procedure. However, even though these policies were proper and were distributed to everyone, the court allowed the jury to award punitive damage award to stand because the employer **had not trained its managers or employees in discrimination law.**

The jury returned a verdict of $15,000 in nominal damages and another $625,000 in punitive damages against U-Haul.

These cases are only two of numerous cases last year where the courts are punishing employers harshly with huge damage awards when these employers have failed to train their managers in Employment Discrimination and Harassment Law.

THE TREND IS CLEAR: TRAIN … TRAIN … TRAIN!

XVI. EEOC TRAINING GUIDELINES: BYSTANDER INTERVENTION

In 2017, the EEOC came out with its guidelines for conducting illegal harassment training. The EEOC's focus was on preventing harassment from occurring in the first place. The entire theme of this training promoted by the EEOC centers more on "workplace civility," which focuses on promoting workplace respect, rather than just training employees on illegal harassment.

One of the key areas for the EEOC was "Bystander Intervention."

The idea of Bystander Intervention training actually started as a way to combat sexual violence on school campuses. However, the idea of empowering co-workers to speak up and giving them the tools to intervene when they witness harassing behavior translates very well to the workplace for bullying and harassment prevention.

The EEOC reasoned that harassment in the workplace will not just stop on its own. Instead, employers must make their employees understand that it is everyone's job to stop workplace harassment. Employers cannot have complacent bystanders and expect that their workplace cultures will magically just change themselves.

The primary idea here is that co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

XVII. GENDER STEREOTYPING

The seminal case in this area of Gender Stereotyping is a United States Supreme Court case called Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, the plaintiff, Ann Hopkins, a female senior manager in an accounting firm, was denied

partnership in the firm, in part, because she was considered to be too "macho." She was told she could improve her chances for partnership if she took a "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The U.S. Supreme Court held that such comments constituted gender discrimination against Ms. Hopkins, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping - that is, discrimination because she failed to act like a woman.

The Supreme Court in Price Waterhouse therefore made it clear that Title VII prohibits discrimination because of "sex," which includes gender discrimination:

> "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."

The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."

After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. Therefore, it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

In Philecia Barnes, formerly known as Phillip W. Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) Phillip Barnes had been an officer with the Cincinnati Police Department since July 1981. Barnes had always received good evaluations and earned both a B.S. and a Master of Social Work degrees. In January 1999, Barnes was promoted to the rank of sergeant and began a six-month probationary period. Within a month of his promotion, his direct supervisor reported that Barnes was having difficulties fulfilling his sergeant duties.

The police department developed a more intensive training and evaluation program exclusively for Barnes, which included daily written evaluations and a requirement that he not go into the field unless accompanied by another sergeant. After six months as a sergeant, the City decided he had failed his probationary period and demoted him to a police officer.

However, Barnes was also in the process of a gender transformation before he received his promotion to sergeant. Throughout his probationary period, he was recognized as a male in public and while on duty and adhered to the male dress code of the Cincinnati Police Division. As an expression of his transsexuality, however, he would at times dress as a woman during his off-hours. After he was demoted to the rank of police officer, he changed his first name from Phillip to Philecia and assumed a female identity in public and while on duty, adhering to the female dress code of the Cincinnati Police Division.

In his lawsuit, Barnes claimed that the city had discriminated against him because of his sex in violation of federal and state law. The City argued that the laws against sex discrimination did not protect Barnes against discrimination on the basis of his sexual orientation or transsexuality and asked the court to dismiss the case.

The federal district court judge hearing Barnes' case denied the City's request, noting that the sex discrimination laws prohibit discrimination against a man because he fails to conform to the **stereotypes** associated with being male.

Relying largely on the U.S. Supreme Court's decision in Price Waterhouse, the court found that Barnes had produced enough evidence to raise a jury issue about whether he was treated differently because the city thought he wasn't masculine enough to be a police sergeant.

The judge noted that Barnes had been told before his promotion that wearing makeup did not present a sufficiently masculine image. He also was repeatedly criticized during his probationary period for failing to establish an adequate "command presence," a term that the judge viewed as possible code for the City's perception that Barnes was not masculine enough to be a police sergeant.

At trial, Barnes presented evidence that no other Cincinnati police sergeant had ever been demoted during the six-month probationary period and that various police command officers had made negative remarks about his lack of masculinity.

The jury unanimously agreed that Barnes had proven that his failure to conform to sex stereotypes was a motivating factor in the City's decision to demote him from sergeant to back to police officer. It further found that the City failed to prove that it would have demoted Barnes even if his failure to conform to sexual stereotypes had played no role in the employment decision. Barnes was awarded $150,000.00 in compensatory damages and $140,000.00 in front pay, which, combined with his agreed-on back pay award, totaled $320,000.00.

The city of Cincinnati appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit found for Barnes.

Relying on a previous case decided on this same issue of "gender stereotyping," Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004), as well as Price Waterhouse, the Sixth Circuit said:

> Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

Also …

In Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004), Jimmie Lee Smith was employed by the City of Salem, Ohio, (the "City") as a lieutenant in the Salem Fire Department. Smith had worked for the Fire Department for seven years without any negative incidents.

However, Smith, who was born biologically a male, had been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. In short, Smith was a transsexual.

After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis," including while he was at work, as part of his treatment for GID.

Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyer, Chief of the Fire Department. However, Eastek almost immediately told Greenamyer about Smith's behavior and his GID.

Greenamyer then met with City of Salem officials in order to terminate Smith because of his transsexualism. On April 18, 2001, the City's executive body met to discuss Smith and devise a plan for terminating his employment. (NOTE: Every member serving on the City's executive body was also named in this lawsuit.)

The City then decided to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, the City officials reasoned, they could terminate Smith's employment on the grounds of insubordination.

However, one of the City officials telephoned Smith after the meeting to inform him of the plan, calling the City's scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's attorney telephoned City officials and advised them of the potential legal ramifications for the City if it followed through on the plan devised during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, the City suspended Smith for one twenty-four hour shift.

Smith then filed suit in the federal district court, claiming sex discrimination and retaliation by the City in violation of Title VII of the 1964 Civil Rights Act. Smith contended that he was the victim of "sexual stereotyping," claiming that the City had discriminated against Smith because he was not acting "manly" enough.

The Sixth Circuit examined whether Smith was in fact the victim of sex stereotyping in violation of the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

(See previous discussion of Price Waterhouse.)

The Sixth Circuit then held that Smith had stated a bona fide claim based upon sex stereotyping by the City of Salem due to his non-conforming behavior and appearance. Smith's conduct and mannerisms did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave due to his feminine appearance and manner. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind the City's actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

XVIII. GENDER STEREOTYPING AND THE RFRA

In EEOC, et. al v. R.G. & G.R. Harris Funeral Homes, No. 16-2424 (2018) Aimee Stephens had worked at R.G. and G.R. Harris Funeral Homes as a male for nearly six years as a funeral director. However, in 2013, Stephens informed the funeral homes owner, Thomas Rost, that she was really a transgender woman. Stephens informed Rost that she had been diagnosed with a gender identity disorder and intended to transition. As a result, Stephens told Rost that she planned to start dressing and presenting herself as a woman.

As a result, Rost fired Stephens two weeks later, explaining that it would be "unacceptable" for her to present and dress as a woman. Rost later testified that he terminated Stephens because "he was no longer going to represent himself as a man," and because Rost believed that gender transition "violat[es] God's commands" because "a person's sex is an immutable God-given fit."

The EEOC brought suit on Stephens' behalf, alleging that the acts of the funeral home constituted unlawful sex discrimination under Title VII. The district court concluded that Harris Funeral Homes had committed sex discrimination against Stephens, but not specifically because she was transgender. Instead, the district court held that Stephens had been the victim of sex discrimination because, consistent with the 1989 U.S. Supreme Court's decision in Price Waterhouse v. Hopkins, and its progeny, she was subjected to impermissible sex stereotypes.

Since Hopkins, the courts have long recognized that Title VII bans discrimination based on "gender stereotyping," *i.e.*, that employees must meet norms about "about what men and women ought to do." Cases afterwards were therefore "framed ... in terms of discrimination based on gender non-conformity," such as in dress, manners, or speech, could succeed under Title VII.

However, the district court then concluded that even though she had been subjected to sex discrimination, the funeral home had a right to terminate her under the Religious Freedom Restoration Act, or "RFRA," even though the funeral home was not affiliated with any specific religious institution. The district court held that RFRA protected the funeral home owner's personal religious beliefs, even when those beliefs resulted in otherwise unlawful sex discrimination.

However, the Sixth Circuit Court of Appeals overturned the lower court's decision and help for the EEOC and Stephens.

In her opinion for the Court of Appeals, Judge Karen Nelson Moore rejected the analysis of the district court regarding both the reach of Title VII in providing protection for transgender persons and the availability of RFRA as a shield behind which an employer is free to engage in otherwise unlawful conduct.

Judge Moore wrote that Title VII ***does*** specifically outlaw employment discrimination against transgender persons for two distinct reasons. First, Title VII prohibits discrimination against persons for failing to conform to expected gender stereotypes. As Judge Moore explained, in firing Stephens because she was transitioning, Rost penalized her for failing to conform to the sex assigned to her at birth.

Judge Moore wrote, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."

Second, and more important, Judge Moore concluded that discrimination against transgender persons is inherently sex based, in that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." Where an employer discriminates against an employee because of her "transgender or transitioning status," that employer is necessarily taking sex into account—in violation of Title VII.

Regarding the district court's conclusion that RFRA provided protection for the employer's discriminatory conduct, Judge Moore rejected this analysis. For the RFRA to serve as a shield for discriminatory conduct, RFRA requires a showing that there has been a "**substantial burden**" on "**religious exercise**," that is not "**in furtherance of a compelling government interest**" and/or "**the least restrictive means of furthering**" that interest. In this case, the funeral home claimed that the presence of a transgender employee would

(1) "often create distractions for the deceased's loved ones" and

(2) force Rost to leave the industry, because working with a transgender person was an infringement on his religious beliefs.

Judge Moore concluded that neither of these constituted substantial burdens on Rost or the funeral home. Regarding the first claimed burden, Judge Moore stated that employers cannot escape the requirements of Title VII simply by assuming the "**presumed biases**" of their customers.

With regard to the second claimed burden, Judge Moore wrote that, "**tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it**."

Judge Moore asserted that Stephens did not ask Rost in any way to endorse or to aid her transition. Instead, she only sought to remain on staff at the funeral home. According to Judge Moore, allowing her to remain employed does not "**substantially burden his religious practice**."

In conclusion, Judge Moore asserted that even if Title VII was to impose a "substantial burden" on Rost's religious beliefs in this case, it would still survive scrutiny under the RFRA because eliminating or preventing employment discrimination because of sex is clearly a "compelling interest," and no less "restrictive means" of preventing such discrimination exists.

Otherwise, according to Judge Moore, all modern civil rights law would be called into question.

XIX. SEXUAL ORIENTATION

A. Circuit Court Reverses Itself And Gives "Protected Class Status" To Sexual Orientation Under Title VII

In most jurisdictions, sexual orientation is *NOT* a protected class under Title VII of the 1964 Civil Rights Act. However, in recent years, some circuit courts have granted protected class status to Sexual Orientation under Title VII.

In Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. July 28, 2016) Ms. Kimberly Hively worked as an adjunct professor for 14 years at Ivy Tech Community College. She had been denied fulltime employment and promotions on six different occasions and was eventually terminated because she is a lesbian.

Hively filed a lawsuit against Ivy Tech claiming discrimination in federal district court. Hively claimed that the EEOC's recent opinion in Baldwin v. Foxx, FAA-2012-24738 (EEOC, June 15, 2015) which held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

However, the federal district court dismissed Hively's case on the grounds that the Seventh Circuit Court of Appeals had previously held that Title VII's coverage of "sex discrimination" only covers discrimination against "men" and "women," and does not extend to sexual orientation.

Hively appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit held against her.

In writing the opinion for the Seventh Circuit, Judge Ilana Rovner claimed that precedent on this issue of sexual orientation had been unequivocal in holding that Title VII did not protect sexual orientation discrimination. The court reasoned that this precedent and holding is in line with several other circuit courts. (1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 10th, and DC Circuits.)

The court observed that these holdings reflected the fact that despite multiple efforts, Congress had repeatedly rejected legislation that would extend Title VII to cover sexual orientation, even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace could no longer be tolerated.

However, the court said that it would need a "compelling reason" to overturn circuit precedent, which would typically come in the form of a decision by the Supreme Court or a change in the law by Congress. Until that happens, the court must adhere to its prior precedent.

The Seventh Circuit reasoned that Title VII's prohibition against discrimination "because of ... sex" reaches only instances of gender non-conformity, not sexual orientation. Even though the Seventh Circuit respected the EEOC's opinion that sexual-orientation discrimination punishes people for being attracted to the "wrong" sex, from an employer's point of view, the court held that the EEOC in Baldwin went too far in interpreting Title VII.

Title VII has long been recognized, as in the 1989 U.S. Supreme Court's decision in Price Waterhouse v. Hopkins, to ban discrimination based on "gender stereotyping," *i.e.*, that employees must meet norms about "about what men and women ought to do." Cases afterwards were therefore "framed ... in terms of discrimination based on gender non-conformity," such as in dress, manners, or speech, could succeed under Title VII.

The irony, conceded by the court, is that gay and lesbian employees who actually conform to employers' gender norms, such as with dress, mannerisms, hair, nails etc., are given *less* job protection under Title VII than their more "flamboyant" co-workers who deny societies' norms regarding their dress and behavior.

The court also recognized the irony in the law where an LGBTQ person can be legally married on Saturday, under Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and then legally fired on Monday under Title VII.

In short, the court ruefully notes, "[w]e are left with a body of [Title VII] law that values the wearing of pants and earrings over marriage."

The Seventh Circuit then reasoned that it is not up to the EEOC to change this aspect of Title VII.

However, on October 11, 2016, the Seventh Circuit Court of Appeals agreed to hear Hively's case again, but this time by all 11 justices (This is referred to as hearing the case "en banc.").

On November 30, 2016, all 11 Seventh Circuit Court of Appeals justices heard oral arguments.

For the next four months, the court was silent. Then, on April 4, 2017, the Seventh Circuit ruled in favor of Ms. Hively by an 8-3 margin.

Chief Judge Diane Wood wrote the opinion for the majority. Judge Wood wrote that the strongest point made by Ms. Hively was the following:

> "Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her…. This describes paradigmatic sex discrimination."

Judge Wood supported this argument by citing the United States Supreme Court's precedents in:

- Price Waterhouse v. Hopkins, which "held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination,"
- Oncale v. Sundowner Offshore Services, which "clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim"
- Loving v. Virginia, which struck down Virginia's miscegenation statute and vindicated the "associational theory of discrimination," and
- The line of LGBT rights cases, which most recently includes Obergefell v. Hodges, which recognized that the Constitution protects the right of same-sex couples to marry.

Judge Joel Flaum's concurrence said:

> "Ivy Tech allegedly refused to promote Professor Hively because she was homosexual, or (A) a woman who is (B) sexually attracted to women. Thus, the College allegedly discriminated against Professor Hively, at least in part, because of her sex. I conclude that Title VII, as its text provides, does not allow this."

However, Judge Diane Sykes's dissent took a different look at this case. Judge Sykes claimed that Title VII's ordinary use of the word "sex" in 1964, and now, means whether someone is biologically male or female. It does not also refer to sexual orientation.

Judge Sykes reasoned that to a fluent speaker of the English language, in 1964 and now, the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation. The two terms are never used interchangeably. There is not overlap in meaning.

Judge Sykes then cited a long list of federal and state statutes that "distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination."

Judge Sykes then cited this example of how confusing the law could be if the courts interpreted "sex" discrimination to also include "sexual orientation" discrimination.

> "If the facts [brought out on remand] show that Ivy Tech hired heterosexuals for the six full-time positions, then the community college may be found liable for discriminating against Hively "because of her sex." That will be so even if all six positions were filled by women. Try explaining that to a jury."

WHAT DOES THIS MEAN TO HR?

If you do business in the Seventh Circuit Court of Appeals, which includes Indiana, Illinois and Wisconsin, this is the law of the land for you. Since then, the Second Circuit Court of Appeals, which includes Connecticut, New York and Vermont, has also granted protected class status to sexual orientation.

Also, it is also important to remember that there is often a "fine line" difference between harassment or discrimination based on someone's sexual orientation and harassment or discrimination based on "gender norms," which is still illegal under Title VII.

B. District Court Grants "Protected Class Status" To Sexual Orientation Under The Constitution To Public Sector Employees

However, in Hutchinson v. Cuyahoga County Board of County Commissioners, Case No. 1:08-CV-2966 (N.D. Ohio, 2011), Shari Hutchinson, a gay woman, began working as a support officer for the Cuyahoga County Support Enforcement Agency (CSEA) in October 2002, although she briefly left her job with the county in 2003. After unsuccessfully applying for an administrative assistant position and a support officer position with CSEA in 2004, she was hired back as a senior account clerk in June 2004.

Hutchinson claims that in April 2005, despite her successful performance as an account clerk, the county board of commissioners and CSEA didn't select her for a business administrator position and instead hired a straight female with less education and financial experience. The next month, she was moved back to the support officer position she held in October 2002. She unsuccessfully applied in May 2006 and October 2006 for promotions that went to less-qualified heterosexual candidates.

Hutchinson alleges that when she was appointed to a temporary program officer supervisor position in August 2007, the board of commissioners and CSEA purposely delayed her appointment for four weeks because of her sexual orientation. She claims that no straight candidate's temporary appointment was similarly delayed. She also claims that two weeks after she began the job, the board of commissioners and CSEA abolished her four-month temporary position, demoting her back to a support officer job.

Hutchison alleges that in December 2007, June 2008, and January 2009, the board of commissioners and CSEA kept various positions vacant to avoid having to appoint her. Moreover, she says that in March 2008, one of the commissioners refused to recommend her for a temporary program officer position, telling other CSEA management officers that she was **"bizarro"** because of her sexual orientation. The temporary position was given to a less-qualified heterosexual female candidate. Hutchinson also alleges that she was placed in the least-influential and lowest-paid administrative officer position available.

Based on those allegations, Hutchinson says the county impermissibly deprived her of equal employment opportunities and retaliated against her based on her sexual orientation in violation of **42 U.S.C. § 1983**. The county asked the court to dismiss her claims before trial, arguing that she made several discrete claims of discrimination that are barred by the two-year statute of limitations and that sexual orientation discrimination is not an actionable equal protection violation in the public employment context.

The Sixth Circuit has held that the statute of limitations for § 1983 claims in Ohio is two years. That two-year period begins to run "when the [employee] knows or has reason to know of the injury which is the basis of his action." Kuhnle Bros.,Inc. v. County of Geauga , 103 F.2d 516 (6th Cir., 1997). Although a category of the continuing violations doctrine extends the limitations period when there's a long- standing demonstrable policy of discrimination, Hutchinson didn't

allege any facts that, if proved, would support a finding that the county had a long-standing demonstrable policy of sexual orientation discrimination. The court therefore dismissed the claims based on discriminatory acts that occurred before December 19, 2006, because they were time-barred.

Next, the court concluded that an employee who alleges sexual orientation discrimination under § 1983 isn't inherently precluded from establishing **an equal protection claim against her employer**. According to the court, although Title VII of the Civil Rights Act of 1964 doesn't include sexual orientation as a statutorily protected class, that doesn't automatically remove all constitutional protection when an employee claims equal protection violations based on her membership in that class. Because Hutchinson's complaint states that the county didn't hire or promote her to a number of positions for which she was qualified because of her sexual orientation and the county didn't treat heterosexual job candidates similarly, **her equal protection claims are viable under § 1983.**

XX. OTHER FORMS OF ILLEGAL HARASSMENT

A. Other Types Of Illegal Harassment

Across the various federal circuits, several courts have applied Faragher and the principles of sexual harassment "hostile environment" to other types of illegal harassment. Below is a sample listing of some of the more prominent areas of illegal harassment decided in the most recent case law:

- **Race** (Allen v. Michigan Department of Corrections, 165 F.3d 405 (6th Cir. 1999); Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999); Moore v. KUKA, 171 F.3d 1073 (6th Cir. 1999))

- **Age** (Crawford v. Medina General Hospital, *et al*., 96 F.3d 830 (6th 1996); Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151 (8th Cir. 1999))

- **Disability** (Wallin v. Minnesota Department of Corrections, 153 F.3d 681 (8th Cir. 1998))

- **National Origin** (Gotfryd v. Book Covers, Inc., No. 97 C 7696, 1999 WL 20925 (N.D. Ill. Jan. 7, 1999))

- **Religion** (Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999)

Ironically, even though the law of sexual harassment was never even mentioned or considered in the original drafting of Title VII, and even though the law of sexual harassment hostile environment grew out of a National Origin claim for hostile environment, today, the law of sexual harassment that sets the pace for all other forms of hostile environment claims to follow.

B. Treated The Same As Sexual Harassment

Since the "boom" of sexual harassment hostile environment claims, and since the U.S. Supreme Court's monumental holding in Faragher, the courts have not only changed the way they examine sexual harassment claims, employer obligations to prevent these claims and the liability imposed against employers for the harassing acts committed by their supervisors, but the courts have also been examining other types of illegal harassment in light of these sexual harassment decisions.

Since Faragher, the basic conclusion of the courts has been, "If employers are expected to draft anti-sexual harassment policies, adopt grievance or complaint procedures that have by-pass procedures and train their managers in sexual harassment, then why shouldn't these same standards be applied to other forms of illegal harassment? Why shouldn't these same standards apply to racial harassment? Harassment based upon disability? Age? National Origin? And so on?"

The response from the courts has pretty much been unanimous…the same standards should apply to all forms of illegal harassment as the U.S. Supreme Court set forth in Faragher.

In Allen v. Michigan Dep't. of Corrections, 165 F.3d 405 (6th Cir. 1999), the court clearly held that the U. S. Supreme Court's decision in Faragher should extend to other forms of illegal harassment, such as racial harassment.

In fact, the court felt that the same standards used for determining if a sexually hostile environment exists should also be used to determine if a hostile environment for other illegal forms of harassment exists.

This same holding has been reiterated by other courts in Hafford v. Seidner, 167 F.3d 1074 (6th Cir. 1999) and Wright-Simmons v. Oklahoma City, 155 F.3d 1264 (10th Cir. 1998)

In fact, in Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1999), the court held that the analysis and standards established in Faragher actually apply to all claims brought under Title VII...illegal harassment and illegal discrimination claims as well.

Specifically, the court said that the U.S. Supreme Court's purpose in adopting the vicarious liability standard for managers was not to be applied only to sexual harassment claims. Instead, the standards and requirements set forth in Faragher in establishing liability for the misuse of supervisor authority are to apply to ALL Title VII actions.

C. Racial Hostile Environment Harassment

In Allen v. Michigan Department of Corrections, 165 F.3d 405 (6th Cir. 1999), Albert Allen was an African American male employed by the Michigan Department of Corrections. In September of 1989, the black officers were transferred out of Cell Block Eight since "it was not customary for black officers to work on Cell Block 8." Allen filed a grievance and was transferred back to the area. This appears to be when the problems began.

Afterwards, Allen was subjected to several racial slurs, including "black ass" and "nigger." He also received death threats signed by the "KKK." Allen was also told the "niggers can't be trusted" and that he would never be promoted because he would not "play ball." Further, Allen was told by a manager that "he was lazy like the rest of his people and that is why they are all in prison."

On one occasion, one of the white officers working with Allen cut the lock off of his locker.

Further, even though Allen scored higher on his testing that white officers, he was passed up for promotion. Allen was also monitored more closely than white officers and was threatened with reprimands when there was no reason to believe he had been the one to commit a violation of the rules, and on one occasion, his log book was altered to make it look as if he was taking long lunches. Allen received a reprimand for the long lunches.

The court then held that the findings in Faragher apply to racial harassment claims "equally" and the standards for proving racial and sexual harassment are the same.

The court then found that a hostile environment based upon race did in fact exist.

In Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999), Van Hafford, was of the Muslin religion and was employed as a corrections officer in Lorain, Ohio. Hafford was the target of racial slurs, such as "black-ass," "fucking nigger," "niggaaah." Hafford also received death threats, with one caller making a reference to lynching Hafford. The court held that there was enough evidence to believe that a hostile environment based upon race did in fact exist. Specifically, the court found the reference to lynching was particularly offensive.

In Swinton v. Potomac Corporation, No. 99-36147 (9th Cir. 2001), Troy Swinton, was the only black male employee of U.S. Mat. During his employment, Swinton was subjected to continuous racial slurs and jokes, which his supervisor overheard. However, Swinton's supervisor never did anything to stop the harassment. After six months of employment with U.S. Mat, Swinton resigned and sued for racial harassment under Section 1981 of the 1866 Civil Rights Act.

At trial, the jury awarded Swinton $1,000,000.00 in punitive damages. U.S Mat appealed the award, claiming that it was excessive and unconstitutional. The

company reasoned that no one in management knew of the harassment except at its lowest levels.

However, the 9th Circuit upheld the award. The court relied on the U.S. Supreme Court's decision in Kolstad, reasoning that employers have a duty to prevent such harassment, even at the lowest levels of management.

D. Pregnancy Hostile Environment Harassment

In EEOC v. W&O Inc., dba Rustic Inn, No. 98-5515/5646 (11th Cir. 2001), Barbara Nuesse was a waitress at the Rustic Inn when she became pregnant. At her fifth month, she was fired.

Henry Oreal and his sons Wayne and Gary were the owners of the Rustic Inn. They were all heard making such comments to pregnant employees as, "No one is going to run around here pregnant and big like that," and that they were from the "old school" and that "No pregnant women are going to tell me how long they'll stay." They were also heard saying that Nuesse was "too fat to be working in here" and that he did not want pregnant waitresses serving his customers because they were "too fat." The court allowed **all** of these comments to be entered into evidence in order to support Nuesse's charge that she, as well as the comments made to other employees who were forced out of their jobs at about their fifth month of pregnancy.

The jury found the Rustic Inn to be liable for $26,231.43 in back pay and $350,000.00 in punitive damages to one plaintiff (Nuesse) for $3,800.24 in back pay and $200,000.00 in punitive damages to another plaintiff (McDevitt) and for $6,225.46 in back pay and $200,000.00 in punitive damages to another plaintiff (Grossman). The punitive damage awards were reduced subject to the statutory cap of $100,000 per employee.

E. ADA Hostile Environment Harassment

In Fox v. General Motors, Inc., No. 00-1589 (4th Cir. 2001), Robert Fox was an employee for General Motors who injured his back in a non-work related accident in 1980. For the next 15 yeas, Fox missed a great deal of work due to this injury.

Throughout this time, Fox contended that he endured much harassment from his co-workers and supervisors, since they resented the accommodations he received. On one occasion, Fox's supervisor approached him and asked Fox to perform a certain task that exceeded his restrictions. Fox said he could not perform the requested task. The supervisor responded by asking, "Why the f--- can't you do it?"

Fox then explained that his abilities were medically limited because of his back. The supervisor then stated "I don't need any of you handicapped m-----f-----'s. As far as I am concerned you can go the h--- home."

On another occasion, a supervisor asked Fox, "[h]ow in the f---- do you take a s**t with these restrictions?" At this point, other company officials who were there began making fun of the disabled workers.

Because of this harassment, Fox decided to apply for a truck driver position, which met his medical restrictions and for which he was otherwise qualified. A supervisor refused to allow Fox to take the physical examination that was a prerequisite for obtaining the truck driver position.

In addition to these incidents, Fox testified that he and other disabled workers endured constant verbal harassment and insults.

Co-workers and supervisors referred to the disabled workers as "handicapped people", "hospital people", "handicapped MFs" and "911 hospital people."

Fox also testified that his supervisors instructed the other employees not to talk to the disabled employees. Perhaps because of this, Fox's co-workers ostracized the disabled employees and refused to bring needed materials to the light-duty table where they worked. Fox also testified that supervisors refused to permit disabled employees to work overtime.

Several other employees at the GM plant testified that either they themselves had been harassed because of their disabilities or had witnessed harassment of Fox and other disabled workers.

In 1997, Fox sued General Motors for discriminating against him and subjected him to a hostile work environment in violation of the Americans with Disabilities Act.

Fox won his case and was awarded $200,000.00 in compensatory damages, $3,000.00 for medical expenses, and $4,000.00 for lost overtime.

The 4th Circuit Court of Appeals upheld the verdict and the award, finding that General Motors had in fact allowed a hostile environment of disability discrimination to exist.

F. Age-Based Hostile Environment Harassment Under The ADEA

In Hudson v. Insteel Indus., Inc., 248 F.3d 1149 (6th Cir. 2001), Hudson was an older employee working for Insteel Industries. Hudson's co-workers and supervisors constantly made fun of him by referring to him as the "old man," "old bastard," "wise old bird." Some co-workers would ask Hudson, "What's the matter, are you old or do you have Alzheimer's?" When Hudson was later terminated for alleged performance issues, Hudson sued for age discrimination.

The company argued that Hudson was terminated for performance issues. However, the jury held for Hudson. The court held that it was permissible for the jury to consider any derogatory age comments made by company employees that may show pretext.

G. Are Some Charges More Serious Than Others?

In very extreme cases, the courts have allowed single or isolated incidents of illegal to constitute a hostile environment.

In King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990), the Seventh Circuit held that although repeated incidents create a stronger claim that a hostile environment exists, with the strength of the claim depending on the number and the severity of such incidents, **a single severe offensive act can be enough to constitute a claim of sexual harassment** under a hostile environment cause of action.

In Wilson v. Wayne County, supra, the court found that a male supervisor's physical attack of a female employee, which included his attempt to put her hand on his crotch as he wrestled her to the floor, could alone create a hostile environment.

In Fall v. Indiana University Bd. Of Trustees, 12 F. Supp. 2d 870 (N.D. Ind. 1998), where the Dean closed the door behind the plaintiff, grabbed her like a gorilla, groped her breasts, kissed her and forced his tongue down her throat, the court held that this was sufficient to create a hostile environment.

In Worth v. Tyer, No. 00-2414 (7th Cir. 2001), where Lisa Worth's supervisor came up behind her, placed his hand inside her shirt and began rubbing her breast for several seconds, the court held that this single incident could create a hostile work environment.

In Livingston v. Adirondack Beverage Co., 141 F.3d 434, (2nd Cir. 1998), where a Latino employee was referred to as a "spic" three times, the court held that a hostile environment had indeed been created.

In Vance v. Southwestern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989), hanging a noose over the plaintiff's workstation twice was enough to create a hostile environment.

In Reid v. Pena, 10 EDR 570 (D.D.C. 1998), where a black employee was given a "Temporary Coon Ass" certificate from a supervisor, the court held that a hostile environment had been created.

In Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993), a supervisor's infrequent comments such as "nigger" and "You blacks guys are too fucking dumb to be insurance agents" was viewed by the court as creating a hostile environment. **The court reasoned that certain remarks, even when used very infrequently, can be so derogatory that they will impair the victim's ability to do his/her job.**

Although many courts have ruled that the analysis used to evaluate and the standards used to determine if a hostile environment exists are the same for all illegal forms of harassment, **many courts have clearly stated that some acts and some comments are viewed as being more severe than others**.

Specifically, certain ethnic slurs are inherently more offensive than a few sexual jokes. Likewise, physical attacks or threatened attacks, such as threats of lynching or physical attacks or groping made against employees, will almost universally be viewed as creating a hostile environment.

H. Isolated Racial Slurs And A Hostile Work Environment

In McCowan v. All Star Maintenance, Inc., No. 00-2040 (10th Cir. 2001), after only three weeks painting houses for All Star Maintenance, Warren McCowan, Johnny Luna, and Steve Guerrero filed a lawsuit against the company for national origin and race discrimination under Title VII.

All Star claimed that even though some derogatory comments that were made regarding the race and national origin of the plaintiffs, "the alleged racial remarks were **not so** severe or pervasive as to alter the conditions of their employment" and create a hostile working environment.

Also, the company argued that comments **were not directed** at the plaintiffs and were simply "coarse dominions of the construction industry." Thus, while statements like "wannabe cholos," "f***ing stupid Mexicans," "my south of the border friend," "f***ing cholo attitudes," "spik," "burrito-eating m***f***er," "worthless n*gger," "n*gger for a day," or "f***ing painter" might have been uttered and overheard, the language was not always directly spoken to plaintiffs.

Additionally, because the plaintiffs spent only a few minutes at the beginning and end of the day in the office where some of the offensive language might have been overheard, the plaintiffs spent their time working on job sites the entire day for the three weeks they were with the company. **Such a short period of time and such isolated incidents could not form the basis of an intimidating or hostile work environment, claimed All Star**.

The circuit court disagreed and held for the plaintiffs. Considering the context in which these various comments were made, **even if a comment about the plaintiffs' baggy pants or low riders might not be explicitly racial, given the context of the statement, it could be reasonably inferred the remarks were related to the plaintiffs' race and were part of an ongoing, pervasive environment of racial taunting**. Within this "context," comments not directed at plaintiffs, such as calling a Brazilian worker a "Duh" or an "idiot," cannot simply be discarded.

Therefore, considering the sensitivity of a reasonable person to these types of comments, an illegal hostile environment did in fact exist.

I. Bystander Harassment: Illegal Harassment Directed At Others

Since the key analysis in a hostile environment cause of action is whether the work environment itself is so "polluted" with the offensive harasser's acts that the plaintiff's conditions of employment have been altered, the question then arises as to whether the offensive conduct directed toward one employee can be used by another employee to make out a hostile environment claim. The courts have tended to hold that such evidence can indeed be used to support the plaintiff's Title VII hostile environment claim.

Further, the EEOC's Guidelines on Sexual Harassment states that harassing **"conduct may be challenged even if the complaining employee(s) are not specifically intended to be the targets of the conduct" (29 C.F.R. § 1604.11(d)).**

In Jackson v. Quanex Corp., 1999 Fed. App. 0326A, 1999 WL 707766 (6th Cir. 1999) Linda Jackson was hired by Quanex Corporation in 1987. Jackson was the 18th black employee Quanex hired out of its total of 349 workers. Jackson herself was called "nigger bitch" and was physically assaulted. Jackson also had a co-worker tamper with her acid valves creating a dangerous situation.

Jackson also witnessed several examples of racial animus throughout her employment with Quanex, even though it was not directed at her.

Specifically, Jackson heard numerous racial slurs, such as supervisors stating "we are up to our asses in nigger sludge" and there was racist graffiti in the women's restroom comparing white and black men's penis sizes and stating that the "KKK is back."

Other black employees also frequently heard Quanex employees use the term "nigger." Further, they received racially offensive notes, they were threatened and they saw racially offensive caricatures of blacks, such as "Black 'O Lantern" and "Sambo."

Black employees were also improperly trained for their jobs and Quanex rules were applied to them differently than white employees.

The court allowed all of these offensive acts admitted into evidence and found that Jackson had indeed been subjected to a racially hostile environment.

Therefore, the definite trend today is to not only allow plaintiffs to enter into evidence harassing conduct directed toward others when making out a claim of hostile environment, but plaintiffs can actually state a cause of action under Title VII even if the offensive conduct was never directed toward them at all. Instead, the plaintiff is only required to prove is that she was forced to work in an atmosphere where such harassment was sufficiently pervasive.

J. Associating With Protected Class Persons

In Caroline Speropoulos v. Jewel Food Stores (N.D. Ill. 1999), 1999 U.S. Dist. LEXIS 2896; Fair Empl. Prac. Cas. (BNA) 566, Caroline Speropoulos was a white female who was dating a black male. Speropoulos claimed that when her employer found out that she was dating a black male, she was terminated. Speropoulos sued her employer for race discrimination under Title VII.

The company, on the other hand, claimed that Speropoulos was terminated since both she and her boyfriend were employed by the company, so their dating violated the company's Nepotism Policy. The company also claimed that Speropoulos lied on her application.

Further, the company argued that Speropoulos did not have a cause of action under Title VII for race discrimination. The company claimed that even if what Speropoulos says is true, she had admitted that the discriminatory action was based upon her boyfriend's race and not hers, which is not actionable under Title VII.

However, the court disagreed. The court held that individuals who claim they have been discriminated against because of their relationships with protected class persons are protected under Title VII.

K. Employers Are Responsible For The Acts Of Non-Employees

More and more, the courts are holding employers responsible for the illegal harassing acts of non-employees in the workplace, such as delivery people, vendors, customers, and so on.

In Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998), Rena Lockard was a waitress at a Pizza Hut. The corporate office of Pizza Hut had published policy bulletins that prohibited acts of sexual harassment in the workplace. It also published complaint procedures for employees to use in reporting such illegal acts. This information was freely distributed to each employee upon hire.

However, after the restaurant closed and the employees were cleaning up, the manager of the Pizza Hut where Lockard worked, Mickey Jack, would often play songs with sexually explicit lyrics. Lockard asked Mr. Jack to stop playing this music, but he refused.

No other improper instances occurred with Mr. Jack.

On different occasions, two male customers would come into the restaurant. These two men were described as being very "rowdy" and "crude." None of the waiters or waitresses wanted to wait on these specific customers due to their reputation for being sexually offensive and rude.

One night these two men came into the restaurant. Lockard had waited on these two men before and they treated her in a sexually harassing manner, which included making such comments as "I would like to get into your pants." In the past, Lockard had asked Mr. Jack if someone else could wait on them, but Mr. Jack refused to assign anyone else to Lockard's table.

On this evening, the staff argued over who would wait on these two men., including the male waiters. Mr. Jack instructed Lockard to wait on these two men. When Lockard went over to their table, they told her that she smelled good and liked her cologne. One of them then grabbed her hair.

Lockard then returned to Mr. Jack and told him that she did not want to continue to wait on them. Mr. Jack then told Lockard, "You wait on them. You were hired to be a waitress. You waitress."

Lockard returned to the table with a pitcher of beer. When she put the pitcher on the table, one of the men grabber her hair, grabbed her breast and then put his mouth on her breast.

Lockard then told Mr. Jack that she was quitting. She then filed suit against Pizza Hut for sexual harassment.

The court held that Pizza Hut could be held liable for the illegal harassing committed by its customers towards its employees. The court reasoned that employers are responsible for maintaining a workplace that is free from illegal harassment, which would encompass the illegal acts of non-employees.

The court further stated that employers should be held to the same standard of liability that is used regarding the illegal harassing acts of co-workers…which is the "knew or should have known" standard. Therefore, if an employer knows of the illegal harassing acts committed by non-employees in its workplace, or if it should have known of these unlawful acts, then the employees may have an illegal harassment suit against the employer.

In Crist v. Focus Homes, Inc., 122 F.3d 1107 (8th Cir. 1997), the plaintiffs were employed by Focus Homes as caregivers for individuals with disabilities living in a residential care facility. J.L. was a resident in one of these facilities who repeatedly assaulted the plaintiffs sexually.

The plaintiffs reported these incidents to management. Management's response to one such complaint was to tell one of the plaintiff to allow J.L. to sexually assault her again in front of the facility's executives so they could view the conduct. Other than that, nothing was done.

The plaintiff's sued their employer for these sexually harassing acts committed by J.L. The employer argued that it could not be held liable for J.L.'s actions because it could not control his behavior. The court rejected this argument.

The court held that employers are entrusted with controlling their environments. Therefore, employers have the ability to correct unlawful behavior to a substantial degree when it occurs.

L. Do The Courts Allow Certain Industries Or Work Environments More "Leeway" In Allowing Harassing Conduct?

In Williams v. General Motors, supra, the employer tried to argue that women working in a male-dominated environment, such as in manufacturing, she should expect to be subjected to more offensive type of conduct than in other industries. The court held that such an assertion is illogical.

The court clearly stated that the standard for sexual harassment DOES NOT vary depending on the work environment. The court reasoned that when a woman chooses to work in a male-dominated, she does not relinquish her right to be free from illegal harassment. The court claimed that holding otherwise would only encourage prevalent sexism to occur as a defense itself. The court then held that it is irrelevant where the employee works; she should be entitled to the protections provided under the law.

Even though this was a sexual harassment case, the courts have held that the same analysis used in sexual harassment cases should be applied to other forms of illegal harassment. **Therefore, regardless of the industry, the clear trend is to examine employees' claims of illegal harassment uniformly…whether the employee works in a bank, in manufacturing, in the computer industry, in service or in the oil fields.**

M. Constructive Notice To Employers: Employees Only Get One "Bite" Of The Apple

In Meritor, supra, the court held that **actual notice to an employer is not necessary in order to establish its liability in a hostile environment cause of action.** Consequently, many jurisdictions have interpreted Meritor as holding that if employers fail to take appropriate action against the harasser, then these employers will be viewed as having received **constructive notice on behalf of all the future victims of this harasser.**

In Paroline v. Unisys Corporation, 879 F.2d 100 (4th Cir. 1989), even though the employer may have acted promptly and effectively once the victim reported a supervisor's offensive behavior, the victim claimed that her employer failed to prevent the harassing conduct from occurring in the first place based on the **previous complaints** it had received regarding this supervisor. The victim contended that her employer therefore had **constructive notice** of her harasser's offensive conduct and it failed in its duty to prevent it from reoccurring.

The court agreed with the plaintiff and held that the employer should have anticipated this harassment since it had received a number of complaints

regarding this supervisor's sexually offensive conduct, yet this behavior continued even after the supervisor was warned to stop. The fact that this conduct continued is evidence that the employer's response to this harassment was nothing but a sham, according to the court.

Therefore, the trend in the courts today is to place employers on constructive notice for the sexually harassing acts committed by their employees in the future, thus giving employers an additional reason to act responsibly when faced with charges of sexual harassment in their work environments.

THE MORAL: DEAL WITH THE HARASSING BEHAVIOR WHEN IT OCCURS … YOU MAY NOT BE ENTITLED TO NOTICE LATER.

XXI. EMPLOYER'S RESPONSE TO THE ILLEGAL HARASSMENT CHARGE

A. Employer Responsibility

The EEOC Guidelines for Sexual Harassment recommend that an employer's response to a charge of sexual harassment be "immediate and appropriate" (29 C.F.R. § 1604.11(d)). The EEOC also states that employers have a duty to express their "strong disapproval" for all acts of sexual harassment and to develop appropriate sanctions for those who commit such offensive acts.

B. Appropriate Employer Responses

In Hylko v. U.S. Steel Corporation, No. 16-2414 (Sixth Circuit), David Hylko, Jr., began working as a shift manager for U.S. Steel in 2011. In 2013, he was reassigned and began working with John Hemphill, a process coordinator. Hemphill was responsible for overseeing maintenance activities and supervising hourly employees. Hylko reported to the area manager, but he worked under Hemphill's instruction. Hemphill trained Hylko and assigned him tasks.

Hylko alleged that Hemphill engaged in inappropriate acts and sexual conversations, including often asking about his sex life. Hylko said he went along with the conversations because he believed his employment depended on Hemphill's approval of him. Hemphill allegedly grabbed Hylko's penis while the men were in an elevator. Also, he allegedly grabbed Hylko's buttocks and said he had a "nice firm ass." Hylko testified that Hemphill poked another employee with a banana that was sticking out of the fly of his pants. Further, Hylko claimed that Hemphill tried to emasculate him by making him fetch coffee and saying he was "well trained."

In January 2014, Hylko complained about the inappropriate touching, emasculating conduct, and banana incident to division manager, Tom Gunnell. Gunnell informed the area manager and the employee relations manager of Hylko's complaint. The employee relations manager suggested that U.S. Steel separate Hylko and Hemphill. Hylko met with management and HR, which

offered to transfer him to the environmental department. Hylko agreed to the new assignment.

Management and HR representatives met with Hemphill about Hylko's complaint. Hemphill admitted grabbing Hylko's buttocks but stated he was just joking around. Hemphill was given a one-week unpaid suspension and was demoted to shift manager, with no loss in pay. He also received a verbal warning and was required to take "people skills" training.

Later, Hylko resigned from U.S. Steel after a fatal crane accident. He claimed that working with Hemphill was part of the reason for his resignation. Hylko filed a lawsuit against Hemphill and U.S. Steel alleging that he was subjected to a hostile work environment based on same-sex sexual harassment.

The district court held that **Hylko did not prove that any harassment he endured was based on his sex**. Further, the court determined that Hylko did not establish that U.S. Steel was liable for harassment because Hemphill was not his "supervisor." Hylko appealed the decision to the Sixth Circuit.

The Sixth Circuit affirmed the district court's decision to grant summary judgment (dismissal without a trial) in favor of U.S. Steel. The court determined that U.S. Steel could not be held vicariously liable for Hemphill's behavior. Employers are vicariously liable for supervisors' harassing conduct. An employee is a supervisor if he has the power to take tangible employment actions against the harassment victim. **Tangible employment actions are actions that cause "a significant change in the victim's employment status."**

Hylko argued that Hemphill was a supervisor because U.S. Steel referred to him as "supervisor" and Hemphill called himself a supervisor as well. However, the court reiterated that "colloquial uses of 'supervisor' do not control the question of whether an employee is one."

Because Hemphill could not take tangible employment actions against Hylko, the court determined that Hemphill was not a "supervisor" for purposes of Hylko's sexual harassment claim under Title VII of the Civil Rights Act of 1964.

Therefore, since Hemphill and Hylko were co-workers, the employer was given a chance to correct the situation once it became aware of what was happening.

In this matter, the court found that U.S. Steel responded to Hylko's complaint appropriately. An employer's response to sexual harassment is "adequate if it is reasonably calculated to end the harassment." Hylko admitted that transferring him to another department and disciplining Hemphill put an end to the sexual harassment. Therefore, us, the court determined that U.S. Steel was not vicariously liable for Hemphill's conduct and dismissed Hylko's claim against the company.

WHAT DOES THIS MEAN FOR HR?

Employers are required to take reasonable measures to prevent harassment in the workplace, which means having a proper policy in place, having a proper reporting procedure in place and, in several jurisdictions, training is mandatory. If these preventative measures are not put into place, if the harassment is committed by a supervisor, then the offended employees does not have to give notice to the employer of the offending acts. The employee can go straight to civil rights and/or to an attorney.

However, if the harassment is co-worker to co-worker, then the offended employee must let the organization know about the harassing acts. The organization is then given a chance to correct the situation.

Therefore, whether an employee is a supervisor or a co-worker can make all the difference in a sexual harassment claim.

Therefore, the best practice for employers is to take the "reasonable measures" needed to prevent such harassing acts into the future. That way, the employer is going to be entitled to receive notice of any such harassing acts that arise, whether they are committed by a supervisor or a co-worker.

Of course, if an employee later complains of harassment, the employer should take prompt and effective action to end it.

In Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984), a male assistant manager and two co-workers, one male and one female, went to a two-day conference. The female plaintiff claimed that on the way to and during the conference, the male co-worker talked about his sexual activities and he touched the plaintiff in offensive ways. The assistant manager failed to intervene on the female employee's behalf.

Upon returning to work, the female employee reported these incidents to her employer. The employer questioned both the assistant manager and the male employee who went to the conference, both of whom categorically denied any wrongdoing. The employer then interviewed two other male employees who attended the seminar, who confirmed the plaintiff's allegations. Upon concluding its investigation within **four days** after first receiving the complaint, **the harasser was placed on a 90-day suspension and was warned that if any further misconduct occurred, he would be discharged. The assistant manager was also reprimanded for failing to intervene on the plaintiff's behalf.**

When the plaintiff was informed of the disciplinary action that was taken against the harasser and the assistant manager, she complained that such measures were totally superficial. However, the court held that the employer's response to this offensive conduct was appropriate. The court reasoned that employers are required to simply take prompt remedial action reasonably calculated to end the

harassment, which does not always include firing the harasser.

In Steele, supra, where two female employees complained to their employer regarding the sexually harassing conduct they had received from a co-worker, **the employer immediately summoned the male harasser back to the U.S. from his assignment in Saudi Arabia. The employer reprimanded the harasser and told him that his offensive conduct must stop immediately.** The two female victims were then informed of the disciplinary action that was taken against the harasser and were assured that the offensive conduct would stop, which it did. The court found that this response by the employer in this situation was adequate to avoid liability.

In Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997), the employer had a proper written policy in place and had communicated this policy to the employees. It then received a charge of sexual harassment against some of its managers. It began the investigation immediately and interviewed several witnesses. The employer found the charge to be valid against one manager, who was fired. Another was found to be involved, but not to the extent of the first manager. This second manager was given a reprimand. Two other managers were found to have no involvement. The court found the response to be appropriate.

C. What Is *Not* An Appropriate Response

In Ways v. City of Lincoln, 871 F.2d 750 (8th Cir. 1989), where the employer tried to effectively deal with a hostile environment claim by providing sensitivity training for its employees, by notifying its supervisors that the problem had arisen, and by bringing in an attorney to lecture the firm's employees on sexual harassment, the court held that such steps were inadequate.

First, the training provided by the employer consisted of a three-part video tape that focused on people's perceptions of themselves followed by a lecture by an attorney. **Neither the video tape nor the attorney's lecture dealt specifically with the harassment the plaintiff was encountering.** Consequently, even though all of the employees and supervisors were required to attend these sessions, little was accomplished since they did not directly address the problem at hand.

Next, the court focused on the fact that **the employer not only failed to discipline any of the harassers for their offensive conduct, but the employer also failed to investigate even one reported incident.** As a result, the court found that the employer had in reality done very little to alter this abusive atmosphere.

In Davis v. Tri State Mack Distributors, 981 F.2d 340 (8th Cir. 1992), the **employer required the harasser to apologize to his victim, but it took no further steps to end the harassment.** The court held that such a response by the

employer was wholly inadequate, stating that Title VII requires more than a mere request to refrain from engaging in discriminatory conduct.

In Paroline v. Unisys Corporation, 879 F.2d 100 (4th Cir. 1989), where the employer warned the harasser that a reoccurrence of the harassment would result in his termination, and it then took punitive measures against the harasser, such as delaying his planned promotion and salary increase, the court held that such responses to the harasser's conduct were inadequate.

The court focused on the fact that the victim's work arrangement continued to expose her to the harasser and that the harasser had previously been warned about committing such offensive conduct, which failed to deter his harassment. Evidence was also produced which showed that the head of the victim's office openly joked about the female employees' complaints of sexual harassment after he had warned his male employees, including this particular harasser, about engaging in such behavior.

Under these circumstances, the court concluded that the employer's actions were actually intended to act as no more than a slap on the wrist to its male harassers.

D. Rules For Responding To Claims Of Illegal Harassment

The standard used by the courts in determining the appropriateness of the employer's response is to simply ask whether the actions taken by the employer were reasonably calculated to end the harassment. Such a standard does not require the termination of the harasser, nor does it require that the absolute "best" solution be imposed.

The standard does not even require that the employer's response be successful, although some courts have imposed a type of **hindsight requirement**. The standard is one of prudence, which tends to give the benefit of the doubt to the employer.

Still, the standard is vague, so it is important to identify a few "rules of thumb" that courts tend to look for in determining if the employer's response was appropriate.

5. When Should Employers Begin Their Investigations?

IMMEDIATELY!!! Cases where employers began their investigations within **one hour or one day** of becoming aware of the harassment have been found to be adequate.

6. How Long Does It Take To Investigate?

Time periods as long as two to four weeks have been found to be reasonable time frames for conducting such investigations. Even though each situation is evaluated on its individual facts, the courts seem

to place a high value on expediency.

7. Are Employers Required To Terminate Harassers?

No, but it depends on the facts of each case. Egregiously offensive acts of harassment should result in the harasser's termination.

However, where any degree of harassment is found to exist, the courts have been very clear:

The harasser MUST receive at least some disciplinary action for THIS illegal behavior, which may take the form of a warning.

In such written reprimands, the harasser must be reminded of the company's policy against illegal harassment, he/she must be told that any further infractions would result in termination and the harasser should be required to go through training once again. (Obviously, it did not "take" the first time.)

In cases where no such action was taken, the courts have generally found the employer's response to be inadequate. Employers must make it clear that such conduct will not be tolerated. Otherwise, the employer's stance against sexual harassment will not be taken seriously.

Still, employers can tailor the punishment to fit the crime, since the courts do not require any specific action be taken against the harasser. All that is required is that some form of disciplinary action be taken that will impress upon the harasser the seriousness of his offense and that such conduct will not be tolerated.

8. What If This Is The Harasser's Second Warning?

Corporate Capital Punishment…Quick.

9. What If Physical Acts Of Violence, Threats, The Harasser Exposed Himself Or If A Tangible Employment Action Was Involved?

Corporate Capital Punishment … the quicker, the better.

10. Should Employers Separate The Harasser From The Victim?

It depends on the facts of each case.

If the facts are bad, but if termination is not warranted, then transferring one of the parties may be necessary. An employer should not force the victim of truly offensive harassment to continue working with her harasser if their relationship has become so damaged that the victim could not continue to be exposed to the harasser.

However, the courts have also been VERY CLEAR in holding that if the victim is the one to be transferred, it must be of **her own choosing**. Otherwise, the company will be viewed as retaliating against him/her for exercising her rights under Title VII. Therefore, if the victim declines a transfer, the transfer must then be imposed on the harasser.

11. Should Employers Inform The Victim Of What Actions Were Taken Against The Harasser?

Since "hostile environment" claims affect the atmosphere and psychological well-being of the victim in the workplace, the victim needs some type of "closure." It is important for the victim's piece of mind and comfort in the workplace that he/she knows what actions were taken against the harasser and the steps the employer took to preserve his/her legal rights.

Otherwise, the victim might never know that the situation has been corrected.

XXII. PREVENTING ILLEGAL HARASSMENT IN THE WORKPLACE IS A JOINT EFFORT

Since the company has now fulfilled its four initial requirements for preventing illegal harassment, Employees should be informed of the following:

1. Employees have 50% and Management has 50% of the responsibility of keeping illegal harassment out of the workplace.

2. All employees are REQUIRED to report any incidents of Illegal Harassment to Human Resources or to any manager IMMEDIATELY in accordance with the company's policy against discrimination and harassment.

3. The courts REQUIRE management to investigate such alleged treatment IMMEDIATELY.

4. Human resources the employees' partner in accomplishing this goal. When in doubt…go to Human Resources!!!

XXIII. NEW HARVEY WEINSTEIN TAX LAW

As a result of the emergence of "MeToo" movement, Harvey Weinstein, and many other famous and public figures in the business and entertainment world, have been accused of committing serious acts of sexual harassment. In many of these cases, there have been significant business consequences, with termination of employment, large legal settlements, and no doubt large legal fees.

As more and more of these cases settled, many people were shocked to find out that these settlements and legal fees are nearly always tax deductible by businesses.

As a result, with a major tax bill also unfolding in late 2017, it was probably inevitable that Congress would act. Therefore, with tax reform being discussed, the tax law relating to the ability to deduct payments made for sexual harassment settlements and related legal fees was examined.

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act, with the goal of completely revamping the tax code. However, this tax bill also includes the "Harvey Weinstein Tax" that denies deductions whenever a "Non-Disclosure" or "Confidentiality" clause is used in an agreement to settle any type of sexual harassment or abuse case. Most notably, this "no deduction" rule applies to the lawyers' fees, as well as the settlement payments.

This new Section 162(q) of the tax code states:

(q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.

> No deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."

WHAT DOES THIS MEAN FOR HR?

This new portion of the tax code will have major implications for all Settlement and Release Agreements where any offenses related in any way to a sexual nature are included. It is very common to include "Non-Disclosure" or "Confidentiality" clauses in such Settlement and Release Agreements. Therefore, if anyone is looking to use an Settlement and Release Agreements that does include "Non-Disclosure" or "Confidentiality" clause where a sexual offense included, then that person had better be ready to accept that all of the sums paid out in this Agreement, as well as the attorney's fees involved, will not be tax deductible.

Of course, that is also true for the person being paid these sums. The alleged victim's attorney's fees will also not be tax deductible.

XXIV. SOLUTIONS

A. U.S. Supreme Court's Opinion and the EEOC's Guidelines For Prevention Of Sexual Harassment

According to the opinions of the U.S. Supreme Court, the lower courts and the EEOC's Guidelines on Sexual Harassment, employers are expected to:

1. Raise the subject and discuss it with their employees,

2. Express their strong disapproval of such acts,

3. Define illegal harassment for their employees,

4. Establish and publicize an appropriate policy and reasonable grievance (complaint) procedures that are to be used to bring such concerns to the attention of the company,

5. Inform employees of their rights under Title VII,

6. Seriously and effectively investigate all suspected acts of illegal harassment and act to remedy the problem in a reasonable manner and

7. TRAIN YOUR SUPERVISORS AND EMPLOYEES!!!

REMIND EMPLOYEES:
MANAGEMENT CANNOT FIX WHAT IT DOES NOT KNOW ABOUT

REQUIRED HARASSMENT TRAINING

SIXTH and FOURTH CIRCUIT COURTS OF APPEALS

The U.S. Supreme Court has held in Faragher v. City of Boca Raton, 118 S Ct. 2275 (1998), Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), Kolstad v. American Dental Assoc., 119 S. Ct. 2118 (1999), as well as numerous circuit courts and lower courts, that employers must:

Take "*Reasonable Measures*" to PREVENT Sexual Harassment and other forms of Illegal Harassment in the workplace.

If employers fail to implement "Reasonable Measures To Prevent Illegal Harassment," then the employee has **NO OBLIGATION TO SPEAK UP AND REPORT THE HARASSMENT**.

In other words, the first time the employer hears about the harassing acts might be when the summons shows up. Employees may simply file suit against their employer without ever giving the employer a chance to correct the situation.

However, once an employer has taken "Reasonable Measures To Prevent Illegal Harassment," employees then have a LEGAL OBLIGATION to speak up and let the employer know when they feel they have been illegally harassment. Therefore, employers will be given a chance to correct the situation.

Therefore, if an employer has taken "Reasonable Measures To Prevent Illegal Harassment" and the employee fails to report the harassment to the employer, thus giving the employer a chance to correct the problem, the employee loses his/her case as a matter of law.

Of course, the question to ask now is: What are "Reasonable Measures"? In short, the U.S. Supreme Court gave employers two requirements and the Sixth Circuit Court of Appeals (Ohio, Kentucky, Tennessee, and Michigan) gave us one additional requirement.

According to the U.S. Supreme Court in Faragher and Ellerth, employers are required to:

- Adopt a proper Anti-Harassment, Anti-Discrimination POLICY,
- Adopt a proper GRIEVANCE ("Complaint") PROCEDURE,

However, in 2001, the Sixth Circuit Court of Appeals also required training.

6th CIRCUIT: No Training … Employer Loses

In EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001), the employer, Harbert-Yeargin, employed 292 maintenance service workers … three of whom were female. The company had a strong anti-harassment policy and grievance policy, both of which were posted for all to see on the company bulletin boards.

However, even though no acts of harassment occurred against the female employees, harassment among the male employees was commonplace, which included unwanted touching, poking and prodding of their gentile areas. "Goosing" each other was also the norm. Supervisors witnessed this behavior and even participated in this activity.

When a group of the employees filed sexual harassment charges with the EEOC rather than follow the guidelines outlined in the company's grievance process, the employer defended itself by claiming that its policy and grievance procedure allowed it to receive a fair notice of these incidents.

The EEOC then filed suit on behalf of the harassed male employees. The court found for the EEOC.

The court held that even though the employer had a proper policy and a proper grievance procedure in place, the employer had not taken reasonable measures to prevent sexual and illegal harassment in the workplace since it had not trained its employees in this area of the law or its policy. As a result, the requirements under Faragher and Ellerth had not been met, so the employer was not entitled to notice from its employees under the law.

In short, the Sixth Circuit Court of Appeals added "training" as a requirement of taking "Reasonable Measures To Prevent Illegal Harassment."

The judge in this case then presented the following version of a Mother Goose poem:

Georgie, porgie, pudding pie,
Goosed the men and made them cry.
Upon the women he laid no hand
So it cost his employer three hundred grand.

CALIFORNIA TRAINING REQUIREMENTS

1. Applies to employers with 50 or more employees, (independent contractors count as employees)

2. Must be at least two hours long for **supervisors**,

3. Must be done every two years,

4. Must be interactive, challenge the trainee with questions that assess learning,

5. Provide skill-building activities that assess the supervisor's application and understanding of content learned,

6. Provide numerous hypothetical scenarios about harassment,

7. Each hypothetical must have one or more discussion questions so that supervisors remain engaged in the training

8. Must contain a section on "abusive conduct,"

   NOTE: The way the term "abusive conduct" is defined is like a definition of "bullying." Under the new law, "abusive conduct" is defined as conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests.

9. New supervisors must receive sexual harassment training within six months of assuming their supervisory position and

10. The training documentation must include: name of trained employee, the date of training, the type of training, and the name of the training provider. Records must be kept for a minimum of two years.

California law has stringent details describing trainer qualifications. Qualified personnel include the following only:

- Attorney with a background in California and/or Title VII law,
- Human Resources professional
- Harassment prevention consultant
- Law school or college professor with knowledge and experience in the prevention and/or handling of harassment, discrimination, and retaliation claims

California requires employers to document this training. In addition to basic documentation that includes the names of the participants and trainers, AB 1825 requires an employer to give each supervisor a copy of its anti-harassment policy and to obtain documentation from each supervisor acknowledging receipt of the policy. The company must then maintain the documentation for two years.

California has the toughest requirements regarding teaching methodology. The methodology must include the following elements:

- Questions that assess learning
- Skill-building exercises
- Discussion questions that actively engage participants in the learning process
- Questions that assess learning success
- Hypothetical situations and scenarios that are true-to-life
- Memorable strategies for reporting and preventing sexual harassment
- Opportunities for participants to ask questions and receive prompt answers

California requires that the training must be interactive. Attendees must be able to have their questions answered within **48 hours**.

Training may therefore be web based.

California's training participants have every opportunity to understand the concepts and absorb them into their own professional values. In addition, companies bear the responsibility of choosing materials that fulfill the methodology criteria and using trainers who can effectively administer it.

As for course content, California requires that the following content be addressed:

- Definition of sexual harassment
- State and federal statutory provisions concerning sexual harassment
- Types of conduct which constitute sexual harassment
- Employer's obligation to investigate
- Remedies available to victims

California law also mandates the following course content:

- Limited confidentiality of the complaint process
- What to do if a supervisor is personally accused of harassment
- How to use the essentials of an anti-harassment policy if a complaint is filed
- Fully detailed anti-harassment policy provided by each employer
- Supervisors' acknowledgment of receipt of the policy

The additional requirements in the California law focuses directly on supervisors. Once supervisors complete the training and acknowledge they have received a copy of the organization's anti-harassment policy, they are fully accountable for knowing and applying the policies correctly. If a sexual harassment complaint arises, they can neither plead ignorance of the law nor accuse the employer of failure to provide policy. These measures empower employees who file sexual harassment lawsuits, thus laying the groundwork for successful prosecution of offenders.

California's AB 1825 requires supervisors to repeat the training every two years.

Subject California FEHC Regulations for AB 1825

Title: Prevention of Sexual Harassment Training

SUMMARY

AB 1825 requires employers to provide every two years at least two hours of effective training to all supervisory employees on the prevention of sexual harassment, discrimination and retaliation.

1. DEFINITIONS

1.1 Employer

1.1.1 Private Employer: any business in California that employs (salary or wage) or engages 50 or more employees or contractors for each working day for at least 20 consecutive weeks in the current or preceding calendar year. The count includes out-of-state employees and contractors.

Note: If the employer had the requisite 50 plus employees and contractors in the prior year, but less today, the employer still must train its supervisors.

1.1.2 Government Employer: the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. Political subdivisions include governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts.

1.2 Employee

An employee is any full time, part time, or temporary worker. This includes leased employees.

1.3 Contractor

A contractor is any person performing services pursuant to a contract (an independent contractor) for each working day for at least 20 consecutive weeks in the current or preceding calendar year.

Note: If a contractor attends the supervisor training, it does not create an inference that the contractor is an employee or a supervisor.

1.4 Supervisor

A supervisor is anyone who, exercising independent judgment, directs other employees, or has the authority (or recommends when) to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, adjust grievances, or discipline other employees.

Note: Only supervisors "located" in California must be trained. Also, if a non-supervisor employee attends the supervisor training, it does not create an inference that the employee is a supervisor.

1.5 Trainer

Any one of the following individuals is a Trainer and can create courses, train, and answer questions.

1.5.1 Attorney: admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

1.5.2 Human Resource Professional or Harassment Prevention Consultant: who worked as an employee or independent contractor with a minimum of two or more years of practical experience in one or more of the following:

- designing and conducting discrimination, retaliation and sexual harassment prevention training;
- responding to sexual harassment complaints or other discrimination complaints;
- conducting investigations of sexual harassment complaints;
- advising employers regarding discrimination, retaliation and sexual harassment prevention.

1.5.3 Professor and Instructor (law schools, colleges or universities): who has a postgraduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964 or the content specified below.

1.5.4 Training Qualifications: A trainer must be qualified to train on the following:

- What are unlawful harassment, discrimination and retaliation under both California and federal law;
- How to report harassment complaints;
- How to respond to a harassment complaint;
- What constitutes retaliation and how to prevent it;
- Essential components of an anti-harassment policy;
- What steps to take when harassing behavior occurs in the workplace;
- The employer's obligation to conduct a workplace investigation of a harassment complaint; and
- The effect of harassment on harassed employees, co-workers, harassers and employers.

1.5.5 Non-qualified Trainer (classroom & webinar training): individuals who do not meet the qualifications of a trainer (attorney, human resource professional, harassment prevention consultant, professor or instructor) because they lack the requisite years of experience may "team teach" with a trainer in classroom or webinar trainings. This is permitted only if the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

1.6 Instructional Designer

An instructional designer is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

2. TRAINING REQUIREMENTS

2.1 Training Methods The following methods qualify as effective training:

2.1.1 Classroom -- training is in-person, trainer-instruction:

- created by a trainer.
- provided by a trainer in a setting removed from the supervisor's daily duties.

2.1.2 E-learning -- training is individualized, interactive, computer-based:

- created by a trainer and instructional designer.
- provides a link to or directions on how to contact a trainer. The trainer must be available to answer questions and provide guidance and assistance about the training within a reasonable time, but no more than **two business** days after the question is asked.

2.1.3 Webinar -- training is an Internet-based seminar:

- created by a trainer and taught by a trainer,
- transmitted over the internet or intranet in real time,
- employers must document and demonstrate that each supervisor who was not physically present in the same room as the trainer did in fact attend the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities.
- provide supervisors an opportunity to ask questions and get answers.

2.1.4 Other Effective Training: includes the use of audio, video, or computer technology with classroom, webinar, and/or e-learning.

2.2 Training Duration

2.2.1 Classroom and Webinars: Training must take at least two hours, but it does not have to be completed in two consecutive hours. The minimum segment is half an hour.

2.2.2 E-learning:the training must take the supervisor no less than two hours to complete the training. It does not have to be completed in two consecutive hours. The supervisor can pause and return without any minimum, provided the actual e-learning program is two hours.

2.3 Training Content

All methods of training (classroom, e-learning, and webinar) must contain:

2.3.1 Learning Objectives:

- assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment" as that term is defined in California and federal law; and
- develop, foster, and encourage a set of values in supervisory employees who complete mandated training and education that will assist them in preventing and effectively responding to incidents of sexual harassment.

2.3.2 Subjects Covered:

- a definition of unlawful sexual harassment under California and federal law, other forms of harassment, and how harassment can cover more than one basis.
- FEHA and Title VII statutory provisions and case law concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.
- The types of conduct that constitutes sexual harassment, strategies to prevent harassment.

- The remedies available to harassed victims.
- The limited confidentiality of the complaint process.
- Strategies to prevent sexual harassment in the workplace.
- Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint.
- What the supervisor should do if personally accused of harassment.
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed.

2.3.3 Interactive Elements:

- Practical examples such as factual scenarios from case law, news and media accounts.
- Hypothetical Scenarios: based on workplace situations, and other sources which illustrate sexual harassment, discrimination and retaliation using role plays, case studies, and group discussions.
- Questions: assess learning and keep supervisors engaged in the training.
- Skill-building Activities: that assess the supervisor's application and understanding of content learned.

2.3.4 Anti-harassment Policy: Either the employer's policy or a sample policy must be provided to supervisors. Whether the employer policy is included in the training, the employer must give each supervisor a copy of its anti-harassment policy and require each supervisor to acknowledge receipt.

2.4 Training Frequency

2.4.1 Current Supervisors: An employer must provide two hours of training, using the mandated content, once every two years. An employer may use either or both of the following methods to track compliance.

- Individual Tracking: You must re-train each supervisor within two years from the date the supervisor was last trained. You need good records for this method.

- Training-year Tracking: You need not track each supervisor, but must designate a "training year" during which you train your supervisors. Then, you must re-train these supervisors by the END of the next "training year," two years later.

Example: the employer trained supervisors in 2005 and adopts 2005 as the training year. These supervisors must be re-trained by the end of 2007 (the next training year).

Many employers mistakenly think they can adopt different training years. They CANNOT. You can only have one training year.

Example: If 2007 is your training year and you trained some supervisors in ‘06, you cannot adopt 2006/2008 as another training year. If you want the ‘06 supervisors in your training year, they must be re-trained by the end of 2007.

However, if you want to re-train the ‘06 supervisors in 2008, you must re-train each one within two years from the date the supervisor was last trained in ’06 (individualized tracking).

Caution: If you trained supervisors in ‘05 and ‘06 and make 2006 the training year, you cannot wait until the end of 2008 to re-train the ’05 supervisors. You must re-train them by the end of the 2006 training year or individually train each one during 2007.

2.4.2 Newly Hired or Promoted Supervisors:

Not Previously Trained: a newly hired or promoted supervisor who has not received training within two years of the hire/promotion date -- must be trained, using either or both tracking methods:

Individual tracking: train within six months of the hire/promotion date and retrain within two years from the date the supervisor completed the training. These supervisors are tracked individually.

Training-year tracking: Assume the Employer trained supervisors in 2005 and adopts 2005 as the next training year and wants to include new supervisors in the training year. If the employer hires or promotes a supervisor in:

- May 2006 . . .train by Nov 2006 and retrain by end of 2007 training year;
- Oct 2006 . . . train by Apr 2007 and retrain by end of 2009 (next TR yr), but if trained during 2006, must retrain by end of 2007 training year;
- Feb 2007 . . . train by Aug 2007 and retrain by end of 2009 (next TR yr);
- Oct 2007 . . . train by Apr 2008 and retrain by end of 2009 (next TR yr);

- Previously Trained: a newly hired or promoted supervisor who received AB 1825 training at the current or another employer (includes joint employer) within two years of the hire/promotion date – need NOT be trained within the six-month window. However, the supervisor must be:
  - given a copy of the current employer's anti-harassment policy within six months of the hire/promotion date,
  - required to acknowledge that the supervisor received and read the policy, and
  - trained by either of the following:
- Individual tracking: no later than two years from the date last trained, or
- Training-year tracking: by the end of the current training year, unless the two-year window comes first.

Examples: assume 2007 is the training year:

- Hired/promoted May 2007 and trained 21 months ago (Aug ’05): must train by August 2007 (2 years from last training). Cannot wait until end of 2007;
- Hired/promoted October 2007 and trained 12 months ago (Oct ’06): must train by end of 2007. Cannot wait until October 2008;
- Hired/promoted May 2007 and trained 3 months ago (Feb ’07): may train by end of 2007 because within the two-year window or can train February 2009 (training year) and retrain 2011;

Note: The employer should require evidence of the training such as a certificate of completion. And, the training must have met the specific requirements of AB 1825 to qualify. The burden is on the current employer to demonstrate the training complied.

Recommendation: To avoid any of the issues discussed above, the employer should treat the supervisor as not previously trained and train the supervisor within six months of the hire/promotion date or if adding to the training year, by the end of the year, provided it’s within six months.

2.4.3 New Businesses with 50 plus employees/contractors:

Newly Created: businesses created after January 1, 2006 with 50 plus employees and contractors must train supervisors within six months of the employer’s establishment date and retrain the supervisors every two years, measured either from the individual or training-year method.

Newly Expanded: businesses that expand to the 50 employee/contractor threshold must train supervisors within six months of the date the employer reached the threshold and retrain the supervisors every two years, measured either from the individual or training-year method.

DOCUMENTATION & RECORD KEEPING

3.1 Training Information

Employers must keep the following documentation of the harassment training to track compliance.

name of the supervisor trained, date of training, type of training, and name of the training provider.

3.2 Retention of records (2 years)

Employers must retain the records for a minimum of two years. Therefore, if the employer uses classroom or webinar training, the employer needs to be sure it can find the trainer and a copy of the course if litigation occurs. For e-learning, it's should not be an issue because all this information is stored electronically.

COMPLIANCE & REMEDIES

An employer who made a substantial, good faith effort to comply with the statute by completing the supervisor training prior to the effective date of these regulations shall be deemed to be in compliance.

Employers who fail to train are not automatically liable in any action alleging sexual harassment. But, the FEHC Commissioner can issue an order that requires the employer to comply with AB 1825 within 60 days of the effective date of the Commission's order according to the Regulations.

Note: When the author of AB 1825 (Sarah Reyes) was asked why there were not tougher sanctions for a failure to train, she replied that the "best penalty is a plaintiff's lawyer." This is a warning to employers. Failure to train will be plaintiff's EXHIBIT ONE should an employer be sued for harassment.

If an employer complies with the new law, it does not protect the employer from liability for sexual harassment of any current, former employee or applicant.

CONNECTICUT REQUIREMENTS

1. Applies to employers with 50 or more employees,

2. Must be at least two hours long for **supervisors**,

3. Must be done every two years,

4. Must allow the attendees to ask questions,

5. New supervisors must receive sexual harassment training within six months of assuming their supervisory position.

Connecticut allows a great deal of latitude in allowing organizations to designate who will provide this training. The organization may designate qualified trainers as being those individuals employed by the company or other persons who agree to provide the training.

Connecticut simply "encourages" employers to document this training.

Connecticut requires that the mandated training be interactive.

As for course content, Connecticut requires that the following content be included:

- Definition of sexual harassment
- State and federal statutory provisions concerning sexual harassment
- Types of conduct which constitute sexual harassment
- Employer's obligation to investigate
- Remedies available to victims

Connecticut only require supervisors to undergo sexual harassment training once.

MAINE REQUIREMENTS

1. Applies to employers with 15 or more employees,

2. Each new ***employee*** and **supervisor** within one year of start date must attend the training,

3. Training must include the illegality of sexual harassment; the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964, 42 United States Code, Title VII, Sections 2000e to 2000e-17; **a description of sexual harassment, utilizing examples; the internal complaint process available to the employee**; **the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation** as provided under Title 5, section 4553, subsection 10, paragraph D.

4. New supervisors must receive sexual harassment training within six months of assuming their supervisory position,

5. Additional training for supervisors and managers must occur within one year of assuming their position,

6. Must be at least **two hours long for supervisors**,

7. Training for employees must cover elements of state and federal law.

8. Training for managers must include specific responsibilities regarding preventing sexual harassment and methods to take to ensure corrective action.

9. Must allow the attendees to ask questions.

Written Notice Requirements

Employers shall provide annually all employees with individual written notice that includes at a minimum the following information: the illegality of sexual harassment; the definition of sexual harassment under state law; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided pursuant to Title 5, section 4553, subsection 10, paragraph D. This notice must be initially provided within 90 days after the effective date of this subchapter. The notice must be delivered in a manner to ensure notice to all employees without exception, such as including the notice with an employee's pay.

Maine does not specify the qualifications of a trainer. Individual companies are at liberty to choose trainers.

Maine requires no documentation of sexual harassment training.

Maine requires that the following content be addressed:

- Definition of sexual harassment
- State and federal statutory provisions concerning sexual harassment
- Types of conduct which constitute sexual harassment
- Employer's obligation to investigate
- Remedies available to victims

Maine only requires that supervisors undergo sexual harassment training once.

Fourth Circuit Adopts Training As A Requirement

In 2002, the Fourth Circuit Court of Appeals followed suit with the Sixth Circuit and also added training as a requirement for "Reasonable Measures To Prevent Illegal Harassment."

In Anderson v. G.D.C., Inc. 281 F.3d 452 (4th Cir. 2002), the jury gave a large award ($15,000.00 in compensatory damages, $100,000.00 in punitive damages and $36,000.00 in attorney's fees) to Tortica Anderson, the victim in a sexual harassment at G.D.C. G.D.C. argued that it had made "good faith efforts" to prevent sexual harassment in the workplace.

The court disagreed. The court ruled that the company failed to adopt a proper anti-harassment policy and it did not train its employees or supervisors in sexual/illegal harassment, so not only was it liable for the harassing acts, but punitive damages were appropriate.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

TRAIN YOUR SUPERVISORS AND EMPLOYEES IN ILLEGAL HARASSMENT!!!

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Happen." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's book, **"Solve Employee Problems Before They Start: *Resolving Conflict in the Real World"*** is #1 for New Releases on Amazon for Conflict Resolution books!

Scott's "**Employment Law Videos**" on the ADA, FMLA, FLSA and Harassment, **"The Human Resource Professional's Complete Guide To Federal Employment And Labor Law" &** Scott's **"Do It Yourself HR Department"** are favorites for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

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