Developments in Harassment Law
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I. Background – The Supreme Court and the Evolution of the Law of Sexual Harassment

Title VII prohibits discrimination by an employer or other statutory respondent "against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's" race, color, sex, religion, or national origin.[1] Title VII does not mention, let alone define, "harassment."

It was not until 1986, in *Meritor Savings Bank v. Vinson*,[2] that the Supreme Court definitively established that Title VII prohibits sexual harassment in employment. Since *Meritor*, the Supreme Court has revisited the law of sexual harassment on a number of occasions, gradually evolving its jurisprudence to address new and more complex issues. The Supreme Court's sexual harassment jurisprudence, in turn, has become the foundation for all claims of harassment in employment law. This paper therefore begins with a brief review of some of the decisions that have shaped harassment law. It then briefly recaps the key issues in many harassment claims. That recap is followed by notes on some recent decisions.

Meritor Savings Bank v. Vinson

The basic elements of employer liability for workplace harassment include: (1) unwelcome conduct (2) because of the plaintiff's gender or other protected status (3) that alters conditions of employment, where (4) the employer can be held responsible for the conduct.

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[1] 42 U.S.C. §2000e-2(a)(1).

[2] 477 U.S. 57 (1986).

In *Meritor,* the complaining employee alleged harassment because she had been pressured into having sexual relations with her supervisor.[3] The Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex."[4] The Supreme Court held that "hostile environment" sexual harassment was sex discrimination, actionable under Title VII. In the process the Court established several principles for future guidance.

First, the Court permitted the sexual harassment claim to proceed even though the plaintiff had voluntarily participated in sexual intercourse with the alleged harasser on a number of occasions. The key to the claim is proof that the conduct was "unwelcome."[5] Unwelcome conduct is conduct that the recipient did not ask for and regards as offensive; sexual advances may be unwelcome even if the recipient acquiesces. The fact that the sex-related conduct was "voluntary," "in the sense that the complainant was not forced to participate against her will" is not a defense to a sexual harassment suit under Title VII. The "correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[6]

Second, the Court held that Title VII prohibits harassment even if the harassment causes no direct financial injury (the form of harassment we now refer to as "hostile environment").[7]

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[3] *Id.* at 60.

[4] *Id.* at 64 (internal quotation marks omitted).

[5] *Id.* at 68.

[6] *Id.* at 67.

[7] *Id.* at 64 (stating that Title VII was not limited to economic aspects of employment).

The *Meritor* Court agreed with the EEOC that unwelcome sexual conduct is prohibited discrimination, regardless of whether it is part of an economic quid pro quo, if the "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[8]

The Court did note that not all "harassment" in the workplace "affects 'a term, condition, or privilege' of employment within the meaning of Title VII."[9] Absent a tangible employment action, harassment is actionable only if it is "sufficiently severe or pervasive to alter the conditions of [the complainant's] employment and create an abusive working environment."[10]

Harris v. Forklift Systems

In 1993, the Supreme Court decided *Harris v. Forklift Systems,*[11] and held that to be actionable the hostile work environment must be one that "a reasonable person" would find hostile, looking at all the circumstances. Additionally, the plaintiff must subjectively perceive the environment as hostile.[12] Psychological injury, however, is not a necessary element of a hostile environment case.[13] Rather, psychological harm is but one relevant factor to consider in determining whether an environment is hostile.[14] Other relevant factors include the frequency of

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[8]477 U.S. at 65.

[9]*Id.* at 67.

[10]*Id.*

[11]510 U.S. 17 (1993).

[12]*Id.* at 21–22.

[13]*Id.* Title VII "comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 22.

[14]*Id.* at 22–23.

the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere "offensive utterance," and whether the conduct unreasonably interferes with the complainant's work performance.[15] An environment is actionable if, evaluated by these factors, a "reasonable person" would find the environment to be hostile, and if the plaintiff subjectively perceived the environment as hostile.[16] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."[17]

Five years later, in its 1997–98 term, the Supreme Court decided three harassment cases. *Oncale v. Sundowner Offshore Services*[18] held that Title VII recognizes claims for "same-sex" harassment. The other two cases, *Faragher v. City of Boca Raton*[19] and *Burlington Industries v. Ellerth,*[20] dealt with employer liability for supervisors' actions.

***Oncale v. Sundowner Offshore Services, Inc.* – Same-Sex Harassment**

In *Oncale v. Sundowner Offshore Services Inc,*[21] a unanimous Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the

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[15]*Id.* at 23. Justice Scalia, in a concurring opinion, argued that the Court's definition of actionable harassment "lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." Justice Scalia admitted, however, that he knew of "no test more faithful to the inherently vague statutory language than the one the Court today adopts."

[16] *Id.* at 21-22.

[17] *Id.* at 23.

[18]523 U.S. 75 (1998).

[19] 524 U.S. 775 (1998).

[20] 524 U.S. 742 (1998).

[21] 523 U.S. 75 (1998).

plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[22]

Joseph Oncale worked as a roustabout for Sundowner Offshore Services in an all-male crew on an oil rig platform in the Gulf of Mexico. Oncale alleged that he was verbally and physically assaulted by other members of the crew, including the supervisor, "in a sexual manner," and was threatened with rape. His complaints to supervisory personnel produced no remedial action. Oncale eventually quit, indicating that he did so because of sexual abuse, and sued.

In a decision written by Justice Scalia, the Court began by repeating the statement from *Meritor* that the language of Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[23] Consistent with its conclusion in earlier race and sex discrimination cases, the Court observed that "Title VII's prohibition of discrimination (because of . . . sex) protects men as well as women."[24]

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the

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[22] *Id.* at 79.

[23] 523 U.S. at ___.

[24] *Id.* (citations omitted).

statutory requirements.[25]

The Court emphasized that bias against the plaintiff *because of* the plaintiff's gender is an indispensable part of a sex harassment case; employment discrimination laws prohibit only adverse employment actions that are motivated by the plaintiff's race, color, sex, religion, national origin, age, or disability.[26] The sexual nature of harassing conduct does not necessarily prove that the harassment is because of sex: "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[27] Title VII does not prohibit all "verbal or physical harassment in the workplace"; conduct can qualify as sexual harassment only if it is based on gender.[28] By the same token, if the unwelcome conduct *is* based on gender, the conduct need not be sexual in content to qualify as sexual harassment. Without mentioning the 1980 EEOC Guidelines,[29] the *Oncale* Court corrected the Guidelines' misleading implication that unwelcome sexual conduct necessarily amounts to sexual harassment. The critical issue is not whether the offensive conduct was sexual in nature but rather "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other

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[25] *Id.* at ____.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 80.

[29] 29 C.F.R. sec. 1604.11 (defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature").

sex are not exposed."[30]

In addressing the evidentiary role of the sexual nature of the challenged conduct, the Court commented:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] . . . because of sex."[31]

[Note that this evidentiary standard continues to be particularly problematic for plaintiffs in a single-sex workplace.]

At the conclusion of the *Oncale* opinion, Justice Scalia emphasized that discriminatory harassment, to be actionable under Title VII, must be sufficiently severe or pervasive as to create a hostile work environment for a reasonable person. "Male-on-male horseplay" and "intersexual flirtation" should not, Justice Scalia cautioned, be mistaken for discrimination, and the "social context in which particular behavior occurs and is experienced by its target" must always be

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[30] *Id.* at 80.

[31] *Id.*

considered.[32] "[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[33]

***Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth* – Liability for Supervisor Harassment**

Burlington Industries Inc. v. Ellerth[34] and *Faragher v. City of Boca Raton,*[35] the other two Title VII harassment cases of the Supreme Court's 1997–98 term, appear factually dissimilar. *Ellerth* came to the Court on a variety of quid pro quo theories and *Faragher* came to the Court on a hostile environment theory. Yet the Court used them to articulate a unified jurisprudence of employer liability for harassment, holding that employers are vicariously liable for sexual harassment by supervisors.

Beth Ann Faragher, a college student, worked part-time for five years as an ocean lifeguard for the Parks and Recreation Department of the City of Boca Raton, Florida. She eventually resigned and sued the city under Title VII, alleging that two of her three immediate supervisors repeatedly touched her and the other female lifeguards (who were a small minority of the total guard force) and subjected them to lewd remarks and offensive comments. The lifeguards had no significant contact with higher city officials, and the city had "completely failed" to distribute its harassment policy to the Marine Safety Section where Faragher worked. Faragher and other female lifeguards made the third on-site supervisor aware of the offensive

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[32] *Id*. at _____.

[33] *Id*.

[34] 524 U.S. 742 (1998).

[35] 524 U.S. 775 (1998).

behavior of the other two, but he neither discussed these complaints with the offending supervisors nor reported the complaints to any other city official.[36]

Kimberly Ellerth worked for 14 months as a salesperson for Burlington in Chicago. She alleged that during her employment she was constantly harassed by her supervisor's boss, Ted Slowik, a mid-level manager who was a vice president based in New York.[37] In addition to "repeated boorish remarks and gestures," Ellerth's claim focused on three incidents.

In the summer of 1993, while on a business trip, Slowik invited Ellerth to the hotel lounge, told her to loosen up, and warned, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington." In March 1994, when Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because she was not "loose enough." The comment was followed by his reaching over and rubbing her knee. Ellerth did receive the promotion; but when Slowik called to announce it, he told Ellerth, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs."

In May 1994, when Ellerth called Slowik, asking permission to insert a customer's logo into a fabric sample, Slowik responded, "I don't have time for you right now, Kim—unless you want to tell me what you're wearing." Ellerth ended the call. A day or two later, Ellerth called Slowik to ask permission again. This time he denied her request, but added something along the lines of, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."[38]

Shortly thereafter, Ellerth quit and filed suit under Title VII. She had not informed anyone

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[36]*Id.* at 781-83, 77 FEP Cases 14.

[37] 524 U.S. 742, 747, 77 FEP Cases 1.

[38]*Id.* at 748, 77 FEP Cases 1 (citations to record omitted).

at Burlington about Slowik's conduct prior to quitting, although she knew that Burlington had a policy against sexual harassment.

The issue in *Ellerth* was initially framed in quid pro quo terms; the Court signaled a major shift in Title VII jurisprudence, however, by reframing the issue as "whether, under Title VII, . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."[39] The Court began its analysis by pointing out that even if Slowik's remarks were threats to retaliate if Ellerth denied him sexual liberties, no such threat was carried out.

> Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.[40]
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> We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.[41]

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[39] *Id.* at 746-47 (citations omitted).

[40] *Id.* at 751.

[41] *Id.* at 753-54.

Thus, the "issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence."[42]

Because Congress defined "employer" under Title VII to include "agents," the Court concluded that Congress directed the federal courts to interpret Title VII "based on agency principles." To establish a "uniform and predictable" federal standard,[43] the Court began with the *Restatement (Second) of Agency*. The *Restatement* provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[44] While "the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment,"[45] Section 219(2)(b) states that: "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (b) the master was negligent or reckless. . . ."[46] The Court stated:

> [A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII; but Ellerth seeks to invoke the more stringent standard of vicarious liability.[47]

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[42]*Id.*

[43]*Id.* at 754.

[44]*Id.* at 756 (citations omitted).

[45]*Id.* at 757.

[46]*Id.* at 758 (citations omitted).

[47]*Id.* at 759.

The Court then turned its attention to Section 219(2)(d) of the *Restatement,* which provides that a master is subject to liability for the tort of a servant acting outside the scope of employment if "the servant . . . was aided in accomplishing the tort by the existence of the agency relation."[48]

A showing of employer liability under the "aided in the agency relation" standard requires more than merely the existence of the employment relationship; otherwise the employer would be vicariously liable for all co-worker harassment as well as for harassment by supervisors. The Court concluded that it is a simple matter to impose vicarious liability on an employer in cases where a supervisor takes a "tangible employment action" against a subordinate.[49]

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
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> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.
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> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.[50]

The Court next addressed a question with a "less obvious" answer—whether the agency relation aids a supervisor in harassment that does not culminate in a tangible employment action.

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[48] *Id.*

[49] *Id.* at 761.

[50] *Id.* at 761- 63 (citations omitted).

The Court answered this question also in the affirmative.

> In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton,* . . . also decided today. *An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8©. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.*[51]

The decision in *Faragher,* written by Justice Souter,[52] began its analysis with a review of the underpinnings of "hostile environment" cases.

> [A]lthough the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition "is not limited to economic or tangible discrimination . . . and . . . covers more than "terms" and "conditions" in the narrow contractual sense. Thus, in *Meritor* we held that sexual harassment so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment" violates Title VII.

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[51] *Id.* at 764 – 65 (emphasis added) (internal citations omitted).

[52] 524 U.S. 775 (1998). Justice Ginsburg filed an opinion concurring in the judgment in each case; Justice Thomas filed a dissenting opinion in which Justice Scalia joined in each case.

> * * * *
> So, in *Harris,* we explained that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including 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." Most recently, we explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." A recurring point in these opinions is that "simple teasing," offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code."[53]

Justice Souter noted that proper application of these standards "will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."[54] Justice Souter next addressed the standard for employer liability for a hostile environment, again using the *Restatement (Second) of Agency.*

The Court then addressed the objectives of Title VII:

> Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," its "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. . . . It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.
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> . . . If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she

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[53]*Faragher,* 524 U.S. at 786 – 88 (internal citations and some quotation marks omitted).

[54]*Id.* at 788 (internal quotation marks omitted).

had done so.[55]

Finally, the Court in *Faragher* adopted the same holding it had adopted in *Ellerth.*[56]

Ellerth and *Faragher* make clear that the employer is vicariously liable for harassment by supervisors. Where a harassing supervisor actually imposes a tangible employment action, the employer's vicarious liability is automatic; no affirmative defense is available to the employer.

Where no tangible employment action has been taken by the harassing supervisor, the employer's vicarious liability is conditional; the employer may present an affirmative defense. The mere existence of an employer policy prohibiting harassment is not sufficient to save the employer from vicarious liability for a supervisor's harassment. Rather, at a minimum the employer must disseminate the policy to affected employees and must ensure that the policy allows for complaints to persons other than the harassing supervisors. The employer's duty to exercise "reasonable care to prevent and correct promptly any sexually harassing behavior" also includes a duty to promptly investigate complaints, and, where justified, to take appropriate remedial action, which may well include workforce training.

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[55]*Id.* at 805–07 (citations omitted).

[56]*Id.* at 807–08. The Court ordered that judgment be entered on remand for Faragher, noting that the city had not sought review of the district court's findings that the hostility in the workplace was severe enough to be actionable, and that it was attributable to the two harassing supervisors, who had virtually unchecked authority over their subordinates. The Court noted that the city had "entirely failed" to disseminate its policy against sexual harassment among the beach employees and had made no attempt to keep track of supervisors' conduct. Further, the "City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints." Thus, the Court held, *as a matter of law,* that the city could not be found to have exercised reasonable care to prevent harassment, and therefore would not have the opportunity to present an affirmative defense.

Where an employer has a procedure to investigate and resolve harassment complaints, employees have a duty to use the procedure.

When the harasser is another employee who is not a supervisor with authority over the complainant and who cannot effect a tangible employment action concerning the complainant, the standard for employer liability remains negligence: whether the employer knew or should have known about the harassment and failed to take prompt remedial action.

***National Railroad Passenger Corp. v. Morgan* –Timeliness of Charge Filing**

In June 2002, in *National Railroad Passenger Corp. v. Morgan*,[57] the Supreme Court determined "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside" the requirement that a Title VII plaintiff file a charge with the EEOC either 180 or 300 days "after the alleged unlawful employment practice occurred."[58] The Court concluded that the answer to the question depends on whether the alleged discrimination consists of discrete discriminatory acts or of a hostile environment; if the alleged discrimination was a hostile environment, which by its very nature often involves repeated conduct, a charge is timely if any act contributing to the hostile environment occurred within the claim period.

Abner Morgan, a black male, filed a charge of discrimination against his employer, Amtrak, with the EEOC and the California Department of Fair Employment on February 27, 1995. Morgan alleged that throughout his employment he was "harassed and disciplined more harshly than other employees on account of his race."[59] Some of the actions about which Morgan complained

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[57]536 U.S. 101 (2002).

[58]*Id*. at 104-05.

[59]536 U.S. at 105.

occurred within 300 days of his EEOC charge, but many had occurred prior to that time period. After Morgan filed suit, Amtrak moved for summary judgment as to all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge. The district court granted Amtrak's motion; the Ninth Circuit reversed.

The Court identified the "critical questions" as: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'? ***** The answer varies with the practice."[60]

The Court held that "a discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it."[61] Further, "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period,"[62] although such acts may constitute relevant background evidence.

Hostile environment claims, however, "are different in kind from discrete acts. Their very nature involves repeated conduct."[63] Harassment "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own," because hostile environment claims are often based on the cumulative effect of individual acts.[64]

Therefore, "a hostile environment claim is comprised of a series of separate acts that

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[60] *Id.* at 110.

[61] *Id.*

[62] *Id.* at 112.

[63] *Id.* at 115.

[64] *Id.*

collectively constitute one 'unlawful employment practice'."[65] Thus, "provided that an act contributing to the claim occurs within the filing period, a court may consider the entire time period of the hostile environment for the purposes of determining liability."[66] For the purpose of assessing the timeliness of a claim for a hostile environment, the Court held that: "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period."[67] The act occurring within the charge-filing period, however, "must be part of the same unlawful employment practice."[68] If the incident within the filing period has "no relation" to the incidents occurring before the filing period, then the most recent incident is not "part of the same hostile environment" and the employee cannot recover for the remote incidents. Further, if there has been "intervening action by the employer," making the recent incident "no longer part of the same hostile environment," then the employee cannot recover for the remote incidents. Last, if the plaintiff has unreasonably delayed filing a charge, the employer may invoke the defense of laches.[69]

Pennsylvania State Police v. Suders **– Constructive Discharge**

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[65] *Id.* at 117.

[66] *Id.*

[67] *Id.* at ___.

[68] *Id.* at ____.

[69] Distant alleged acts also remain "subject to waiver, estoppel, and equitable tolling when equity so requires." 536 U.S. at 121.

In *Pennsylvania State Police v. Suders*[70] the Supreme Court held a "constructive discharge" claim was viable under Title VII. An employee can quit and sue for damages as if she had been discharged if harassment has created working conditions that are objectively intolerable. Further, an employer can assert the *Ellerth/Faragher* affirmative defense in a case of constructive discharge when the employee has resigned because of co-worker conduct or unofficial supervisory conduct. The employer, however, is vicariously liable and cannot assert the affirmative defense when the employee has resigned because of the employer's official acts.

Plaintiff Nancy Drew Suders alleged that her supervisors, officers of the Pennsylvania State Police, harassed her so severely that she was forced to resign. The Court addressed the burden of proof in a sexual harassment/constructive discharge claim under Title VII, building on its prior harassment jurisprudence. First, to establish a hostile environment, the plaintiff must show harassing behavior sufficiently severe or pervasive to alter the conditions of employment.[71]

> [W]e hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.[72]
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[70] 124 S.Ct. 2342 (2004).

[71] *Id.* at 2347.

[72] *Id.*

> Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. .... The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?
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> We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.
> *******
> Essentially, Suders presents a "worse case" harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.[73]

Thus, after *Suders* a harassment plaintiff can establish a constructive discharge – and thereby obtain all the damages that would be available in the event of a formal termination of employment – when an abusive working environment is “ratcheted up” beyond merely unlawful harassment and has become so intolerable that the employee’s resignation qualified as a fitting response.

II. Miscellaneous Background

A. The Employer’s Defenses

An employer may defend on the grounds of jurisdiction, that the matter was not covered under Title VII or other applicable law; on factual grounds that the alleged conduct did not occur; that the conduct was not severe or pervasive enough to constitute actionable harassment; or that the conduct was not directed at the complainant because of complainant’s membership in a protected

[73] *Id.* at 2351 – 56 (most internal citations omitted).

group.

The causal connection with a tangible employment action may be rebutted by evidence that the employment action was taken for reasons other than the complainant's membership in a protected class; the employer may articulate a legitimate, nondiscriminatory reason for the employment action.

B. What Actions Qualify as Tangible Employment Actions?

Since the Court's 1998 decisions in *Ellerth* and *Faragher*, lower courts have struggled to define "tangible employment action," to establish parameters for vicarious liability. Some cases are fairly straightforward. A tangible employment action occurs, for example, where a supervisor threatens to fire a subordinate if she refuses to participate in sex acts with him, and then actually fires her when she continues to resist his demands.[74]

But other actions are less straightforward, and therefore more difficult to characterize. Further, the various federal appellate courts are not necessarily in agreement on what constitutes a tangible employment action, just as they fail to agree on the definition of "supervisor" for purposes of the *Ellerth/Faragher* analysis. For example, in *Lee-Crespo v. Shering Plough Del Caribe, Inc.*[75] the First Circuit concluded that even an action as indefinite as thwarting an employee's ambition to transfer could, in some circumstances, constitute a tangible employment action, assuming plaintiff can establish the causal connection. The court also noted that a reassignment could constitute a tangible employment action. In *Durkin v. City of Chicago*[76] the Seventh Circuit suggested in dicta

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[74] *See* Holly D v. California Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003).

[75] 354 F.3d 34 (1st Cir. 2003).

[76] 341 F.3d 606 (7th Cir. 2003).

that denial of training could, dependent on the circumstances, constitute a tangible employment action. In *Jin v. Metropolitan Life Ins. Co.*,[77] the Second Circuit granted a new trial to plaintiff because the trial court failed to instruct the jury that temporarily withholding plaintiff's paychecks could constitute a tangible employment action.

In *Green v. Administrators of the Tulane Ed. Fund,*[78] the Fifth Circuit concluded that a demotion, with substantial diminishment of job duties, sufficed to constitute a tangible employment action.

In *Molnar v. Booth*,[79] the Seventh Circuit upheld a jury verdict in favor of a probationary art teacher who alleged that after she rebuffed her principal's sexual advances he took back the art supplies he had given her, refused to give her an art room in which to teach, and gave her a failing evaluation in her internship (which meant she could not get her license to teach in Indiana). Although six months later the School Board overturned the conclusion that plaintiff had failed her internship, the Seventh Circuit stated: "The clearest tangible employment action shown in Molnar's evidence was Booth's confiscation of the art supplies he had given her – supplies the jury could have believed were necessary for her to be able to perform her assigned job."[80] Further, the court concluded: "At least as a temporary matter, the negative evaluation Booth gave Molnar was also a tangible employment action; the jury could have believed it spelled the end of a career for a intern. The mere fact that the evaluation was reversed more than six months later and Molnar's

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[77] 295 F.3d 335 (2d Cir. 2002).

[78] 284 F.3d 642 (5th Cir. 2002).

[79] 229 F.3d 593 (7th Cir. 2000).

[80] *Id*. at 600.

career put back on track does not diminish its importance during the time it lasted. To hold otherwise would mean that harassing supervisors could demote employees who rejected their advances with impunity, as long as they later reversed the demotion and restored the employees to their former positions. The short duration is naturally relevant to the degree of damage Molnar suffered ... ."[81]

On the other hand, in *Murray v. Chicago Transit Auth.,*[82] the Seventh Circuit affirmed judgment as a matter of law for defendant CTA, rejecting plaintiff's argument that the CTA President's refusal to approve her travel plan to a conference at which she was a scheduled speaker after she rejected his dinner invitation constituted a tangible employment action. The court restated its rule that "not everything that makes an employee unhappy" is actionable, and stated: "The isolated, and relatively minor, actions Murray alleged did not significantly affect her job responsibilities or benefits, and therefore, cannot be a 'tangible employment action.'"[83]

Perhaps the most vexing unanswered question is that category of sexual harassment cases sometimes referred to as submission cases, "cases in which the complaining employee submits to the sexual advances of the supervisor."[84] The Ninth Circuit and the Second Circuits have concluded that a tangible employment action occurs when an employee complies with a

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[81] *Id*. at 600-01.

[82] 252 F.3d 880 (7th Cir. 2001). *See also* Fyfe v. City of Fort Wayne, 241 F.3d 597 (7th Cir. 2001) (denial of reimbursement for travel and lodging expenses at seminar not an adverse employment action); Bell v. EPA, 232 F.3d 546 (7th Cir. 2000) (cancelling conference called by plaintiff and failing to greet her or speak to her were not adverse employment actions).

[83] *Murray*, 252 F.3d at 888.

[84] Lutkewitte v. Gonzales, 436 F.3d 248, 255 (D.C. Cir. 2006) (Brown, concurring).

supervisor's sexual demands in order to avoid a threatened adverse action.[85] Indeed, the Ninth Circuit stated: "We join the Second Circuit in holding that, in addition to those acts explicitly mentioned in *Ellerth*, a 'tangible employment action' occurs when a supervisor extorts sexual favors from an employee by conditioning her continued employment on her participation in unwelcome sexual acts."[86] "Such a claim may lie either when continued employment has been expressly conditioned on participation in sexual acts or when the supervisor's words or conduct would communicate to a reasonable woman in the employee's position that such participation is a condition of employment."[87] "It is enough that the individual making the unwelcome sexual advance was plaintiff's supervisor, and that a link to employment benefits could [reasonably] be inferred under the circumstances."[88]

In *Lutkewitte v. Gonzales*, [89] the D.C. Circuit refused to reach the question, concluding that plaintiff had failed to offer adequate evidence at trial to establish that her job or significant employment benefits were conditioned on her sexual submission to her supervisor.[90]

C. Relationship between "Tangible Employment Action" and "Materially Adverse

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[85] *Id.*, *citing* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1167 (9th Cir. 2003) and Jin v. Metro Life Ins. Co., 310 F.3d 84, 97 (2d Cir. 2002).

[86] *Holly D*, 339 F.3d at 1173.

[87] *Id.*

[88] *Id.*

[89] 436 F.3d 248 (D.C. Cir. 2006).

[90] The Ninth Circuit has "left for another day" the question of "whether quid-pro-quo liability attaches when an alleged harasser, who was not in a position to exact reprisals at the time his advances were rejected, is subsequently entrusted with and abuses such authority." Porter v. Cal. Dept of Corr., 419 F.3d 885, 892 (9th Cir. 2005).

Action" for Purposes of a Retaliation Claim

Harassment claims are often coupled with claims of retaliation – allegations that when the employee complained of the harassment, the employer or other employees retaliated. A "tangible employment action" is not co-terminus with the "materially adverse" action prohibited by Title VII's anti-retaliation provisions. As the Court said in *Burlington Northern and Santa Fe RR Co. v. White,*[91] where it addressed the scope of Title VII's anti-retaliation provision: "We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. *In the present context* that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[92] The Court concluded that although the language of the substantive provision (section 703(a)) explicitly limits the scope of the provision "to actions that affect employment or alter the conditions of the workplace," "[n]o such limiting words appear in the anti-retaliation provision." Concluding that Congress did intend its different words to make a legal difference, and that the anti-retaliation provision's "primary purpose" is to maintain "unfettered access to statutory remedial mechanisms," the Court held that the anti-retaliation provision was "not limited to discriminatory actions that affect the terms and conditions of employment."

The anti-retaliation provision, however, "protects an individual not from all retaliation, but from retaliation that produces an injury or harm." "[A] plaintiff must show that a reasonable

[91] 548 U.S. ___ (2006).

[92] *Id*. at ___.

employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[93] The Court phrased "the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."[94]

III. Recent Decisions of Note

Please note that many of these cases address multiple issues. I am here focusing only on some of the interesting harassment decisions of 2007 – 08, and am in most cases not mentioning issues other than harassment, even though those other issues may have been present in the cases.

Seventh Circuit

The Seventh Circuit, long one of the most active in deciding harassment cases, continued its activity during 2007 – 08.

Yuknis v. First Student, Inc., 481 F.3d 552 (7th Cir. 2007) – "Target Area" Harassment

Ms. Yuknis worked for First Student as a bus driver, and apparently made repeated complaints to managers that personnel at the facility where she worked "show blatant disrespect for their marital vows, watch pornography, use foul language, tell vulgar jokes, ... [and] gamble

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[93] *Burlington Northern*, ___ U.S. at ___ . The Court further stated "We speak of *material* adversity because we believe it is important to separate significant from trivial harms." (emphasis in original)

[94] *Burlington Northern,* ___ U.S. at ___.

openly." She accused one manager of referring to another female driver as a "fat ass," of having an affair with another driver, and of making off-color remarks to the plaintiff at work. She accused another manager of watching pornography on his computer in his office (not in her presence), and assorted other transgressions. The company investigated, rebuked those determined to have gambled and sold Avon products at work, but fired the plaintiff "for undermining internal relations at the facility and damaging the credibility of the facility's management, by her incessant complaining." The District Court granted summary judgment, and the Seventh Circuit affirmed, concluding that only two suggestive comments, of all the conduct she described, were directed at her, and those two comments fell short of the severity or pervasiveness necessary to create an actionable environment under Title VII.

The court reminded us of the difference between "mere offense" on the one hand and actionable harassment on the other. "The fact that one's coworkers do or say things that offend one, however deeply, does not amount to harassment if one is not within the target area of the offending conduct – if, for example, the speech or conduct is offensive to women and one is a man, or offensive to whites and one is a black." One could be the target, the court pointed out, or one could be in the "target area because a group of which one was a member was being vilified, although one was not singled out." The court went on to say:

> In suggesting the alternative term 'target area,' we do not mean to suggest that there must be an intention of causing distress or offense. A working environment may be deeply hurtful to women even though the men who created it were merely trying to please themselves.... ***** [T]he creation of a hostile working environment is actionable under Title VII only when the hostility is to a group (or specific members of a group), such as women, whom the statute protects.[95]

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[95] *Id*. at 554.

Jackson v. County of Racine, 474 F.3d 493 (7th Cir. 2007) – Hostile Environment/Affirmative Defense

Brenda Jackson, Sherri Lisiecki, Patricia Birchell-Sielaff, and Linda Schultz worked at the Child Support Division (CSD) of Racine County, Wisconsin. While there, they assert, they were subjected to constant sexual harassment from CSD's Division Manager, Robert Larsen. Within weeks of Larsen's appointment to the position of Director, the women alleged that he began to engage in inappropriate conduct toward the female employees in the CSD; he did not engage in similar behavior toward the male employees.

Although several employees, among them a couple of the plaintiffs, complained often to the County's Human Resources Manager about Larson, no one complained about sexual harassment until February 2001. Over the next three months, women complained about harassment from Larson on at least four occasions; each time, the HR Manager investigated, and each time, the employees stated they did not wish to file a formal complaint. The County held harassment training and counseled the manager about sexually inappropriate behavior. The fifth time an allegation of sexual harassment came up against Larson, in May 2001, the general counsel and the HR Manager convened the Anti-Harassment Committee to conduct "a full investigation of Larsen's management of the CSD."[96] Within days, the County placed Larsen on administrative leave; the Committee recommended that Larsen be terminated based on his inappropriate conduct. Upon review, the County Executive decided that demotion, with a reduction in pay, a lesser title with fewer responsibilities, and banishment from the CSD, was an adequate punishment.

Although the district court concluded that the alleged harassment was not severe or pervasive enough to be actionable, the Seventh Circuit thought that the testimony as a whole might

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[96] *Id*. at 498.

be sufficient to show that each of the women was sexually harassed in the workplace. But the court did not reach the point, because it concluded that in any event the County prevailed on its affirmative defense.[97]

The court's analysis is basic but instructive:

> The County's first task is to show that it took reasonable care to prevent or correct any harassing behavior. ********** At the time these incidents took place, the County had a comprehensive anti-harassment policy in effect that plainly covered sexual harassment. The policy was posted in every department, including CSD. Marta Kultgen, the manager of the Human Resources Department, responded promptly to every complaint that reached her.
>
> Nor could any trier of fact find that the County did not act reasonably to correct harassing behavior that was brought to its attention. Neither the County, nor the Anti-Harassment Committee, nor Kultgen can be criticized for attempting to work with complainants who did not wish to lodge formal complaints, at least over the short time between mid-February 2001 and early May 2001, when the Committee launched its comprehensive investigation. After all, when Kultgen followed up at the end of April with the four original complainants (including Jackson and Lisiecki), she received either no response or an assurance that all was well. The investigation was thorough and resulted in a significant disciplinary measure for Larsen: demotion and all of its attendant disadvantages. **********
>
> The County also has the burden of showing that the plaintiffs unreasonably failed to take advantage of any preventive or corrective opportunities that it provided. One sign of unreasonable behavior on the plaintiffs' part is undue delay in calling the problem to the employer's attention.[98]

The plaintiffs had waited until May 2001 to ask for a full investigation; because a full investigation had followed immediately upon the request, the court concluded that summary judgment was required in the County's favor, based on the *Ellerth/Faragher* affirmative defense.

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[97] As a side note, the court noted that a working environment need not be "hellish" before a Title VII suit can succeed – the issue for the lawyers for all parties should rather be whether "a protected group is experiencing abuse in the workplace, on account of their protected characteristic, to the detriment of their job performance or advancement." *Id*. at 501.

[98] *Id.* at 501-02 (most internal citations omitted).

Bernier v. Morningstar, Inc., 495 F.3d 369 (7th Cir. 2007) – same-sex harassment – notice to employer

An employer is liable for the actions of a co-worker in creating a hostile environment only where it knew (either through a complaint by the harassed employee, through a complaint from some other employee or through constructive knowledge) of the allegedly harassing conduct and failed to act reasonably to solve the problem once it had knowledge. Thus, where an employee who felt himself harassed by a gay co-worker who "stared" at him did not follow the company's anti-harassment complaint procedure, but instead sent an anonymous message to the co-worker which read "Stop staring! The guys on the floor don't like it", the company had no notice of alleged harassment and was justified in firing the first employee when the recipient complained of harassment and the first employee denied sending the e-mail.

Bannon v. Univ. of Chicago, 503 F.3d 623 (7th Cir. 2007) – subjective perception of the workplace as hostile and failure to complain

Gloria Bannon worked at Argonne National Laboratory. She and a co-worker sued the lab's operator, the University of Chicago, on a number of grounds, including a hostile work environment claim by Bannon based on her Mexican national ancestry. The Seventh Circuit affirmed the district court's grant of summary judgment.

Bannon alleged her supervisor called her names such as "wetback," "brown cow," and "Mexican terrorist in a miniskirt," and told her that her "Mexican brain" couldn't understand figures. Bannon alleged that this behavior went on for five years; however, she continued to socialize with her supervisor outside of work, including a week-long vacation that she and her supervisor took together with their spouses, and inviting her then ex-supervisor to lunch after she had been promoted. Further, Bannon never reported her supervisor's behavior.

In affirming the grant of summary judgment, the court stated "We think that Bannon's failure to report Reilly's behavior over this long period of time combined with the unusually extensive social relationship she maintained with him would prevent a reasonable jury from finding that she subjectively viewed her work environment as hostile."[99]

Lapka v. Chertoff, 517 F.3d 974 (7th Cir. 2008) – reasonableness of employer's response to complaint

Department of Homeland Security employee Leah Lapka alleged that while she was in Georgia attending a month-long mandatory training session at a Federal Law Enforcement Center, she was raped by a fellow DHS employee. She claimed that DHS failed to adequately investigate the assault and failed to take reasonable steps to protect her from further harm. The district court granted summary judgment for the Department of Homeland Security and the Seventh Circuit affirmed.

Lapka alleged that after she become intoxicated in the bar at the training center, Paul Garcia helped her to her room, and she awakened to find him sexually assaulting her. Although Lapka was taken to a hospital and reported a possible date rape that night, and reported the assault to FLETC and police two weeks later, no one contacted Lapka about the status of the investigation after she returned to Chicago. Nine months later, Lapka checked and discovered that both the police and the agency had closed the investigation with no action taken, due to lack of evidence.

A few months later, Lapka was startled to see Garcia's brother, who also worked for DHS and strongly resembled her assailant, in her office building. Several more visits followed, including one by Garcia himself. Although there was no contact during those visits, Lapka was

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[99] 503 F.3d at 629 (internal citations omitted).

later diagnosed with postraumatic stress disorder. She sought and received a state court order barring Garcia from entering her workplace, but was dissatisfied with the actions taken by agency management.

The court's decision was instructive both on the issue of timeliness and on the question of adequacy of employer response.

> We believe that Lapka's claim is timely. To determine the timeliness of her contact with the counselor, we must determine when the counseling requirement was triggered. To do this, we must carefully identify the exact nature of Lapka's claim. See Ledbetter v. Goodyear Tire & Rubber Co., ---U.S. ----, 127 S.Ct. 2162, 2167, 167 L.Ed.2d 982 (2007). As the district court noted, Lapka is not making a "series of discrete claims, one arising from the assault, a separate claim arising from the failure to investigate, and perhaps another claim arising from the Garcia brothers' later visits to her workplace." Instead, she is making a single hostile environment claim "composed of" a series of events. Of course, in articulating her claim, Lapka must refer to concrete events. It would be unintelligible otherwise. But her legal claim is for the cumulative effect of those events, and that effect forms a "single unlawful employment practice." See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).
>
> The question, then, is when this hostile environment claim accrued.
> **********
> Lapka was raped on June 15, 2002. She learned that the DHS had closed its investigation into the assault without taking any action against Paul Garcia on March 24, 2003. Jaime Garcia visited the 230 South Dearborn Building on May 15, 2003, May 22, 2003, and June 12, 2003. Paul Garcia visited on August 22, 2003. These are the component acts of Lapka's claim. Morgan dictates that if at least one of these acts took place within the statutory period, the claim is not time-barred. Because Lapka contacted an EEO counselor in Dallas during the second week of June 2003, within forty-five days of Jaime Garcia's visits, her claim is timely.[100]

As to Lapka's hostile environment claim, however, the Seventh Circuit concluded that she had failed to show a basis for employer liability.

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[100] 517 F.3d 974, 981-82.

To establish a prima facie case, Lapka must establish that "she was (1) subjected to unwelcome sexual conduct, advances, or requests; (2) because of her sex; (3) that were severe or pervasive enough to create a hostile work environment; and (4) that there is a basis for employer liability." Erickson v. Wisconsin Dep't of Corr., 469 F.3d 600, 604 (7th Cir.2006). These elements are evaluated in light of the "particular facts and circumstances" of the case. Lapka has established the first three elements but she has failed to show a basis for employer liability.

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It goes without saying that forcible rape is "unwelcome physical conduct of a sexual nature." Rape is also, by definition, a form of harassment based on sex.

****
But harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace. See Doe v. Oberweis Dairy, 456 F.3d 704, 715-16 (7th Cir.2006).

****
Lapka has established that she was subject to sexual harassment because of her sex, at least for the purposes of summary judgment.

Lapka must also show that the harassment she experienced was "severe or pervasive" enough to create an abusive environment and to alter the conditions of her employment. Meritor Sav. Bank, 477 U.S. at 67, 106 S.Ct. 2399, 91 L.Ed.2d 49. This element has both an objective and subjective component. We have no reason to doubt that, subjectively, Lapka perceived her work environment to be hostile; she began to lose weight and miss work, and she was ultimately diagnosed with posttraumatic stress disorder. But the DHS argues that no reasonable person could have found the visits by the Garcia brothers to be objectively hostile. The visits, however, cannot be viewed in isolation. They must be viewed in the context of the sexual assault.

The sexual assault alone may have been sufficient to create an objectively hostile environment. It is true that it turned out to be an isolated incident and, thus, was not pervasive. But we have repeatedly stressed that the phrase "severe or pervasive" is disjunctive. It is well settled that "even one act of harassment will suffice if it is egregious." We have held that assaults within the workplace create an objectively hostile work environment for an employee even when they are isolated. The severity of the assault alleged in this case would be sufficient to establish the third element of Lapka's prima facie case. The result is no different if one focuses on the visits paid by the Garcia brothers, which occurred shortly after the sexual assault and in its context. The continued presence of a rapist in the victim's workplace can render the workplace objectively hostile

because the rapist's presence exacerbates and reinforces the severe fear and anxiety suffered by the victim.

We move now to the basis for employer liability. ********** So Lapka must proceed on a theory of co-worker liability, which is basically a theory of supervisory negligence. The DHS can be held liable for Garcia's harassment if it "unreasonably fail[ed] to take appropriate corrective action ... reasonably likely to prevent the misconduct from recurring." The emphasis is on the prevention of future harassment.

Lapka first faults the DHS for failing to investigate the alleged assault. ********** The investigation in this case was in fact initiated promptly; when Lapka informed FLETC personnel about the assault, they immediately called in a FLETC investigator and the Brunswick police department. The police took a formal statement from Lapka and also interviewed Paul Garcia. The FLETC officials obtained the police report and forwarded it, along with the FLETC report, to the INS Office of the Inspector General, which reviewed the claim before forwarding it back to the DHS. The DHS then decided not to pursue the issue further. The police report already contained detailed statements from Lapka and Garcia; the DHS knew that the police had decided not to prosecute due to a lack of evidence. Unfortunately, no rape kit was taken at the hospital and Lapka could not remember many of the details of the night of the alleged rape because she was passing in and out of consciousness. It was reasonable for the DHS to believe that it, too, had insufficient evidence to proceed against Garcia. Lapka would have preferred a different result but the emphasis of Title VII in this context is not on redress but on the prevention of future harm. So "the question is not whether the punishment was proportionate to [the] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring." We believe that the DHS did.

Lapka also claims that the DHS failed to protect her from visits by the Garcia brothers. It is not clear that the DHS could have prevented the visits by Paul's brother Jaime; he never tried to contact Lapka and he had nothing to do with the original assault. Lapka's supervisor told her that she would monitor Jaime's behavior. That was sufficient. The visit by Paul were more troubling. But the DHS responded to Lapka's complaints by adopting a new policy demanding that visitors to Lapka's building be on "official business." This policy was announced only two weeks after Paul Garcia's visit to Lapka's place of work. It appears that the DHS Director did contact Garcia's supervisor and tell him not to send Garcia to 230 South Dearborn on official business.
********** Physical separation had been achieved here. Even if Paul Garcia could have reentered the building, there was little likelihood that he would. And, in

> fact, Paul Garcia never visited again. The "efficacy of an employer's remedial action" is "material" to our inquiry into the reasonableness of the response.
> *********
> It is not availing to say that the employer "should have taken even more aggressive measures." The measures taken by employers will often "not meet the plaintiff's expectations." Title VII requires only that the employer take steps reasonably likely to stop the harassment. The DHS took reasonable steps in this case; that is enough to justify denial of Lapka's claim.[101]

Coolidge v. Consolidated City of Indianapolis, 505 F.3d 731 (7th Cir. 2007) – severe or pervasive conduct and employer liability

The Seventh Circuit affirmed the grant of summary judgment where an employee unintentionally viewed pornography portraying necrophilia, where the pornography was allegedly left in the workplace by a retired by a retired co-worker who had been the subject of an earlier successful harassment suit by the plaintiff.

> [E]ven considered in light of the earlier harassment, the video incident does not create a hostile work environment. The encounter was brief and not particularly severe-Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting. Moreover, even if the pornography was severe enough, Willoughby had been retired from the Crime Lab for nearly a year when Coolidge discovered it. It would be onerous to require employers to conduct a thorough search of the premises to make sure a retiring employee didn't leave anything nasty behind. And although Coolidge perhaps had good reason to believe that the tapes were Willoughby's-it came out during the first trial that in his job as a forensic scientist, Willoughby manipulated corpses in sexually suggestive ways, hence the tie to necrophilia-no evidence shows that they were meant for her, or even left in a place where she was more likely to find them than others. (The video library was used by several Crime Lab employees.) Although Willoughby did not need to target Coolidge in order for her to prevail, Yuknis v. First Student, Inc., 481 F.3d 552, 554-55 (7th Cir.2007), we believe that the chain of events here was too attenuated to show that Willoughby sexually harassed Coolidge by leaving the tapes and hoping she would find them, and that the Crime Lab was

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[101] *Id*. at 982-85 (internal citations omitted).

responsible for failing to prevent this.[102]

EEOC v. V & J Foods, Inc., 507 F.3d 575 (7th Cir. 2007) – complaint procedure

The court reversed and remanded a grant of summary judgment against the corporate owner of a number of fast food restaurants in a sex-based hostile work environment case. Here, the company hired teenagers and those teenagers were sexually harassed by the 35-year-old restaurant manager, who eventually fired the 16-year-old plaintiff after she complained repeatedly of his conduct to no avail, and her mother confronted the restaurant manager. The young employee had been unable to determine to whom, other than employees in the restaurant, she should complain.

> The main grounds on which the district court dismissed the suit were not that Merriweather had not been harassed on grounds of sex but, first, that she had failed to invoke the company's procedure for complaining about harassment, and, second, that firing her because of her mother's intervention was not actionable retaliation for "oppos[ing] any practice made an unlawful employment practice" by Title VII, 42 U.S.C. s 2000e-3(a), because it was "third-party retaliation." The term refers confusingly to retaliation against the victim of discrimination because someone else opposed the discrimination.[103]
>
> *********
>
> [A]n employer can avoid liability under Title VII for harassment (on a ground, such as sex, that constitutes a form of discrimination that the statute forbids) of one of his employees by another by creating a reasonable mechanism by which the victim of the harassment can complain to the company and get relief but which the victim failed to activate. Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). If the harasser is a supervisor and the harassment takes the form of firing or taking other employment action against the victim, the employer's liability is strict, and that principle is applicable to the two firings of which Merriweather complains. The presence or absence of an adequate complaint machinery is relevant only to her

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[102] 505 F.3d at 734 (internal citations omitted).

[103] 507 F.3d at 577.

claim for damages for the harassment that she suffered while she was employed by the defendant, and not to her claim of having been unlawfully fired.

The mechanism must be reasonable and what is reasonable depends on "the employment circumstances," and therefore, among other things, on the capabilities of the class of employees in question. If they cannot speak English, explaining the complaint procedure to them only in English would not be reasonable. In this case the employees who needed to be able to activate the complaint procedure were teenage girls working in a small retail outlet. V & J's lawyer surprised us a second time by telling us that an employee's age and education are irrelevant to the adequacy of the grievance machinery established by the employer-if it is a machinery within the competence of a 40-year-old college graduate to operate, it will do for a 16-year-old girl in her first paying job. An employer is not required to tailor its complaint procedures to the competence of each individual employee. But it is part of V & J's business plan to employ teenagers, part-time workers often working for the first time. Knowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager. Here as elsewhere in the law the known vulnerability of a protected class has legal significance.

Ignoring this point, the company adopted complaint procedures likely to confuse even adult employees. The employee handbook that new employees are given has a brief section on harassment and states that complaints should be lodged with the "district manager." Who this functionary is and how to communicate with him is not explained.
****

If an employee complains to a shift supervisor or assistant manager, that person is supposed to forward the complaint to the general manager (and thus in this case to Wilkins) even if the complaint is about the general manager. After receiving the complaint the general manager is supposed to "turn himself in," which of course Wilkins did not do. Nor did the shift supervisors or assistant manager report Merriweather's complaints to Wilkins or to anyone else. A policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law. Faragher v. City of Boca Raton, supra, 524 U.S. at 808-09, 118 S.Ct. 2275; see also Clark v. United Parcel Service, Inc., 400 F.3d 341, 349-50 (6th Cir.2005).

****

Were it costly for an employer to provide a clearer path for complaints about harassment, the cost would have to be weighed against the benefits, the latter being measured presumably by the increase in meritorious complaints that the clearer procedure would generate and the resulting reduction in workplace

harassment. An unreasonably costly complaint mechanism would not be reasonable. But it would cost very little, certainly for a company of V & J's size, to create a clear path for complaints of harassment and other forms of illegal discrimination.
****
In any event, the defendant has the burden of proving that it has established and implemented an effective complaint machinery-it is an affirmative defense, and V & J has presented no evidence at all about the cost of adopting and administering an effective complaint machinery.[104]

Bombaci v. Journal Community Publishing Group, Inc., 482 F.3d 979 (7th Cir. 2007)

Though an employer "reasonably can expect a victim of sexual harassment to make some minimal effort to follow up on an initial complaint when the employer requests her to do so, ... we have never held that an employer acts reasonably where a supervisor receives a credible complaint of sexual harassment and no effort is made to contact the alleged victim."[105]

Isaacs v. Hill's Pet Nutrition, Inc., 485 F.3d 383 (7th Cir. 2007)

Holding that sexual harassment that began in one department and continued in another department when plaintiff's job assignment changed, was one continuous course of harassment for purposes of timeliness of charge filing under *Morgan*, where the "employer's response remained constant ...doing nothing," and her "new superior picked up where her old one left off" in terms of harassing and intimidating her.

Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781 (7th Cir. 2007)

Reversing grant of summary judgment, and holding that 1) hostile environment sexual harassment claims are not limited to claims in which the harassment is based on sexual desire –

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[104] 507 F.3d 577-80.

[105] 482 F.3d at 986.

comments evincing anti-female animus can support a hostile environment claim; and 2) at least eighteen sexist or sexual comments by supervisor in less than a year's time, with no response by management to employee's complaints, was sufficient evidence of pervasiveness to survive summary judgment.

Other Appellate Courts

District of Columbia Circuit

Greer v. Paulson, 505 F.3d 1306 (DC Cir. 2007)

As a matter of law, a *per se* rule barring consideration of incidents that occurred during an employee's absence from the workplace is inappropriate, as it would provide "a perverse incentive" for an employer to place on leave an employee for whom it had created a hostile environment.[106] Additionally, the plaintiff employee should be permitted to try to establish that events occurring prior to a leave of absence were sufficiently linked to those occurring post-leave, for purposes of establishing one continuing course of harassment and thus timeliness under *Morgan* (in *Greer* the court concluded that the plaintiff failed to establish the connection).

Vickers v. Powell, 493 F.3d 186 (DC Cir. 2007)

The DC Circuit reversed and remanded the district court's grant of summary judgment for the FDIC on Vickers' hostile environment claim, concluding that the line between the hostile environment created by the first supervisor and the actions of his "deputy-turned-successor" in perpetuating the environment were not so clear that the court could conclude they were not related as a matter of law. Thus, because some of the alleged incidents took place during the filing period,

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[106] 505 F.3d at 1314.

the district court should consider all of the allegations concerning conduct by both supervisors to determine whether plaintiff produced sufficient evidence of a hostile environment to survive a motion for summary judgment.

First Circuit

Forrest v. Brinker International Payroll Co., LP, 511 F.3d 225 (1st Cir. 2007)

The First Circuit affirmed the district court's grant of summary judgment on hostile environment sexual harassment claim, where in a case involving a prior failed relationship between co-worker harasser and alleged victim, harasser barraged victim with gender-specific epithets and interfered with her work in restaurant. But because the restaurant responded to the victim's complaints with progressive discipline and ultimate termination of the harasser (all within the span of one month), its actions were prompt and appropriate and therefore no liability attaches.

Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008)

First Circuit reversed and remanded district court's grant of summary judgment on plaintiff's hostile environment claim, where over the space of several years and despite repeated complaints, plaintiff's supervisor stared repeatedly at her breasts. "The point at which a work environment becomes hostile or abusive does not depend on any 'mathematically precise test.'"[107] "The highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior. Conduct that amounts to sexual harassment under one set of circumstances may, in a different context, equate with the sort of 'merely offensive'

[107] 515 F.3d at 48, *citing Harris*.

behavior that lies beyond the purview of Title VII, and vice versa." [108]

The court accepted, "as a general proposition, that not every such claim premised on staring or leering in the workplace automatically presents a question for the jury. We hold simply that the record in this case does not permit the ruling, as a matter of law, that the circumstances of Billing's employment did not add up to a hostile environment."[109]

Second Circuit

Patane v. Clark, 508 F.3d 106 (2d Cir. 2007)

The Second Circuit vacated the district court's dismissal of plaintiff's hostile environment and retaliation claims pursuant to Federal Rule of Civil Procedure 12(b)(6), where a secretary in Fordham University's Classics Department alleged that over the space of several years one of the professors, who was also Chair of the department at various times, engaged in inappropriate sexually-charged conduct in the workplace. Some of the alleged conduct involved the harassment of another woman in the department, but most of it involved the professor's watching of pornography, leaving links to pornographic websites on plaintiff's computer, and having pornographic videotapes delivered to the department, which plaintiff was required to open and deliver to the harasser's mailbox. Under *Bell Atlantic v. Twombly*, the complaint "must plead 'enough facts to state a claim for relief that is plausible on its face.'"[110]

> [T]he district court concluded that Plaintiff failed to

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[108] *Id*. at 49.

[109] *Id*. at 50.

[110] *Patane*, 508 F.3d at 11-12 (*citing Bell Atlantic*, 127 S.Ct. 1955, 1974).

allege that she faced an objectively hostile work environment, "because [she] never saw the videos, witnessed Clark watch the videos, or witnessed Clark performing sexual acts." However, Plaintiff does allege that she regularly observed Clark watching pornographic videos. This Court has specifically recognized that the mere presence of pornography in a workplace can alter the "status" of women therein and is relevant to assessing the objective hostility of the environment. Moreover, Plaintiff alleges that she was regularly required to handle pornographic videotapes in the course of performing her employment responsibilities of opening and delivering Clark's mail; and that she once discovered hard core pornographic websites that Clark viewed on her workplace computer. Combined with Plaintiff's other allegations regarding Clark's sexually inappropriate behavior in the workplace, including her allegation regarding his earlier harassment of Dr. Peirce, and with Fordham's failure to take any action notwithstanding Plaintiff's numerous complaints, a jury could well conclude that Plaintiff was subject to frequent severely offensive conduct that interfered with her ability to perform her secretarial functions. Though whether a particular work environment is objectively hostile is necessarily a fact-intensive inquiry, we conclude that Plaintiff has alleged sufficient facts to be "entitled to offer evidence to support [her] claim[ ]."

Defendants also argue that Plaintiff has not alleged that the harassing conduct was aimed at her-let alone aimed at her because of her sex. However, some of the conduct that Plaintiff has alleged was undoubtedly aimed at her-for instance, the hard core pornographic websites on her computer and the pornography-containing mail that Clark knew she was responsible for handling. Moreover, a plaintiff need only allege that she suffered a hostile work environment because of her gender, not that all of the offensive conduct was specifically aimed at her. In Petrosino v. Bell Atlantic, we recognized that sexually charged conduct in the workplace may create a hostile environment for women notwithstanding the fact that it is also experienced by men. 385 F.3d 210, 223 (2d Cir.2004). In that case, we endorsed the Fourth Circuit's reasoning in Ocheltree v. Scollon Products., Inc.:

> The employer contended that the offensive conduct could not be deemed discriminatory based on sex "because it could have been heard [or seen] by anyone present in the shop and was equally offensive to some of the men." The court disagreed, concluding that a jury could find "[m]uch of the conduct ... particularly offensive to women and ... intended to provoke [plaintiff's] reaction as a woman."

As in Ocheltree, Plaintiff pleads facts sufficient to allow a jury to find much of Clark's complained of conduct particularly offensive to women and intended to

provoke Plaintiff's reaction as a woman.[111]

Ninth Circuit

Davis v. Team Electric Co., 520 F.3d 1080 (9th Cir. 2008)

The Ninth Circuit reversed the district court's grant of summary judgment for the employer on plaintiff's disparate treatment, retaliation, and hostile environment claims. In determining what types of conduct can rise to the level of an actionable hostile environment, the court observed that "Offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile."[112] The plaintiff, a female electrician on an otherwise all male job site, alleged that she was told not to enter the office trailer even though male employees were permitted to do so, that her supervisors made a number of anti-female comments, brought donuts to the job site "only for the guys," referred in sexist and derogatory terms to other women, etc. There were no allegations of physical abuse or aggressive sexual advances. The court concluded that whether these incidents would be considered abusive by an "objective" reasonable woman was a close question, but there is no "mathematically precise test," and given the frequency of the conduct, "it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment."

Craig v. M & O Agencies, Inc., 496 F.3d 1047 (9th Cir. 2007)

The Ninth Circuit reversed the district court's grant of summary judgment on plaintiff's hostile environment claim, where, over the course of a number of months, plaintiff's supervisor,

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[111] *Id*. at 114-15.

[112] 508 F.3d at ___.

the company's interim president, began by making repeated inappropriate comments about Craig's legs and how she should wear shorter skirts, and escalated to persistent, repeated requests that Craig make love to him. Craig reported the president's conduct 19 days after the first of his persistent attempts to persuade Craig to have sex with him. The court first concluded that because plaintiff did not allege that the president explicitly conditioned her continued employment on acquiescing to sexual relations with him, there was no tangible employment action and therefore no quid pro quo harassment. On the other hand, the court concluded that plaintiff's hostile environment claim was sufficient to survive a motion for summary judgment: the president's "conduct falls somewhere between mere isolated incidents or offhand comments, which do not amount to a Title VII claim, ... and serious and pervasive harassment, that clearly comes within Title VII ...."[113]

Fourth Circuit

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306 (4th Cir. 2008)

The Fourth Circuit Court of Appeals reversed a grant of summary judgment for the employer in a religious discrimination case, where a Muslim American alleged that he was harassed in the workplace in the wake of September 11, concluding that the employer knew of the harassment and failed to take appropriate corrective action to stop the harassment. A sentence worth quoting: "But the event that shook the foundations of our buildings did not shake the premise of our founding – that here, in America, there is no heretical faith." 521 F.3d at

[113] 496 F.3d at 1056.

____; 2008 WL 836409 *1.

Fifth Circuit

EEOC v. WC&M Enterprises, Inc., 496 F.3d 393 (5th Cir. 2007)

The Fifth Circuit Court of Appeals reversed a grant of summary judgment for the employer in a religious discrimination case, again where the harassed employee was a practicing Muslim. This decision is virtually a companion case to the Fourth Circuit's Sunbelt Rentals decision. **In both cases, the wake of September 11th brought a stream of demeaning comments and degrading actions, and in both cases the employees complained but their complaints brought limited response.**

In an excellent reminder of the framework in which a hostile environment claim should be analyzed, the court in WC & M Enterprises stated:

> [T]he district court made two findings that essentially disposed of the EEOC's hostile work environment claim on the merits: (1) that the EEOC had not shown that Rafiq lost sales as a result of the alleged harassment that he suffered; and (2) that the EEOC could not bring a claim based on Rafiq's national origin because none of the harassing comments specifically referred to the fact that Rafiq was from India. The EEOC argues that the district court erred in each respect. We agree.
>
> To state a hostile work environment claim under Title VII, the plaintiff must show that: (1) the victim belongs to a protected group; (2) the victim was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) the victim's employer knew or should have known of the harassment and failed to take prompt remedial action. Only elements (3) and (4) are seriously contested in this case.
>
> The Supreme Court has emphasized that Title VII's prohibition "is not limited to 'economic' or 'tangible' discrimination." Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Rather, "[w]hen

the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." Harris v. Forklift Sys., 510 U.S. 17, 21 ....

For harassment to be sufficiently severe or pervasive to alter the conditions of the victim's employment, the conduct complained of must be both objectively and subjectively offensive. Harris, 510 U.S. at 21-22, 114 S.Ct. 367. Thus, not only must the victim perceive the environment as hostile, the conduct must also be such that a reasonable person would find it to be hostile or abusive. Id. To determine whether the victim's work environment was objectively offensive, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance. Id. at 23, 114 S.Ct. 367. No single factor is determinative. Id. In short, a showing that the employee's job performance suffered is simply a factor to be considered, not a prerequisite.

****

Here, the district court held that even if Rafiq could prove that any harassment occurred, "he has not shown that it was so severe that it kept him from doing his job." In so holding, the district court applied an incorrect legal standard. Whether Rafiq lost sales as a result of the alleged harassment is certainly relevant to his hostile work environment claim; but it is not, by itself, dispositive. The district court erred in concluding otherwise.

Applying the totality of the circumstances test, we conclude that the EEOC has presented sufficient evidence to create an issue of fact as to whether the harassment that Rafiq suffered was so severe or pervasive as to alter a condition of his employment. The evidence showed that Rafiq was subjected to verbal harassment on a regular basis for a period of approximately one year. During that time, Rafiq was constantly called "Taliban" and referred to as an "Arab" by Kiene and Argabrite, who also mocked his diet and prayer rituals. Moreover, Rafiq was sporadically subjected to additional incidents of harassment, ...
****

Although no single incident of harassment is likely sufficient to establish severe or pervasive harassment, when considered together and viewed in the light most favorable to the EEOC, the evidence shows a long-term pattern of ridicule sufficient to establish a claim under Title VII.

In addition, the evidence is sufficient to show that the harassment Rafiq suffered

was based on his religion and national origin. First, some of the alleged harassment dealt specifically with Rafiq's Muslim faith, including: (1) mocking comments about his dietary restrictions and prayer rituals; (2) Swigart's written comment that Rafiq was acting like a "Muslim extremist;" (3) Kiene's statement to Rafiq that "We don't want to hear about your religious beliefs" even though Rafiq was not even talking about them at the time; (4) Kiene's question to Rafiq, "Why don't you go back to where you came from since you believe what you believe?"; and (5) Swigart's statement to Rafiq, "This is America. That's the way things work over here. This is not the Islamic country where you came from." Also, a factfinder could reasonably infer that the comments suggesting that Rafiq was (1) involved in the September 11th terrorist attacks and (2) a member of the Taliban because he, like members of the Taliban, was Muslim, were based on his religion.

With respect to national origin, the district court found that the EEOC could not prevail on its claim that Rafiq was harassed on the basis of national origin because none of the alleged harassment related to the fact that Rafiq is from India. The district court is correct that none of the harassing comments directly referred to Rafiq's actual national origin. However, a party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim's actual country of origin.

Indeed, the EEOC's guidelines on discrimination define "discrimination based on national origin" broadly, to include acts of discrimination undertaken "because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. s 1606.1. Nothing in the guidelines requires that the discrimination be based on the victim's actual national origin.[114]

Lauderdale v. Texas Dep't. of Criminal Justice, 512 F.3d 157 (5th Cir. 2007)

Plaintiff alleged she was sexually harassed while working as a correctional officer. The district court granted summary judgment; the appellate court concluded that the allegedly harassing supervisor's behavior was pervasive, even if not severe: plaintiff alleged that her supervisor called her ten to fifteen times a night for almost four months. "Though Lauderdale does not assert that each phone call carried sexual overtones, the frequency of unwanted attention, over a four-month

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[114] WC & M Enterprises, Inc., 496 F.3d at 399 - 401 (most citations omitted).

time period, amounts to pervasive harassment."[115]

But having concluded that there was a genuine issue of material fact as to the creation of a hostile work environment, the court then looked at the employer's assertion of the *Ellerth/Faragher* affirmative defense. The employer's anti-harassment policies and educational programs satisfied the first prong of the affirmative defense. Plaintiff argued that the second prong of the defense – "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"[116] – was not available to the employer because she reported the harassment to her immediate supervisor. But her immediate supervisor "explicitly indicated his unwillingness to act on her complaint," and plaintiff did not report the conduct to any of the other people or agencies listed in the policy as avenues for reporting sexual harassment.

The Fifth Circuit imposed an arguably heavier burden on the employee than that explicitly discussed in *Ellerth/Faragher*. "In most cases, as here, once an employee knows his initial complaint is ineffective, it is unreasonable of him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint."[117]

The last Fifth Circuit decision of interest is **Abner v. Kansas City Southern RR Co., 513 F.3d 154 (5th Cir. 2008)**, where the court affirmed a jury verdict in a racially hostile environment case awarding $125,000 in punitive damages but no compensatory damages to each of the eight plaintiffs. The trial court added $1 in nominal damages and entered judgment on the verdict. The

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[115] 512 F.3d 157, 164.

[116] *Id*., quoting *Faragher*, 524 U.S. at 807.

[117] *Id*. at 165.

Fifth Circuit affirmed: "We agree with the conclusion of several of our sister circuits that a punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages. We base our holdings on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII."[118]

Sixth Circuit

Clay v. United Parcel Service, Inc. 501 F.3d 695 (6th Cir. 2007)

Multiple plaintiff race discrimination case, with claims including hostile environment, where the Sixth Circuit affirmed the district court's grant of summary judgment on plaintiff Moss's harassment claim.

> Moss does not allege that any racially derogatory comments were made in the workplace; her claim is based on the theory that the facially neutral conduct of her supervisor towards her was, in fact, based on her race. Conduct that is not explicitly race-based may be illegally race-based and properly considered in a hostile-work-environment analysis when it can be shown that but for the employee's race, she would not have been the object of harassment.
>
> Moss claims that Terlop singled her out and castigated her for engaging in behaviors in which her white counterparts engaged with impunity. In support of her argument that she was harassed based on her race, Moss supplied her own affidavit as well as affidavits from two coworkers.
>
> ***********
> The affidavits assert that Moss was criticized for conduct for which her white co-workers were not. Moss was criticized for the doughnut incident, for the route she took to get to her work station, for leaving her work station to get a cup of coffee, for using the bathroom at the end of her break, and for the size of her earrings. These affidavits set forth specific conduct for which Moss was berated and for which her white co-workers were not; thus, the district court erred in finding that these affidavits did not provide sufficient detail.
>
> ************
> Given that Moss was the only black employee in her work area and that she alleges that Terlop

[118] 513 F.3d at 160.

> disciplined her for things for which he did not discipline her co-workers, Moss has created an inference, sufficient to survive summary judgment, that race was the motivating reason behind Terlop's behavior. Accordingly, the district court erred in finding otherwise.[119]

So far, so good. But having concluded that a reasonable jury could find that the facially neutral conduct was, in fact, based on plaintiff's race, the court went on to consider whether the complained of conduct was sufficiently severe or pervasive to create an actionable hostile environment. The court concluded that it was not – that the fifteen specific incidents spanning a two-year period were for the most part "mere offensive utterances," not actionable under Title VII. The court therefore affirmed the grant of summary judgment.

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008)

Four female brewery workers filed a sex discrimination and retaliation case against Anheuser-Busch; three of the plaintiffs also alleged that a male co-worker's sexual harassment rose to the level of a hostile environment. The district court granted the employer's motion for summary judgment; the Sixth Circuit reversed as to most of the hostile-environment-related claims.

One of the issues was:

> whether a plaintiff alleging a hostile work environment may introduce evidence of other incidents of sexual harassment in the workplace directed at employees other than the plaintiff, but of which the plaintiff was aware.
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> ***********
>
> ______A review of ... Sixth Circuit caselaw addressing other-act evidence ... makes clear that we may consider evidence of other acts of harassment of which a plaintiff becomes aware during the period his or her employment, even if the other acts were directed at others and occurred outside of the plaintiff's presence.
>
> **************
>
> This is not to say that a plaintiff's knowledge of other acts of harassment will necessarily establish a hostile work environment, or that a factfinder is required to give significant weight

[119] 501 F.3d at 706-07.

> to other acts that are unrelated to the plaintiff's allegations. When determining the relative weight to assign similar past acts of harassment, the factfinder may consider factors such 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 degree to which a past act of harassment is relevant to the determination of whether a plaintiff's work environment is hostile is a fact-specific inquiry that requires courts to determine the relevancy of past acts on a case-by-case basis. In general, however, the appropriate weight to be given a prior act will be directly proportional to the act's proximity in time to the harassment at issue in the plaintiff's case. The further back in time the prior act occurred, in other words, the weaker the inference that the act bears a relationship to the current working environment. On the other hand, more weight should be given to acts committed by a serial harrasser if the plaintiff knows that the same individual committed offending acts in the past. This is because a serial harrasser left free to harass again leaves the impression that acts of harassment are tolerated at the workplace and supports a plaintiff's claim that the workplace is both objectively and subjectively hostile.[120]

Eighth Circuit

Vajdl v. Mesabi Academy of Kidspeace, Inc., 484 F.3d 546 (8th Cir. 2007)

The Eighth Circuit affirmed the district court's grant of summary judgment on a hostile environment claim. Plaintiff was a "youthcare worker" in the sex offender unit of an institution that provided residential, educational, and vocational care to male youths convicted of violent crimes. She alleged she was subjected to a hostile environment because 1) over the course of seven months, several youths made physical threats and sexual comments to her; and 2) three co-workers frequently commented on her body and asked her out on dates; one of the co-workers also allegedly once touched her hair and once her pant leg.

As to the inmates, the court observed that they were encouraged to verbalize their anger, frustration, and sexual fantasies as part of a rehabilitation program. The court thus concluded that

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[120] 517 F.3d at 333-37 (most citations omitted).

absent special circumstances the inmates' conduct could not be attributed to the employer in order to show that the harassment by the inmates affected a term, condition, or privilege of plaintiff's employment. As to the co-workers, the court concluded that the complained-of conduct was not objectively severe or pervasive enough to alter a term, condition, or privilege of employment. First, most of the complained-of conduct occurred within a three month time. Second, plaintiff did not allege that she felt physically threatened by her co-workers' conduct; the court pointed to plaintiff's characterizations of her co-workers' conduct as "flirting," "an absurdity," and "ridiculous," in concluding that she did not find the conduct subjectively unwelcome.

Engel v. Rapid City School Dist., 506 F.3d 1118 (8th Cir. 2007)

An interesting analysis, applying *Morgan* to a sexual harassment and constructive discharge claim. Plaintiff was being harassed by a co-worker; she complained, and the employer suspended the co-worker. Plaintiff alleged the co-worker's harassing conduct continued after the employer disciplined him. Significantly, the court stated that "to show that a hostile work environment has continued after an employer's remedial action, a plaintiff need not prove an entire accumulation of harassing acts, amounting to a new and free-standing hostile work environment."[121] Plaintiff dutifully reported the continuing post-discipline harassment. But the court concluded:

> That Herrera's harassment continued, and that Engel reported the harassment, is not sufficient, in and of itself, to establish that RCSD could be liable for the hostile work environment. Proper remedial action need be only "reasonably calculated to stop the harassment," and remedial action that does not end the harassment can still be adequate if it is reasonably calculated to do so.
>
> We conclude that there is insufficient evidence to show that RCSD is liable for the hostile work environment that occurred prior to April 2003. During this period, RCSD had a written policy against sexual harassment and a formal complaint

[121] Engel, 506 F.3d at 1124.

procedure, yet no employee reported Herrera's harassment to supervisory employees until March 2, 2003. Herrera was suspended from work on March 6, 2003. The first remedial action, set forth in the conference review dated April 3, 2003, sanctioned Herrera with an unpaid suspension, restricted his ability to gain access to buildings, assigned him to undergo counseling, and issued a stern warning that additional harassment or inappropriate conduct would result in termination. Although it turns out that this action did not stop Herrera's harassment entirely, it did eliminate some of the offending conduct, and the law does not require an employer to fire a sexual harasser in the first instance to demonstrate an adequate remedial response. The response was prompt, reasonably comprehensive in scope, and stern in its warnings. We therefore conclude as a matter of law that RCSD cannot be liable for a hostile work environment that existed prior to Herrera's return to work on April 15, 2003.

That an employer responds adequately to an initial report of sexual harassment, however, does not discharge the employer's responsibility to respond properly to subsequent reports of offending conduct by the harasser. In this case, as we have recounted, there is a genuine issue of fact as to whether Herrera's harassment continued after the first remedial action in April 2003. As to the time period between April 2003 and March 2004, we conclude that there is also a genuine issue of fact as to whether RCSD was negligent in responding to Herrera's continued harassment, such that it may be liable for a hostile work environment continuing to occur after the first remedial action, and for damages limited to that later period.

Several considerations lead to this conclusion. A reasonable jury could conclude that RCSD's second remedial action in August 2003 failed to address one element of Herrera's ongoing harassment. RCSD did not reprimand Herrera for his continued leering at Engel, even though she testified that he continued "undressing [her] with his eyes," and that she reported this conduct to the assistant superintendent in May or June 2003. The second remedial action, moreover, did not stop this aspect of the harassment. Engel testified that after August 2003, Herrera continued to give her "the look, the glance, the once over," just as he had done during the initial period of harassment. There is a gap in the record with respect to Engel's allegation of continued leering. ********** In any event, on the record before us, taken in the light most favorable to the plaintiff, Engel complained that Herrera continued to leer at her after the first remedial action, and RCSD failed to respond.

Significantly in our view, RCSD's decision to respond to Herrera's continued harassment by decreasing, rather than increasing, its threatened sanctions may reasonably be viewed as contributing to a negligent response. The reasonableness of an employer's response to repeated sexual harassment "may well depend upon whether the employer progressively stiffens its discipline, or vainly hopes that no

> response, or the same response as before will be effective." Here, RCSD had threatened to terminate Herrera if any additional substantiated complaints of harassment were made against him, but taking Engel's complaints as true for purposes of summary judgment, RCSD did not follow through on this promise. Instead, RCSD responded to Engel's additional complaints by suspending him and then advising that further inappropriate conduct could lead to administrative action, "up to and including the termination of [his] employment"-thus opening the possibility that even a third round of harassment would not cost Herrera his job. Engel reasonably contends that this backtracking may have emboldened Herrera, and thereby contributed to his continued harassment of her.
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> **********
>
> In sum, Engel has presented evidence that could support a reasonable finding that some elements of RCSD's second remedial action were insufficient to address Herrera's ongoing harassment, that the remedial action did not stop the harassment, and that the second remedial action may actually have encouraged Herrera to feel that he could safely continue certain activities.[122]

Brenneman v. Famous Dave's of America, Inc., 507 F.3d 1139 (8th Cir. 2007)

Offensive touching and humiliating comments by supervisor over a period of several months was sufficient that a reasonable person could find the work environment adversely affected plaintiff's working conditions. But the court affirmed the district court's grant of summary judgment for the employer because it concluded that employer had successfully asserted the affirmative defense.

> The first element has two prongs: prevention and correction. Under the prevention prong, the employer must have exercised reasonable care to prevent sexual harassment. Under the correction prong, the employer must have promptly corrected any sexual harassment that occurred.
>
> Famous Dave's demonstrated that it exercised reasonable care to prevent sexual harassment. It has a facially valid anti-harassment policy, with a non-retaliation provision and a flexible reporting procedure, listing four individuals who may be contacted in the case of harassment. Although having an anti-harassment policy is not in itself enough to

[122] *Id*. at 1125 – 27 (citations omitted).

> show that Famous Dave's exercised reasonable care, distribution of a valid policy provides compelling-but not dispositive-proof of preventing sexual harassment. Most importantly, Brenneman received training specifically about the policy. *********** When Brenneman invoked the hotline and the policy, she received an immediate response from Famous Dave's.
>
> Additionally, Famous Dave's meets the correction prong. When the harassment was reported, Famous Dave's sent Schindler to investigate and stop the harassment. Moreover, Schindler attempted to work out a new schedule with Brenneman and offered to relocate her to a restaurant five miles away. Though transferring Brenneman, instead of Ryburn, is not ideal, Famous Dave's has satisfied the correction prong.
>
> Famous Dave's also satisfies the second element of the defense. While Brenneman did not unreasonably fail to take advantage of any preventative opportunities, she did unreasonably fail to take advantage of corrective opportunities. Her failure to take advantage of Schindler's assistance was unreasonable. Brenneman tries to justify not cooperating with Schindler, claiming she feared "repercussions" from Ryburn. This excuse is unreasonable here where Schindler, a corporate human resources officer, appeared to any reasonable observer to be in charge of the situation and superior to Ryburn. Moreover, the policy expressly contained an anti-retaliation provision.[123]

This is one of several somewhat troubling decisions where the appellate court seems to find no problem with the idea that transferring the victim of harassment to another location provides a reasonable solution. *See also* ***Baldwin v. Blue Cross/Blue Shield of Alabama,*** **480 F.3d 1287, 1304-05 (11th Cir. 2007)** (court concluded the employer had established both elements of the affirmative defense, stating that: 1) nothing in *Ellerth/Faragher* requires an employer to "conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment"; 2) the requirement that the employer conduct a reasonable investigation "does not include a requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser"; 3) "even if the process in which an employer arrives at a remedy in the case of alleged sexual harassment is somehow defective, the defense is still available if the

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[123] 507 F.3d at 1145-46.

remedial result is adequate," because "a reasonable result cures an unreasonable process"; and 4) where employer offered either to transfer alleged victim from Huntsville, Alabama to Birmingham, Alabama or to have an industrial psychologist conduct a counseling program with the alleged victim and alleged harasser and then "monitor their relationship," these options, coupled with a warning to the alleged harasser, was "an adequate corrective remedy" where the employer could not corroborate the alleged victim's allegations).

Anda v. Wickes Furniture Co., 517 F.3d 526 (8th Cir. 2008)

The Eight Circuit affirmed a grant of summary judgment where it concluded that 1) complaints referring to arguments by sales people over customers and gossip between sale people were not pervasive enough to give rise to an issue of fact as to the existence of a hostile environment, where only two "isolated comments" had any sexual overtone; 2) further, even if these allegations rose to the level of sexual harassment, where the company promptly investigated, issued a written reprimand to the offending employee, and told plaintiff that the process of investigating and disciplining the offending employee was still ongoing, the company "took prompt and effective remedial action" and therefore summary judgment was appropriate.

Weger v. City of Ladue, 500 F.3d 710 (8th Cir. 2007)

The Eighth Circuit also affirmed a grant of summary judgment where two female communications officers for the Ladue Police Department sued the city for sexual harassment and retaliation. The court concluded that although the plaintiffs established a prima facie case of hostile environment sexual harassment, the city had established the *Ellerth/Faragher* affirmative defense. The court stated:

Plaintiffs contend that the Department did not satisfy the prevention prong because its antiharassment policy was ineffective in the following ways: (1) Plaintiffs' coworkers and supervisors did not report observed acts of Baldwin's harassment of Plaintiffs; (2) the Department did not offer training or counseling with regard to sexual harassment; and (3) the Department made no attempt to monitor Baldwin's behavior. However, Plaintiffs have offered no authority from this court that these failures render the Department's harassment prevention efforts unreasonable. *********** Furthermore, Plaintiffs have not alleged that their delay in invoking the Department's complaint procedure was, in any way, a result of the policy's deficiencies. On the contrary, Plaintiffs chose not to invoke the Department's complaint procedure for at least a year due to their fears of retaliation and that they would not receive a fair investigation, which goes to the second element of the *Ellerth-Faragher* affirmative defense.

In sum, we find that the Department acted reasonably to prevent harassment as a matter of law because it had a facially valid antiharassment policy that, when invoked by Plaintiffs, brought an immediate end to Baldwin's harassment.

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Plaintiffs also contend that the Department has not satisfied the correction prong as a matter of law because: (1) it had both actual and constructive notice of Baldwin's harassment via its employees observation of the harassment prior to Murphy's complaint; (2) its investigation of Plaintiffs' complaint was flawed; and (3) its remedial action was harsh and skewed in favor of Baldwin.

The correction prong requires the Department to demonstrate that it “exercised reasonable care ... to correct promptly any sexually harassing behavior.” *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275. Therefore, in applying the correction prong, “the employer's notice of the harassment is of paramount importance....” ***********

Plaintiffs assert that the Department had actual notice of Baldwin's harassment prior to November 5, 2002, because at least one supervisor, who was designated to receive harassment complaints under the Department's policy, observed the harassment. Plaintiffs further contend that, because the policy required employees who observed harassment to report it, their coworkers' observation of Baldwin's harassment also constituted actual notice to the Department prior to Murphy's complaint. However, where an employer has a complaint procedure delineating the individuals to whom notice of harassment must be given, employee observations are not relevant to the actual notice inquiry.

Rather, because the Department has a published policy that provides a procedure for reporting suspected harassment, Plaintiffs must have invoked this procedure in order to establish actual notice. Prior to Murphy's complaint to Lt. Baker on November 5, 2002, which provided actual notice to the Department,

Murphy admits that she failed to inform any Department supervisor or any other individual designated by the policy that she was being sexually harassed by Baldwin. **********

Plaintiffs also assert that the Department's correction of Baldwin's harassment was not reasonably prompt because the Department had constructive notice of such harassment prior to Murphy's complaint via supervisor and coworker observation of Baldwin's inappropriate conduct. An employee can show an employer's constructive knowledge of sexual harassment by demonstrating that "the harassment was so severe and pervasive that management reasonably should have known of it.

The district court considered the following six instances in determining whether constructive notice, prior to Murphy's complaint, should be imputed to the Department: (1) Baldwin's comment to Sgt. Wagner with regard to Weger's breast reduction surgery in February 1999; (2) Baldwin's remark to Sgt. Wagner and Lt. Baker with regard to Murphy's appearance in October 1999; (3) the incident witnessed by Det. Norman in the winter of 2001, which ended with Murphy stating that she could not "stand" Baldwin; (4) Officer Bonney's observation of Baldwin touching Murphy and attempting to tickle her after she told him to stop where Murphy eventually told Baldwin to leave her alone; (5) Det. Lucas's observation of Baldwin touching Weger's shoulders and Weger rolling her eyes; and (6) the September 2002 incident where Officer Bonney and Sgt. Wagner saw Baldwin rubbing Murphy's shoulders and Murphy grimaced and turned away from Baldwin.

The district court found, as a matter of law, that these instances did not impute constructive notice to the Department that Baldwin was sexually harassing the Plaintiffs because they occurred over a substantial period of time and no single officer observed more than three incidents. Though the behavior attributed to Baldwin is reprehensible, the six instances observed by Department employees lack the requisite pervasiveness to support a finding that it "was obvious to everyone." Therefore, as a matter of law, constructive knowledge that Baldwin was sexually harassing the Plaintiffs cannot be imputed to the Department before it received actual notice via Murphy's complaint on November 5, 2002. ***********

Finally, Plaintiffs contend, despite the fact that Baldwin's harassment ended the day of Murphy's complaint, that the Department failed to satisfy the correction prong because its investigation of Murphy's complaint was flawed and its remedial action was harsh and skewed in favor of Baldwin. Generally, where the employer responds to a sexual harassment complaint in such a way as to promptly stop the sexual harassment, there is no basis for finding employer's postcomplaint actions not sufficiently corrective.

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Plaintiffs also contend that the Department's postcomplaint actions do not satisfy

the correction prong because they were harsh and skewed in Baldwin's favor. However, "[i]f an employer has ... notice of harassment but takes immediate and appropriate corrective action, the employer is not liable for the harassment." Here, as our previous analysis established, the Department had notice of Baldwin's harassment on November 5, 2002. When Chief Wickenhauser became aware of Murphy's complaint the following day, he took immediate action to discuss the claims with Murphy, investigate them, and distance Baldwin from Plaintiffs by temporarily relieving him of his supervisory duties for the communications officers and instructing him not to enter the communications area unless in the company of another supervisor and for a work-related purpose.

Therefore, there is no genuine issue of fact with regard to the timeliness and adequacy of the Department's corrective actions. Thus, the district court correctly found that the City of Ladue acted reasonably to prevent and promptly correct sexually harassing behavior ....

Plaintiffs also contend that the district court erred in finding that, as a matter of law, the Plaintiffs unreasonably delayed reporting Baldwin's harassment. In order to satisfy the second element of the *Ellerth-Faragher* affirmative defense, the Department must show that "the [Plaintiffs] unreasonably failed to take advantage of any preventative or corrective opportunities provided by the [Department] or to avoid harm otherwise." Though "proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257; *Faragher,* 524 U.S. at 807-08, 118 S.Ct. 2275. ********

Plaintiffs admit that they knew the Department's antiharassment policy was in effect at the inception of Baldwin's harassment and that they were to invoke the Department's complaint procedure the first time they were harassed. However, Murphy did not report the harassment for over a year, and Weger only did so when directly questioned about Baldwin's conduct toward her during Chief Wickenhauser's investigation. Therefore, absent some credible basis for Plaintiffs' admitted year long delay in reporting Baldwin's harassment, the City of Ladue has established the second element of the affirmative defense.

Plaintiffs contend that their delay was not unreasonable in light of their credible fears of retaliation and their belief that they would not receive a fair investigation due to Baldwin's and Wickenhauser's close relationship. We recognize "the enormous difficulties involved in lodging complaints about discrimination in the workplace, including sexual harassment," specifically, "the great psychological burden it places on one who is already the victim of harassment to require that

person to complicate further his or her life with the ramifications, both legal and otherwise, of making a complaint." We further acknowledge that this burden is even greater where, as here, the victims of harassment perceive a bias in favor of their harasser on the part of the individual that will investigate their harassment complaint. However, as the First Circuit observed:

> Reporting sexually offensive conduct by a supervisor would for many or most employees be uncomfortable, scary or both. But because this will often or ordinarily be true, as the Supreme Court certainly knew, its regime necessarily requires the employee in normal circumstances to make this painful effort *if the employee wants to impose vicarious liability on the employer and collect damages under Title VII.* In short, for policy reasons representing a compromise, more than ordinary fear or embarrassment is needed.
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> ************

Accordingly, Plaintiffs must demonstrate a "truly credible threat of retaliation," in order to render their delay reasonable.

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In this case, because the record is devoid of any threat by any Department employee, Plaintiffs' fear of retaliation is not credible and, thus, does not excuse their year long delay in reporting Baldwin's harassment. [124]

Tenth Circuit

Herrera v. Lufkin Ind., 474 F.3d 675 (10th Cir. 2007)

The Tenth Circuit reversed a grant of summary judgment on Herrera's Title VII racially hostile environment claim. Plaintiff presented evidence of several discrete instances of racial harassment over the course of several years. But in addition, he presented evidence of on-going harassment over a four-year period, consisting primarily of constant, consistent, derogatory comments about Herrera to the other people with whom he worked. Mr. Herrera's supervisor and co-workers often told Herrera about these comments, and warned him that the manager who was

[124] Weger, 500 F.3d at 72- 26. Citations and portions of the text omitted.

making the comments was a bigot and that plaintiff should be wary of him. Finally, the biased manager sent a new manager to Herrera's service center, and this new manager treated plaintiff and his son, the only Hispanic employees at the service center, worse than he treated other employees. Because Herrera was aware of the derogatory comments made about him to his co-workers and his supervisor, the court concluded that these comments were part of the hostile environment, even though not made directly to the plaintiff. **See also Tademy v. Union Pacific Corp.,** 520 F.3d 1149 (10th Cir. 2008), for a thorough discussion of the use of evidence of a general work atmosphere in establishing a harassment claim.

Eleventh Circuit

Nurse "BE" v. Columbia Palms West Hospital, 490 F.3d 1302 (11th Cir. 2007)

The Eleventh Circuit vacated a jury award to a nurse against her former employer, Columbia Palms West Hospital. The court concluded that 1) the hospital was not put on notice of sexual harassment, and therefore had no duty to take prompt and reasonable corrective action, where the plaintiff told her supervisor that the alleged harasser physician had made as many as five late-night "harassing" phone calls asking her out on dates, but where the plaintiff asked her supervisor not to report the calls; and 2) once the hospital was given notice of the physician's subsequent harassing behavior, it took reasonable and prompt corrective action where it notified the physician, who was not a hospital employee, that he was to have no further contact with plaintiff, notified physician's employer of plaintiff's allegations and the inconclusive result of the hospital's prompt investigation, and where his employer issued a "disciplinary action form" to the

physician which stated that any further contact with plaintiff other than in a strictly professional capacity would result in his immediate termination.

Freytes-Torres v. City of Sanford, unpublished decision, 2008 WL 763216 (11th Cir. March 25, 2008)

The Eleventh Circuit reversed the district court's grant of summary judgment on Freytes-Torres' hostile environment sexual harassment claim for two reasons. First, the appellate concluded that the totality of the circumstances showed that plaintiff established frequency, severity, and physically threatening conduct. The more interesting discussion, however, came in the context of the court's conclusion that the employer also failed to establish the *Ellerth/Faragher* affirmative defense, concluding that although the city had an anti-harassment policy, it "did not execute its sexual harassment policy in good faith," where the city "did not allow Freytes-Torres' complaint to be heard by someone who was not directly supervised by her harasser, pressured her to retract her formal, written complaint, and then used the absence of a formal complaint to justify a truncated investigation and an absence of punishment."[125]

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[125] 2008 WL 763216 ** 7 - 8.