

ALI-ABA Course of Study  
Current Developments in Employment Law

July 24-26, 2003  
Santa Fe, New Mexico

**Harassment in the Workplace**

by

Debra S. Katz and Alan R. Kabat  
Bernabei & Katz, PLLC  
Washington, D.C.



Sections 1985(3) and 1986

2

Title VII

3

1. Title VII's Scope and Procedural Issues

3

2. Title VII's Coverage and Employer Size

4



3.	Membership in Protected Class	.	.
			.
			.
			.
		12	.
4.	Unwelcome Nature of Conduct	.	.
			.
			.
		12	.
5.	Harassment Based on Sex	.	.
			.
			.
			.
		15	.
6.	Conduct Sufficiently Pervasive or Severe	.	.
			.
			.
		19	.
5.	The Quantity of Harassing Conduct	.	.
			.
			.
		19	.
6.	The Continuing Violation Doctrine	.	.
			.
			.
		20	.
7.	Single Incident Harassment	.	.
			.
			.
			.
			.
		21	.
7.	Single Incident Harassment Is a Hostile Work Environment		22
8.	Single Incident Harassment Is Not a Hostile Work Environment		26
8.	The Spectrum of Sexual and Racial Harassment	.	.
			.
		27	.
9.	Employer Liability (Respondeat Superior)	.	.
			.
			.
		46	.
9.	The <i>Ellerth/Faragher</i> Affirmative Defense to Employer Liability for Damages Under Title VII . . . . .		46
10.	Is Constructive Discharge a Tangible Employment Action? . . . . .		49

	11.	How the Federal Courts Have Applied the Affirmative Defense	53
	12.	How the State Courts Have Applied the Affirmative Defense	63
	13.	The <i>Kolstad</i> Limitation to Punitive Damages Under Title VII	67
	14.	The Application of <i>Kolstad</i> by the Circuit Courts	. . . 68
	15.	The Application of <i>Kolstad</i> by the State Courts	. . . 93
	16.	When Is a Supervisor Not a Supervisor?	. . . 96
	17.	Employer Liability for Co-Worker and Customer Harassment	99
10.		Individual Liability	. . . 102
			. . .
			. . .
			. . .
			. . .
			. . .
18.		NATIONAL ORIGIN AND RELIGION HARASSMENT	. . . 104
			. . .
			. . .
	11.	Definition of Harassment Because of National Origin	. . . 104
	12.	Definition of Harassment Because of Religion	. . . 105
	13.	Elements of a National Origin or Religion Harassment Claim	. . . 105
	14.	National Origin Harassment and Discrimination Appellate Cases	. . . 106
	15.	Religion Harassment and Discrimination Appellate Cases	. . . 110
19.		THE CONSPIRACY STATUTES	. . . 119
			. . .
			. . .
			. . .
			. . .
			. . .
20.		PROCEDURAL ISSUES: RECENT DEVELOPMENTS	. . . 123
			. . .
			. . .
	16.	Status of At-Will Employees and Independent Contractors	. . . 123
	17.	Employer Status of Corporate Affiliates and Subsidiaries	. . . 125

18.	Employer Status of Public Entities	.	.
			.
			.
			.
		126	.
19.	Anti-Harassment Policies and the Unionized Workplace	.	.
		126	.
20.	Extension of <i>Weingarten</i> Rights to Non-Unionized Workplaces	.	127
21.	USE OF JURY AND TRIAL CONSULTANTS FOR HARASSMENT CASES	.	.
		128	.
22.	JURY INSTRUCTIONS	.	.
			.
			.
			.
			.
			.
			.
		130	.
23.	STATE LAW CLAIMS	.	.
			.
			.
			.
			.
			.
			.
			.
		131	.
21.	Overview	.	.
			.
			.
			.
			.
			.
			.
			.
		131	.
22.	Supplemental Jurisdiction	.	.
			.
			.
			.
			.
			.
		131	.
23.	State Anti-Discrimination Laws	.	.
			.
			.





# **Harassment in the Workplace**

by

**Debra S. Katz**  
**Alan R. Kabat<sup>1</sup>**

**Bernabei & Katz, PLLC**  
**1773 T Street, N.W.**  
**Washington, D.C. 20009-7139**  
**(202) 745-1942**

## 26. INTRODUCTION

This chapter provides an overview of harassment employment law claims under Title VII and Section 1981, with an emphasis on sexual and racial harassment claims, and a briefer presentation of concurrent state civil rights remedies.

There are no comprehensive statistics for the total number of all workplace harassment complaints, formal and informal, since there is no central repository for the reporting of complaints that are resolved before going through the agency or judicial stage. The EEOC's most recent enforcement statistics show there were 14,396 sexual harassment charges filed during fiscal year 2002, which represented about 56% of all gender-based charges; the remainder were gender discrimination charges. See EEOC, "Enforcement Statistics" (Feb. 6, 2003) <<http://www.eeoc.gov/stats/>>. These statistics do not include charges filed with state or local agencies but not cross-filed with the EEOC. The EEOC no longer provides comparable statistical information for racial or national origin harassment claims.

---

<sup>1</sup> Debra S. Katz is a name partner with Bernabei & Katz, PLLC, a civil rights firm based in Washington, D.C., that specializes in the representation of plaintiffs in employment law, civil rights and civil liberties matters. Alan R. Kabat is an associate with the law firm of Bernabei & Katz, PLLC. Lindy Lucero and Mike Perez, summer associates with Bernabei & Katz, assisted with researching and updating several sections.

## 27. APPLICABLE FEDERAL STATUTES

Most racial and sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; racial harassment claims can also be brought under the Reconstruction-Era civil rights statute, 42 U.S.C. § 1981. Racial harassment claims against state or local governments can be brought under 42 U.S.C. § 1983, if the employee alleges that her constitutional rights were violated by defendants' discriminatory conduct. In similar circumstances, a claim may also be brought under the conspiracy statutes, 42 U.S.C. §§ 1985(3) and 1986. The state statutes covering racial and sexual harassment are tabulated in § 8 *infra*, but these statutes are only analyzed with regard to litigation in federal courts pursuant to their supplemental jurisdiction and the issues of state sovereign immunity.

### 24. Section 1981.

Section 1981, part of the Civil Rights Act of 1866, was enacted pursuant to the Thirteenth Amendment and bars racial discrimination. 42 U.S.C. § 1981. In 1989, the Supreme Court interpreted Section 1981 as excluding claims arising during the employment context from its protection. Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989). In response, the Civil Rights Act of 1991 expressly amended Section 1981 to add subsections (b) and (c), which provide for a broader reading of the right to “make and enforce contracts” and reaffirm the applicability of Section 1981 to private employers. Thus, courts now recognize that racial discrimination and harassment claims by employees lie within the statutory protection of Section 1981. See Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1033-34 (7th Cir. 1998).

Section 1981 provides, in relevant part, that:

- (a) All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .
- (b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
- (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added).

The statute of limitations for Section 1981 actions is governed by “the most appropriate one provided by state law.” Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975). The Supreme Court granted certiorari to resolve a split among several of the federal circuit courts regarding whether plaintiffs can use the catchall federal four-year statute of limitations, 28 U.S.C. § 1658, to revive their claims that would otherwise be stale under the state statute of limitations. Jones v. R.R. Donnelley & Sons, Co., 305 F.3d 717 (7th Cir. 2002), cert. granted, 123 S. Ct. 2074 (2003). The Third, Seventh and Eighth Circuits have rejected attempts to use Section 1658 for Section 1981 claims. See Jones, 305 F.3d at 722-28; Madison v. IBP, Inc., 257 F.3d 780 (8th Cir. 2001), vacated on other grounds, 536 U.S. 919 (2002); Zubi v. AT&T Corp., 219 F.3d 220, 224 (3d Cir. 2000). The Tenth Circuit, in contrast, held that Section 1658 could be used for claims under Section 1981(b), but not Section 1981(a). Harris v. Allstate Ins. Co., 300 F.3d 1183, 1186-92 (10th Cir. 2002). It should be noted that Section 1981a, which sets forth certain remedies, applies to Title VII actions, and not to Section 1981 actions.

25. Sections 1985(3) and 1986.

Sections 1985(3) and 1986, the conspiracy statutes, govern harassment that results from the actions of two or more persons. Section 1986 reaches those who had notice of the conspiracy and were able to prevent it, but did not do so. Section 1985(3) provides, in relevant part, that:

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (emphasis added). The companion statute, Section 1986, provides, in relevant part, that:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to

the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

42 U.S.C. § 1986 (emphasis added). A claim under Section 1986 must be brought “within one year after the cause of action has accrued.” Id.

26. Title VII.

Title VII was enacted through the Civil Rights Act of 1964, pursuant to the Fourteenth Amendment, and applies to employers with “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year.” 42 U.S.C. § 2000e(b). Thus, employees of certain small or seasonal businesses are not protected by Title VII, although they may be able to obtain recourse for employment discrimination through Section 1981 (for racial or national origin harassment claims), or those state or local anti-discrimination statutes that have lower thresholds.

28. Title VII’s Scope and Procedural Issues.

Section 703 of Title VII, as amended, provides in relevant part, that:

(a) It shall be an unlawful employment practice for an employer — (1) . . . to discriminate against any individual with respect to his **compensation, terms, conditions, or privileges of employment**, because of such individual’s race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

The statute of limitations for private-sector Title VII actions is governed by 42 U.S.C. § 2000e-5(e)(1), which requires that a charge “shall be filed [with the EEOC] within one hundred and eighty days after the alleged unlawful employment practice occurred” unless the charge is also filed with a state or local agency, which extends the filing period to 300 days. See Delaware State College v. Ricks, 449 U.S. 250, 256-59 (1980); see also 29 C.F.R. § 1601, subpart B (procedural requirements). In contrast, federal-sector employees must inform their agency’s designated EEO office within 45 days of the alleged discrimination or harassment; the agency then allows the employee to participate in either counseling or alternative dispute resolution. If these mechanisms are unsuccessful, the federal employee can then file an EEO complaint with the agency, but has only 15 days to do so. See 29 C.F.R. § 1614.

Title VII's "mixed motive" element allows the plaintiff to recover if she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). This "mixed motive" element is limited to discrimination or harassment claims, is not available for retaliation claims, Tanca v. Nordberg, 98 F.3d 680, 682-85 (1st Cir. 1996), and does not apply to Section 1981 claims. Mabra v. United Food & Commercial Workers Local Union No. 1996, 176 F.3d 1357, 1358 (11th Cir. 1999). The Supreme Court recently held that, in a mixed motives case, a plaintiff can rely on circumstantial evidence of discriminatory conduct, and does not have to present direct evidence. Desert Palace, Inc. v. Costa, 539 U.S. \_\_\_, 123 S. Ct. \_\_\_, 2003 WL 21310219 (2003).

## **2. Title VII's Coverage and Employer Size.**

The Supreme Court recently ruled upon an appeal from the Ninth Circuit which raised the question of whether shareholder-employees (here, physicians) in a professional corporation were "employees" for the purpose of determining whether the employer had sufficient employees to meet the minimum employer size for ADA claims. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. \_\_\_, 123 S. Ct. 1673 (2003). The Court held that the EEOC's six-factor analysis would be particularly useful in making this determination:

We are persuaded by the EEOC's focus on the common-law touchstone of control, see Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), and specifically by its submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee:

- [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- [2] Whether and, if so, to what extent the organization supervises the individual's work;
- [3] Whether the individual reports to someone higher in the organization;
- [4] Whether and, if so, to what extent the individual is able to influence the organization;
- [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; [and]
- [6] Whether the individual shares in the profits, losses, and liabilities of the organization.

Wells, 123 S. Ct. at 1680 (quoting EEOC Compliance Manual, § 605:0009). The Supreme Court discussed the implications of these factors:

As the EEOC’s standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor. . . . Nor should the mere existence of a document styled “employment agreement” lead inexorably to the conclusion that either party is an employee. . . . Rather . . . the answer to whether a shareholder-director is an employee depends on “all of the incidents of the relationship . . . with no one factor being decisive.”

Id. at 1680-81 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)). The Court seemed to lean towards finding that these shareholder-employees would not be statutory employees, but remanded to the district court for further fact finding. Id. at 1681 & n.11.

29. Title VII’s Coverage of Law Firm Partners.

The Supreme Court’s Wells decision, by focusing on the EEOC’s six factor test, and by recognizing that no one factor is outcome determinative, may provide better guidance to the lower courts in resolving the difficult and fact-specific question of whether partners in a professional corporation, such as accounting and law firms, are employees and hence protected under the employment discrimination statutes. See, e.g., EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 703-07 (7th Cir. 2002) (collecting cases).

Traditionally, persons who were partners had both an equity interest and the full ability to participate in the management and control of the partnership. In more recent years, large partnerships have found it unwieldy to allow all partners vote on managerial and personnel decisions, so that these firms have typically created a separate management committee comprised of a small number of partners who make these decisions on behalf of the partnership. Further, an increasing number of partners are now “salary” or “income” partners, which means that they get a fixed salary instead of a share of the profits, and they do not have any equity in the partnership. These two trends — rule by management committee and non-equity salaried partners — mean that many professionals who are denominated as “partners” are, in fact,

employees for the purposes of the employment discrimination statutes. See also Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring) (“Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as ‘partners.’”).

The courts have consistently drawn a line between “general” partners — those who have equity in the partnership, have a significant degree of management or control over the partnership, are subject to liability, and are compensated as a function of the partnership’s profit — and “nominal” partners — those who do not have equity, do not have any significant management or control over the partnership, are not subject to liability, and are compensated primarily or exclusively on a wage basis. Only the former category of partners are excluded from the definition of employee under the employment discrimination statutes. See, e.g., Wheeler v. Main Hurdman, 825 F.2d 257, 260 (10th Cir. 1987) (plaintiff was a general equity partner in an accounting firm, was entitled to compensation as a share of firm profits, contributed to capital, had unlimited personal liability, and had the right to vote on nearly all matters affecting the partnership).

In contrast, where the employee, although denominated a partner, received a regular salary, lacked equity, lacked any meaningful opportunity to exercise management or control over the partnership, and was not liable for the partnership’s debts, then the circuit courts have held that such persons are employees. See, e.g., Simpson v. Ernst & Young, 100 F.3d 436, 443-44 (6th Cir. 1996); Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996) (“determining whether an individual is an ‘employee’ typically requires a factual inquiry which goes beyond merely the partnership agreement and the ‘partner’ label.”).<sup>2</sup>

---

<sup>2</sup> The district courts have similarly held that nominal “partners” who lacked equity and significant control were employees. See, e.g., Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 215 (S.D.N.Y. 1997) (non-equity law “partner” who could be terminated at will); Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 147-51 (S.D.N.Y. 1987) (salaried accountant “partner”); Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., 670 F. Supp. 597, 602 (W.D. Pa. 1987) (salaried attorney “partner” who had no management control).

## 30. WORKPLACE HARASSMENT

### 27. Definition.

During the 1990s, the courts and legal commentators differentiated between “quid pro quo” sexual harassment and “hostile work environment” sexual harassment. This distinction was “between cases in which threats are carried out and those where they are not or are absent altogether.” Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 751 (1998). The case law had developed to recognize that “both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive.” Id. (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). However, the Court recognized that this dichotomy was of “limited utility” other than in differentiating between the presence and absence of implemented threats. Id. at 752. Therefore, the Court decided that, to determine whether the employer should be held vicariously liable, as opposed to “liability limited to its own negligence,” for the actions of its supervisors, the key issue is whether there was a tangible employment action. Id. at 753.

The result is that practitioners should focus on the presence or absence of a tangible employment action, and not the categories of “quid pro quo” and “hostile work environment” which the Supreme Court effectively abandoned. See also Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 120 (3d Cir. 1999) (these cases “largely eliminated the distinction between hostile work environment claims and quid pro quo claims, focusing instead on the presence or absence of tangible adverse employment actions.”); Vonderohe v. B&S of Fort Wayne, Inc., 36 F. Supp. 2d 1079, 1083 (N.D. Ind. 1999) (“the distinction between the two kinds of harassment is analytical, not statutory”).

Although long antedating the Supreme Court’s 1998 decisions, the EEOC promulgated, in 1980, a definition of sexual harassment, which is concordant with the case law:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.



29 C.F.R. § 1604.11(a). The first and second prongs correspond to “quid pro quo” harassment, while the third prong corresponds to hostile environment harassment.

28. Elements of the Claim.

The Supreme Court first recognized the validity of “hostile or abusive work environment” claims under Title VII in a sexual harassment case. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). The Supreme Court noted that the first case “to recognize a cause of action based upon a discriminatory work environment” was a Fifth Circuit case involving a Hispanic plaintiff who had claimed that “her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele.” Id. at 65-66 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). In Rogers, the Fifth Circuit held that “the practice of creating a working environment heavily charged with ethnic or racial discrimination” was sufficient to fall within the proscription of Title VII’s expansive “terms, conditions or privileges of employment.” Rogers, 454 F.2d at 238.

The Meritor Court held “that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” Meritor, 477 U.S. at 66. However, the Court recognized that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.” Id. at 67 (citing Rogers, 454 F.2d at 238). Therefore, the Court required that: “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’” Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Meritor Court adopted the requirement of Rogers and Henson which had required that harassment must affect the “terms, conditions or privileges” of plaintiff’s employment in order to violate Title VII.

Seven years later, the Supreme Court addressed the issue of whether the conduct “must seriously affect an employee’s psychological well-being or lead the plaintiff to suffer injury” in order for the plaintiff to prove hostile environment harassment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993) (internal quotation marks and brackets deleted). The Supreme Court rejected the approach taken by three circuits which had required such a serious effect, since “concrete psychological harm [is] an element Title VII does not require.” Id. at 22 (emphasis added). Instead, the Harris Court adopted a requirement that the plaintiff must show defendants’ conduct to be both objectively and subjectively hostile or abusive:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

Id. at 21-22 (emphasis added). The Harris Court recognized that this determination “is not, and by its nature cannot be, a mathematically precise test.” Id. at 22. Nonetheless, the Court set forth various analytical factors:

whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Id. at 23. The Court further recognized that “no single factor is required.” Id.

The lower federal courts have generally used the Supreme Court’s approach in Harris as a starting point for analyzing harassment claims. The Second, Seventh, Eighth and Tenth Circuits have used the Harris framework, usually bifurcated into objective and subjective components, followed by proof of the employer’s liability (respondeat superior). See cases cited *infra*.

The Third, Fourth, Sixth, Ninth and Eleventh Circuits have adopted a five-element test to analyze harassment claims. This test originated in the framework used by the Eleventh Circuit for a sexual harassment case. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982). The Henson elements are: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual or racial harassment; (3) the harassment complained of was based on employee’s sex or race; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) existence of employer’s liability (respondeat superior). This approach has also been used by the Fifth Circuit for sexual harassment claims, and has been applied by district courts within the District of Columbia, First and Fifth Circuits to racial harassment claims. Although not all of the harassment cases discussed herein have cited Henson, they typically cite to cases from their own circuit, involving hostile environment sexual harassment, which have cited to Henson. See cases cited *infra*.

**District of Columbia Circuit.** This circuit has not set forth an analytical framework for racial harassment claims, although it has recognized the analogy to sexual harassment. See, e.g., Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981) (“Racial slurs . . . may [also] create Title VII liability”). Several district court cases in this Circuit have applied the Henson framework to racial harassment cases. See, e.g., Villines v. United Bhd. of Carpenters and Joiners of Am., AFL-CIO, 999 F. Supp. 97, 104 (D.D.C. 1998); Jones v. Billington, 12 F. Supp. 2d 1, 11 (D.D.C. 1997). This corresponds to the approach taken by the Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits, *infra*.

**First Circuit.** This circuit also has not expressly discussed racial harassment claims under either analytical framework. Several district court cases in this Circuit have applied the five factor Henson approach to racial harassment, albeit without citing to Henson itself. See, e.g., Riesgo v. Heidelberg Harris, Inc., 73 FEP Cases 1783, 1787 (D.N.H. 1997); Johnson v. Teamsters Local Union No. 559, 67 FEP Cases 1150, 1153 (D. Mass. 1995).

**Second Circuit.** This circuit has adopted a two-prong analysis for harassment claims, which effectively collapsed the first four Henson elements into one. First, plaintiff “must demonstrate that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his work environment.” Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (citing Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1996)) (internal quotation marks omitted). Second, plaintiff must demonstrate respondeat superior, *i.e.*, “that a specific basis exists for imputing the conduct that created the hostile environment to the employer.” Id.

**Third Circuit.** This circuit has adopted a five prong analysis which differentiates the objective and subjective elements. The harassment plaintiff must show: “(1) that he or she suffered intentional discrimination because of [sex]; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same [sex] in that position; and (5) the existence of respondeat superior liability.” Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081 (3d Cir. 1996). The second element does not require the “severity” standard of other circuits. The third element corresponds to the subjective standard; the fourth element corresponds to the objective standard. See West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995).

**Fourth Circuit.** This circuit has adopted a four prong analysis which effectively assumes that the plaintiff belonged to a protected group. The plaintiff, to prove a hostile work environment, “must show that (1) the harassment was unwelcome; (2) the harassment was based

on his [sex]; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer.” Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998).

**Fifth Circuit.** This circuit has not expressly analyzed racial harassment claims. However, the Fifth Circuit has used the Henson framework for sexual harassment claims, which suggests that this test would also be applied by that circuit to racial harassment claims. See, e.g., Shepherd v. Comptroller of Pub. Accounts of State of Tex., 168 F.3d 871, 873 (5th Cir. 1999) (collecting cases); Waymire v. Harris County, Texas, 86 F.3d 424, 428 (5th Cir. 1996) (same). Several district courts have used the five factor Henson approach for racial harassment cases. See, e.g., Skinner v. Brown, 951 F. Supp. 1307, 1321-22 (S.D. Tex. 1996) (citing Waymire).

**Sixth Circuit.** This circuit has used the Henson test, stating that the hostile work environment harassment plaintiff must prove “(1) He was a member of a protected class; (2) He was subjected to unwelcomed racial and/or religious harassment; (3) The harassment was based on [sex], race or religion; (4) The harassment had the effect of unreasonably interfering with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) The existence of employer liability.” Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999); accord Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1078-79 (6th Cir. 1999).

**Seventh Circuit.** This circuit has expressly rejected the multi-factor approach taken by several other circuits, on the grounds that such a test “has the potential for a mechanical application that overlooks or underemphasizes the most important features of the harassment inquiry,” i.e., the objective and subjective standards. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271 (7th Cir. 1991); see also Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993) (applying Daniels test). Instead, the Seventh Circuit has required that the plaintiff must (1) prove the subjective element by showing that the defendant’s conduct had an “actual effect upon the particular plaintiff bringing the claim” and (2) prove the objective element by showing the “likely effect of a defendant’s conduct upon a reasonable person’s ability to perform his or her work and upon his or her well-being.” Rodgers, 12 F.3d at 674; Daniels, 937 F.2d at 1271-72. Once the plaintiff has made this showing, then the court must also determine the existence of respondeat superior: “whether the employer knew or should have known about an employee’s acts of harassment and fails to take appropriate remedial action.” Daniels, 937 F.2d at 1272 (quoting Brooms v. Regal Tube Co., 881 F.2d 412, 420 (7th Cir. 1989)).

**Eighth Circuit.** This circuit has also used the two-step objective and subjective analysis of harassment claims. Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130 F.3d 349, 357 (8th Cir. 1997). Although the Delph court did not formally articulate its analytical framework, the harassment claim was analyzed based on plaintiff's "sufficient showing that he was subjected to a racially hostile workplace environment a reasonable person would find intolerable, and that he did find it intolerable." Id.

**Ninth Circuit.** This circuit has used a three-element analysis under which the plaintiff "must show (1) that he was subjected to verbal or physical conduct of a racial [] nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." Gregory v. Widnall, 153 F.3d 1071, 1074 (9th Cir. 1998) (per curiam) (citing Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995)).

**Tenth Circuit.** This circuit has used the same three-factor approach as for the Seventh Circuit, first requiring the plaintiff to prove that defendant's conduct met both the objective and subjective elements, and then prove that the defendant employer was liable under respondeat superior. Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1269-71 (10th Cir. 1998).

**Eleventh Circuit.** The district courts in this circuit have applied its Henson precedent to racial harassment claims. See, e.g., Perkins v. U.S. Airways, Inc., 8 F. Supp. 2d 1343, 1350-51 (M.D. Fla. 1998); Bivins v. Jeffers Vet Supply, 873 F. Supp. 1500, 1508 (M.D. Ala. 1994) (citing Henson), aff'd 58 F.3d 640 (11th Cir. 1995) (table).

The differences between these approaches are frequently more academic than outcome determinative, since the variations reflect a reworking or combining of several of the Henson elements. The following analysis is based on the five-factor Henson element test.

29. Membership in Protected Class.

This element can be met by “a simple stipulation that the employee” belongs to a protected class. Henson, 682 F.2d at 903. However, a generalized claim by an employee that others were harassed is not actionable, since private parties lack standing to enforce the rights of harassed coworkers or customers. See Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1180 (7th Cir. 1998) (“Her claim is not that white women were harassed on account of *their* race or sex, but that persons of any race or sex who were opposed to discrimination felt uncomfortable.”); see also Childress v. City of Richmond, Va., 134 F.3d 1205, 1207 (4th Cir. 1998) (en banc) (per curiam) (white police officers lacked standing to bring Title VII hostile environment claim “for discrimination directed at others”). There is an exception: persons who are discriminated or harassed for having opposed racial or sexual harassment against others are protected by the opposition clause of the anti-retaliation statute, 42 U.S.C. § 2000e-3(a).

For sexual harassment claims, the courts have long recognized that males can be victims of workplace harassment. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983). The EEOC enforcement statistics indicate that males represent a small but growing number of all sexual harassment charges: in fiscal year 1992, 9.1% of all Title VII sexual harassment charges filed were by males; this increased to 14.9% in fiscal year 2002. See EEOC, “Sexual Harassment Charges” (Feb. 6, 2003) <<http://www.eeoc.gov/stats/harass.html>>. The EEOC statistics do not, however, indicate the percentage of these charges filed by males that are same-sex harassment (as opposed to harassment by female supervisors); nor do these statistics indicate the percentage of charges filed by females that represent same-sex harassment.

30. Unwelcome Nature of Conduct.

This element must be judged under the objective and subjective criteria of Harris, which are based on a standard of reasonableness. Although the conduct must be severe or pervasive, it is not necessary for there to be “concrete psychological harm” provided that “the environment would reasonably be perceived, and is perceived, as hostile or abusive.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (emphasis added). As the Harris Court noted, “Title VII comes into play before the harassing conduct leads to a nervous breakdown,” id., and the same presumably also applies to racial harassment under Section 1981.

The Second Circuit aptly remarked that: “Harassed employees do not have to be Jackie Robinson, nobly turning the other cheek and remaining unaffected in the face of constant degradation. They are held only to a standard of reasonableness.” Torres v. Pisano, 116 F.3d

625, 632-33 (2d Cir. 1997) (footnote omitted). The Seventh Circuit has explicated the requisite analysis, which differentiates the objective and subjective components, specifies the evidence relevant to the subjective standard, and explains why that evidence in that case satisfied the objective standard. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272-75 (7th Cir. 1991).

Courts have struggled with the question of whether the “reasonable person” standard refers to any reasonable person, or, more contextually, to a reasonable person of the same race or gender as the harassed employee. Compare Watkins v. Bowden, 105 F.3d 1344, 1356 (11th Cir. 1997) (per curiam) (upholding “reasonable person” jury instruction instead of “reasonable African American or woman” jury instruction) with West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995) (“reasonable person of the same protected class in that position”). The Eleventh Circuit noted the divergent approaches taken by the courts on this issue. Watkins, 105 F.3d at 1356 n.22 (collecting cases). Courts which have adopted the generic “reasonable person” standard have taken a literal reading of Harris (a sexual harassment case), which referred to “a reasonable person” and not to “a reasonable woman.” Harris, 510 U.S. at 21.

However, the Supreme Court’s 1998 Oncale decision may be construed to have recast this issue by emphasizing “that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position.” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Although Oncale did not discuss the split in the courts between “reasonable person” and “reasonable person of plaintiff’s (race/gender),” the Supreme Court has set forth an analysis based upon the objective reasonable person standard, looking at “the social context in which particular behavior occurs and is experienced by its target” which inevitably “depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” Id. at 81-82. It is difficult to conceive of a “social context” under which sexual, let alone racial, harassment would not be found offensive, but Oncale may permit the harassed employee to argue that the harassment should be judged from the perspective of a person of her own gender, race or ethnic group, and not that of society at large.

The Second Circuit, in Richardson, rejected the narrow “reasonable person of the plaintiff’s group” approach in favor of determining “whether a reasonable person who is the target of discrimination would find the working conditions so severe or pervasive as to alter the terms and conditions of employment for the worse.” Richardson v. New York State Dep’t of Correctional Serv., 180 F.3d 426, 436 (2d Cir. 2000). The Second Circuit concluded that the narrower approach would be misleading and incongruent with the goals of Title VII:

In adopting this standard as the proper one under Title VII, we reject the view of those courts that look to the perspective of the particular ethnic or gender group, e.g., a “reasonable African-American” or a “reasonable Jew.” . . . we believe that examining hostile environment claims from the perspective of a “reasonable person who is the target of racially or ethnically oriented remarks” is the proper approach. First, Title VII seeks to protect those who are the targets of such conduct, and it is their perspective, not that of bystanders or the speaker, that is pertinent. Second, this standard makes clear that triers of fact are not to determine whether some ethnic or gender groups are more thin-skinned than others. Such an inquiry would at best concern largely indeterminate and fluid matters varying according to location, time, and current events. It might also lead to evidence, argument, and deliberations regarding supposed group characteristics and to undesirable, even ugly, jury and courtroom scenes.

Id. at 436 n.3 (internal citations omitted).

The standards of what might be acceptable in society at large do not always correspond to what is legally acceptable in the workplace. Torres, 116 F.3d at 633 n.7 (“What *is*, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable.”). As the Federal Circuit, in discussing sexual harassment, remarked: “The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.” King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

However, a district court recently took a somewhat jaundiced view of sexual harassment claims, stating that because public sexual conduct was pervasive in modern society, the threshold for workplace claims was somehow higher:

The question of what is “sufficiently severe” sexual harassment is complicated because: (a) courts routinely remind plaintiffs that “Title VII is not a federal civility code,” . . . ; (b) the modern notion of acceptable behavior -- as corroded by instant-gratification driven, cultural influences (e.g. lewd music, videos, and computer games, “perversity-programming” broadcast standards, White House “internal affairs” and perjurious coverups of same, etc.) has been coarsening over time; therefore, (c) what courts implicitly ask the “Title VII victim” to tolerate as mere “boorish behavior” or “workplace vulgarity” must, once placed in the



contemporary context, account for any “Slouch Toward Gomorrah” societal norms might take.

Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1375-76 (S.D. Ga. 2001). Indeed, this court somewhat cynically claimed that the divergent approaches taken in the case law merely reflected a distinction between “sensitive judges” and “judges desensitized by contemporaneous, ‘Vulgarians-at-the-Gate’ cultural standards.” Id. at 1377. The court, after granting summary judgment to the employer, notwithstanding plaintiff’s exhaustive list of sexually harassing conduct in the workplace, admitted that: “Concededly, a judge with sensitivities less dulled by contemporary vulgarianism might conclude otherwise here.” Id. at 1381; see generally R.R. McDonald, “Modern ‘Vulgarism’ May Doom Sex Harassment Laws, Says Federal Judge,” Fulton County Daily Report, July 10, 2001.

If the plaintiff did not perceive the alleged harassment as abusive, then there can be no violation of Title VII. For example, the Sixth Circuit affirmed the grant of summary judgment to the employer, because the plaintiff “failed to show that the anonymous communications were subjectively hostile.” Newman v. Federal Express Corp., 266 F.3d 401, 405 (6th Cir. 2001). Here, the plaintiff, in his deposition, “admitted that he did not consider the racially-charged letter a ‘big deal,’ and was not surprised, shocked or disturbed by it. When asked if he was going to lose sleep over the letter, Newman replied, ‘Oh, no.’ Newman referred to the message left on his voice mail as ‘silly.’” Id. at 406. Since the plaintiff did not perceive the work environment as subjectively hostile, he could not prove a prima facie case of harassment. Id.

A district court rejected the employer’s argument that the plaintiff welcomed the behavior in question by virtue of her own workplace conversations. Morton v. Steven Ford-Mercury of Augusta, Inc., 162 F. Supp. 2d 1228, 1230 (D. Kan. 2001). The court recognized that resolution of this issue “turns primarily on credibility determinations which are inappropriate for summary judgment.” Id. at 1239. Nonetheless, the court readily disposed of the employer’s argument:

First, defendant argues that plaintiff’s discussion of nude sunbathing and topless fishing in the work setting suggests that she welcomed conversations of a sexual nature. The court disagrees. . . . according to plaintiff’s testimony, she intended to engage in such discussions only with a female coworker and that the conversations became more widely known only because Owens would eavesdrop on plaintiff. The context of the conversations thus does not suggest that plaintiff was, in any way, welcoming nonconsensual talk of a sexual nature from male coworkers.

Id. Hence, the district court found that the plaintiff did not welcome the harassing conduct.

31. Harassment Based on Sex or Race.

It is not sufficient merely to show that the hostile work environment plaintiff was a member of a protected group; the plaintiff “must show that ‘but for’ his race [or sex] he would not have been the victim of the alleged discrimination [harassment].” Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998); see also Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994) (no racial harassment where “the record reveals the intimidation, ridicule, and insult were directed indiscriminately, not targeted at [plaintiff] due to his race”). Conclusory statements alone are insufficient; there must be “specific evidentiary support” for plaintiff’s claim “that the alleged acts of mistreatment were based on his race.” Causey, 43 F.3d at 802. When the plaintiff can present “a showing that race is a substantial factor in the harassment, and that if the plaintiff had been white she would not have been treated in the same manner,” then plaintiff has satisfied this element. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996).

The Supreme Court has recently emphasized the “but for” pleading requirement for harassment claims: “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘*discriminat[ion]* . . . because of . . . sex.’” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998).

The Oncale Court expressly held “that nothing in Title VII necessary bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.” Id. at 79. Therefore, Title VII, and state anti-discrimination statutes modeled after Title VII, reach same-sex harassment, regardless of whether the harassment arose from “proposals of sexual activity” or from “general hostility to the presence of women in the workplace.” Id. at 80. Thus, “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” Id. Although Oncale was a sexual harassment case, its holding should be equally applicable to racial harassment cases: workplace harassment by a person of one race against another person of the same race, which is motivated by the aforementioned “general hostility to the presence of [persons of the same race] in the workplace” is an equivalent violation of Title VII.

The Third Circuit recently set forth three alternative theories by which same-sex sexual harassment can be proven under Title VII:

There are several situations in which same-sex harassment can be seen as discrimination because of sex. The first is where there is evidence that the harasser sexually desires the victim. . . . [The second is where] the harassment was caused by a general hostility to the presence of one sex in the workplace or in a particular work function. . . . [The third] by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.

Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001), cert. denied 534 U.S. 1155 (2002).

The following cases illustrate what happens when (1) there is severe sexual harassment that is not based on the employee's sex (and is not actionable), or (2) when the harassment is seemingly based on sexual orientation but in fact can be deemed to be based on sexual stereotypes (and is therefore actionable).

In Rizzo v. Sheahan, 266 F.3d 705 (7th Cir. 2001), the plaintiff, an employee of the Cook County Sheriff's Department, alleged sexual harassment by her supervisor. The district court granted summary judgment, holding that the alleged conduct was not severe or pervasive. The Seventh Circuit disagreed, finding that the conduct was severe, but ultimately affirmed, on the grounds that the harassment did not occur because of the employee's sex. The employee alleged that after her fifteen-year old daughter (Jennifer) came to the worksite at the end of the shift, her supervisor (Mahon), upon learning from another officer that Jennifer was Rizzo's daughter, first asked Rizzo if Jennifer was her daughter and then said, "Well, I'd like to fuck her." Id. at 709. Several months later, Mahon approached Rizzo again, saying that he had recently seen Jennifer at a restaurant, commented that Jennifer was very attractive and reiterated that he "would like to fuck" her daughter. Id. On a third occasion, Mahon walked by Rizzo, "looked [her] over, and stated in a suggestive manner that he wished he was Rizzo's husband." Id.

On the one hand, the Seventh Circuit readily disagreed with the district court, and concluded that these three incidents were sufficiently severe or pervasive to be actionable. Id. at 711-12. The Seventh Circuit noted that "Indeed, as a mother, it may be more disturbing to be subjected to these comments than to be personally to subjected to many of the types of unwanted sexual advances we have seen in reviewing other harassment claims." Id. at 712. On the other hand, the Seventh Circuit held that this harassment did not occur because of Ms. Rizzo's sex. In fact, as Ms. Rizzo documented through her appellate briefs and the oral argument, her position was that Mahon's harassment arose from his animosity towards her husband, who was also an investigator in the sheriff's department, and she explained "that this animosity was the reason

Mahon was ‘going after’ [her].” Id. at 712-13. Thus, “this case presents the unique situation where the plaintiff has produced clear evidence that the harassing behavior was not motivated by sex, and thus does not comply with the requirements of Title VII.” Id. at 713.

In Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864 (9th Cir. 2001), Antonio Sanchez, one of the three plaintiffs, alleged that he was repeatedly taunted by his male co-workers and a supervisor because, in essence, he did not act like a man. Specifically, his co-workers and a supervisor (1) “repeatedly referred to Sanchez in Spanish and English as ‘she’ and ‘her;’” (2) “mocked Sanchez for walking and carrying his serving tray ‘like a woman;’” (3) “taunted him in Spanish and English, as, among other things, a ‘faggot’ and a ‘fucking female whore;’” and (4) “derided [him] for not having sexual intercourse with a waitress who was his friend.” Id. at 870, 874. Critically, “no witness — including the supervisor accused of participating in the harassment — testified to the contrary.” Id. at 872.

The Ninth Circuit agreed that Mr. Sanchez was discriminated against on the basis of his sex, because he failed to conform to a male stereotype. The Ninth Circuit applied Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that Title VII was violated where the employer discriminated against a female employee who did not conform to sexual stereotypes of how women should behave, to hold that Title VII is similarly violated where a male employee is discriminated against for not conforming to stereotypes of how men should behave. Azteca Restaurant, 256 F.3d at 874-75. This case shows that harassment that, at first glance, appears to be based on sexual orientation, can be actionable under Title VII where it is grounded in sexual stereotypes. In contrast, where the plaintiff insists that the harassment was based on his or her sexual orientation, then there can be no Title VII claim. See, e.g., Bianchi v. Philadelphia, 183 F. Supp. 2d 726, 737-38 (E.D. Pa. 2002) (“His unwavering persistence in presenting his complaint as one concerning his alleged sexuality, rather than one concerning his alleged failure to meet a masculine ideal, defeats his Title VII harassment claim.”) (distinguishing Azteca Restaurant); see generally S. Duffy, “Gay Bias Case Fails, but Judge Approves ‘Stereotype’ Theory,” Legal Intelligencer (Philadelphia), May 28, 2003.

The Ninth Circuit, in an en banc decision, recently held that essentially all same-sex harassment can be actionable under Title VII. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc), cert. denied, 123 S. Ct. 1573 (2003). It should be noted that there was a concurring opinion based on a different rationale, two other concurring opinions, and a strongly stated dissenting opinion, so it is possible that other circuits may not follow the lead opinion. The plaintiff was an openly gay butler at a Los Vegas hotel, who alleged that he was constantly harassed by his supervisor and several co-workers (all male), because he was gay. Id. at 1064.

The district court granted summary judgment on the grounds that Title VII did not cover discrimination based on sexual preference. Id. A panel of the Ninth Circuit affirmed, but the en banc court reversed, on the grounds that the plaintiff “has alleged physical conduct that was so severe or pervasive as to constitute an objectively abusive working environment,” reaching the level of physical assault, i.e., the supervisor and co-workers “grabbed [the plaintiff’s] crotch and poked their fingers in his anus.” Id. at 1065. The Ninth Circuit cited a variety of appellate cases in which “physical sexual assault has routinely been prohibited as sexual harassment under Title VII,” because “such harassment -- grabbing, poking, rubbing or mouthing areas of the body linked to sexuality -- is inescapably ‘because of sex.’” Id. at 1065-66 (collecting cases). Thus, sexual orientation was not relevant, since in traditional male-on-female harassment cases, the victim was not denied relief because she “was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.” Id. at 1066; see generally M. Talbot, “Men Behaving Badly,” N.Y. Times Magazine, Oct. 13, 2002, at 52.

The Fifth Circuit recently applied Oncale to hold that same-sex harassment could be actionable under Title VII where the conduct constituted discrimination because of sex, where the harasser was gay and made advances upon the plaintiff. La Day v. Catalyst Tech., Inc., 302 F.3d 474 (5th Cir. 2002). Critically, the plaintiff was able to show that the harasser made sexual advances to both the victim and to other employees. Id. at 480. Further, the harassment was not in the nature of “male-on-male horseplay,” but was so severe and pervasive as to constitute a hostile work environment. Id. at 483.

Related to this issue is the so-called “equal opportunity harasser,” i.e., a person who indiscriminately harasses both males and females, or both minorities and non-minorities. For example, the Seventh Circuit held that a married couple, who worked in the same office where each was sexually harassed by an allegedly bisexual supervisor who solicited sex from each, could not state a sexual harassment or discrimination claim under Title VII. Holman v. Indiana, 211 F.3d 399, 402-07 (7th Cir. 2000). The Seventh Circuit applied the Oncale holding, namely that discrimination or harassment must be “on the basis of sex,” id. at 403, but held that “both sexes are treated badly” which did not constitute discrimination under Title VII. Id. at 404.

If a supervisor and an employee previously had a consensual relationship, which was broken off by the employee, and the employee rejected the supervisor’s attempt to renew the relationship, upon which the supervisor commenced harassing the employee, then the employee can maintain a hostile work environment claim notwithstanding their prior relationship. Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642, 656 (5th Cir. 2002). The Fifth Circuit

agreed with the district court's application of Oncale to find that since "it was only after the relationship ended that Richardson began to harass her. This fact alone supports a jury's inference that he harassed her because she refused to continue to have a casual sexual relationship with him." Id. at 657.

If a supervisor has an affair with one or more subordinates, whom he then promotes or otherwise favors over the remaining coworkers, then those coworkers may be able to state a harassment claim on the grounds that sexual favoritism is a form of sexual harassment, but only if they can show that the consensual relationship "was so indiscreet as to create a hostile work environment" or there was "other pervasive conduct by [the supervisor] which created a hostile work environment." Proskel v. Gattis, 41 Cal. App. 4th 1626, 49 Cal. Rptr. 2d 322, 69 FEP Cases 1433, 1434 (Cal. Ct. App. 4th Dist. 1996). However, most courts have held that a consensual workplace relationship, by itself, did not create a sexually hostile work environment as to other employees. Id. (collecting cases). The California Supreme Court recently granted certiorari on this issue, in a case in which the female plaintiffs alleged that they were harassed by the supervisor and the female paramour in order to intimidate them from complaining about the paramour's improper promotion. Mackey v. Department of Corrections, 105 Cal. App. 4th 945, 130 Cal. Rptr. 2d 57, 90 FEP Cases 1651 (Cal. Ct. App. 3d Dist. 2003), cert. granted, 67 P.3d 647, 133 Cal. Rptr. 2d 323 (Cal. 2003); see generally M. McKee, "Can Co-Workers' Sex With Boss Create a Cause of Action?," The Recorder (San Francisco), Apr. 25, 2003.

32. Conduct Sufficiently Pervasive or Severe.

1. The Quantity of Harassing Conduct.

This element is not one of mathematical precision, but represents the reality that a line must be drawn along the spectrum between the extremes of a few isolated stray remarks and an ongoing, pervasive barrage of harassing conduct. The Supreme Court has differentiated between the workplace (1) that is "permeated with 'discriminatory intimidation, ridicule, and insult,'" and (2) where there is the "mere utterance of an . . . epithet which engenders offensive feelings in an employee' [that] does not sufficiently affect the conditions of employment to implicate Title VII." Harris, 510 U.S. at 21 (quoting Meritor, 477 U.S. at 65, 67).

The circuit courts have struggled to draw the line between actionable and non-actionable harassment. Compare Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (harassment based on twelve incidents during twenty month period) and Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996) (harassment "on a daily basis") and West v.

Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995) (harassment “occurred consistently” over five year period) with Gregory v. Widnall, 153 F.3d 1071, 1075 (9th Cir. 1998) (*per curiam*) (single incident of racial harassment “is not sufficient to raise a jury question”) and Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994) (“two overtly racial remarks . . . and one arguably racial comment” over an eight year period “were not pervasive [and] they are insufficient to be actionable”) and Powell v. Missouri State Highway & Transp. Dep’t, 822 F.2d 798, 801 (8th Cir. 1987) (“Title VII, however, is not necessarily violated by a few isolated racial slurs”).

Thus, practitioners should bear in mind that there is and can be no “bright-line” rule for this element. As the Seventh Circuit has remarked:

The number of instances of harassment is but one factor to be considered in the examination of the totality of the circumstances. A Title VII plaintiff does not prove racial harassment or the existence of a hostile working environment by alleging some ‘magic’ threshold number of incidents. Conversely, an employer may not rebut a claim simply by saying that the number of incidents alleged is too few.

Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273-74 (7th Cir. 1991); accord West, 45 F.3d at 757 (not necessary for plaintiff to prove “daily contact with the harasser”). The courts have noted that the plaintiff need not directly experience the harassment to suffer from a hostile work environment. See, e.g., Schwapp, 118 F.3d at 111 (“Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment.”) (citations omitted).

## **2. The Continuing Violation Doctrine.**

The courts have recognized that the “continuing violation” doctrine may be used to show that there is “an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action.” Huckabay v. Moore, 142 F.3d 233, 239 (5th Cir. 1998) (internal citation omitted). This allows the harassment plaintiff to include conduct occurring prior to Title VII’s statutory 300-day deadline or the applicable Section 1981 statute of limitations period. *Id.* at 238. The Supreme Court, in 2002, held that the continuing violation doctrine could be applied to harassment claims, but not to other kinds of discrete discrimination claims. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

On the one hand, discrete discrimination claims, based on acts “such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify,” id. at 114, and each such act “starts a new clock for filing charges alleging that act.” Id. at 113. Even if the employee does not file a charge based on older discrete acts, that employee can still use “the prior acts as background evidence in support of a timely claim.” Id.

On the other hand, harassment claims are fundamentally different from those based on discrete employment acts:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conducts. The “unlawful employment practice” therefore cannot be said to occur on any particular day. It 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. Such claims are based on the cumulative effect of individual acts.

Id. at 115 (internal citations omitted). For this reason, the Supreme Court rejected the reasoning of several circuits that a plaintiff could not include in her harassment suit conduct that occurred prior to the statute of limitations:

Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 117. Therefore, the harassment plaintiff can recover damages for the entire course of harassment, in contrast to the plaintiff who alleges discrete acts of discrimination. The Supreme Court did recognize that employers can raise defenses based on laches if the employee waits too long before filing a lawsuit. Id. at 121-22.

In order to use the continuing violation doctrine, the plaintiff must first show “that at least one act occurred within the filing period.” West, 45 F.3d at 754 (citing United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977)). Then, the plaintiff must prove the requisite nexus among the individual incidents of discrimination or harassment. Id. at 755. The second determination can be made by considering the following three factors, which are non-exhaustive:



(i) subject matter — whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence — whether the nature of the violations should trigger the employee’s awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id. at 755 n.9 (citing Martin v. Nannie and Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993)). This determination must be made in “the particular context of individual employment situations [which] requires a fact-specific inquiry that cannot easily be reduced to a formula.” Huckabay, 142 F.3d at 239 (citing Berry v Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983)). Many of the cases cited in the next section have also discussed whether the plaintiff could invoke the continuing violation theory to support their harassment claim. The result is that a plaintiff who satisfies the continuing violation doctrine can incorporate a much broader range of harassing conduct and can more readily meet the pervasive or severe conduct element. Yet, even those plaintiffs who cannot satisfy this doctrine may still be able to use untimely events as background evidence to support her claims based on the timely events.

### 33. Single Incident Harassment.

Most plaintiffs who allege a hostile work environment claim will base their claim on a series of incidents which they allege were sufficiently severe or pervasive that they adversely affect the terms and conditions of their employment. However, some plaintiffs will base their hostile work environment claim on a single incident. The courts have generally been reluctant to allow the latter category of claims, except where that single incident was so severe, such as an extreme physical assault or truly egregious verbal threats, that the incident materially altered the conditions of their employment. In Ellerth and Faragher, the Supreme Court did not have to address this issue because the underlying conduct involved a series of harassing incidents. See Ellerth, 524 U.S. at 754 (“The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.”); Faragher, 524 U.S. at 788 (“We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.”).

In 2001, the Supreme Court held that, based upon the underlying facts alleged by the plaintiff, that a single incident of sexual harassment was not actionable. Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (per curiam). The plaintiff, during a meeting with her supervisor and another male employee, alleged that her supervisor read a psychological

evaluation report in which one applicant said “I hear making love to you is like making love to the Grand Canyon.” Id. at 269. The supervisor “read the comment aloud, looked at [plaintiff] and stated, ‘I don’t know what that means.’ The other male employee then said, ‘Well, I’ll tell you later,’ and both men chuckled.” Id. The Supreme Court, without oral argument, reversed the Ninth Circuit and held that this single incident of alleged sexual harassment was not so severe or pervasive as to violate Title VII. Id. at 271. However, it must be emphasized that the Supreme Court did not hold that a single incident could never be actionable, merely that the incident alleged in this case was not actionable.

### **1. Single Incident Harassment Is A Hostile Work Environment.**

The courts have recognized that single incidents that are sufficiently severe can constitute a hostile work environment. See, e.g., Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (“the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were ‘sufficiently continuous and concerted’ to have altered the conditions of her working environment”); Richardson v. New York State Dep’t of Correctional Serv., 180 F.3d 426, 439 (2d Cir. 2000) (“There is neither a threshold ‘magic number’ of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.”) (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993)); Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (the Ellerth/Faragher “defense, adopted in cases that involved ongoing sexually harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipated sexual harassment”); Torres v. Pisano, 116 F.3d 625, 631 n.4 (2d Cir. 1997) (“Of course, even a single episode of harassment, if severe enough, can constitute a hostile work environment.”); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (“we agree with the district court that even a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability”).

In Little, a female employee was raped by a client following a business dinner. Little v. Windermere Relocation, Inc., 265 F.3d 903 (9th Cir. 2001). Ms. Little’s position required her to develop and maintain client contacts for a Seattle real estate corporation. She was assigned to Starbucks, a potentially lucrative client. Id. at 908. During a client dinner with the Starbucks Human Resources Director, Dan Guerrero, after having several drinks, she “suddenly became ill and passed out,” and then “awoke to find herself being raped by Guerrero in his car. She fought him off and jumped out of the car, but again she became violently ill. Guerrero put her back in the car and took her to his apartment, where he raped her again. Little fell asleep, and when she

awoke he was raping her again. Afterward, he showered and drove her to her car.” Id. (although the court opinion does not say so, one wonders if she was exposed to a date rape drug). Ms. Little was initially reluctant to report this rape, because “I knew how important the Starbucks account was to Mr. Glew [Windermere’s President].” Id. When she did report the rape to another manager, that person “advised her not to tell anyone in management.” Id. at 909. When she told a second manager, a person who was designated by Windermere as a “complaint receiving manager,” that person told Ms. Little that “she wouldn’t say anything to Glew unless I proceeded to seek legal action against Dan Guerrero.” Id. Finally, Ms. Little told Mr. Glew of the rape, and he responded “that he did not want to hear anything about it,” that she would have to discuss it with counsel, and that her salary was being reduced immediately by one-third. Id. When Ms. Little challenged this pay cut, she was terminated two days later. Id. at 909-10.

The Ninth Circuit reversed the district court’s grant of summary judgment, holding that the alleged conduct was sufficiently severe and pervasive to create a sexually hostile work environment. Id. at 911-12. Even if the three rapes in one evening were viewed as a single incident, that could suffice to “support a claim of hostile work environment because the ‘frequency of the discriminatory conduct’ is only one factor in the analysis.” Id. at 911 (citing Breeden, 532 U.S. at 271). Thus, the Ninth Circuit held that Ms. Little’s hostile work environment claim should be submitted to the jury to determine whether Windermere will be liable for Guerrero’s conduct, which would occur “if a jury finds that it ratified or acquiesced in the rape by failing to take immediate corrective action once it knew or should have known of the rape.” Id. at 913. The strong language in the opinion makes it seem unlikely that Windermere will be able to prevail, given that its “response to the rape was equivocal at best.” Id.

In Turnbull, the plaintiff alleged that she was assaulted by a patient. Turnbull v. Topeka State Hosp., 255 F.3d 1238 (10th Cir. 2001). The plaintiff, a psychologist at a state-run mental hospital, alleged sexual harassment based on a single sexual assault by a patient that occurred while the plaintiff and the patient were walking in the hospital grounds during an outdoors therapy session. Id. at 1242-43. The Tenth Circuit held that “an isolated incident may suffice if the conduct is severe and distressing.” Id. at 1243. Indeed, this one incident “was objectively abusive, dangerous, and humiliating, and Dr. Turnbull was so traumatized she was unable to return to work thereafter.” Id. at 1243-44. The Tenth Circuit rejected the defendant’s arguments that because male staff members “were also subject to sexual comments or physical arguments by patients,” such events could not constitute sexual harassment, because “conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff.” Id. at 1244. Here, the male staff “were not subject to the fear or the reality of sexual assault in the same manner as the female staff.” Id.

In Howley, the sole female firefighter in a municipal fire department was subjected to verbal assault during and after a meeting of the firefighters' benevolent association. Howley v. Town of Stratford, 217 F.3d 141 (2d Cir. 2000). During this meeting, a male firefighter (1) publicly shouted at her "to 'shut the fuck up, you fucking whining cunt;'" (2) "made further inappropriate remarks concerning [her] menstrual cycle;" (3) refused to apologize, yelling in her "direction that 'there is no fucking way that I will fucking apologize to the fucking cunt down there;'" and (4) telling plaintiff "to the effect that the reason she did not make assistant chief was because she did not 'suck cock good enough and only made lieutenant.'" Id. at 148. The Second Circuit reversed the dismissal of the hostile work environment claim, holding that this single incident was sufficiently severe to allow her hostile work environment claim to proceed:

Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. . . . It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley's working conditions . . .

Id. at 154. The hostile work environment claim was remanded for trial. Id. at 156.

In Lockard, a waitress was sexually harassed by two male customers who twice "grabbed her by the hair" and one customer "then grabbed her breast and placed his mouth on it." Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998). The Tenth Circuit found that this single incident was "physically threatening and humiliating behavior which unreasonably interfered with Ms. Lockard's ability to perform her duties as a waitress," id., so that:

We therefore disagree with defendants' assertions that a single incident can never be sufficient to create an abusive environment. "Looking at all the circumstances," as we must, we are persuaded that the record contains sufficient evidence to support the jury's conclusion that the harassing conduct of the customers was severe enough to create an actionable hostile work environment.

Id. (quoting Harris, 510 U.S. at 23) (upholding jury verdict in favor of plaintiff on her hostile work environment claim).

In Smith, a female prison guard was assaulted by a fellow guard [Gamble] on a single occasion: there was a dispute between the two guards, “during which Gamble called Smith a ‘bitch,’ threatened to ‘fuck [her] up,’ pinned her against a wall, and twisted her wrist severely enough to damage her ligaments, draw blood, and eventually require surgical correction.” Smith v. Sheahan, 189 F.3d 529, 531 (7th Cir. 1999). Ms. Smith promptly complained to her supervisor, but the subsequent investigation “was an institutional shrug of the shoulders,” during which “Investigator Sullivan made light of the incident and jokingly suggested that Smith should ‘kiss and make up’ with Gamble.” Id. The Seventh Circuit held that:

A jury would also be entitled to conclude that the assault Smith suffered was severe enough to alter the terms of her employment, even though it was a single incident. The district court held to the contrary; it opined that sex-based harassment can never be actionable unless it is repeated. This was error: the Supreme Court has repeatedly said, using the disjunctive “or,” that a claim of discrimination based on the infliction of a hostile working environment exists if the conduct is “severe or pervasive.” In any case, the ultimate question is thus whether the harassment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”

Id. at 533 (citations omitted). Therefore, the Seventh Circuit reversed the district court’s grant of summary judgment on the hostile work environment claim. Id. at 535.

The district courts, in a variety of circumstances, have similarly held that a single incident of harassment can constitute a hostile work environment claim. See, e.g., Flower v. Mayfair Joint Venture, 95 Civ. 1744 (DAB), 2000 WL 272187 (S.D.N.Y. Mar. 13, 2000) (“Plaintiff has demonstrated that DiPalma’s physical attack on her was sufficiently severe to constitute a hostile work environment”); Dunegan v. City of Council Grove, 77 F. Supp. 2d 1192, 1197-98 (D. Kan. 1999) (single incident where the supervisor “put his arms around plaintiff from behind . . . squeezed her, grabbed her right breast, and kissed her on both sides of the neck . . . he was sexually aroused during this encounter” was “sufficiently severe to create a hostile work environment”); Keefer v. Universal Forest Prods., 73 F. Supp. 2d 1053, 1055 (W.D. Mo. 1999) (“under proper circumstances a single incident of harassment can be actionable”); Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 879-80 (N.D. Ind. 1998) (single incident, where the supervisor “in his office with the door closed, forcibly grabbed and kissed the Plaintiff while forcing his hand inside her blouse to grope her breasts” was sufficiently severe to sustain a Title VII hostile work environment claim); Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 969-70 (D. Minn. 1998) (“A single sexual assault has a far greater potential to adversely

alter the work environment, and with greater permanence, than would an offensive verbal remark, or a series of such remarks.”).

This approach is consistent with the EEOC’s 1990 “Policy Guidance on Current Issues of Sexual Harassment” (Mar. 19, 1990) (reprinted in the FEP Manual, at 405:6681-6701 and online at <<http://www.eeoc.gov/docs/currentissues.html>>). On the one hand, “Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.” *Id.* at 405:6690. On the other hand, “a single unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.” *Id.* at 405:6690-91.

## **2. Single Incident Harassment Is Not A Hostile Work Environment.**

In contrast, the courts have generally held that single incidents (or a small number of incidents) that do not rise to the level of severity as those in the previous section fail to satisfy the requirements for a hostile work environment claim.

For example, in *Brooks*, a telephone dispatcher was approached by a coworker who placed his hand on plaintiff’s stomach, forced his hand under plaintiff’s clothing to fondle her breast, and told her that she didn’t “have to worry about cheating” on her husband. *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000). The Ninth Circuit recognized that “if a single incident can ever suffice to support a hostile work environment, the incident must be extremely severe,” *id.* at 926, but that threshold was not met here, since “Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term, especially given that the city took prompt steps to remove [the harasser] from the workplace.” *Id.* However, the court did recognize that the outcome could be different if the harasser was the plaintiff’s supervisor:

A different question would arise if [the harasser] were Brooks’ supervisor, rather than her co-worker. Because the employer cloaks the supervisor with authority, we ordinarily attribute the supervisor’s conduct directly to the employer. Thus, a sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.

*Id.* at 927 n.9 (citing *Ellerth*).

In Quinn, there were only two timely incidents that formed the basis of plaintiff's hostile environment claim: that her supervisor (1) "told Quinn she had been voted the 'sleekest ass' in the office;" and (2) that he "deliberately touched [her] breasts with some papers that he was holding in his hand." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998). The Second Circuit did recognize that a single incident, if "sufficiently severe" could support a hostile work environment claim. Id. Here, however, the severity threshold was not met, since while these two incidents "are obviously offensive and inappropriate, they are sufficiently isolated and discrete that a trier of fact could not reasonably conclude that they pervaded Quinn's work environment. Nor are these incidents, together or separately, of sufficient severity to alter the conditions of Quinn's employment without regard to frequency or regularity." Id.

The district courts, in a variety of circumstances, have held that either (1) single incidents never constitute a hostile work environment or (2) the single incident at issue in a particular case was not sufficiently severe to constitute a hostile work environment. See, e.g., Sedotto v. Borg-Warner Prot. Servs. Corp., 94 F. Supp. 2d 251 (D. Conn. 2000) (an "isolated remark by a co-worker does not meet the requirements of a hostile work environment"); Curtis v. Airborne Freight Corp., 87 F. Supp. 2d 234, 249 (S.D.N.Y. 2000) ("nor do plaintiffs allege a single severe incident of racial harassment sufficient in and of itself to alter the conditions of plaintiffs' employment"); Dunegan v. City of Council Grove, 77 F. Supp. 2d 1192, 1198-99 (D. Kan. 1999) (a single incident where a teenage co-worker made "two [unsuccessful] attempts to kiss the plaintiff"); Adenji v. Administration for Children Serv., 43 F. Supp. 2d 407, 422 (S.D.N.Y. 1999) ("A single incident of discriminatory comments is not sufficient to establish a hostile work environment."); Hanover v. Sheridan, No. C-3-96-122, 1999 WL 33117272, at \*7 (S.D. Ohio Sept. 21, 1999) ("no reasonable jury could find that the kiss on the cheek incident was sufficiently severe that it caused the Plaintiff's work environment to be objectively hostile"); Jones v. Clinton, 990 F. Supp. 657, 675 (E.D. Ark. 1998) ("This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment.").

#### 34. The Spectrum of Workplace Harassment.

This section describes a variety of examples of what the courts have and have not found constituted a hostile work environment. It must be emphasized that this determination is contextual and fact-specific, since there is no bright line that can be drawn along the spectrum of workplace activities. These cases are arranged by circuit. The cases finding hostile environment harassment are listed first, followed by those cases not making such a finding. The reader should

bear in mind that this is a sampling of recent published cases, and is not a comprehensive analysis of every harassment case filed under Section 1981 and Title VII.

### **District of Columbia Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment of an apprentice, by a supervisor, where the supervisor (1) “made lewd comments and gestures concerning Peyton’s breasts on more than one occasion; (2) “engaged in a pattern of harassment, including threats communicated directly and through co-workers” after learning that the apprentice had filed an informal complaint; and (3) other supervisors “told [plaintiff] that she should drop her complaint.” Peyton v. DiMario, 287 F.3d 1121, 1123 (D.C. Cir. 2002).

Four incidents where the supervisor “chastised and mistreated” plaintiff, particularly for events that were not her fault, constituted hostile environment racial harassment when none of plaintiff’s white co-workers were singled out for such harassment. Villines v. United Bhd. of Carpenters and Joiners of Am., AFL-CIO, 999 F. Supp. 97, 104 (D.D.C. 1998). Although none of these incidents involved explicit racial epithets, their context indicated that the supervisor “would not have singled her out and subjected her to harassment” had plaintiff been white. Id.

Three racist remarks by a supervisor to a black plaintiff were held sufficient to defeat defendants’ summary judgment motion. Baxter v. Hartford Fire Ins. Co., 72 FEP Cases 901, 904 (D.D.C. 1996). The supervisor had (1) “referred to one of plaintiff’s co-workers, a native of Trinidad, as ‘a crazy island girl;’” (2) “allegedly stated that African-Americans like to eat watermelon;” and (3) “is alleged to have made derogatory remarks about an African-American employee’s ‘afro’ hairstyle, asking whether ‘bugs fly in [her] hair.’” Id.

### **District of Columbia Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment of an employee for alleged actions by his male co-workers, including tire-slashing, taunting, and several incidents where a co-worker “approached [plaintiff] at his work station and grabbed his crotch, made kissing gestures, and used a phrase describing oral sex,” where the plaintiff could not show that these actions were anything but a workplace grudge match, and did not occur because of sex. Davis v. Coastal Int’l Sec., Inc., 275 F.3d 119 (D.C. Cir. 2002).

Two allegedly racist incidents, one directed at another employee, and one “broad and unspecified” were held insufficient to defeat defendants’ summary judgment motion. Jones v.



Billington, 12 F. Supp. 2d 1, 12 (D.D.C. 1997), aff'd 1998 WL 389101 (D.C. Cir. June 30, 1998) (per curiam). Here, (1) the supervisor had issued to another employee a “counseling memorandum, which involves comments directed at another employee and not at the Plaintiff;” and (2) a nurse quoted plaintiff’s remarks “that he had heard that ‘racial and prejudicial remarks were being made against him,’ to other individuals, though not in his presence.” Id.

There was no hostile environment racial harassment when the plaintiff was sharply criticized at staff meetings, since the supervisor also subjected non-minority employees to the same public criticisms. Lewis v. American Foreign Serv. Ass’n, 846 F. Supp. 71, 74 (D.D.C. 1993). Nor did two remarks — (1) that the supervisor indicated that “apartheid in South Africa had some favorable features” or (2) that the President joked that “AFSA [defendant] is a white supremacist organization and [plaintiff] fell for it hook, line and sinker” — constitute racial harassment, where the first statement was credibly denied, and the second statement was not congruent with the totality of the circumstances, since a majority of the employees at AFSA were women, and many were African-American. Id. at 76.

#### **First Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment where the employee’s supervisor initially (1) made “sexual comments, often accompanied by lascivious looks and offensive gestures;” (2) “also would contrive to ‘bump into’ Marrero in the narrow hallway between their work spaces, and on several occasions rubbed his body against hers as she used the photocopier machine.” Marrero v. Goya of P.R., Inc., 304 F.3d 7, 14 (1st Cir. 2002). After the employee complained to her supervisor about his harassment, the harassment resumed, “now accompanied by more ‘vulgar’ comments made ‘with a gross tone.’” Id. The supervisor also began to harass her in petty, non-sexual ways. Id. at 14-15, 20 (“He criticized her work unfairly, sometimes embarrassing her by yelling at her in front of her co-workers.”). The sexual harassment continued on an almost daily basis. “For example, Cardenas constantly referred to Marrero as ‘the redhead’ and frequently made comments such as ‘the redhead is really hot,’ ‘the redhead is on fire,’ or ‘if this is what hell is like then the devil can take me with him.’ Cardenas also made repeated comments about Marrero’s lips, legs and clothing.” Id. at 19. “At other times, Cardenas was more explicit: he once asked Marrero ‘what are you going to do with the thing you have between your legs?’” Id. Cardenas “also discussed Marrero’s appearance with other employees. For example, he told Marrero’s co-workers that she ‘would be the model that would be used for any future female employees that Goya would hire.’ Another time, Cardenas invited a male employee to assess what sort of underwear Marrero was wearing under her skirt.” Id. Finally, on Halloween, “Cardenas told Marrero that he was going out to buy Halloween presents.

He gave her ‘a direct penetrating look with lust,’ and said: ‘I have a little present for you that you’re never going to forget and if you don’t do the things I tell you and order you to do I am going to fire you.’ Marrero interpreted that comment as a sexual invitation, and a threat that if she did not submit, she would be fired.” Id. at 15.

There was hostile environment sexual harassment, by a co-worker, where the plaintiff was subjected to “disturbing and sometimes peculiar behavior,” including (1) “grabbing her foot and massaging it against her will at an L.L. Bean pool party;” (2) “continually following her to work;” (3) “physically blocking her path and thereby forcing her to squeeze by him;” (4) “giving her gifts designed to let her know that he was watching her;” (5) dancing in the aisles near her;” (6) “waiting in the dark for her to come upon him, following her home, and even breaking into her house.” Crowley v. L.L. Bean, Inc., 303 F.3d 387, 391 (1st Cir. 2002). Indeed, not until the plaintiff obtained a court protection order against the co-worker did the employer take decisive steps to stop the escalating harassment. Id. at 400. The First Circuit held that even harassment that took place off the worksite, presumably beyond the employer’s control, could be used by the plaintiff as evidence, since “Courts, however, do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace as well as to establish that the conduct was motivated by gender.” Id. at 409. Here, the co-worker’s “intimidating behavior and hostile interactions with Crowley outside of work help explain why she was so frightened of [him] and why his constant presence around her at work created a hostile work environment.” Id. at 409-10.

#### **First Circuit: No Hostile Environment.**

There was no hostile environment racial harassment where the supervisor called the plaintiff “boy” when this only occurred once, and that term “refers to a person’s age and lacks racial and/or color connotations.” Falero Santiago v. Stryker Corp., 10 F. Supp. 2d 93, 99 (D.P.R. 1998). This opinion seems to disregard the negative connotation of the term “boy” as applied to adult African-American males.

#### **Second Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment, by the plaintiff’s manager, based on an escalating series of events: “From May 1993 to June 1994, Morabito engaged in a pattern of egregious conduct towards Jin [plaintiff] that included (a) making numerous crude sexual remarks to her, both in the office and by calling her at home; (b) offensively touching Jin’s buttocks, breasts, and legs on numerous occasions at the office, including when she was making sales calls at her desk and walking clients to the elevator; (c) requiring Jin, beginning in the

summer of 1993, to attend weekly Thursday night private meetings in his locked office during which he would threaten her with a baseball bat, kiss, lick, bite and fondle her, attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her; and (d) repeatedly threatening to fire Jin if she did not accede to his sexual demands, as well as threatening her with physical harm. In February 1994, after months of submitting to the weekly sexual abuse out of fear of losing her job, Jin refused to attend another Thursday evening meeting with Morabito. Jin began working in the evenings and on weekends to avoid Morabito, but he continued to fondle and harass Jin when he saw her.” Jin v. Metropolitan Life Ins. Co., 295 F.3d 335, 339 (2d Cir. 2002).

The Second Circuit concluded that “requiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace.” Id. at 344. Thus, this case was unlike Ellerth, since Ms. Jin suffered adverse employment actions when the supervisor withheld her paychecks: “[Ms.] Ellerth, unlike Jin, was able to resist her supervisor’s advances, and the threat to deny her tangible job benefits in lieu of her submission was never carried out. In fact, she was promoted despite the alleged harassment and later quit.” Id. at 347. Hence, “the key difference in this case is the claim that Jin was required to submit to sexual acts and that Morabito used that submission as a basis for granting her a job benefit (her continued employment). This is substantially different from the type of unfulfilled threat alleged in Ellerth, where no job benefit was granted or denied based on the plaintiff’s acceptance or rejection of her supervisor’s advances.” Id.

There was hostile environment sexual harassment, by a co-worker, based upon a series of incidents, where the co-worker (1) made a series of unwanted touchings; (2) “propositioned her to have sex with him and said, ‘Mary, what do you say, it’s going to be good;’” (3) exposed himself, on three occasions, to the plaintiff; and (4) taunted plaintiff with sexist names, including calling her a virgin. Distasio v. Perkin Elmer Corp., 157 F.3d 55, 59-60 (2d Cir. 1998).

Hostile environment racial harassment was present, based upon four incidents which occurred in plaintiff’s presence, and eight other incidents that were relayed to plaintiff by his co-workers. Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997) (reversing grant of summary judgment and holding that district court erred in excluding the eight incidents which plaintiff did not directly experience). The four incidents which plaintiff experienced were (1) another officer told plaintiff “that he was dealing with a ‘nigger bitch from Hartford who was beating the shit out of her kids;’” (2) during a football game, an officer asked “‘why do they [black athletes] have to do that jungle dance every time they score a touchdown?’” (3) an officer gave plaintiff “a copy of a racially offensive joke involving a play on the word nigger;” and (4) a

lieutenant told plaintiff that he should not complain of racial harassment, since he “‘had to understand the history of an all white male department and that at one time all the crimes in Avon were committed by blacks and that guys started to stereotype people.’” *Id.* at 108. The eight incidents which plaintiff did not directly experience, but learned of while on the workforce, were (1) during roll call, other officers were warned to “‘watch out for the nigger at [a gas station];” (2) a supervisor instructed officers “‘to target black and Hispanic people for traffic stops during the summer months;” (3) a racist joke was told during roll call, and when another officer objected, the supervisor responded that the plaintiff “‘was not present to be offended;” (4) an officer distributed “‘a written joke that involved criminal behavior and used [minority-group] names;” (5) an officer told a black employee “‘who was working the day shift instead of his usual night shift, ‘I see you are working white man’s hours;” (6) during roll call, a supervisor stated “‘we have a nest of camel jockeys [persons of Middle-Eastern origin] over at 156 West Main;” (7) during a training session on using pepper spray, an officer stated “‘you have capsicum if you stop a car . . . and it is a car load of Puerto Ricans;” and (8) a dark skinned Italian officer “‘was referred to as the ‘big nigger’ by [other] officers.” *Id.* at 108-09.

### **Second Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment based on four incidents over a five year period, where the incidents were “‘infrequent and episodic,” “‘were difficult for the employer to remedy because they were largely anonymous,” and “‘were too few, too separate and time, and too mild . . . to create an abusive working environment.” *Alfano v. Costello*, 294 F.3d 365, 380 (2d Cir. 2002). Here, the four “‘overtly sexual” incidents were (1) a Captain told the plaintiff, a female corrections officer, “‘that she should not eat carrots, bananas, hot dogs or ice cream on the job because she did so in a ‘seductive’ manner;” (2) plaintiff “‘discovered in her workplace mailbox a carrot and two potatoes put there by someone who had the idea of arranging them to suggest mail genitalia;” (3) “‘a spurious notice was posted in the visiting room . . . purporting to be signed by [the] Superintendent, stating that ‘carrots will not be allowed in the visiting area due to Sgt. Alfano’s strong liking for them. If they are diced up, it will be okay. Supt.;” and (4) “‘Alfano found in her mail box a hand-drawn cartoon depicting an officer under her supervision [] making vulgar sexual remarks.” *Id.* at 370.

The Second Circuit upheld the district court’s entry of post-verdict motion for judgment on plaintiff’s hostile work environment claim, finding the following evidence insufficient as a matter of law: (1) “‘plaintiff testified that he did not have a good feeling about his work environment;” (2) a Hispanic co-employee “‘testified that he had a ‘gut, personal feeling’ that he did not belong in the office, and that ‘an atmosphere of uneasiness existed;” (3) “‘plaintiff found

a file containing racist material, including a memorandum entitled ‘Affirmative Action in Heaven,’ on top of a wall locker near his office;” and (4) “plaintiff was consistently given menial tasks,” including washing and putting gas in his boss’s car. The court concluded that “generalized feelings of discomfort fell well short of the proof required to show a hostile work environment. Williams v. County of Westchester, 171 F.3d 98, 102 (2d Cir. 1999).

There was no hostile environment racial harassment when (1) “one of [plaintiff’s] supervisors made several discriminatory remarks about minorities” and (2) plaintiff alleged that her supervisors told her “that Coach [defendant] ‘seeks to hire and promote people who have a ‘Coach look’ — the examples to whom her supervisors referred were young non-minority persons.” Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d Cir. 1998). The Second Circuit recognized that while these “alleged comments are despicable and offensive, they fail to constitute discriminatory behavior that is sufficiently severe or pervasive to cause a hostile environment.” Id. at 713.

### **Third Circuit: Hostile Environment Present.**

Hostile environment sexual harassment was present when the supervisors and fellow officers of a female police officer (1) “harassed her by making sexually derogatory comments about her hygiene during roll call, disturbed her while she was changing her in the drill room;” (2) referred to plaintiff “as ‘the cunt’ and placed a tampon and a copy of Hustler magazine in her squad car;” (3) “told plaintiff that upper management sent a woman to his unit to ‘break his balls;” (4) “officers placed a sanitary napkin with sergeant’s stripes over the roll call podium and affixed a dildo either to the wall or the podium in the roll call room;” (5) plaintiff “was the subject of sexually explicit graffiti and drawings of herself at three locations on city property: the roll call room, the roll call bathroom, and the bathroom of the Masonic Temple, a building used by both employees and the public;” (6) the supervisor “reacted to the latest sexually explicit graffiti by rushing to see it and laughingly informing [plaintiff], in front of her colleagues, that ‘it’s really bad,’ but he took no action to remove or prevent the appearance of the graffiti;” (7) when the plaintiff complained to her supervisor, “he replied that women in the private sector are protected against such harassment because they ‘sleep with their bosses;” (8) the supervisor told plaintiff “that he lost weight by ‘having sex a few times a day,’ and that women came to him ‘when they’re ready;” and (9) when the plaintiff “was unable to locate her coffee mug, [supervisor] asked her if she wanted to drink out of his jock cup.” Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 103-05 (3d Cir. 1999).

Hostile environment racial harassment was present when co-workers and supervisors made “inherently racist remarks” and treated the two black plaintiffs more harshly than white employees. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996). The white employees (1) referred to the plaintiffs as “another one,” “one of them,” “that one in there,” and “all of you;” (2) falsely accused the plaintiffs of favoritism and incompetence; (3) regularly insulted other black employees with “don’t touch anything” and “don’t steal.” Id. The supervisors (1) told one plaintiff that “if things were not resolved with [the other plaintiff], ‘we’re going to have to come up there and get rid of all of you;” (2) told one plaintiff “that he knew all about her and two other employees” when the “only factor the three shared in common was their race;” (3) after the plaintiffs filed a complaint, a supervisor “stated that ‘the blacks are against the whites,’ and that if anyone did not like it at Cort Furniture, they could leave.” Id. The Third Circuit recognized that while several remarks were not overtly racist, “the use of ‘code words’ can, under circumstances such as we encounter here, violate Title VII,” since such words “could be seen as conveying the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace.” Id. at 1083.

Hostile environment racial harassment was present, based upon incidents which the plaintiff experienced and incidents which other black employees had experienced. West v. Philadelphia Elec. Co., 45 F.3d 744, 749 (3d Cir. 1995). Examples of the former included “(1) racially harassing conversations; (2) racially derogatory postings on a bulletin board, (3) slurs and physical threats; (4) a large noose hanging in the workshop entranceway; (5) a picture of a Ku Klux Klan member posted in several locations throughout the workplace, and (6) a Confederate flag painted on the side of a co-worker’s helmet.” Id. at 749 n.1 (numbering added). Another example included a reference to then-Mayor Frank Rizzo, when a foreman “approached [plaintiff], slammed a stick on [his] workbench, remarking, ‘This is how Rizzo kept ‘city people’ in line when he was Police Commissioner,’” where it was understood that ‘city people’ referred to African-Americans. Id. at 750. The Third Circuit further held that evidence of racial harassment experienced by other black employees but not witnessed by plaintiff was still admissible in plaintiff’s case, since it was “evidence of notice of racial harassment given to PECO [defendant] by other employees. The company’s notice of racial harassment is always, relevant, regardless of its source, because it bears upon the duty of the company to investigate and to remedy a hostile work environment.” Id. at 756 n.10. The harassment experienced by others included (1) a supervisor “allegedly waved a noose in front of another African-American in the shop and remarked, ‘You know what we use these for;” and (2) a foreman “placed a photocopy of a figure on the side of his desk, facing Smith [a black employee]. West suggests

that it was a black ‘voodoo doll,’ intended to harass Smith because he had argued with [the foreman] the day before.” Id. at 751.

### **Third Circuit: No Hostile Environment.**

Three isolated incidents did not constitute hostile environment racial harassment. Harley v. McCoach, 928 F. Supp. 533, 541 (E.D. Pa. 1996). The incidents were (1) “the electronic mail message in which she was addressed as ‘Brown Sugar,’” (2) an allegation that she had heard from another worker that a supervisor “had referred to her using the word ‘n\*\*\*\*\*,’” and (3) “other workers teased her about an alleged tryst between her and [a white employee] by referring to her as the Whitney Houston character in ‘The Bodyguard,’ a film that depicts an inter-racial love affair.” Id. However, the court did find that plaintiff had shown extensive sexual harassment based on other, gender-related incidents. Id. at 539-40.

### **Fourth Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment where the employee was constantly “barraged with comments of a sexual nature.” Anderson v. G.D.C., Inc., 281 F.3d 452, 456 (4th Cir. 2002). In particular, the plaintiff’s supervisor was the “worst perpetrator,” since he “made vulgar comments regarding Anderson’s breasts and buttocks on a daily basis and who repeatedly stated that he ‘heard black women had the best p\*\*\*y’ and that ‘you hadn’t f\*\*\*ed until you have been with a black woman.’ Cooper also told Anderson that if he ever caught her driving on a certain road, he ‘would f\*\*\* [her] in the a\*\*,’ and that ‘all [Anderson] needed was a good f\*\*\* and [she] wouldn’t be so mean.’ Twice, Cooper touched Anderson’s hand in a suggestive manner when she handed him her paper-work. On one occasion, Cooper paged Anderson and inputted a telephone sex line as the response number. Anderson called the number believing it to be her son’s day-care; when she returned to the dispatch trailer, she found Cooper and several drivers laughing at her.” Id.

Even after Anderson complained about this harassment, “Cooper then responded to Anderson, telling her that she ‘might as well get used to it’ and that ‘[t]hat was the way of G.D.C.’” Id. Subsequently, “Anderson asked Cooper for assistance with a question regarding her paperwork. In the guise of assisting her, Cooper came up behind Anderson and pressed his penis into her buttocks (the touching incident). Anderson whirled around and told Cooper that she would ‘cut his f\*\*\*ing throat if he ever did it again.’” Id.

The co-workers also made sexual remarks to Ms. Anderson: “Male G.D.C. drivers made numerous comments regarding Anderson’s buttocks and stated within Anderson’s hearing that they ‘would like to f\*\*\* [her] in the a\*\*.’ Male G.D.C. drivers also commented that they would like to perform oral sex on Anderson. Further, they noted that Anderson wore red lipstick and stated that they ‘would like to see the red ring around their d\*\*\*’ and that they bet Anderson ‘could suck a good d\*\*\*.’ As much as possible, Anderson tried to avoid using the employee restroom located in the dispatch trailer because other drivers would make off-color comments when she did so. Once while Anderson was in the restroom, another driver commented, loudly enough for Anderson to hear, that he ‘would like to take a bath in [her] hot p\*\*\*.’” Id.

A series of remarks made by a shop foreman constituted hostile environment racial harassment. Brumback v. Callas Contractors, Inc., 913 F. Supp. 929, 939-40 (D. Md. 1995). These included (1) plaintiff and the foreman “were alone in the diesel shop, that Hammond [foreman] lit a torch, soot came off the torch, and in response, Hammond said something akin to ‘Look at all them little nigger babies flying around through the air there;’” (2) after plaintiff told the foreman that he had no plans for New Year’s Eve, the foreman suggested that plaintiff “go to Jonathan Street and ‘kill off all the niggers so we white people could have more;’” (3) the plaintiff overheard the foreman telling the manager “something along the lines of ‘getting tired of that nigger in that shop doing nothing. Either you do something about that nigger or I’m going to bust him upside his head;’” (4) the foreman also described the plaintiff to the manager “as being ‘a no good nigger and they was going to find a way to get rid of’ him;” (5) the foreman, “in reference to a cut off saw, had said that ‘that looks like the work of that dumb nigger back in the shop;’” and (6) the foreman told the plaintiff that “he was a dumb fucking nigger, he couldn’t put a God damn bicycle together if they had directions there for him.” Id. at 935-36. The court concluded that these were not isolated incidents, since “where one individual continues to verbally abuse an employee over the course of several months, this Court is at a loss to call these incidents ‘isolated.’” Id. at 939. The court further noted the significance of the racial epithet at issue: “Nor is repeated use of the ancient epithet — ‘nigger’ — trivial as a matter of law. Id.

#### **Fourth Circuit: No Hostile Environment.**

A panel of the Fourth Circuit held that there was no hostile environment sexual harassment where the plaintiff could not show she would not have been exposed to the same numerous comments had she been male, *i.e.*, the sexist comments occurred regardless of whether women were present in the workplace. Ocheltree v. Scollon Productions, Inc., 308 F.3d 351 (4th Cir. 2002), vacated on reh’g en banc (4th Cir. Dec. 16, 2002); see also M. Rhyne, “Panel Reverses Sex Harassment Verdict,” Nat’l L.J., Oct. 21, 2002, at B-1. The Fourth Circuit held its



en banc oral argument on February 25, 2003, but no decision has issued as of June 10, 2003. See D. Sontag, “The Power of the Fourth: How One Appellate Court is Quietly Moving America Ever Rightward,” N.Y. Times Magazine, Mar. 9, 2003, at 38 (describing oral argument).

Notwithstanding the numerous sexist incidents, the panel held that: “With respect to the vast majority of offensive conduct upon which Ocheltree relies, the uncontested evidence demonstrates conclusively that Ocheltree would have been exposed to the same atmosphere had she been male. Of the catalogued offensive behavior, only three incidents were directed toward Ocheltree -- the vulgar song, the body-piercing magazine, and the sexual acts with the mannequin. The remainder of the conduct occurred in group settings as part of the male workers’ daily bantering toward one another and was overheard or witnessed by Ocheltree.” Id. at 356-57. “Moreover, the uncontested evidence demonstrated that the men’s behavior did not begin or change as of the date Ocheltree began working with Scollon Productions but had been ongoing before she came to work for Scollon Productions.” Id. at 357.

The incidents included: “some of the primarily male staff engaged in open conversations about sex, made comments about the sexual habits of others on the staff, used foul, vulgar, and profane language, and told sexually-oriented jokes. Ocheltree also testified about specific incidents that occurred during her employment, including an incident when she witnessed employees pretending to perform oral sex and other sexual acts on a mannequin, another incident when employees showed Ocheltree a picture of pierced male genitalia and asked her what she thought about it, and finally, an incident when a co-worker sang her a song in which the lyrics were ‘come to me, oh baby, come to me, your breath smells like cum to me.’ According to Ocheltree’s testimony, the shop supervisor, Harold Hirsch, showed a photograph of a nude woman around the shop and engaged in several sexually explicit conversations with Ocheltree’s male coworkers.” Some incidents were corroborated by a male co-worker. Id. at 353-54.

The lengthy dissenting opinion noted that the majority (Judges Williams and Niemeyer) had ignored or downplayed a number of other sexist incidents, and argued that the majority’s approach was illogical since it would prevent a racial harassment plaintiff from bringing a claim based on the “daily use of the meanest racial slur against African-Americans” if the employer could show that “the workplace had previously been all white and that the pattern of racial slurs was the same both before and after the plaintiff’s arrival.” Id. at 376 (Michael, J., dissenting).

A single incident, involving the “display of a poster with a picture of a gorilla and the motto, ‘I wouldn’t mind being a NOBODY if I could only get A LITTLE RECOGNITION once in a while,’” was held not to constitute hostile environment racial harassment, where the message

was a “pun on the name of the Recognition Branch [of the Navy]” and there is no evidence that the owner of the poster or any other supervisor “had actual or constructive knowledge that the poster was potentially offensive to African-American employees.” Carter v. Ball, 33 F.3d 450, 460-61 (4th Cir. 1994).

### **Fifth Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment where the plaintiff, who previously had a consensual sexual relationship with her supervisor, suffered from a hostile work environment after the termination of their relationship. Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002). Although the exact nature of the incidents is not specified, the “evidence supports a finding that Richardson’s actions interfered with Green’s work performance, that he reprimanded and demoted her, and that he cursed at and humiliated her.” Id. at 656. Critically, “it was only after the relationship ended that Richardson began to harass her. This fact alone supports a jury’s inference that he harassed her because she refused to continue to have a casual sexual relationship with him.” Id. at 657.

There was hostile environment sexual harassment where plaintiff’s two supervisors harassed her. Wyatt v. Hunt Plywood Co., 297 F.3d 405 (5th Cir. 2002). The first-level supervisor, Thompson, started harassing the plaintiff almost from the first day: he “commenced harassing her sexually, referring to her in vulgar terms and continually asking her to have sex with him.” Id. at 407. After Ms. Wyatt complained to her second-level supervisor (Gorum), the harassment by Thompson persisted. Then, “Gorum himself eventually subjected Wyatt to sexual advances and harassment.” Id. Finally, “Thompson’s harassment of Wyatt reached its zenith . . . when he sneaked up behind her and pulled down her sweat pants while she was actively working on the line, and in the plain view of other employees.” Id. Even after Ms. Wyatt reported this to Gorum, “in an effort to down-play Thompson’s actions, Gorum declined to indicate in the [incident] report that Thompson had pulled Wyatt’s pants down.” Id. at 407-08.

There was hostile environment harassment where the supervisor (1) “made inappropriate jokes both to and about [plaintiff];” (2) “continually made sexual innuendos” to [plaintiff];” (3) “once grabbed her buttocks as well as touched her in other ways on several other occasions;” and (4) “began following her through the store calling her a ‘homewrecker’ and saying that she was ‘homeless’ in front of other employees, vendors, and customers,” referring to her extramarital affair with another supervisor. Watts v. Kroger, 170 F.3d 505, 507-08 (5th Cir. 1999).

There was hostile environment sexual harassment of a police officer by her supervisors, based on a series of incidents, where the sergeants (1) “announced in front of over one hundred officers and police cadets that Sharp ‘needs to be in a wet T-shirt contest;’” (2) “often referred to Sharp’s breasts as ‘headlights’ and, on one occasion, as Sharp walked toward him and several other officers, he yelled, ‘I see those headlights coming!’” (3) “When Sharp would bend over to pick up equipment, Bice, while swiveling his hips, would shout out, ‘hold that position, gal!’” (4) “When Sharp requested time off, Bice often joked that he had keys to a motel room where they could go to ‘discuss the matter;’” (5) “He often commented that the couch in his office folded out into a bed, and invited her to come in and close the door;” (6) “He once told Sharp that he would approve her vacation request if she brought back pictures of herself on a nude beach;” (7) “during roll call, Hankins walked up to Sharp and unzipped his pants, placing his crotch inches from her face [and] capped off the ‘joke’ by making a reference to oral sex;” (8) “When Sharp asked job-related questions, on several occasions Hankins grabbed his crotch and shook it, inviting her to ‘chew on this.’” Sharp v. City of Houston, 164 F.3d 923, 926-27 (5th Cir. 1999).

There was hostile environment racial harassment, by a black elected official against a white public employee, where the official (1) “stated that ‘blacks had suffered for two hundred years, and now it was the whites’ turn;’” (2) demoted experienced whites, forcing them to work under less experienced blacks; (3) “refused to allow whites who had been injured on the job to perform ‘light duty’ — as he did for blacks — but insisted that they perform heavy duty or stay home;” (4) “allowed black employees to take frequent breaks on the job, but chastised whites who did the same;” and (5) “tolerated and helped to foster an atmosphere in which whites were called ‘honkeys’ and were made the subject of ridicule and harassment on account of race.” Huckabay v. Moore, 142 F.3d 233, 237 (5th Cir. 1998). The court recognized yet other incidents, which allowed the plaintiff to plead under the continuing violation theory. Id. at 240.

### **Fifth Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment where plaintiff’s supervisor’s acts, while “boorish and offensive,” were not severe, did not physically threaten plaintiff, and did not “interfere unreasonably with a reasonable person’s work performance.” Shepherd v. Comptroller of Pub. Accounts of State of Tex., 168 F.3d 871, 874 (5th Cir. 1999). The supervisor (1) “stood in front of [plaintiff’s] desk and remarked ‘your elbows are the same color as your nipples;’” (2) “remarked once ‘you have big thighs’ while he simulated looking under her dress;” (3) “stood over her desk on several occasions and attempted to look down her clothing;” (4) “on two occasions, when [plaintiff] looked for a seat after coming in late to an office meeting, [he] patted his lap and remarked ‘here’s your seat.’” Id. at 872.

There was no hostile environment sexual harassment when the plaintiff's supervisor sent anonymous notes and postcards of a sexist nature, as well as anonymous prank calls, since these incidents occurred infrequently, did not occur in the workplace, were not publicly displayed or manifested, did not contain threatening statements, and "would not interfere unreasonably with a reasonable person's work performance." Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 269-70 (5th Cir. 1998).

There was no hostile environment harassment, based on three same-sex incidents that were "crude but did not create a hostile environment." Pfullman v. Texas Dep't of Transp., 24 F. Supp. 2d 707, 712 (W.D. Tex. 1998). Here, (1) a supervisor "sat on Plaintiff's lap and briefly 'rocked around,' commenting 'that sure feels good right here;'" (2) another supervisor "made fellatio insinuations to [plaintiff] while [plaintiff] was eating a sausage;" and (3) "In connection with fit-testing hazardous chemical respirators [a third supervisor] told [plaintiff's co-worker] to 'bend over and he would 'fit test' [co-worker] right there.'" Id. at 710-11.

There was no hostile environment racial harassment when plaintiff could only allege a single racial epithet. Nguyen v. Benson Toyota Co., 73 FEP Cases 1321, 1324 (E.D. La. 1997). Here, the Vietnamese-American plaintiff was called a "rice-eating gook" by a co-worker during an argument. Id. at 1323. The court held that: "This is exactly the kind of 'mere utterance' that should not, by itself, support an actionable claim for hostile work environment." Id. at 1324.

### **Sixth Circuit: Hostile Environment Present.**

There was pervasive hostile environment racial harassment against a prison guard, where (1) a supervisor told plaintiff that "he was lazy like the rest of his people and that is why they are all in prison;" (2) another supervisor told plaintiff that "I'm writing your black ass up" and transferring him to another area "in which he could be watched more closely because 'niggers can't be trusted;'" (3) plaintiff received a threatening letter "telling him to 'Pull bid [for a shift change] — If not, you will be looking for a job or die. Nigger out,' [and] the note was signed by the 'KKK' and contained a reference to lynching, a drawing of a stick figure with a noose around its neck." Allen v. Michigan Dep't of Corrections, 165 F.3d 405, 410-11 (6th Cir. 1999).

Another prison guard also suffered hostile environment racial harassment, based on (1) a guard "had referred to him as a 'black-ass fucking nigger;'" (2) plaintiff received "harassing and threatening phone calls" over the prison phone system, including "you wanta swang, bitch" which plaintiff took "to refer to race-related lynching;" (3) plaintiff received "another

anonymous phone call in which the caller hissed ‘niggaaaaah;’” and (4) plaintiff was reprimanded for conducting his own investigation into these calls, while the supervisors made no attempt to investigate the harassers. Hafford v. Seidner, 183 F.3d 506, 509-10, 514 (6th Cir. 1999).

There was hostile environment sexual harassment based on a series of remarks made by plaintiff’s supervisor, even though only one was made about plaintiff herself. Abeita v. Transamerica Mailings, Inc., 159 F.3d 246, 248 (6th Cir. 1998). The incident involving the plaintiff was when the supervisor stated, regarding her clothing, “oh, yellow dress and yellow shoes, yellow underwear, too?” Id. The comments involving other females, mostly fashion models used by the defendant in its catalogs, included (1) “I’d really like to lay the pipe to her” or “I’d really like to lay her;” (2) when plaintiff asked the supervisor what to do with a new model, he replied “Well, that doesn’t matter. It’s what I’d like to do with her that’s important;” and (3) the supervisor “made sexual comments about a model found in a Frederick’s of Hollywood catalog.” Id. at 248-49.

There was hostile environment racial harassment where the supervisor [Guy] (1) verbally abused plaintiff more than he abused white employees; (2) pointed out to another supervisor “the black service agents [and] remarked how lazy they were and how slow they worked and said that was typical of blacks. . . . he wished he could get rid of the ‘niggers’ and hire some more Vietnamese workers. . . . [and] referred to Anthony [plaintiff] as his ‘whipping boy’ and said he didn’t know who he would ‘fuck with’ if Anthony left;” (3) told the other supervisor “that he wanted to get Anthony to quit because it would be difficult to fire him because he was black.” Booker v. Budget Rent-A-Car Systems, 17 F. Supp. 2d 735, 743 (M.D. Tenn. 1998). Another supervisor, who knew of these incidents, wrote: “Talk about a favorite whipping boy, Mr. Booker could probably sue the pants off Budget for discrimination after Guy is finished with him. I sure hope it is not because he’s black, that he gets this treatment.” Id. at 744.

### **Sixth Circuit: No Hostile Environment.**

There was no hostile environment sexual or racial harassment, where there was no evidence that the alleged series of actions were based on the plaintiff’s race or gender. Farmer v. Cleveland Public Power, 295 F.3d 593, 604-05 (6th Cir. 2002). Although the plaintiff alleged that “defendants restricted her access to necessary information, gave her conflicting and vague performance objectives, ignored her requests for clarification of her targeted goals, and prepared performance evaluations based upon expectations that had not been discussed with her,” and that she was “physically isolated from her co-workers” and “disciplined for actions she did not take,” none of these were based on her race or gender. Id. at 604.

There was no hostile environment racial harassment where the plaintiff's work performance was not affected by the alleged incidents. Harrison v. Metropolitan Gov't of Nashville & Davidson County, Tenn., 80 F.3d 1107, 1118 (6th Cir. 1996) ("plaintiff has failed to present evidence that his work performance was affected by the racial hostility, even if only in his own opinion"). In this case, there was a single use of a racial epithet by plaintiff's supervisor, and there was one "Ku Klux Klan hood incident at work." Id. The Sixth Circuit only noted that there were "relatively few incidents over a rather lengthy period of time." Id. at 1117.

### **Seventh Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment of plaintiff, an assembly plant worker, mostly from the conduct of her co-workers, who (1) "at least twice a week" prepared fake penises from rubber sealant, which "were sent down the assembly line past her work station;" (2) "accused [plaintiff] of 'sucking a white boy's dick on the roof;'" (3) "commented, 'I can make your pussy bloom;'" (4) "was taunted with offensive literature" including a sheet "that pontificated on why beer is better than women," was shown photos of nude persons, given "sexually explicit cartoons" and (5) "while on medical leave, [plaintiff] received a lewd greeting card which had been signed by approximately 38 Chrysler employees including a supervisor [] and three foremen." Wilson v. Chrysler Corp., 172 F.3d 500, 508 (7th Cir. 1999).

There was hostile environment sexual harassment of plaintiff by the Chancellor of Indiana University, South Bend, based on a single incident where the Chancellor had sent her an e-mail as a "'ruse' to get her into his office" whereupon he "put his arms around the Plaintiff and grabbed her 'like a gorilla,' . . . started kissing her, forcing his tongue in her mouth, and started grappling with his hands down her blouse [and] succeeded in forcing his hand down the Plaintiff's blouse far enough to grope her breasts as he was grabbing her." Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 873 (N.D. Ind. 1998). Even though this was a single incident, the court held that it was so severe, and caused such trauma to the plaintiff, that it sufficed to constitute an actionable hostile environment claim. Id. at 879-80.

There was hostile environment racial harassment of a hospital nurse based on numerous incidents: (1) "African-American employees and patients were referred to as 'you people;'" (2) the black nurse "was told that it is more difficult to give injections to African-American patients because their 'skin is tougher' than that of white patients;" (3) she "was once asked to draw blood from her own 'kind,' i.e., African-American patients;" (4) "More than once, Johnson [nurse] was asked by white coworkers to 'interpret' what African-American patients were

saying;” (5) a coworker “was in the habit of making racial comments, informing African-American employees when fried chicken or watermelon was being served in the cafeteria and referring to cleaning floors as ‘nigger work;” (6) a supervisor frequently commented “that African-Americans were unintelligent and do not speak ‘proper’ English.” EEOC v. St. Michael Hosp. of Franciscan Sisters, Milwaukee, Inc., 6 F. Supp. 2d 809, 813 (E.D. Wis. 1998).

### **Seventh Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment where the plaintiff, a female surgeon, suffered only two derogatory remarks, one of which was “the only valuable thing to a woman is that she has breasts and a vagina,” because those “comments were too isolated and sporadic to constitute severe or pervasive harassment.” Patt v. Family Health Sys., 280 F.3d 749, 754 (7th Cir. 2002). Further, remarks made to other employees outside the plaintiff’s presence were just “second-hand harassment” which do not have as great an impact “as harassment directed toward Patt herself.” Id.

A series of comments were held not to constitute hostile environment racial harassment, since the plaintiff admitted that the supervisor “cursed at all employees on the line, white and black, male and female,” and “there was nothing inherently sexual or racial about his comments.” Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345 (7th Cir. 1999).

A single racist statement was held to be an isolated event that did not “establish an inference of a hostile environment.” Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 885 (7th Cir. 1998). Here, a white supervisor remarked to plaintiff, who was also white, but friendly with black employees, “Why don’t you take your nose and put it up the black’s ass like you have always got it and keep it there?” Id. at 882.

### **Eighth Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment where the supervisor began harassing the plaintiff soon after she was hired, “he boasted about his sexual abilities, commented frequently on her body type and appearance, and suggested that they watch pornographic movies and engage in sex with one another. She also testified that he made explicit speculations about her sex life and that he once tried to unzip her sweater.” Jaros v. Lodgenet Entertainment Corp., 294 F.3d 960, 963 (8th Cir. 2002).

There was hostile environment sexual harassment, where the supervisor (1) “made an offensive comment to her [plaintiff] that she considered sexual harassment;” (2) belittled her and criticized her work performance because she had rebuffed his advances;” and (3) “sexually assaulted her.” Moisant v. Air Midwest, Inc., 291 F.3d 1028, 1030 (8th Cir. 2002).

There was hostile environment sexual harassment where the supervisor “repeatedly propositioned [plaintiff], physically accosted her on numerous occasions and made increasingly serious threats of retaliation” for more than five years. Van Steenburgh v. Rival Co., 171 F.3d 1155, 1160 (8th Cir. 1999). The incidents occurred when the supervisor (1) “repeatedly confronted [plaintiff] in private and proposed that she engage in a romantic relationship with him;” (2) “touched [plaintiff] on numerous occasions;” (3) “entered her office, put his arms around her, and told her that he wished he could take her away from her husband;” (4) “put one arm around her, and put one hand on her breast, [and] said he would stop harassing her if he could just touch (her) down there;” and (5) frequently “stared at [plaintiff], entered her office uninvited, and repeatedly asked her to have an affair with him.” Id. at 1157-58.

There was hostile environment racial harassment where (1) a co-worker frequently referred to plaintiff, “as a ‘colored girl,’ ‘jackass,’ ‘asshole,’ and ‘little black bitch,’ among other derogatory names;” and (2) a second-line supervisor told another supervisor that “If the dumb nigger doesn’t like it she can sign out.” White v. Honeywell, Inc., 141 F.3d 1270, 1273-74 (8th Cir. 1998). The Eighth Circuit held that the district court’s exclusion of the latter statement on grounds of its prejudicial effect was reversible error, since it was a “highly probative piece of evidence [which] affected her substantive rights.” Id. at 1277.

### **Eighth Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment where the alleged actions “were boorish, chauvinistic, and decidedly immature,” but were not sufficiently severe or pervasive. Duncan v. General Motors Corp., 300 F.3d 928, 935 (8th Cir. 2002). The manager’s actions included propositions; directing the plaintiff to work on the manager’s computer, which had a screen saver with a picture of a naked woman; having sexually suggestive objects in his office; posting a “recruitment” poster on a company bulletin board, which depicted plaintiff as the “president and CEO of the Man Hater’s Club of America” and itemizing five membership criteria; and asking plaintiff “to type a draft of the beliefs of the ‘He-Men Women Hater’s Club,’” which had numerous sexually derogatory statements about women. Id. at 931-32. The dissenting opinion strongly took task with the majority, arguing that these sexual incidents were



not isolated incidents, but represented “a string of degrading actions that Mr. Booth directed toward Ms. Duncan based on her sex.” Id. at 937 (R.S. Arnold, J., dissenting).

There was no hostile environment racial harassment for the plaintiff physician, where “a chief resident physician made racially offensive remarks about him and patients” because that person “did not evaluate appellant’s clinical performance and was not involved in the decisionmaking process.” Carter v. St. Louis Univ., 167 F.3d 398, 399, 402 (8th Cir. 1999).

### **Ninth Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment of the plaintiff, a female police officer, where the Deputy Chief of Police constantly harassed her and raped her on three occasions, the third time at her home, in front of her daughter. B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1096 (9th Cir. 2002). Further, “pornographic magazines were displayed as part of a normal routine at the police stations, along with pornographic films;” the plaintiff “would be compared by the male officers to the pictures in the magazines or asked if she could perform the acts depicted in the films.” Id. Other officers and supervisors also retaliated against the plaintiff after she reported her complaints, by calling her “a fucking cunt or fucking bitch” and subjecting her “to sexual comments on an average of two out of three days.” Id. at 1096-97. On at least three occasions, the male officers refused to provide her with backup assistance in response to her emergency calls. Id. at 1097. Several other female co-workers testified as to the pervasive sexual harassment that they had suffered on the job. Id. at 1097 n.4. This decision also has an extensive discussion about evidentiary issues under Rule 412, Fed. R. Evid., relating to the plaintiff’s own sexual conduct. Id. at 1103-06.

There was hostile environment sexual harassment based on repeated sexual incidents by the supervisor against both plaintiffs. Vandermeer v. Douglas County, 15 F. Supp. 2d 970, 979 (D. Nev. 1998). These incidents occurred where the supervisor (1) “had a habit of periodically brushing up against their breasts with his arms, as well as occasionally touching their hips and buttocks;” (2) “expressed a desire to ‘consummate’ the building;” (3) “often complained about the state of his sex life, and expressed a desire to have an extramarital affair with another coworker;” (4) “behaved strangely on a business trip they took to Las Vegas, including: insisting that he have an adjoining room to the one plaintiffs were sharing, and showing up twice at the door to their room without being fully dressed; (5) “signed her birthday card with the inscription, ‘I hope you’re not too old for the stable;” (6) told plaintiff “that his son had gone to the doctor after performing oral sex on a stripper at a bachelor party;” and (7) “discussed with her and another female employee the existence of a new female contraceptive, which he likened to Saran

Wrap, and then either asked the women to bring a roll of Saran Wrap to work or said that he would bring one himself.” Id. at 979-80.

The plaintiff had satisfied her prima facie case of sexual harassment, based on “more than thirty incidents of sexual jokes, unwanted touching, unwanted kissing, requests for dates, and requests for sex.” Miller v. D.F. Zee’s, Inc., 31 F. Supp. 2d 792, 801 (D. Or. 1998). These incidents, made by both supervisors and co-workers, included: the supervisor (1) “looked at [plaintiff’s] pelvic area, informed her that he bet she had ‘a cute little box’ and that he could put something in her ‘cute little box’ [which plaintiff] understood him to be referring to her genital area;” (2) “suggested that he and [plaintiff] go into the stock room for an hour together;” (3) “peeled a banana in front of [plaintiff] and asked ‘how much of this do you think you could take?’” (4) “engaged in a series of jokes where he asserted that [plaintiff] ‘owed him a blow job;” (5) asked plaintiff “to date him on several occasions” and asked her “whether she had broken her ‘streak,’ and that he wanted to help her break her ‘streak;” (6) “When [plaintiff] came into the restaurant on a day off wearing a tank top, [the supervisor] commented that the way the top pushed her breasts up, ‘any man would want to jump her;” (7) “approached [plaintiff], said the restaurant was quiet, and asked if they could ‘do it on a table;” to enumerate only a few incidents involving the supervisor alone. Id.

#### **Ninth Circuit: No Hostile Environment.**

There was no hostile environment racial harassment based upon one incident involving “a single drawing of a monkey on a memo circulated to senior NCOs [non-commissioned officers], accompanied by the verbal explanation that it was intended to remind officers not to ‘get the monkey off their back’ by passing their responsibilities to others.” Gregory v. Widnall, 153 F.3d 1071, 1074-75 (9th Cir. 1998) (per curiam). Although plaintiff had also alleged several incidents of disciplinary treatment, the court found that none of them showed the requisite animus. Id.

There was no hostile environment racial harassment based on a single racial epithet, where the plaintiff called a white male co-worker “a little bitch,” and the co-worker “responded by calling [plaintiff] a ‘nigger.’” Hotchkins v. Fleet Delivery Serv., 25 F. Supp. 2d 1141, 1143 (D. Or. 1998). The court held that this single incident was a mere utterance and did not constitute severe or pervasive conduct. Id. at 1149.

#### **Tenth Circuit: Hostile Environment Present.**

There was hostile environment sexual harassment, based on pervasive same-sex conduct by a police lieutenant. Carney v. City of Shawnee, 38 F. Supp. 2d 905, 909 (D. Kan. 1999). The incidents included (1) the lieutenant “grabbing [plaintiff’s] head and hunching (masturbating) on his neck;” (2) “on more than one occasion, [lieutenant] made comments which requested oral sex from plaintiffs;” and (3) the lieutenant had been observed for some time “seeking oral sex, asking male officers to hold his genitalia, and — in one instance, touching [plaintiff’s] leg and requesting a blow job.” Id.

There was hostile environment sexual harassment, based on extensive and pervasive sexual-related conduct by plaintiff’s supervisor. Cadena v. The Pacesetter Corp., 30 F. Supp. 2d 1333, 1337 (D. Kan. 1998). These incidents occurred when the supervisor (1) “told her she was glad she had gone out because he had a ‘wet dream’ about her that night;” (2) “told plaintiff on a weekly basis that he wanted her to go out on Fridays so that he could have ‘more wet dreams;’” (3) told plaintiff to make telephone calls “on my desk;” (4) “told plaintiff not to wear her hair a certain way because it turned him on too much;” (5) “asked plaintiff if she was getting enough sex and suggested that female co-workers were disagreeable because they hadn’t gotten ‘laid;”” (6) “often came up behind plaintiff and rubbed her back, arms, shoulders, and neck in an offensive manner;” and (7) “told plaintiff to flash her breasts to a co-worker, to motivate him, and stated ‘I know that sure as hell would turn me on.’” Id.

Hostile environment racial harassment was present, with regard to two defendants, based on racial epithets directed by strikers against African-American workers who crossed the union picket lines. Standifer v. General Teamsters, Chauffeurs, and Helpers Union No. 460, 76 FEP Cases 1307, 1313 (D. Kan. 1998). One defendant (Couch) had “used the word ‘nigger’ multiple times during the nine-month strike” and the other defendant (Davenport) had “uttered racial slurs at whites and blacks on ‘a couple of occasions’ in the first few weeks of the strike.” Id. at 1308. While one plaintiff was driving his truck through the gate, these two defendants had, along with other strikers, blocked and attacked the truck with logs, screamed “Kill the nigger; hang the nigger,” and struck plaintiff and his truck with a club. Id. at 1310. The “severity of the assault that Couch and Davenport inflicted upon [plaintiff], combined with their pattern of racial profanities,” precluded summary judgment for those two defendants. Id. at 1312-13. However, the court did grant summary judgment in favor of three other defendants who had, on several occasions, referred to the plaintiffs as “niggers” since those incidents were “isolated racial slurs” that “did not alter the terms, conditions, or privileges of their employment.” Id. at 1312.

### **Tenth Circuit: No Hostile Environment.**

There was no hostile environment racial harassment based upon only two incidents over a two year period. Witt v. Roadway Express, 136 F.3d 1424, 1432-33 (10th Cir. 1998). The two actionable incidents (the other incidents occurred prior to the effective date of the Civil Rights Act of 1991), both involved supervisors referring to plaintiff as a “nigger,” id. at 1428-29, but “neither comment was directed at [plaintiff] and in the 1992 incident, the speaker did not know that [plaintiff] was within earshot.” Id. at 1433.

There was no hostile environment racial harassment when there were “only two overtly racial remarks (the Ku Klux Klan comment and the use of the term ‘nigger’) and one arguably racial comment (the sad face cartoon)” over an eight year period. Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994). Both comments were made by co-workers, and plaintiff did not report them to his supervisors. Plaintiff had also alleged “intimidation, ridicule and insult,” but these were not actionable since they “were directed indiscriminately, not targeted at [plaintiff] due to his race.” Id.

There was no hostile environment sexual harassment when “the possible humiliating incidents were few and far between” and the workplace “perhaps fosters occasional stereotypically sexist and boorish behavior” but not at a severe or pervasive level. Fiscus v. Triumph Group Operations, Inc., 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998). The alleged incidents included excessive touching or standing too close by male supervisors; a supervisor commenting that first aid cream “looked like sperm” and later ordered plaintiff to “put lotion on his back;” the supervisors told plaintiffs that they had to “bend over” so that the supervisor could determine whether their tank tops were acceptable workplace attire; and a supervisor put ice down the front of a plaintiff’s shirt. Id. at 1234-37.

#### **Eleventh Circuit: Hostile Environment Present.**

There was hostile environment racial harassment based on numerous incidents directed against Plaintiff and against his black co-workers. Perkins v. U.S. Airways, Inc., 8 F. Supp. 2d 1343, 1350-52 (M.D. Fla. 1998). “It does not matter that all of the remarks were not directed at Plaintiff as the trier of fact can consider evidence of discriminatory acts at the Tampa facility directed at employees other than Plaintiff which tend to show racial animus.” Id. at 1351. The overtly racial incidents included: (1) a supervisor told another supervisor of a “black employee who was on light duty, to ‘Make sure you put that n\_\_\_ back to work’” and referring to the employee, “that he was ‘going to get that arrogant n\_\_\_;” (2) a white employee told a black co-worker that “All I can see on your company I.D. is your eyes and your teeth;” (3) an employee “commented to Plaintiff that several black employees had filed lawsuits against Defendant and

that the only thing black employees wanted to do was file lawsuits;” (4) “a white employee made a racist doll from clay. The doll had gray skin, steel wool for hair, flashlight bulbs for eyes and an exaggerated nose and lips” and was “placed on top of his toolbox next to the time clock for everyone to see” and was later placed “on the toolbox” of a black employee; (5) an employee “held out a bag of burnt popcorn and said to Plaintiff, ‘Hey Kim, Black is beautiful;’” (6) a black employee “received a note which stated that his ‘black ass should have been fired;’” (7) “The bathroom walls had pictures of black faces and racial comments were written on the walls. One such comments said ‘There will always be problems until those n\_\_\_\_\_ are gone;’” and (8) “White employees have stated that ‘the blacks there have caused a lot of the problems that are going on in Tampa.’” Id. at 1348-49.

There was hostile environment racial harassment for a black female prison administrator, where her supervisor “repeatedly used racial slurs in the workplace, at times directing the comments toward Plaintiff.” Frazier v. Smith, 12 F. Supp. 2d 1362, 1370 (S.D. Ga. 1998). The court recognized that these “racially derogatory comments undermined Plaintiff’s confidence and authority [with regard to the inmates] and affected her employment.” Id. The court also recognized that the “fact that some of these remarks were not directed at Plaintiff is not determinative,” id., since such remarks affected her ability to control the inmates.

### **Eleventh Circuit: No Hostile Environment.**

There was no hostile environment sexual harassment, where “almost all of these [alleged] incidents are not supported by the record, and most of them are not related to [plaintiff’s] sex.” Williams v. Motorola, Inc., 303 F.3d 1284, 1293 (11th Cir. 2002) (district court erred in allowing plaintiff’s Title VII claims to go to the jury). The nature of the alleged incidents was not set forth in the appellate opinion.

There was no hostile environment racial harassment based on two epithets, since they were not “made by individuals involved in the challenged decisions regarding Plaintiff’s employment,” there was no “nexus between these observed statements” and any adverse employment decision, and these were mere epithets. Givhan v. Electronic Eng’rs Inc., 4 F. Supp. 2d 1331, 1342 (M.D. Ala. 1998). The two remarks were that the manager “called Plaintiff a ‘sorry nigger,’” and that another supervisor “allegedly said ‘Ya’ll need to fire that nigger.’” Id.

### **I. Employer Liability (Respondeat Superior).**

31. The *Ellerth/Faragher* Affirmative Defense to Employer Liability for Damages Under Title VII.

In 1998, the Supreme Court set forth a significant clarification and reanalysis of employer liability (respondeat superior) in two sexual harassment cases. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The critical issue was to determine the circumstances in which the defendant employer can be held liable under Title VII for the discriminatory or harassing conduct of its agents or supervisors. The Supreme Court turned to the Restatement (Second) of Agency, § 219(2)(d), which provides for liability under certain circumstances:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

*Ellerth*, 524 U.S. at 758 (quoting Restatement (Second) of Agency, § 219(2)).<sup>3</sup> It is the second element, aided in the agency relationship, that governs most employment cases, since it is unlikely that the employee will erroneously believe that the harasser or discriminating person was her supervisor. *Id.* at 759.

The “apparent authority” component applies when the alleged harasser is not the titular supervisor of the plaintiff, but has supervisory authority nonetheless. See, e.g., *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998) (“We have consistently distinguished employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers.”). As the Seventh Circuit concluded, “it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.” *Id.* at 1034. In contrast, the Eleventh Circuit abandoned the distinction between supervisor and non-supervisors, holding that “If an employee takes a tangible employment action

---

<sup>3</sup> Some courts have short-cited this case as “*Ellerth*” (the plaintiff-respondent) and others, including the Supreme Court, have cited this case as “*Burlington*.”

against the plaintiff, the employer will be held liable under Title VII for that action (if the action otherwise violates the statute), regardless of whether the employee taking the action is labeled the plaintiff's 'supervisor.'" Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1247 n.29 (11th Cir. 1998). For that reason, "a Title VII plaintiff, therefore, may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a tangible employment action against her." Id. at 1247.

Where there is a "tangible employment action [which] 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," Ellerth, 524 U.S. at 761, then the employer is strictly liable for the conduct of its supervisor or agent. Id. at 763; accord Faragher, 524 U.S. at 790 (discussing "this apparently unanimous rule"). The rationale for applying strict liability is that only a supervisor or agent of the employer could cause a tangible employment action, through "an official act of the enterprise." Ellerth, 524 U.S. at 762. Under agency law, the challenged actions were aided by the agency relationship; which "requirements will always be met when a supervisor takes a tangible employment action against a subordinate." Id. at 762-63.

However, when there is no such tangible employment action (i.e., the employee is still employed with no adverse change in her status), then the Supreme Court turned to principles of vicarious liability to determine whether the employer should be held liable. The Ellerth Court was reluctant to impose "automatic liability" for all occurrences of harassment which did not lead to a tangible employment action, given Title VII's statutory goals of "promot[ing] conciliation rather than litigation" and "encouraging employees to report harassing conduct before it becomes severe or pervasive." Id. at 764. Therefore, the Ellerth Court held that the "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." Id. at 765. Unlike the strict liability when a tangible employment action has occurred, the employer can raise an affirmative defense to vicarious liability:

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.

Id.; accord Faragher, 524 U.S. at 807 (citing Ellerth). The first element can be satisfied by showing that the employer had an effective or reasonable mechanism for deterring and

remediating workplace discrimination and harassment; the second element can be satisfied by showing that the plaintiff did not proceed with or exhaust the internal processes before proceeding to litigation. It is probable that the determination of (1) whether the employer's anti-discrimination and anti-harassment policies were "reasonable" and (2) whether the plaintiff was "unreasonable" in failing to invoke these policies will require considerable judicial analysis of the underlying facts. In some cases, it will be obvious that the affirmative defense will fail, *e.g.*, as in Faragher itself, where the employer had "entirely failed to disseminate its policy against sexual harassment among the beach employees" and this "policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints." Faragher, 524 U.S. at 808 ("we hold as a matter of law that the [defendant] could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct").

Therefore, practitioners representing employees should advise their clients to exhaust all internal remedies, unless it is patently obvious that such procedures would be useless, would lead to reprisal, or are nonexistent. Similarly, practitioners representing employers should advise their clients to implement and disseminate effective anti-discrimination and anti-harassment policies. The EEOC provides Technical Assistance Program Seminars ("TAPS") and customized training programs designed to "provide practical, how-to-do-it information and assistance to encourage voluntary compliance with Federal laws prohibiting job discrimination based on race, color, religion, national origin, sex, age or disability." EEOC, "Technical Assistance and Training Programs" <<http://www.eeoc.gov/outreach/taps.html>>. The EEOC issued a comprehensive enforcement guidance document that applies Ellerth/Faragher to the workplace. EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 18, 1999) <<http://www.eeoc.gov/docs/harassment.html>>. Private consultants also provide workplace training.

The Supreme Court also recognized the possibility that discrimination or harassment may occur "where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer." Ellerth, 524 U.S. at 757. Although seemingly improbable, this has occurred. *See, e.g., Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 802-03 (D. Or. 1998) ("Templeton believed that employees who were more relaxed were more productive. Thus, Templeton believed the sexual atmosphere he created benefitted his employer. Stradley also testified that the sexual conduct was designed to 'release tension.' When a management level employee creates a sexualized atmosphere in the workplace as a management technique designed, at least in part, to benefit the employer, the conduct is within the scope of employment."); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1075 (M.D. Ala. 1991) ("The evidence convinces the court that the department has a policy of discouraging



women from remaining in the department and seeking advancement . . . and that sexual harassment was simply a way of furthering that policy.”); see generally *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 152 (3d Cir. 1999) (“there may be cases in which a harasser thinks that he is doing what is best for his workforce when he deploys sexual harassment as a weapon to drive female workers away. . . . There are other cases in which sexual harassment seems fundamentally connected to the work situation, as when it is part of a campaign against women in nontraditional jobs.”) (collecting cases).

32. Is Constructive Discharge a Tangible Employment Action?

A key issue arising under the *Ellerth/Faragher* affirmative defense is whether a constructive discharge constitutes a “tangible employment action” (or “tangible adverse employment action”) that would preclude the availability of this defense to the defendant employer. The courts are split, with the better-reasoned view adopted by the majority of the courts being that constructive discharge falls within the scope of tangible employment actions under *Ellerth* and *Faragher*. The *Ellerth/Faragher* affirmative defense is not available when the employee suffered from an adverse employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); accord *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (citing *Ellerth*). The *Ellerth* Court stated that:

No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment.

*Ellerth*, 524 U.S. at 765 (emphasis added); accord *Faragher*, 524 U.S. at 808 (citing *Ellerth*). The key operative phrase is “such as” which probably should be read as descriptive or illustrative and not read as prescriptive or mandatory.

Among the federal appellate courts, the Third and Eighth Circuits have held that constructive discharge is a tangible employment action, while the Second and Sixth Circuits have held to the contrary. The district courts in the remaining circuits are similarly split.

(a) **Constructive Discharge Is a Tangible Employment Action.**

The first circuit court to consider this issue in the context of *Ellerth/Faragher* was the Third Circuit, which held that the scope of tangible employment actions should be read broadly:

The concept of tangible adverse employment action is not limited to changes in compensation, although [plaintiff's] pay was certainly affected by the actions taken against her. "Tangible adverse employment action" includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job . . .

Durham Life Ins. Co. v. Evans, 166 F.3d 139, 144 (3d Cir. 1999). In Evans, the plaintiff lost her office, her secretary, her files, and was given work assignments leading to a fifty percent pay decrease, upon which she resigned; the court held that these actions that lead to her constructive discharge "are tangible adverse employment actions under Ellerth and Faragher." Id. at 154.

More recently the Third Circuit held that constructive discharge, if proven, was a tangible employment action that forecloses the affirmative defense. Suders v. Easton, 325 F.3d 432 (3d Cir. 2003); see also S. Duffy, "'Constructive Discharge' Bars Use of 'Faragher/Ellerth' Defense," Legal Intelligencer (Phila.), Apr. 17, 2003. The Third Circuit followed the approach of the Eighth Circuit, *infra*, and expressly rejected the contrary holdings of the Second and Sixth Circuits, *infra*, as being contrary to Ellerth and Faragher:

Our decision is based on the following observations: . . . holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in Ellerth and Faragher and to our own Title VII jurisprudence.

Suders, 325 F.3d at 454. To hold otherwise would create perverse incentive for the employer:

In that regard, we emphasize that removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment. . . . Under such a rule, the temptation of employers to preserve their affirmative defense would be overwhelming in many situations. Some employers might wish for an employee to quit voluntarily; others might even tacitly approve of increased harassment to achieve that result.

Id. at 461. Similarly, the Eighth Circuit held, without further discussion, that "constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the affirmative defense." Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 966 (8th Cir. 2002) (citing Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020, 1026 (8th Cir. 2001)); see also

Spears v. Missouri Dep't of Corrections & Human Res., 210 F.3d 850, 854 n.3 (8th Cir. 2000) (“a constructive discharge may constitute an adverse employment action”); Breeding v. Arthur v. Gallagher & Co., 164 F.3d 1151, 1158 n.1 (8th Cir. 1999) (“a constructive discharge claim could satisfy the element of an adverse employment action”).

The Fourth Circuit, in ambiguous dicta in an unpublished decision, left open the possibility that a constructive discharge might constitute a tangible employment action. See Bailey v. ManorCare Health Services, Inc., No. 98-2736, 203 F.3d 819 (table), 2000 WL 135105 (4th Cir. Feb. 7, 2000). In Bailey, the court upheld summary judgment in favor of the employer, explaining that “ManorCare noted that Bailey never experienced any tangible adverse employment action as a result of the alleged harassment. Bailey’s contention that she was constructively discharged was belied by her attempt to return to work. . . .” Id. at \*1. The court used the plaintiff’s failure to prove constructive discharge to support the employer’s assertion that there was no tangible employment action. This implies that the Fourth Circuit might find that constructive discharge, if proven, would constitute a tangible employment action.

The Eleventh Circuit, in cases that were decided before Ellerth and Faragher, has held that “constructive discharge qualifies as an adverse employment decision.” Poole v. Country Club of Columbus, Inc., 129 F.3d 551, 553 n.2 (11th Cir. 1997) (collecting cases).

The majority of district courts have ruled that if the plaintiff proved, or could prove, that she was constructively discharged, then there was or would be a tangible employment action that would preclude the Ellerth/Faragher affirmative defense. See, e.g., Vasquez v. Atrium Door & Window Co. of Ariz., Inc., 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002); Rousselle v. GTE Directories Corp., 85 F. Supp. 2d 1286, 1292 (M.D. Fla. 2000); Bevilacqua v. Cubby Bear, Ltd., No. 98 C 7568, 2000 WL 152135, at \*5 (N.D. Ill. Feb. 4, 2000); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160 (N.D. Iowa 2000); Watson v. Lucent Techs., 92 F. Supp. 2d 1129, 1135 (D. Kan. 2000); Price v. Delaware Dep't of Correction, 40 F. Supp. 2d 544, 553 (D. Del. 1999); Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1383, (S.D. Ga. 1998); Lintz v. American Gen. Fin., Inc., 50 F. Supp. 2d 1074, 1084 (D. Kan. 1999); Delazaro v. Lehigh Univ., 79 FEP Cases 256, 259 (E.D. Pa. 1998); Galloway v. Matagorda County, Tex., 35 F. Supp. 2d 952, 957 (S.D. Tex. 1999); Leslie v. United Tech. Corp., 51 F. Supp. 2d 1332, 1345-46 (S.D. Fla. 1998); Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 803 (D. Or. 1998).

Several other courts have indicated that if a plaintiff had properly pled or successfully proved a constructive discharge claim, then she could use that as a bar to defendants’ invocation of the affirmative defense. See Guerra v. Editorial Televisa-USA, Inc., 80 FEP Cases 463, 469

(S.D. Fla. 1999); Marsicano v. American Soc’y of Safety Engr’s, No. 97 C 7819, 1998 WL 603128, at \*6 (N.D. Ill. Sept. 4, 1998). Cf. Montero v. Agco Corp., 192 F.3d 856, 861 (9th Cir. 1999) (“We need not decide whether a constructive discharge can be a ‘tangible employment action’ for the purposes of a Faragher analysis, because Plaintiff was not constructively discharged.”); EEOC v. Barton Protective Serv., Inc., 47 F. Supp. 2d 57, 60 (D.D.C. 1999) (“In the context of this case, [the employee’s] claim of constructive discharge thus would not amount to a tangible employment action even if proven.”).

**(b) Constructive Discharge Sometimes Can Be a Tangible Employment Action.**

Several district courts have suggested that constructive discharge, in some circumstances, will qualify as a tangible employment action, depending upon the events giving rise to the constructive discharge. These courts look to the nature of the harassment that led to the resignation and analyze whether the harassment was such that it could only have been carried out by a supervisor, as opposed to a co-worker. Compare Troendle v. Yellow Freight, Inc., C.A. No. 97-CV-2430, 1999 WL 89747 (E.D. Pa. Feb. 2, 1999) (constructive discharge would be a tangible employment action) with Jackson v. T & N Van Serv., 86 F. Supp. 2d 497 (E.D. Pa. 2000) (actions did not rise to the level of constructive discharge because harassment not enabled because of supervisory authority) and Elmasry v. Veith, C. No. 98-696-JD, 2000 WL 1466104, \*5 (D.N.H. Jan. 7, 2000) (plaintiff had been harassed by her supervisor, but there was no evidence that the supervisor had used his official authority to harass her, then his actions leading to her alleged constructive discharge would not amount to a tangible employment action).

**(c) Constructive Discharge Is Not a Tangible Employment Action.**

Only one circuit court, the Second Circuit, has held in a published decision that constructive discharge is not a tangible employment action under Ellerth and Faragher. See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999). In Caridad, the court stated that “constructive discharge is not a tangible employment action warranting the imposition of strict liability under the Ellerth/Faragher standard.” Id. at 295. The Second Circuit emphasized the Supreme Court’s discussion of agency principles in Ellerth and Faragher. Id. at 294. The court explained that either co-workers or supervisors can cause constructive discharge, and stated that constructive discharge, “unlike demotion, discharge or similar economic sanctions . . . is not ratified or approved by the employer.” Id. The court also emphasized the fact that Ms. Ellerth had originally made a constructive discharge claim and noted that the Supreme Court had stated that “Ellerth has not alleged she suffered a tangible employment action.” Id. at 295 (quoting Ellerth, 524 U.S. at 766). The Sixth Circuit, in an unpublished

decision, has taken the same approach. Turner v. Dow Brands, Inc., No. 99-3984, 221 F.3d 1336 (table), 2000 WL 924599, at \*1 (6th Cir. June 26, 2000) (per curiam).

The Second Circuit's approach is problematic for several reasons. First, although either supervisors or co-workers can cause the constructive discharge of an employee, the strict liability set forth in Ellerth and Faragher was only intended to apply in those cases where a supervisor is harassing a subordinate. If the plaintiff alleges constructive discharge as a result of harassment by co-workers (or customers), then the traditional negligence standard for employer liability applies, and the Ellerth/Faragher affirmative defense is inapplicable.

Second, there are cases in which the constructive discharge is clearly ratified or approved by the employer. In Evans, constructive discharge came about through official acts; the employer took away the plaintiff's secretary and office. Evans, 166 F.3d at 153-54. In Troendle, the employer reassigned the plaintiff to hours that she could not work. Troendle, 1999 WL 89747, at \*1. These two cases exemplify constructive discharges that required some level of ratification by the employer.

Finally, the Second Circuit's reliance on Ms. Ellerth's constructive discharge claim is misplaced. Though Ellerth did commence with, inter alia, a constructive discharge claim, this claim was dismissed by the district court, does not appear to have been addressed by the circuit court and was apparently not part of her request for Supreme Court review. The Supreme Court granted certiorari solely to decide whether there was liability when an employee had not suffered a tangible employment action. Ellerth, 524 U.S. at 751. Thus the Court did not reach the question of whether constructive discharge was a tangible employment action.

Several district courts have also held that constructive discharge is not a tangible employment action, several having considered Ms. Ellerth's allegation of constructive discharge to be determinative, though, as explained above, the Supreme Court did not address her constructive discharge claim. Reynolds v. Golden Corral Corp., 106 F. Supp. 2d 1243, 1249 (M.D. Ala. 1999), aff'd 213 F.3d 1344 (11th Cir. 2000) (per curiam); Desmarteau v. City of Wichita, Kan., 64 F. Supp. 2d 1067, 1078 (D. Kan. 1999); Dunegan v. City of Council Grove, Kan., 77 F. Supp. 2d 1192, 1200 (D. Kan. 1999); Scott v. Ameritex Yarn, 72 F. Supp. 2d 587, 594 (D.S.C. 1999); Alberter v. McDonald's Corp., 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999); Powell v. Morris, 37 F. Supp. 2d 1011, 1019-20 (S.D. Ohio 1999).

In sum, the majority of courts that have dealt with this issue, including the Third, Fourth and Eighth Circuits, have held or stated in dicta that constructive discharge is a tangible

employment action in some, if not all, circumstances. These courts recognize that the examples presented in Ellerth and Faragher are only illustrative, intended to provide guidance in understanding the metes and bounds of tangible employment actions, but are not intended to limit those actions to those few mentioned by name in those two opinions.

A complicating factor is that constructive discharge can occur as a result of harassment by supervisors, co-workers, or both. Only if the plaintiff alleges constructive discharge resulting from harassment by her supervisor(s) should the court determine whether this constitutes a tangible employment action to allow the employer to invoke the vicarious defense to employer liability. Otherwise, if the plaintiff alleges constructive discharge solely as a result of harassment by co-workers (or customers), then the traditional negligence standard for employer liability applies, and the Ellerth/Faragher affirmative defense is inapplicable.

### 33. How the Federal Courts Have Applied the Affirmative Defense.

The lower courts have had to determine whether the defendant employer can invoke the affirmative defense when there has been no tangible employment action. Most of the case law in the late 1990s has been decided by the district courts; the circuit courts who have considered this defense typically remanded the case for further proceedings, since the underlying evidentiary record, if assembled prior to these June 1998 decisions, did not address this defense. *See, e.g., Allen*, 165 F.3d at 412 (remanding “for a determination regarding [defendant’s] affirmative defense to liability”); *Wright-Simmons*, 155 F.3d at 1271 (same).

The defendant employer may move for summary judgment on the harassment claim, arguing that it has satisfied this affirmative defense. However, where there are disputed factual issues concerning the elements of this defense, then summary judgment will be inappropriate. *See, e.g., Dees v. Johnson Controls World Serv., Inc.*, 168 F.3d 417, 423 (11th Cir. 1999) (“We thus conclude that these allegations are sufficient to raise an issue of material fact as to whether [defendant] is both directly and vicariously liable for Dees’ abuse, and that the district court inappropriately granted summary judgment in favor of [defendant].”). The Eleventh Circuit concluded that the plaintiff had made two allegations regarding her prior complaints of sexual harassment, yet the defendants had done nothing in response. *Id.* at 422-23.

The district courts have also denied such motions under similar circumstances. *See, e.g., DeWitt v. Lieberman*, 48 F. Supp. 2d 280, 292 (S.D.N.Y. 1999) (“Given the timing and nature of plaintiff’s complaints, whether she failed to notify HFA of Lieberman’s sexual harassment in a manner reasonably calculated to put HFA on notice of his misconduct is a question of fact that

must be decided by a jury.”); Powell v. Morris, 37 F. Supp. 2d 1011, 1020 (S.D. Ohio 1999) (“even if Defendants could establish that Plaintiff did not take advantage of the available procedures, the question remains whether her failure to do so was *reasonable* or not.”); Vandermeer v. Douglas County, 15 F. Supp. 2d 970, 981 (D. Nev. 1998) (“plaintiffs have argued that they had legitimate reasons for not reporting Stangle’s behavior, including a belief that his supervisors already knew about it, and had done nothing, it will be up to the trier of fact to determine whether or not the plaintiffs did act reasonably.”); Ponticelli v. Zurich Am. Ins. Group, 16 F. Supp. 2d 414, 431-32 (S.D.N.Y. 1998) (existence of “factual dispute” and “triable issues of fact” make summary judgment inappropriate).

One sexual harassment case is remarkable for the contrast between the defendant employer’s policy, which appeared to be reasonable, and the rationales for its promulgation. Cadena v. The Pacesetter Corp., 30 F. Supp. 2d 1333, 1339 (D. Kan. 1998). The employer claimed “that it promulgated a policy against sexual harassment, including a complaint procedure, and that this policy was included in the employee handbook. Further, defendant notes that it sent its managers periodic reminders concerning sexual harassment and provided sexual harassment training for all employees, including a videotape aired for employees.” Id. The court recognized that while this looked good on its face, “a closer look reveals flaws in defendant’s evidence.” Defendant’s counsel sent a memo which started with:

The highly publicized confirmation hearings for Clarence Thomas did much to place before the public the emotionally charged issues of sexual harassment. Although the charge did not ultimately block the judge’s confirmation, the hearings created an ‘emergency’ atmosphere on Capital [sic] Hill. The most strident of the feminists actually managed to grasp victory out of the jaws of defeat by playing upon this crisis mentality to bully Congress and President Bush into enacting the Civil Rights Act of 1991. . . . The price tag for any type of sexual harassment has been increased significantly.

Id. The court concluded that “this sexual harassment policy memoranda include[s] statements that appear to mock the right of female employees to be free from sexual harassment.” Id. at 1341. The court further noted that notwithstanding its alleged policy, the employer took no action in response to plaintiff’s complaints, other than to tell the plaintiff “that she was an attractive young lady and that she should construe [her supervisor’s] conduct as a compliment [and] that [her supervisor] made a lot of money for the company and even suggested that she should feel sorry for [him] because his eyesight was failing.” Id. at 1339.

The following appellate court cases are representative of those holding that the defendant employer did satisfy the affirmative defense.

Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001). The plaintiff went on a business trip with her supervisor (Ramsey), a Vice President. During this trip, Ramsey (1) “told Barrett sexually provocative stories and unsuccessfully attempted to engage her in sexually explicit conversation;” (2) “harassed Barrett by propositioning her, grabbing her, and kissing her on the mouth;” and (3) “directed vulgar, threatening, and offensive comments to her.” Id. at 264. After the trip, Ramsey “repeatedly propositioned Barrett, showed her pornographic pictures, attempted to engage her in sexually explicit conversation, and touched her without permission.” Id. Ms. Barrett told “at least seven other ARECO employees, the CEO’s son, a counselor, a police officer, and two lawyers” about Ramsey’s conduct, but did not report this to any of the twelve ARECO managers who were designated in ARECO’s anti-harassment policy as those to whom complaints can be made. Id. at 265. Meanwhile, ARECO was independently investigating Ramsey’s telephone usage through which it was discovered that Ramsey was harassing Barrett; after this was confirmed by an outside investigative firm, Ramsey was fired within a week of ARECO’s discovery of his harassment. Id. Ms. Barrett never filed a complaint pursuant to ARECO’s anti-harassment policy, and only filed a complaint with the EEOC. Id.

The Fourth Circuit held that the employer was entitled to the affirmative defense, because Ms. Barrett unreasonably failed to invoke the anti-harassment policy, since she never reported the harassment to any of the twelve managers. Id. at 266-67. The Fourth Circuit rejected her claims that ARECO must have had notice “because she told so many of her co-workers about Ramsey’s behavior,” because she “has no evidence, however, that her conversations with her colleagues filtered up to management,” and “it is undisputed that she never told management herself.” Id. at 267. Further, Ms. Barrett’s generalized fear of retaliation based on the close friendships between Ramsey and other corporate managers was “does not excuse a failure to report sexual harassment,” particularly where the anti-retaliation provision of Title VII provides a remedy should any such retaliation occur. Id. Indeed, “if Barrett could bring herself to tell two lawyers, seven colleagues, and the CEO’s son about Ramsey’s harassment, there is no reason why she could not inform one of the many managers designated to receive a sexual harassment complaint.” Id. at 268-69. Thus, the Fourth Circuit affirmed the district court’s grant of judgment notwithstanding the verdict because ARECO satisfied the affirmative defense.

Matvia v. Bald Head Is. Mgmt., Inc., 259 F.3d 261 (4th Cir. 2001). The plaintiff, a maintenance worker, alleged a series of “unwanted attentions” from her supervisor (Terbush), including where he: (1) “approached Matvia, said he needed a hug, and proceeded to hug her;”



(2) “informed Matvia that he no longer had sexual relations with his wife;” (3) “placed a pornographic picture on Matvia’s desk;” (4) “told Matvia she looked good enough to eat;” (5) “frequently placed his arm around Matvia when they were riding in a golf cart and massaged her shoulder;” (6) “repeatedly told Matvia that he loved her and had a crush on her;” (7) “on December 10, 1997, told Matvia that he had a dream that she sued him for sexual harassment and warned her that if she did bring suit she would be in big trouble;” and (8) “five days after recounting his dream, pulled Matvia close to him in the golf cart, tried to kiss her, and struggled with Matvia until she was able to escape.” *Id.* at 265. Ms. Matvia became ill and went home early after the last incident. On December 16, Terbush told his managers “what had happened in the cart and was suspended pending an investigation.” *Id.* Ms. Matvia “participated in the investigation and also pressed criminal charges against Terbush. On December 31 [1997], BHIM fired Terbush for sexually harassing Matvia.” *Id.* In addition to claiming sexual harassment by Terbush, Ms. Matvia alleged that she was ostracized by her co-workers and management after Terbush was suspended. *Id.* at 266.

The Fourth Circuit affirmed the district court’s grant of summary judgment on Ms. Matvia’s sexual harassment claims because the employer satisfied the affirmative defense to liability. Critically, the employer “suspended Terbush without pay four days after he attempted to kiss Matvia” and terminated Terbush “twelve days later, after completing an investigation.” *Id.* at 268. The Fourth Circuit rejected Ms. Matvia’s claim that the employer’s failure to prevent the subsequent ostracism by her co-workers negated the affirmative defense, because this ostracism was not sexual harassment. *Id.* at 269. The Fourth Circuit also rejected Ms. Matvia’s claim that she did not file a complaint with the employer because “she needed time to collect evidence against Terbush so company officials would believe her,” since *Faragher* and *Ellerth* “command that a victim of sexual harassment report the misconduct, not investigate, gather evidence and then approach company officials.” *Id.* Where, as here, there was a “pattern of behavior beginning in September 1997 and ending December 15,” and Ms. Matvia frequently rebuffed Terbush throughout that period, then her non-reporting was inexcusable. *Id.* at 270.

*Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971-72 (5th Cir. 1999). Here, the plaintiff had been harassed by her school principal, but during the course of an investigation prompted by an anonymous letter (not written by plaintiff), the plaintiff “denied that [the principal’s] conduct was sexually harassing or vulgar, and she did not inform [defendant] of [the principal’s] sexually harassing actions towards her.” *Id.* at 970. As a result of this investigation, the district was unable to find evidence of sexual harassment. Subsequently, the plaintiff filed a harassment complaint with the district, which led to a renewed investigation culminating with the principal’s termination. The Fifth Circuit upheld the dismissal of the plaintiff’s Title VII action

on the grounds that since she lied during the initial investigation, she was “failing to inform [defendant] of [the principal’s] conduct when given an express opportunity, [thus she] acted unreasonably.” *Id.* at 971. Thus, “when an employer initiates a good-faith investigation of charges of discrimination, it must be able to rely on the evidence it collects. By misleading investigators, [plaintiff] thwarted the purposes of Title VII and frustrated [defendant’s] efforts to remedy past misconduct and prevent future harassment by [the principal].” *Id.* at 971-72.

Similarly, the Seventh Circuit found that the plaintiff had not properly availed herself of the employer’s anti-harassment procedures. *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1038 (7th Cir. 1998). Here, the plaintiff had complained about sexual harassment to a Mr. Spellman, who was not a supervisor and had no supervisory authority. Thus, “Spellman was not a person who could reasonably be expected to refer complaints of sexual harassment to the appropriate people. His limited duties and authority . . . made it unreasonable for [plaintiff] to believe that Spellman was the type of employee who could be expected to convey her complaints to someone who could stop the harassment.” *Id.* Thus, the Seventh Circuit concluded that after the plaintiff had realized that her complaints to Spellman and another foreman had “failed to alleviate the harassment” that she should have pursued other opportunities to complain. *Id.* (“A reasonable person, realizing that her complaints were ineffective, would then seek a remedy elsewhere.”). The Seventh Circuit affirmed summary judgment to the employer on the grounds that it had satisfied the *Ellerth/Faragher* affirmative defense. *Id.* at 1040. The Eleventh Circuit also affirmed the grant of summary judgment to the defendants, where the plaintiff’s complaints were too generalized and hence insufficient to place the defendant employer on notice of the alleged harassing conduct. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364-66 (11th Cir. 1999) (*per curiam*). As the Eleventh Circuit concluded: “When an employer has taken steps, such as promulgating a considered sexual harassment policy to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer’s directives have been breached so that the employer has the opportunity to correct the problem.” *Id.* at 1366.

The following district court cases are representative of those holding that the defendant employer satisfied the affirmative defense.

*Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 625-26 (D. Md. 2001) (because (1) there was an anti-harassment policy; and (2) the employer promptly conducted an investigation and disciplined the harassing supervisor, that the employer was entitled to invoke the affirmative defense and summary judgment in its favor would be entered); *O’Dell v. Trans World Entertainment Corp.*, 153 F. Supp. 2d 378, 390 (S.D.N.Y. 2001) (“Having refused to cooperate with Trans World’s investigation, thereby undermining its legitimacy, plaintiff cannot now claim

that defendant's investigation and sexual harassment procedures were ineffective."); Masson v. School Bd. of Dade County, 36 F. Supp. 2d 1354, 1359 (S.D. Fla. 1999) ("it is undisputed that [plaintiff] never took advantage of the School Board policy and never filed a complaint . . . . [Plaintiff] never argues that she was unaware of the policy and does not assert any reason why she chose not to follow its procedures."); Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 1203 (D. Col. 1998) (plaintiff "states she received the [Employee] Handbook, remembered looking over the sexual harassment policy, understood Denny's policy and what constituted sexual harassment, and knew the channels through which she could complain;" plaintiff did not allegedly complain until after she transferred to another facility, yet there was no evidence that her complaint, to the corporate "800" number, had actually been made); Madray v. Publix Super Markets, Inc., 30 F. Supp. 2d 1371, 1376 (S.D. Fla. 1998) ("Armed with the knowledge contained in the policy manual, which they chose not to follow, plaintiffs unreasonably failed to take advantage of preventative or corrective opportunities provided by [defendant]."); Fiscus v. Triumph Group Operations, Inc., 24 F. Supp. 2d 1229, 1240-41 (D. Kan. 1998) (Defendant "obviously had a written anti-harassment policy in place, which directed [plaintiffs] to any number of company officials for the communication of a complaint. The company also condemned harassing behavior in a public forum and conducted anti-harassment workshops / training for its supervisors. . . . Given [defendant's] responsive track record, it is evident that [plaintiffs] had a viable path to take to resolve any harassment issues. To decline to follow policy therefore constituted an unreasonable failure to take advantage of the preventive or corrective opportunities made available to them by [defendant]."); Patterson v. SEK-CAP, Inc., 29 F. Supp. 2d 1248, 1253 (D. Kan. 1998) ("it is uncontroverted that defendant had a procedure in place for dealing with harassment claims. Garrison acted promptly to investigate [plaintiff's] claims when they were first brought to his attention. [Plaintiff], in contrast, never raised any claims of harassment against [her supervisor] until after she left work in September, 1993, and even then failed to assist in the investigation by showing Garrison copies of her 'documentation.'"); Ponder v. Rochester Gen. Hosp., 29 F. Supp. 2d 147, 151 (W.D.N.Y. 1998) ("defendant did everything possible to immediately investigate and resolve plaintiff's complaints; however, plaintiff failed to provide sufficient information or cooperate with the reasonable measures advanced by defendant's [officers]"); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 491-93 (S.D.N.Y. 1998) (first element met since "it is undisputed that Saks had an antiharassment policy and that complaint procedures were readily available to [plaintiff];" second element also met since the plaintiff's only reasons for not reporting were "conclusory allegations of feared repercussions"); Landrau-Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185, 191-92 (D.P.R. 1998) ("It is also undisputed that defendant had a policy against sexual harassment and a mechanism in place to deal with any claims of sexual harassment by employees. . . . it is not contested that plaintiff received a copy of the sexual harassment policy

and signed a receipt to that effect. It is also not contested that plaintiff successfully completed [defendant's] training protection which ordinarily entails a lecture on the sexual harassment policy;" and plaintiff himself never complained about the alleged sexual harassment).

The following federal appellate circuit court cases are representative of those holding that the defendant employer did not satisfy the affirmative defense.

Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 2001). The Seventh Circuit affirmed the jury award (\$25,000) to the plaintiff on her Title VII hostile environment sexual harassment claim. The employee, who was an administrative assistant, claimed that her supervisor repeatedly harassed her during a four month period, including (1) "40 hugs, 15 shoulder rubs, a kiss on her cheek, and two instances where [supervisor] petted her cheeks;" (2) inquiring "about her staying the night with him" and saying "that her clothes would look better on the floor;" (3) "asked her to 'try out the back counter' with him;" (4) giving "her a single page 'World of Love 1997, Mexico' calendar that depicted cartoon drawings of different sexual positions, one for each day," and asking "her to pick out a couple of her favorite days." Id. at 845. In addition, her second-level supervisor said, in her presence, that "she was going to become a 'sex'retary." Id.

The Seventh Circuit rejected the employer's invocation of the Ellerth/Faragher affirmative defense, because the employer's sexual harassment policy did not specify the identity of the "Human Resource Representative" to whom complaints were to be made, and the defendant's own witnesses presented conflicting testimony as to who served in this position. Id. at 847-48. Even if the policy were adequate, the corrective actions were held to be inadequate. For example, when the plaintiff complained to the Benefits Coordinator (a woman) about her supervisor's conduct, and her concerns that this conduct was causing other workers to gossip about her, this person initially told the employee "that she should develop a thick skin" and later said that they couldn't change the supervisor: "this was his personality, that was how he worked. He had been there for years type thing. There was really nothing that had ever been done about it and she didn't think that there ever [would be]." Id. at 848-49.

Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864 (9th Cir. 2001). In this case, which involved sexually derogatory remarks about a restaurant employee, the Ninth Circuit held that the employer's failure to investigate and remedy the sexual harassment meant that the employer was not entitled to invoke the affirmative defense with respect to the supervisor's harassment of the plaintiff. Although Azteca Restaurant had policies in place, its response to Mr. Sanchez's repeated complaints of sexual harassment were merely to ask him to inform the

manager if any offensive conduct recurred. Id. at 876. Critically, the employer “made no effort to investigate Sanchez’s complaint; it did not discuss his allegations with the perpetrators; it did not demand that the unwelcome conduct cease; and it did not threaten more serious discipline in the event the harassment continued.” Id. The result is that “by conditioning its response on Sanchez’s reports of further harassment, Azteca placed virtually all of its remedial burden on the victimized employee.” Id. Thus, the Ninth Circuit held that “Azteca did not exercise reasonable care to promptly correct the sexually harassing behavior directed at Sanchez, and therefore cannot assert the affirmative defense,” and is therefore “liable for the hostile environment created by its supervisor.” Id. at 877.

Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1027-28 (10th Cir. 2001) (“the evidence indicates that non-supervisory personnel were not provided with copies of the [harassment and discrimination] policy, nor were copies of the policy posted on all of the bulletin boards . . . . More importantly, the evidence strongly suggests that . . . the policy was largely ignored. Brown, the harasser in this case, testified without contradiction that no mention was made of the policy . . . and that no seminars on the subject of sexual harassment were ever held.”).

Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 118 (3d Cir. 1999) (“The proof at trial focused extensively on what the [defendants] did and failed to do about the harassment — issuing written policies but not enforcing them, painting over offensive graffiti every few months only to see it go up again in minutes, failing to investigate sexual harassment as it investigated and punished other forms of misconduct. . . . [defendants] failed to make a colorable case that its policies met the Ellerth/Faragher standards.”).

Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1242 (10th Cir. 1999) (although “plaintiff made numerous complaints to supervisors and other management personnel,” defendants had a “lackadaisical attitude towards the harassment;” there was only a “small amount of training given the employees [which] was inadequate in light of the severity of the problem;” and the “investigation conducted by defendant was a sham”).

Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2d Cir. 1998) (harassment reported to a supervisor, who “did not follow company policy that required him to report [plaintiff’s] complaints to Human Resources. This failure to comply with the company’s own reporting requirements is evidence tending to show that the company’s response was inadequate.”).

Wilson v. Tulsa Jr. College, 164 F.3d 534, 541-42 (10th Cir. 1998) (defendant’s policy was inadequate, since complaints could not be reported on evenings or weekends, when many

students and employees were on the campuses; and supervisors were not told of their obligations to report informal complaints).

The following district court cases are representative of those holding that the defendant employer did not satisfy the affirmative defense. Carney v. City of Shawnee, 38 F. Supp. 2d 905, 911-12 (D. Kan. 1999) (defendant “had not adopted an appropriate anti-harassment policy and complaint reporting procedure;” defendant “did not regularly communicate its sexual harassment policy to police department employees -- the policy was not posted and was not discussed in any police officer training sessions.”); Glickstein v. Neshaminy Sch. Dist., 80 FEP Cases 67, 78 (E.D. Pa. 1999) (plaintiff “presented sufficient evidence to suggest that the School District did not exercise reasonable care in attempting to avoid or remedy Melley’s actions” since the “‘point man’ designated to receive all complaints of sexual harassment . . . was a good friend of the harasser, Melley . . . [and] would defend Melley’s actions. Furthermore, [plaintiff’s] attempts to go around Jones as the point man were constantly thwarted by school administrators who simply told [plaintiff] to see Jones or to confront Melley himself.”); Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 882-83 (N.D. Ind. 1998) (Defendant “had actual notice . . . that Cohen [the Chancellor] had a history of inappropriate sexual behavior towards female IUSB employees prior to the incident with the Plaintiff” thus making summary judgment inappropriate); Cadena v. The Pacesetter Corp., 30 F. Supp. 2d 1333, 1339-40 (D. Kan. 1998) (plaintiff notified defendant twice, with no action taken the first time, and defendant waited two weeks before responding the second time; thus plaintiff’s delay in reporting other incidents was reasonable, given defendant’s refusal to act upon her first report); Lancaster v. Sheffler Enter., 19 F. Supp. 2d 1000, 1003-04 (W.D. Mo. 1998) (defendant’s mere issuance of a sexual harassment policy without further implementation was inadequate; plaintiff had complained on several occasions so defendants were on notice); Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 821-24 (W.D.N.Y. 1998) (plaintiff complained “almost daily” about the harassment; “defendant also concedes that no anti-harassment policy existed at the time” nor was there “any mandatory anti-harassment training until more than one year after [the supervisor] admitted to the harassment;” defendants took no or insufficient disciplinary actions against the harasser); Miller v. D.F. Zee’s, Inc., 31 F. Supp. 2d 792, 803 (D. Or. 1998) (“There is evidence that defendants had no written policy against sexual harassment, there were no complaint procedures in place, when defendants knew of sexual harassment they took no action, sexual harassment was continuing in the workplace despite complaints, and management level employees gave instructions to ‘make life so miserable’ for those complaining of sexual harassment that they would quit.”).

A key issue regarding the second prong of the affirmative defense is whether plaintiff's delay in reporting the harassing conduct was reasonable. Otherwise, the court will find that the plaintiff had unreasonably delayed in reporting the conduct, and the employer will be able to satisfy the second prong. One court recognized that the plaintiff need not report harassing remarks when they are first made, and can wait until the harassment "became virtually impossible to ignore." Corcoran v. Shoney's Colonial, Inc., 24 F. Supp. 2d 601, 607-08 (W.D. Va. 1998) (plaintiff did not complain at time of the first remark, and waited seven months, during which the harassment escalated, before complaining); accord Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) ("Watts alleges that her supervisor's harassment intensified in the spring of 1994. A jury could find that waiting until July of that same year before complaining is not unreasonable."); Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 885 (N.D. Ind. 1998) ("the Court cannot say as a matter of law that a sexual assault victim who waits three months to report the incident, under these circumstances, unreasonably failed to take advantage of the University's anti-harassment procedures."). But see Montero v. AGCO Corp., 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998) ("Plaintiff's explanation [fear of retaliation] is insufficient to justify waiting nearly two years to report the alleged conduct."). The burden of proof is on the defendant to show that "a reasonable person in [plaintiff's] position would have come forward early enough to prevent [her supervisor's] harassment from becoming 'severe or pervasive.'" Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999).

A second key issue is whether plaintiff's fear of reprisal for complaining about harassment would excuse delays in reporting, or not reporting at all. Compare Madray, 30 F. Supp. 2d at 1376 ("To permit an employee to disregard a policy of which she was admittedly aware based on generalized fears would require an employer to be automatically liable for harassment committed by a supervisor.") and Fierro, 13 F. Supp. 2d at 492 ("However, to allow an employee to circumvent the reasonable complaint requirements of Faragher and Burlington, by making conclusory allegations of feared repercussions would effectively eviscerate an affirmative defense which the Supreme Court clearly went to great effort to craft in order to stem the tide of unwarranted lawsuits.") with Sharp v. City of Houston, 164 F.3d 923, 931 (5th Cir. 1999) (plaintiff "presented abundant evidence that to lodge such a complaint against a fellow officer was effectively forbidden by the code of silence") and Booker, 17 F. Supp. 2d at 747-48 (evidence showed an "atmosphere" where employees feared "retaliation" and "retribution" for complaining; hence it was reasonable for plaintiff not to report the harassment). As the Fifth Circuit remarked, a plaintiff may be faced with "an unfortunate dilemma: report the harassment and lose her career, or endure the harassment and lose her dignity." Sharp, 164 F.3d at 931.

Related to this issue is the employer's designation of the appropriate person(s) with whom complaints can be raised. Where the employer had designated only one person "as the individual to receive and investigate complaints" yet it was that very individual who had allegedly harassed the plaintiff, then it was a question of fact, inappropriate for summary judgment resolution, as to whether defendant had "exercised reasonable care" in implementing its anti-harassment policy. Ponticelli, 16 F. Supp. 2d at 431; see also Brandrup, 30 F. Supp. 2d at 1289 ("Instructing an employee to voice complaints directly to the supervisor that is allegedly responsible for the harassing behavior would not be a reasonable response to an employee's concerns and would contravene the spirit, if not the terms of [defendant's] own sexual harassment policy."). It can also be acceptable for the employee to pursue grievance channels other than those set forth by the employer, such as filing a union grievance. Watts v. Kroger Co., 170 F.3d 505, 511 (5th Cir. 1999) ("Taking advantage of the union grievance procedure falls within this language [Ellerth] because both the employer and union procedures are corrective mechanisms designed to avoid harm.").

A third key issue is whether the existence of an anti-harassment policy, including written procedures for processing complaints, is sufficient to satisfy the first prong of the affirmative defense, *i.e.*, the employer's duty of reasonable care. The Supreme Court recognized that: "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." Ellerth, 524 U.S. at 765; accord Faragher, 524 U.S. at 807 (citing Ellerth); see also Fierro, 13 F. Supp. 2d at 491 ("the employer's promulgation of 'an antiharassment policy with complaint procedure' is an important, if not dispositive, consideration"); Landrau-Romero, 14 F. Supp. 2d at 192 ("The Supreme Court in Faragher implied that issuance of an explicit antiharassment policy with a complaint procedure would satisfy the first prong . . . . In fact, the Court specified that such a policy is not necessary as a matter of law and that even a less obvious policy may sometimes suffice.").

The courts have recognized that merely having a policy alone, without any further reasonable steps to implement the policy, is legally insufficient to satisfy the employer's duty of reasonable care. See, e.g., Hollis, 28 F. Supp. 2d at 823 ("the policy does not contain any procedures for reporting or investigating complaints of sexual harassment"); Lancaster, 19 F. Supp. 2d at 1003 ("McDonald's had a sexual harassment policy, but there appears to be no evidence of the employer exercising reasonable care to prevent sexual harassment. Simply forcing all new employees to sign a policy does not constitute 'reasonable care.' The employer



must take reasonable steps in preventing, correcting and enforcing the policy. Reasonableness requires more than issuing a policy.”) (internal citations to Ellerth omitted).

A 1998 decision from the Fifth Circuit merits separate discussion, although it must be emphasized that the court’s discussion of the application of the affirmative defense is solely the opinion of one judge; the other two judges concurred only in the judgment (affirming the motion to dismiss and for judgment as a matter of law), and not in the reasoning of the opinion. See Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999). Judge Edith Jones, in her opinion, effectively concluded that the affirmative defense should be read in the disjunctive; i.e., the employer can satisfy its affirmative defense solely by proving the first prong, and not by proving both prongs. Judge Jones created a new legal doctrine, the “incipient hostile environment,” which, if “corrected by prompt remedial action,” she argued should not result in any liability for the employer. Id. at 265. Judge Jones stated that “Where the company, on hearing a plaintiff’s complaint about inappropriate sexual behavior, moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed.” Id. at 266. Thus, “if the plaintiff complains promptly, the then-incident misbehavior can be stymied before it erupts into a hostile environment, and no actionable Title VII violation will have occurred.” Id. at 267 (holding that defendant’s “prompt remedial response relieves it of Title VII vicarious liability.”).

Judge Wiener, although concurring in the judgment, wrote separately to express his strong disagreement with Judge Jones’ approach. See Indest v. Freeman Decorating, Inc., 168 F.3d 795 (5th Cir. 1999) (Opinion of Wiener, J.). Judge Wiener first noted that since the third judge on the panel “concur[s] only in the judgment of this case without concurring in Judge Jones’s opinion or mine, neither enjoys a quorum and thus neither writing constitutes precedent in this Circuit.” Id. at 796 n.1. Judge Wiener stated that the affirmative defense requires that the employer “prove *both* elements of the one and only affirmative defense now permitted by the court to escape vicarious liability.” Id. at 796. Judge Wiener noted that “it is undisputed that Freeman cannot satisfy the second element of this defense . . . Freeman is vicariously liable to Indest.” Id. Therefore, “Judge Jones’s exoneration of Freeman’s vicarious liability on but one element of the Court’s new and exclusive two-element, conjunctive defense cannot survive scrutiny under Ellerth/Faragher.” Id. at 797. Indeed, “Judge Jones would permit the employer’s extant grievance system and quick action to save the day *even when* the employee too timely takes appropriate steps. This cherry picking of but one of two conjoint elements of the defense flies directly in the face of identical statements to the contrary in each of the two Supreme Court opinions.” Id. at 801. The only reason that Judge Wiener concurred in the judgment is because

“the inappropriate conduct of the supervisor, Arnaudet, does not rise to the level of ‘severe or pervasive,’ and thus is not actionable for purposes of vicarious liability.” Id. at 806.

Again, since both opinions were “solo” efforts, their precedential value is nugatory. See Casiano v. AT&T Corp., 213 F.3d 278, 283 n. 2 (5th Cir. 2000) (“neither opinion precedential for lack of concurrences”). The Tenth Circuit has expressly rejected Judge Jones’ approach. See Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1026 (10th Cir. 2001) (“the reasoning of Indest is highly suspect and, in our view, should not be adopted”). Instead, the precedent in the Tenth Circuit, as for other circuits, is that district courts must apply the two-prong Ellerth and Faragher affirmative defense:

In doing so, we effectively rejected the position advanced in Indest, *i.e.*, that an employer’s prompt corrective action can be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee.

Id. It remains to be seen whether a full panel of the Fifth Circuit, or any other circuit, will adopt Judge Green’s reasoning in Indest.

#### 34. How the State Courts Have Applied the Affirmative Defense.

As of June 3, 2003, Ellerth and Faragher have been cited in 115 reported decisions by the courts of 27 states and the District of Columbia. Space and time constraints preclude a comprehensive survey of how these jurisdictions have applied the affirmative defense to state law claims. Hence, the foregoing discussion is limited to those few states that have not followed the Ellerth and Faragher affirmative defense, either because there is strict liability for supervisory harassment, or because the burden is on the plaintiff to prove that she promptly reported the harassment and that the employer failed to take proper remedial actions. Most state courts have followed Ellerth and Faragher, when they have applied it to state law claims.

In California, the Court of Appeal recently held, in a mandamus action, that under the California Fair Employment and Housing Act (“FEHA”), there was strict liability for supervisory harassment. Department of Health Servs. v. Superior Ct. of Sacramento Co., 113 Cal. Rptr. 2d 878, 94 Cal. App. 4th 14, 87 FEP Cases 481 (Cal. Ct. App. 3d Dist. 2001). The Court of Appeal distinguished liability under FEHA from Title VII, because the state statute only allows for an affirmative defense for harassment by a nonsupervisory coworker, and not for harassment by a supervisor or agent. Id., 113 Cal. Rptr. 2d at 884. The Court of Appeal rejected

the contrary approach taken by the Ninth Circuit in predicting how the California courts would adjudicate liability for supervisory harassment. *Id.* at 889 (rejecting the analysis of Kohler v. Inter-Tel Technologies, 244 F.3d 1167 (9th Cir. 2001)). However, on February 13, 2002, the Supreme Court of California granted the employer's petition for review, and the case is now pending before that court. Department of Health Servs. v. Sacramento County Super. Ct., 41 P.3d 1, 117 Cal. Rptr. 2d 166 (Cal. 2002). As of June 2003, this appeal is still pending (No. S103487); although the briefing is completed, no date has been set for oral argument.

In Illinois, the state appellate courts have held that there is strict liability under the Illinois Human Rights Act. Webb v. Lustig, 298 Ill. App. 3d 695, 700 N.E.2d 220 (Ill. App. 1998) (“Unlike Title VII, under which employers are not always automatically liable for sexual harassment, in Illinois the Act imposes strict liability on the employer regardless of whether the employer knew of the offending conduct.”) (collecting cases).

In Massachusetts, a federal district court concluded that, based on a 1987 appellate decision, there would be no affirmative defense for harassment claims arising under state law:

However, Massachusetts discrimination law does not recognize the affirmative defense articulated in Ellerth and Faragher. The proposed affirmative defense is contrary to the Supreme Judicial Court's interpretation of M.G.L. ch. 151B in College-Town v. Massachusetts Comm'n Against Discrim., 400 Mass. 156, 508 N.E.2d 587 (1987). College-Town holds that . . . an employer is vicariously liable for sexual harassing conduct of its supervisory personnel and has no reasonable care defense.

Myrick v. GTE Main Street, Inc., 73 F. Supp. 2d 94, 98 (D. Mass. 1999); accord Horney v. Westfield Gage Co., 211 F. Supp. 2d 291, 313 n.20 (D. Mass. 2002).

Michigan's Civil Rights Act appears to be unique in that respondeat superior is an element that plaintiff must prove, not a defense for the employer, when there is hostile environment harassment. Chambers v. Tretco, Inc., 463 Mich. 297, 614 N.W.2d 910 (Mich. 2000). The Supreme Court of Michigan recently held that Ellerth and Faragher had no effect on the burden of proof under the state statute, which requires that the employee-plaintiff prove five elements by a preponderance of the evidence; the first four elements corresponding to Title VII pleadings, and the fifth element being respondeat superior. *Id.* at 311, 614 N.W.2d at 915. However, when there is quid pro quo harassment, then the employer is strictly liable. *Id.* at 312, 614 N.W.2d at 916 (“To summarize, an employer is strictly liable only for quid pro quo sexual

harassment.”). Therefore, the Court expressly rejected the affirmative defense, because it is contrary to Michigan precedent for both harassment claims:

If this Court were to adopt the principles announced by the United States Supreme Court in Faragher and Ellerth, it would represent a significant change in our approach to determining employers’ vicarious liability for sexual harassment. Specifically, the holdings issued by the United States Supreme Court in those cases both: (1) conflate the concepts of quid pro quo harassment and hostile environment harassment, and (2) shift the burden of proof from the employee to the employer regarding whether the employer should be held vicariously liable “for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”

Id. at 314, 614 N.W.2d at 917 (quoting Faragher). Thus, Michigan practitioners will continue to differentiate between quid pro quo and hostile environment claims based on state law.

In Missouri, it was an administrative regulation, as opposed to a statute, that precluded the affirmative defense for claims under the Missouri Human Rights Act. Pollock v. Wetterau Food Distrib. Group, 11 S.W.3d 754 (Mo. Ct. App. 2000). The then-applicable regulations of the Missouri Commission on Human Rights, “Guidelines and Interpretations of Employment Anti-Discrimination Laws,” Mo. Code Regs. tit. 8, § 60-3.04(17)(c), provided that employers were responsible for supervisory sexual harassment “regardless of whether the employer knew or should have known of their occurrence.” Wetterau, 11 S.W.3d at 766. Therefore, the intermediate appellate court held that the affirmative defense “should not be available in cases involving supervisory sexual harassment.” Id. at 767. However, while this appeal was pending, the Missouri Commission amended this regulation through an emergency amendment, so that it now provides for liability only “if the employer knew or should have known of their occurrence.” Id. Further, the regulation now includes an affirmative defense provision that closely tracks the language of Ellerth and Faragher. See Mo. Code. Regs. tit. 8, § 60-3.040(17)(D) (2001) (effective June 30, 2001). Thus, practitioners in Missouri will need to determine whether the alleged harassing conduct occurred before or after these regulatory amendments.

In New Jersey, the situation in the state courts is somewhat uncertain, since there has been no clear ruling from the state Supreme Court. At present, the New Jersey courts follow a case-by-case application of the principles for agency liability. Mancuso v. Atlantic City, 193 F. Supp. 2d 789, 799 (D.N.J. 2002) (discussing state case law). To find vicarious liability for

supervisory harassment, the fact finder must decide that each of the following four elements have been satisfied: “(1) Did the employer delegate the authority to the supervisor to control the situation of which plaintiff complains; (2) Did the supervisor exercise that authority; (3) Did the exercise of authority result in a violation of [the state statute]; (4) Did the authority delegated by the employer to the supervisor aid the supervisor in injuring the plaintiff?” Lehman v. Toys ‘R’ Us, Inc., 132 N.J. 587, 620, 626 A.2d 445 (1993). Thus, under the New Jersey Law Against Discrimination, “an employer is generally liable for a hostile work environment created by a supervisor because the power an employer delegates to a supervisor to control the day-to-day working environment facilitates the harassing conduct.” Cavuoti v. New Jersey Transit Corp., 161 N.J. 107, 117, 735 A.2d 548 (1999). Nonetheless, it has been suggested by a federal district court “that the New Jersey Supreme Court may be inclined to follow the course charted by the Supreme Court in Ellerth and Faragher.” Mancuso, 193 F. Supp. 2d at 800. More recently, the Superior Court Appellate Division (the lower appellate court) held that the affirmative defense would not be available if the plaintiff was constructively discharged as a result of the hostile work environment. Entrot v. BASF Corp., 819 A.2d 447, 359 N.J. Super. 162, 91 FEP Cases (BNA) 980 (N.J. Super. Ct. App. Div. 2003). The implication of Entrot is that if a plaintiff was not constructively discharged, then the New Jersey courts would recognize the affirmative defense for claims under the New Jersey Law Against Discrimination.

The New York Supreme Court Appellate Division (the lower appellate court), while not formally adopting the affirmative defense in ruling upon a plaintiff’s sexual harassment claims under New York state and city law, noted that the defendant could not invoke that defense, since the harasser “was the president, treasurer, and 50% owner of the corporation,” and “the defense may be relied on only when the alleged harassers are not sufficiently elevated within the corporate hierarchy to be viewed as corporate proxies.” Randall v. Tod-Nik Audiology, Inc., 704 N.Y.S.2d 228, 229, 270 A.D.2d 38 (N.Y. App. Div. 1st Dept. 2000). The court noted, in dicta, that even if the harasser was not a corporate proxy, the employer “would still not be entitled to dismissal of plaintiff’s harassment causes under Faragher/Ellerth since it is not clear that plaintiff suffered no retaliation from defendant employer by reason of her report of the alleged workplace harassment, or that defendants took prompt preventive and corrective action, or that plaintiff’s refusal to cooperate in defendants’ investigation of the harassment was unreasonable.” Id.

Although the District of Columbia courts have not ruled on this under the D.C. Human Rights Act, the applicable agency regulations state that: “An employer shall be responsible for the actions of its supervisory personnel, and shall be responsible for the actions of its other employees of which it knew or should have known.” D.C.M.R. tit. 4, § 506.5. This regulation,

which imposes strict liability for supervisory harassment, is substantively the same as that of the aforementioned Missouri regulation (prior to its 2001 amendment), and is consistent with the judicial interpretations of the Illinois and Massachusetts statutes.

35. The Kolstad Limitation to Punitive Damages Under Title VII.

Section 1981a, applicable to Title VII claims, provides for statutory punitive damages:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis added). The aforementioned sliding scale based upon employer size also applies to punitive damages, *i.e.*, Title VII punitive damages are capped at \$50,000 to \$300,000 depending upon the employer's size. 42 U.S.C. § 1981a(b)(3)(A) - (D). It must be emphasized that there is no such statutory cap for Section 1981 punitive damages.

Prior to 1999, there was a split in the circuit courts as to the appropriate standard for awarding punitive damages under Title VII. The Second Circuit used the statutory "malice or with reckless indifference" standard while the District of Columbia, First, Fourth, Sixth, Seventh, Eighth and Ninth Circuits imported the common-law "egregiousness" standard into the statutory regime. Kolstad v. American Dental Ass'n, 139 F.3d 958, 968-69 (D.C. Cir.) (*en banc*) (collecting cases), *cert. granted*, 525 U.S. 960 (1998). The definition of "egregiousness" varied among the courts, but that of the District of Columbia Circuit was representative: "the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence, or otherwise evinced a criminal indifference to civil obligations." *Id.* at 965 (internal quotation marks omitted). The Supreme Court, in 1999, vacated and remanded the D.C. Circuit's decision. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).

The Supreme Court's Kolstad opinion, written by Justice O'Connor, has two distinct components: (1) Part II-A, joined by six other justices (Stevens, Scalia, Kennedy, Souter, Ginsburg and Breyer), held that the appropriate standard of liability for Title VII punitive damages was the statutory malice or reckless indifference standard, thus rejecting the approach taken by several courts in requiring that the plaintiff prove that the employer's conduct be characterized as egregious. Kolstad, 527 U.S. at 533-39. (2) Part II-B, joined by four other

justices (Rehnquist, Scalia, Kennedy and Thomas), held that “in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer’s ‘good faith efforts to comply with Title VII.’” Id. at 545.

It is Kolstad’s second holding that has raised the burden for the plaintiff who seeks punitive damages under Title VII. The Kolstad Court began with the recognition that Title VII was to be interpreted based on agency law principles. Id. at 541-42. Section 218C of the Restatement (Second) of Agency “places strict limits on the extent to which an agent’s misconduct may be imputed to the principal for purposes of awarding punitive damages.” Id. at 542. Under the Restatement, one of four grounds for employer “liability for punitive awards [was] where an employee serving in a ‘managerial capacity’ committed the wrong while ‘acting in the scope of employment.’” Id. at 543 (quoting Restatement (Second) of Agency, § 218C(c)). According to the Supreme Court, the problem with the Restatement approach is that:

Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages -- that it is ‘improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.’”

Id. at 544 (quoting Restatement (Second) of Torts, § 909, cmt. b).

Applying the Restatement of Agency’s ‘scope of employment’ rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. . . . Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.

Id. Therefore, the Kolstad Court rejected the broad application of the “scope of employment” rule, by limiting vicarious liability to those circumstances where the defendant employer did not make “good-faith efforts to comply with Title VII.” Id. The Kolstad Court remanded this case for the presentation of further factual evidence regarding these agency principles, and noted that: “It may also be necessary to determine whether the [defendant] had been making good faith efforts to enforce an antidiscrimination policy.” Id. at 546.

Kolstad represents a mixed victory for Ms. Kolstad herself. On the one hand, the Supreme Court expressly rejected the egregiousness requirement which several courts had imposed on Title VII plaintiffs seeking punitive damages. On the other hand, the reformulation of vicarious liability represents “a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.” Id. at 2130 (Opinion of Rehnquist, C.J.). As it happened, Ms. Kolstad’s case ultimately settled shortly before a new trial on punitive damages. For practitioners, Kolstad imposes an additional requirement for pretrial discovery: it will be necessary to determine whether defendant employers have made “good-faith efforts to comply with Title VII.” Since the Kolstad Court did not define the scope or minimum baseline for such efforts, the lower courts will struggle to draw the line in this area.

### 36. The Application of *Kolstad* by the Circuit Courts.

The following survey discusses the application of Kolstad by the circuit courts to the determination of punitive damages in civil rights litigation. Although some of these cases involve claims under other employment and civil rights statutes, the Kolstad analysis is largely the same as for Title VII racial and sexual harassment cases. As of June 3, 2003, Kolstad has been cited by 276 reported decisions, of which 113 are from the federal appellate courts, 148 are from the federal district courts, and 15 are from the state appellate and trial courts. However, a significant number of these are unpublished decisions, and many only cited Kolstad in passing.

#### **First Circuit: Punitive Damages Allowed.**

The First Circuit applied Kolstad in a Title VII sexual harassment and retaliation case, and determined that punitive damages were warranted where the employer never implemented its sexual harassment policy and failed to take remedial actions. Marrero v. Goya of P.R., Inc., 304 F.3d 7 (1st Cir. 2002). Although the employer claimed that it had obtained a sexual harassment policy from its outside counsel, it never disseminated that policy, and one of its supervisors testified during his deposition that the policy had been used during the plaintiff’s orientation, which contradicted his trial testimony that the policy was not received by the company until nearly a half-year after the plaintiff was hired. Id. at 21. The supervisor’s testimony that the employer had posted anti-sexual harassment posters “all around Goya’s facilities, including the glass doors of the entrance to the lobby” was contradicted by plaintiff’s videotape which showed that “there were no posters to be seen anywhere on the premises, including the glass doors of the lobby.” Id. at 21-22. Critically, after the plaintiff complained about her supervisor’s harassment to other managers, one of them “cautioned [her] that she should keep in mind that Cardenas was



a vice president and had worked at Goya for many years, whereas she was a relative newcomer,” and another “simply advised her to ‘ignore’ Cardenas.” Id. at 30.

The First Circuit, in a Title VII case, applied Kolstad and found that the evidence supported a jury punitive damages award of \$285,000. Romano v. U-Haul Int’l, 233 F.3d 655, 669 (1st Cir. 2000). Ms. Romano was hired by U-Haul of Maine to answer phones, rent trucks, and install trailer hitches. Id. at 661. The President of U-Haul of Maine, upon learning of her hire, asked to speak to her supervisor, Greg Nadeau, who immediately told her that “they didn’t want women installing hitches.” Id. Romano was fired and replaced only one week later. Nadeau apologized and attempted to explain that the “only problem you have is you sit when you pee.” Id. The First Circuit held that these facts supported a finding of reckless disregard for Romano’s federal rights because Nadeau was aware that firing her was discriminatory, and the President was aware of U-Haul’s anti-discrimination policy. Id. at 669. The President was found to be a “manager” of U-Haul International for the purposes of imputing liability for punitive damages to the parent company because U-Haul of Maine and U-Haul International were a single employer for the purposes of Title VII. Id. at 669-70. The Court characterized the good-faith element of Kolstad as an affirmative defense, placing the burden on the employer, and held that a jury could reasonably find that there was no good-faith effort if the employer publishes an anti-discrimination policy and disseminates it to its employees only once, but fails to re-disseminate the materials or further train its employees on the implementation of the policies. Id. at 670.

In a Section 1983 race discrimination case, the First Circuit suggested that intentional racial discrimination demands a presumption of reckless indifference for an award of punitive damages, considering the extent of statutory and constitutional law prohibiting such conduct. DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 38 (1st Cir. 2001). The plaintiff claimed that a government agency in Puerto Rico discriminated against non-Puerto Ricans by making the English language exam significantly harder than the Spanish version and by purposely misgrading her test. Id. at 29. She also pointed to discriminatory statements made by members of the Board. Id. The district court’s punitive damages award of \$50,000 was upheld. Id. at 38.

### **First Circuit: Punitive Damages Not Allowed.**

The First Circuit applied Kolstad in a Section 1983 false arrest case, and determined that the underlying facts did not warrant an award of punitive damages. Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999). The plaintiff engaged in videotaping the meetings of various municipal commissions for a news program that he broadcast on a local cable channel. Id. at 17. During

one such meeting, he was repeatedly asked to leave; upon his refusal, the local police were summoned and the plaintiff was arrested and placed in custody for four hours. Id. at 17-18. The jury awarded plaintiff compensatory damages and \$135,000 in punitive damages on his Section 1983 claim against the police officer. Id. However, the district court struck the award of punitive damages. Id. at 18, 25.

On appeal, the First Circuit reviewed the police officer's conduct in light of the intervening Kolstad decision, holding that "Iacobucci needed to adduce evidence sufficient to show that Boulter determined to effectuate the arrest knowing that he lacked probable cause to do so, or, at least, with conscious indifference to the possibility that he lacked probable cause." Id. at 26. Here, however, "the evidence shows no more than that an exasperated police officer, acting in the heat of the moment, made an objectively unreasonable mistake, [thus] punitive damages will not lie." Id. at 26-27. Therefore, the First Circuit affirmed the district court's order vacating the jury's award of punitive damages. Id.

### **Second Circuit: Punitive Damages Allowed**

In a Title VII sex discrimination case, the Second Circuit held that training in "equal opportunity," even if it does not entail explicit discussion of federal law, is sufficient to convey awareness of Title VII's requirements and thereby provides the basis for finding reckless indifference to the employee's statutory rights. Zimmerman v. Associates First Capital Corp., 251 F.3d 376, 385 (2d Cir. 2001). The Second Circuit also noted that a jury can reasonably find that the employer did not enforce its anti-discrimination policy in good-faith even though it was published and disseminated to employees. Id. at 386. The Second Circuit upheld the jury's punitive damages award of \$300,000 (after remittitur).

### **Second Circuit: Punitive Damages Not Allowed.**

The Second Circuit applied Kolstad in an ADA case, in which it upheld the district court's order vacating the jury's award of \$150,000 in punitive damages. See Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224 (2d Cir. 2000) (per curiam). Dawn Joy Fashions fired the plaintiff after he had a heart attack. Id. at 228. The company stated that it was busy and did not know if the plaintiff would be able to return to work in "four or five weeks, but it may be four to five months or it may be never and we can't wait." Id. The plaintiff's physician had said that he would be able to go back to work in four to five weeks, and he was in fact ready to return to work approximately four weeks after his heart attack. Id. The Second Circuit found that there was no evidence that the defendant showed malice or reckless disregard for the plaintiff's rights,

under the Kolstad standard. Id. at 235-36. The evidence did not show that defendant knew it was violating federal laws; further, “because Dawn Joy contacted counsel prior to severing contact with Weissman and therefore could not have acted in reckless disregard for Weissman’s rights,” defendant’s alleged retaliation did not support a finding of punitive damages. Id. at 236. Therefore, while upholding the jury’s award of compensatory and economic damages, the Second Circuit affirmed the denial of the jury’s award of punitive damages. Id. at 237.

### **Third Circuit: Punitive Damages Allowed**

The Third Circuit, in an ADA claim, found that the repeated failure of an employer to act pursuant to its legal responsibilities suffices to support a finding of reckless indifference to its employee’s statutory rights. Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 573 (3rd Cir. 2002). Gagliardo’s supervisors were aware that she had Multiple Sclerosis, since they had discussed it among themselves and with Gagliardo, and they were aware of the ADA and their responsibilities under it. Id. Yet, despite Gagliardo’s repeated discussions with her supervisors regarding her physical limitations and her repeated requests for accommodation, the employer failed to respond. Id. The court held that there was sufficient evidence to support the jury’s punitive damages award of \$300,000 (after remittitur), based on the employer’s reckless indifference. Id. at 573.

### **Fourth Circuit: Punitive Damages Allowed**

The Fourth Circuit applied Kolstad in a Title VII and Section 1981 race discrimination case in which a jury had found for the plaintiffs, and upheld the punitive damages award of \$272,000 on behalf of two plaintiffs. Lowery v. Circuit City Stores, Inc., 206 F.3d 431 (4th Cir. 2000). The Lowery plaintiffs, two African-American women, claimed that their employer, Circuit City, unlawfully discriminated against them on the basis of their race. Id. at 436. The jury found for plaintiffs and awarded them compensatory and punitive damages. Id. On the initial appeal, the Fourth Circuit affirmed the verdict but vacated the punitive damages award. Id. The plaintiffs then petitioned for writ of certiorari to the Supreme Court, which remanded this case in light of the Kolstad decision. Id.

The Fourth Circuit, in applying Kolstad to determine whether “a reasonable juror could have found [defendant] liable for punitive damages,” explained that the district court must work through four questions. Id. at 443. (1) First, the court must ask “whether the record contains sufficient evidence for a reasonable juror to find that in intentionally refusing to promote the plaintiff to the position at issue, the decision maker did so in the face of a perceived risk that her

decision would violate federal law.” Id. If not, the defendant would prevail as a matter of law. Id. (2) If so, and if the decision maker was not a principal, the court must then ask if “a reasonable juror could find [that] the decision maker served the employer in a managerial capacity.” Id. If not, again, the defendant would prevail as a matter of law. Id. (3) If so, the court must then ask if “a reasonable juror could find that the decision maker acted within the scope of her employment in making the challenged decision.” Id. If not, the defendant would win. Id. (4) If so, the fourth and final question was “whether a reasonable juror could only conclude that [defendant] engaged in good-faith efforts to comply with § 1981.” Id. If not, the plaintiff prevails and the trial court’s decision not to grant a judgment as a matter of law on punitive damages in favor of the defendants was to be upheld. Id. If so, then defendant prevails.

In Lowery, the record evidence was that the African-American plaintiffs were passed over for promotions, in spite of their high performance evaluations. Id. at 437-38. There was also evidence that Circuit City executives had made comments demonstrating racial bias. Id. at 438-39. Additionally, there had been two internal reports ordered by Circuit City that were critical of the company’s promotion and diversity policies, but these two reports were not circulated to the employees, were recalled from the managers, and no policy changes were made as a result of the reports. Id. at 439. Finally, there was a “company-wide system for promotions that bestowed upon promoters the ability to use widely subjective criteria in their decision-making processes,” which an expert testified resulted in a system that “could easily result in discrimination against racial minorities.” Id. at 438 n.2.

The Fourth Circuit rejected defendants’ efforts to comply with the law as inadequate. Id. at 439-40. Circuit City (1) had a policy in its employee handbook entitled “Treating Associates with Respect,” which laid out the company’s “alleged commitment not to discriminate against its employees on account of factors made illegal by federal anti-discrimination statutes;” (2) had posters in its stores that described this policy; (3) held some training sessions on the policy in 1991 and 1992; (4) had an employee handbook that informed employees how they could pursue their complaints within the company; and (5) had investigated some complaints of discrimination and that some of the investigations had lead to disciplinary actions. Id.

Although these policies looked good on paper, the Fourth Circuit concluded that, in light of the abundant record evidence concerning defendants’ actual practices, “we are not persuaded that a reasonable juror could only conclude that Circuit City engaged in good-faith efforts to comply with § 1981.” Notably, the Fourth Circuit wrote that:

Here, the sincerity of Circuit City's commitment to a company-wide policy against racial discrimination in the workplace is called into question when one considers the racially discriminatory attitudes of two top Circuit City executives and the implementation of a promotional system by one of those executives having the capacity to mask race discrimination in promotional decisions. Furthermore, the positive nature of Circuit City's [policies] . . . is countered by evidence of employees who testified they felt ignored or intimidated for complaining about promotion procedures and feared retaliation if they used one of those venting procedures to complain about racial animus among Circuit City management. Other evidence suggesting that Circuit City's purported efforts to comply with § 1981 were not taken in good-faith, but with the intent to cover-up a corporate policy of keeping African-Americans in low level positions, is [Senior Vice President] Zierden's burying of the [promotion and diversity] reports.

Id. at 446. Since the “good-faith exception rests on the notion that the existence and enforcement of an anti-discrimination policy shows that the employer itself ‘never acted in reckless disregard of federally protected rights,’” id. at 445 (quoting Kolstad, 525 U.S. at 544), Circuit City was unable to avail itself of the good-faith defense through its failure to implement and enforce its anti-discrimination policies. Id. at 446. Therefore, the Fourth Circuit reinstated the punitive damage awards to both plaintiffs. Id. at 446, 448.

The Fourth Circuit reversed the district court's denial of punitive damages in a truck driver's sexual harassment claim. Anderson v. G.D.C., Inc., 281 F.3d 452 (4th Cir. 2002). The evidence showed that the supervisor “engaged in his harassing conduct despite knowing that such conduct might violate federal law,” since the supervisor “testified that he had seen an EEOC poster regarding sexual harassment in the dispatch trailer.” Id. at 460. The supervisor's “reckless indifference to Anderson's rights is further demonstrated by his response to her complaints regarding his conduct — that Anderson ‘might as well get used to it’ because ‘that was the way of G.D.C.’” Id. The employer “never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination. . . [the] placement of the EEOC poster regarding discrimination in the dispatch trailer simply does not constitute a good faith effort to forestall potential discrimination or to remedy any that might occur.” Id. at 461.

### **Fifth Circuit: Punitive Damages Allowed.**

The Fifth Circuit, in a Title VII and Section 1981 racial discrimination case, found that the record evidence was sufficient to allow it to conduct the Kolstad analysis regarding the trial

court's judgment as a matter of law in favor of defendants. Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 (5th Cir. 1999). Ms. Deffenbaugh-Williams was harassed for dating a black man; her supervisor "pursued a series of pretextual disciplinary actions against her; and she was ultimately terminated on what the court found constituted "fabricated workplace-policy grounds." Id. at 280.

The Fifth Circuit first held that the harassing supervisor (Gipson) "was a requisite 'managerial agent' [who] had supervisory authority over Deffenbaugh, terminated her on his own authority, and was, as noted, in charge of departments at six stores." Id. at 285. Since the supervisor "had authority to make personnel decisions regarding Deffenbaugh and others in her department and in those of five other stores," id., the Fifth Circuit concluded that "substantial evidence existed from which a jury could reasonably find that Gipson was a managerial agent, acting in the scope of employment. Id. at 285-86. Having established the requirement that Gipson was a managerial agent, the Fifth Circuit then turned to the good-faith defense. The first prong was not satisfied, since:

Wal-Mart's only evidence (elicited in cross-examining Deffenbaugh) was that it (Wal-Mart) encourages employees to contact higher management with grievances. Plainly, such evidence does not suffice to establish, as a matter of law, Wal-Mart's good faith in requiring its managers to obey Title VII. Wal-Mart presented no evidence either of its response to Deffenbaugh's complaint, or of any specific Title VII efforts . . . .

Id. at 286. In contrast, the plaintiff showed that even though she had complained to her regional manager (Norman), Wal-Mart's procedures were ineffective:

Deffenbaugh, on the other hand, presented substantial evidence that Wal-Mart failed to respond effectively to her complaints about Gipson's racial animus: despite Norman's promise to check into her complaint of hostility to her interracial relationship, she was fired the next month on pretextual grounds. Wal-Mart's minimal presentation left the jury wide latitude to infer that any Wal-Mart policy against discrimination was too poorly enforced to distinguish Wal-Mart's actions from Gipson's.

Id. Therefore, the Fifth Circuit reversed the district court's judgment as to punitive damages and reinstated the jury's punitive damages award after remittitur to \$75,000. Id.

### **Fifth Circuit: Punitive Damages not Allowed**

The Fifth Circuit, in a Title VII sexual harassment and retaliation case, clarified what constitutes good-faith efforts by an employer and upheld a jury verdict that did not award any punitive damages to the plaintiff. Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642, 654 (5th Cir. 2002). Ms. Green’s supervisor, Donald Richardson, harassed and demoted her after she chose to end their consensual sexual relationship. Id. The Fifth Circuit found that Tulane failed to adequately reprimand Richardson or to reinstate Green’s duties, but stated that “this does not establish that Tulane did not act in good faith. It only illustrates that Tulane did not resolve the problem in a completely satisfactory manner.” Id. at 654. Tulane’s staff handbook contained a written policy on sexual harassment. Id. Tulane put Green on paid leave following the incidents, held several meetings about the issue, and directed Richardson to reinstate Green to her previous position. Id. The Fifth Circuit thus held that no reasonable juror could find Tulane did not make a good-faith effort. Id. at 654.

The Fifth Circuit, in a Title VII wrongful discharge gender discrimination case, reversed the \$100,000 punitive damages award because the discriminatory acts were not made by the supervisor who had the power to discharge the plaintiff. Williams v. Trader Publ. Co., 218 F.3d 481, 487 (5th Cir. 2000) (per curiam). Ms. Williams was employed by Trader Publications for six years, holding multiple positions and receiving several raises. Id. at 483. In 1995 she was fired without warning for allegedly being disruptive, a deviation from Trader’s customary policy of giving oral warnings. Id. at 484. She claimed that the newly hired office manager, Ron Haas, treated male employees more amicably and with more deference, approaching them informally about problems and giving them a chance to respond to allegations. Id. at 483. The Fifth Circuit never reached the question of malice, instead prohibiting punitive damages on the grounds that Haas did not actually fire Williams, but reported her behavior to his supervisor who had the actual authority to give the order. Id. at 484. Because Haas was not the supervisor in charge of firing Williams but merely the office manager, the Fifth Circuit held that he was not acting in a managerial position for the purposes of imputing punitive liability to the employer. Id. at 487.

### **Fifth Circuit: Remand for Further Proceedings**

The Fifth Circuit emphasized that “not every sufficient proof of pretext and discrimination is sufficient proof of malice or reckless indifference,” Hardin v. Caterpillar, Inc., 227 F.3d 268, 270 (5th Cir. 2000), thereby implying that simply equating the two types of proof is improper, and implicitly rejecting the approach taken by the First Circuit in DiMarco, supra. Nor did the court believe that “there [was] a useful litmus for marking the point at which proof of

violation sufficient to impose liability becomes sufficient to also support a finding of malice or reckless indifference.” Id. The case was remanded on the basis that the Kolstad analysis requires consciousness that the discrimination is wrong. Id. Here, the trial court had entered a jury verdict in favor of the plaintiff, but refused to let punitive damages go to the jury.

### **Sixth Circuit: Punitive Damages Allowed**

The Sixth Circuit, in a Fair Housing Act case, emphasized that punitive liability does not require the discrimination to be more invidious than average, but rather a particular state of mind on the part of the discriminatory actor, maliciousness or reckless indifference. Preferred Properties, Inc. v. Indian River Estates, Inc., 276 F.3d 790, 800 (6th Cir. 2002). Duane Tillimon, President of Indian River Estates, refused to sell several lots in a subdivision to Preferred Properties, who planned on building several middle-income duplexes which would accommodate persons with disabilities. Id. at 795. Tillimon backed out of the sales agreement because local residents had so strongly protested “handicapped housing.” Id. The Sixth Circuit found that Tillimon, by dint of twenty years of real estate experience and having rented to persons with disabilities in the past, had the requisite knowledge of federal law to perceive the risk that his actions would be unlawfully discriminatory. Id. at 800. It therefore upheld the jury’s finding that Tillimon’s conduct was “willful, wanton, or in reckless disregard.” Id. The Sixth Circuit also suggested that where, as in this case, it was the president of the company who acted with reckless disregard, a showing of good-faith efforts to adhere to anti-discrimination law would be impossible because there is no higher management to implement the anti-discrimination policy. Id. at 800. The jury’s \$125,000 punitive damages award was upheld.

The Sixth Circuit, in a Title VII race discrimination case, noted that while egregiousness is not a necessary element for punitive liability, it can be introduced in order for the jury to draw an inference of malicious or reckless indifference. Jeffries v. Wal-Mart, Inc., 15 Fed. Appx. 252, 264 (6th Cir. 2002). Ms. Jeffries produced evidence of frequent intentional retaliatory conduct, which she had repeatedly protested. All of this conduct occurred with the actual or tacit approval of Wal-Mart’s district and regional managers. Id. at 264-65. The Sixth Circuit concluded that this evidence was sufficient to support the jury’s finding of reckless disregard on the part of Jeffries’ supervisors, thereby upholding the \$425,000 award in punitive damages under Title VII and the Ohio anti-discrimination statute. Id. at 265.

### **Sixth Circuit: Punitive Damages Not Allowed**



In a same-sex sexual harassment case, the Sixth Circuit held that, despite there being no definitive precedent as to whether such conduct was then covered by Title VII, other evidence can be used to show that the employer perceived the risk that its actions would violate federal law. EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 513 (6th Cir. 2001). One of the victims, Joseph Carlton, was improperly touched several times by his supervisor (Louie Davis), was taunted by his coworkers about it, and eventually resigned because of this harassment. Id. at 501-02. Nonetheless, in a split opinion, the Sixth Circuit held that punitive damages were not warranted as to either of two employees. Id. at 523 & n.7.

### **Seventh Circuit: Punitive Damages Allowed**

The Seventh Circuit recently affirmed the jury's award of \$300,000 in punitive damages (as reduced to the statutory cap) in a Title VII gender retaliation case, where the plaintiff had written a letter to the employer's Human Resources manager, complaining about sexual discrimination and harassment, but the letter was promptly turned over to one of the alleged discriminators (Looney), and the employer terminated the plaintiff because she had written this letter. Fine v. Ryan Int'l Airlines, Inc., 305 F.3d 746, 755 (7th Cir. 2002). Further, Looney then made a pretextual entry in the personnel files that the plaintiff "was terminated for poor attendance and interpersonal skills." Id. Finally, the company's president and namesake claimed that he could not take action upon the plaintiff's complaints, "because if he accepted her allegations of discrimination he would have to fire all of his top managers." Id. The Seventh Circuit aptly noted that "if all of Ryan's top managers really were discriminating against women, then Ron Ryan should have taken whatever steps necessary to fix the problem and ensure compliance with federal law." Id.

The Seventh Circuit affirmed the jury's award of \$15,000 for punitive damages in a Title VII sexual harassment case. Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 2001). Applying Kolstad, the Seventh Circuit found that there was the requisite "malice or reckless indifference," because at least three of the employer's managers had knowledge of the supervisor's inappropriate conduct, and the supervisor himself "knew that sexual harassment was against the law and that a female employee could consider his conduct to be sexual harassment." Id. at 852. Indeed, the supervisor himself "also thought it was common knowledge among some of the management that he hugged female employees." Id. Further, the Seventh Circuit rejected the employer's claim that the plaintiff's refusal to cooperate in their internal investigation somehow shielded it from liability, because her letter setting forth her complaint discussed her particularized concerns, and explained that her ongoing counseling "is helping, yet I also need to

continue being removed from the situation so that I may progress.” Id. at 852 n.2. Thus, “under these circumstances, a face-to-face meeting with the complainant seems less critical.” Id.

The Seventh Circuit affirmed the jury’s award of \$20,000 in punitive damages in another Title VII sexual harassment case. Hertzberg v. SRAM Corp., 261 F.3d 651 (7th Cir. 2001), cert. denied, 534 U.S. 1130 (2002). The plaintiff, a shipping coordinator for a bicycle components manufacturer, alleged that when she reported harassing remarks by a co-worker (Loayza), her supervisor (Lester) told her “that she was ‘being too emotional, just like a woman,” and he later “put his hand on Ms. Hertzberg’s knee and told her he would take care of it.” Id. at 654-55. When the plaintiff then complained to the plant manager (Margelos), he “‘seemed to shrug . . . off’ her concerns.” Id. at 655. The harassing co-worker “apparently never was warned formally or disciplined for his comments, and, despite Ms. Hertzberg’s repeated complaints to Margelos, the comments continued unabated until her departure from SRAM.” Id. The Seventh Circuit applied Kolstad to find that the employer was liable for punitive damages. First, “there was evidence that both Lester and Margelos knew of the antidiscrimination laws and the employer’s policies for implementing those laws.” Id. at 662. Second, “the evidence establishes a lack of a good faith effort to insulate Ms. Hertzberg from Loayza’s harassment.” Id. at 663. Not only were “both managers . . . ineffective in addressing the problem because Loayza’s badgering did not stop,” but also there was “evidence that Margelos failed to follow SRAM’s procedure for receiving complaints because he did not put them in writing” and that “SRAM did not provide its employees ready access to its sexual harassment policy, nor did a management employee inform Ms. Hertzberg of this avenue of redress.” Id. at 664.

### **Seventh Circuit: Punitive Damages Not Allowed**

The Seventh Circuit, in an ADA case, reversed the jury’s award of punitive damages, based upon the Kolstad standard. Gile v. United Airlines, Inc., 213 F.3d 365 (7th Cir. 2000). Cheryl Gile, a United Airlines clerical employee, id. at 368, began suffering from depression, insomnia, and anxiety upon her return from maternity leave. Id. She saw a clinical social worker (on United’s list of recommended providers) who recommended that Ms. Gile seek a transfer from the night to the day shift. Id. Ms. Gile met with United’s Regional Medical Director, Dr. Robert McGuffin, who agreed with the diagnosis of depression. Id. at 369. However, Dr. McGuffin did not believe that this condition was work-related, thought that her transfer request was related to her personal issues instead of a medical condition, and suggested that she resign if she was unhappy. Id. at 370. As a result, Ms. Gile was not given a transfer. Id. Because Dr. McGuffin believed that Ms. Gile’s request for a day shift was not medically necessary, United would not pay her while she was on temporary disability leave, but it granted

her authorized leave. Id. Several months later, while on authorized leave, Ms. Gile received a letter informing her she had been terminated for abandoning her job. Id. Ms. Gile was subsequently reinstated, after United stated that the termination letter was sent in error. Id. at 371. When she returned to work, she was first assigned to a day shift and later to an evening shift, both of which were acceptable to her, and her condition rapidly improved. Id. United had a reasonable accommodation policy that required United to identify work restrictions for an employee covered by the ADA and to determine the financial and productivity loss resulting from accommodating the restrictions. Id. If United could accommodate the employee's needs without significant financial or productivity loss, then it would do so. Id. If United decided to deny the accommodation, and that decision was upheld by its Accommodation Committee, then United was to help the employee find alternative job opportunities. Id.

The Seventh Circuit upheld the jury's finding that United violated the ADA by not accommodating Ms. Gile's medical need for a different shift. Id. at 373-74. However, the court held that there was no evidence that United acted with malice or reckless indifference for Ms. Gile's federally protected rights. Id. at 375. The court explained that, under Kolstad, "punitive damages are proper when the employer discriminates in the face of a perceived risk that its actions will violate federal laws." Id. (internal quotations omitted). The court noted that Dr. McGuffin and Ms. Gile's supervisor both knew of the ADA and of United's reasonable accommodation policy. Id. Their failure to accommodate her needs occurred solely because Dr. McGuffin "in good faith disagreed with [the social worker] that a shift transfer would enable Gile to work and believed that Gile's psychological condition was a nonoccupational, personal problem which did not trigger any obligation under the ADA on United's part." Id. Thus, the court found that United's failure to accommodate Gile was the result of negligence, not malice or recklessness, and therefore vacated the punitive damages award of \$100,000, while leaving the \$200,000 compensatory damages award. Id. at 375-76.

The dissent believed that the jury could have found United's conduct to be reckless under the Kolstad standard. Id. at 376 (D. Wood, J., dissenting in part). Judge Wood explained that Dr. McGuffin was authorized to make decisions about whether accommodations were necessary. Id. Because he knew about United's ADA policy, but ignored the recommendations of a health care professional, and "behaved with astonishing callousness in the face of Gile's disability," Judge Wood thought that the jury could reasonably have determined that United was reckless. Id. Therefore, the dissent would have affirmed the punitive damages award.

The Seventh Circuit overturned, on narrow grounds, a \$10,000 punitive damages award in a Title VII sexual harassment case where the defendant's "manager" was both the harasser and

the supervisor charged with enforcing the anti-discrimination policy. Cooke v. Stefani Mgmt. Servs., Inc., 250 F.3d 564, 569-70 (7th Cir. 2001). Mr. Cooke, a bartender, alleged that he was sexually harassed by his manager, Fred Lagon, who made repeated unwanted and inappropriate sexual advances. Id. at 565. Cooke, in turn, made repeated complaints to Lagon and the assistant manager, Jennifer Wilson, all to no avail. Id. Lagon then fired Cooke. Id. at 566. Cooke sued his employer under a theory of vicarious liability for the harassment. Stefani, to foreclose liability for punitive damages, introduced evidence of its anti-discrimination policies and training program for restaurant managers. Id. at 568. Indeed, it was Lagon himself who had been trained to oversee and enforce the anti-discrimination policy. Id. at 569. Cooke argued that Stefani had failed to make good-faith efforts to implement its policies because the supervisor in charge of enforcing them, Lagon, had been on notice and had failed to stop the harassment or report it to a higher officer. Id. at 569. The Seventh Circuit held, however, that Cooke's argument could not succeed because the plaintiff's claim was based on an improper theory of liability. Id. at 569. Here, the claim was based on vicarious liability, but when the supervisor charged with implementing anti-discrimination policies fails to do so, then the corporate employer is directly liable. Id. Because Lagon never reported his own harassing conduct, Stefani could not be held vicariously liable, and because Cooke had not based his claim on direct liability, Lagon's failure to act was not part of the plaintiff's cause of action. Id. at 569-70.

### **Seventh Circuit: Remand for Further Proceedings**

In a retaliatory demotion case under Title VII, the Seventh Circuit found evidence to support a finding of reckless indifference by a supervisor in a managerial position. Bruso v. United Airlines, Inc., 239 F.3d 848, 859-60 (7th Cir. 2001). Mr. Bruso, after a verbal altercation with a coworker, Kevin Sporer, reported Sporer to several supervisors for his inappropriate conduct towards female employees. Id. at 853. Bruso was soon demoted. Id. at 854. The Seventh Circuit found that a mere awareness of federal law is enough to substantiate a finding of reckless indifference. Id. at 858. Bruso's supervisors were found to be aware of federal law and of United's anti-discrimination policy, based on evidence that they had been charged with managerial responsibilities, including enforcing anti-discrimination policies, thereby allowing a reasonable jury to conclude that the supervisors had acted with reckless indifference to Bruso's rights. Id. at 859-60. The Seventh Circuit deferred to the jury's determination that United did not make any good-faith effort to comply with its obligations under Title VII. Id. at 861. Despite an investigation of Bruso's complaints, and official "findings" being made by United, the jury could have reasonably concluded that the company's actions were a sham perpetrated in order to cover up the harassment and to discredit Bruso. Id. Here, the trial court had refused to submit punitive damages to the jury, and the Seventh Circuit reversed on that issue.

## **Eighth Circuit: Punitive Damages Allowed**

The Eighth Circuit, in a Title VII sexual harassment and retaliation case, found that the plaintiff had suffered adverse employment actions in response to her complaints of sexual harassment, and reversed the district court's judgment as a matter of law in favor of defendants on punitive damages, reinstating the jury's award of \$100,000 in punitive damages. Blackmon v. Pinkerton Sec. & Investigative Serv., 182 F.3d 629, 630 (8th Cir. 1999).

Ms. Blackmon, a Pinkerton security guard, was constantly harassed by her supervisor and four coworkers; her supervisor also took pretextual disciplinary actions against her. Id. at 631-34. The harassing and retaliatory conduct included: (1) her four co-workers "frequently engaged in constant, graphic sexual conversations in her presence" and these conversations were "often instigated" by her supervisor; (2) when she complained, her supervisor, "accused [her] of complaining because she was not 'getting any sex'" or "was on the rag;" (3) her second-line supervisor publicly stated that her promotion was "a joke" and that he "did not promote women on his account, he got rid of them;" and (4) her second-line supervisor also told her co-workers that they "didn't have to listen to her opinions or what she told them to do" and "often referred to women — including appellant — as 'bitches' and 'cunts.'" Id. at 631-32. These incidents continued even after Ms. Blackmon complained to her supervisor and her second-line supervisor; she then complained to Pinkerton's district manager and human resources officer. Id. at 632. The investigation, as described below, was largely a sham, and led to Ms. Blackmon suffering from a series of pretextual disciplinary actions leading to her termination on fabricated grounds.

The Eighth Circuit held that the requisite "malice or requisite indifference" standard was met, since:

[Defendants] acted with malice and reckless indifference to [plaintiff's] federally protected rights when it (1) failed to investigate [plaintiff's] complaints and institute prompt remedial action even after [she] complained to three successive levels of supervision; (2) repeatedly retaliated against her for complaining of sexual harassment by reprimanding her, demoting her, fostering an environment in which her co-workers were openly hostile to her, and finally terminating her; (3) attempted to escape legal liability by soliciting information against [plaintiff] to prove she caused the harassment; and (4) attempted to escape legal liability for terminating [plaintiff] by firing another employee at the same time.

Id. at 636. The good-faith defense was not available, since defendant’s “‘investigation’ of [plaintiff’s] complaint was clearly inadequate and disproportionate to the seriousness of [her] complaints;” defendant’s “only remedial action [] did not address the crux of [plaintiff’s] complaint;” and the court was skeptical of defendant’s “actions to limit its liability by investigating [plaintiff] rather than the harassment and by simultaneously firing a male employee” as a smokescreen for their termination of plaintiff. Id. at 637 & n.7. The Eighth Circuit concluded that: “However, we do not consider [defendant’s] half-hearted responses to [plaintiff’s] serious complaints of sexual harassment to satisfy [its] obligation.” Id. Therefore, the jury’s punitive damages award of \$100,000 was reinstated. Id.

In another Eighth Circuit Title VII sexual harassment and discrimination case, the court imputed liability for punitive damages to the employer since the harasser’s supervisor [Dall], who was the general manager and executive vice president, knew of the conduct taken by the harasser [Boggs] but failed to act. Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782, 784 (8th Cir. 1999). Indeed, “Loma Linda’s appeal does not contest the finding that Chuck Boggs subjected the plaintiffs to gross and abusive sexual harassment, including unwanted groping, constant requests for sex, and inappropriate conduct.” Id. at 783. The Eighth Circuit concluded that liability was justified under Kolstad because:

[T]here was evidence that Dall ratified Boggs’s abusive conduct and repeatedly ignored detailed and graphic complaints about Boggs’s harassment of the plaintiffs. Kimbrough testified that at one point Boggs placed his hands in flour and then grabbed her behind leaving white hand prints on her black pants. When she went to Dall to complain he responded, “Oh, that looks good on you.” This evidence of Dall’s malice and reckless indifference would permit a jury to find Loma Linda liable for punitive damages because of Dall’s own state of mind, or because he ratified Boggs’ actions. Therefore, the jury was free to consider Boggs’s conduct when it set the punishment for Loma Linda’s discriminatory practices.

Id. at 785 (internal citations omitted). Therefore, the Eighth Circuit upheld the awards of \$50,000 in punitive damages to each of two plaintiffs. Id.

The Eighth Circuit similarly affirmed a \$260,000 punitive damages award in a Title VII sexual harassment and retaliation case. Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000). The complaint was brought by Ms. Ogden, who worked for Wax Works as a sales manager from May 1987 until September 1995. Id. at 1003. In June or July of 1994, Ms.

Ogden's immediate supervisor, Robert Hudson, began sexually harassing her: (1) he put his arm around her when they were both out with a group of employees; (2) he asked her to come with him to his hotel, (3) he inquired whether she was involved with anyone, (4) he asked her out on dates and propositioned her, (5) he chastised her when her male friends visited her, and (6) he offered to stay with her, allegedly to protect her from her estranged ex-husband. Id. When Ms. Ogden rebuffed his advances, he became abusive at work, yelling at her and otherwise treating her less favorably than other employees. Id. at 1003-04.

Hudson, as Ms. Ogden's supervisor, prepared her annual performance review. Id. Annual raises were based on the performance reviews and could not be given until the performance review was completed. Id. In the spring of 1995, Hudson refused to do Ms. Ogden's performance review unless she accompanied him on a "three-day gambling spree." Id. at 1004. She refused to do so and he did not do the performance review. Id. Ms. Ogden told the regional manager, Jeff Klem, who ordered Hudson to do the review, but he still did not do the review. Id. When Ms. Ogden resigned from Wax Works in September, she still had not received her annual performance review or her annual raise. Ms. Ogden had complained to Klem about Hudson's inappropriate behavior in August of 1995. Id. Klem told her he already knew about problems with Hudson and that Hudson had been warned previously. Id. Klem testified at trial that he had warned Hudson about inappropriate relationships with employees and other inappropriate conduct. Id. at 1004 n.5. A Wax Works vice president also testified that he had heard rumors about Hudson's inappropriate conduct. Id. at 1004.

When Ms. Ogden first complained, Klem appeared sympathetic and promised to address the problem. Id. However, after Klem had spoken with Hudson, Klem began to minimize the problem. Id. Klem came to the store to investigate the problem; Ogden was unable to meet with Klem at that time because she was ill, but she subsequently tried to speak with him on the phone. Id. He refused to discuss the issue with her afterwards, saying that "You didn't come in. You missed your chance." Id. at 1005. An employee who met with Klem testified that Klem's questions focused on Ms. Ogden's behavior and not Hudson's. Id. Shortly after this visit, Ms. Ogden was told that Hudson was an "asset" to the company; as a result of this "investigation," Ms. Ogden resigned shortly thereafter. Id. During the period that Ogden worked for Wax Works, the company had a sexual harassment policy that was distributed only to the store managers. Id. The policy, published in the employee manual, explained what sexual harassment was and "encouraged" employees to report sexual harassment "to a member of management or directly to the Director of Human Resources." Id. There were also posters in each store that provided a toll-free number to call for any grievances. Id. Hudson had received considerable

training about sexual harassment when he was in an MBA program, but the company did not implement any sexual harassment training, and Ms. Ogden received no such training. Id.

The Eighth Circuit applied the Kolstad analysis to the punitive damages award. The court first addressed whether there was sufficient evidence of malice or reckless indifference. Id. at 1010. The court found that the abusiveness of the conduct, the existence of the company policy forbidding sexual harassment, and Hudson's admitted training in sexual harassment issues were enough to allow a jury to "infer Hudson had knowledge of Title VII's proscriptions, and given this knowledge, reasonably conclude he acted in the face of a perceived risk that his actions would violate federal law." Id. The court then determined that Hudson's conduct could be imputed to the company under the respondeat superior doctrine. Id. The court explained that there was substantial evidence that Hudson was acting in a managerial capacity and within the scope of his employment: (1) he had the power to carry out performance reviews upon which raises were based, (2) most of the harassment occurred during working hours at Wax Works, and (3) his conduct was "in part to serve Wax Works." Id.

Finally, the Eighth Circuit rejected the good-faith efforts defense put forward by Wax Works. Id. The company claimed that its sexual harassment policy and the posters with the phone number for grievance calls should serve as proof of its efforts to prevent and address problems with sexual harassment. The court disagreed, holding that:

Plainly, such evidence does not suffice, as a matter of law, to establish good-faith efforts in the face of substantial evidence that the company minimized Ogden's complaints; performed a cursory investigation which focused upon Ogden's performance, rather than Hudson's conduct; and forced Ogden to resign while imposing no discipline upon Hudson for his behavior.

Id. (internal quotation marks omitted). Therefore, the Eighth Circuit affirmed the \$260,000 award of punitive damages. Id. at 1011.

The Eighth Circuit upheld the jury's award of \$100,000 of punitive damages in a Title VII sexual harassment case. Henderson v. Simmons Foods, Inc., 217 F.3d 612 (8th Cir. 2000). Ms. Henderson was a long-time employee of a Simmons Foods chicken processing plant. Id. at 613. In 1994, Sergio Sanchez, a co-worker, began to sexually harass Ms. Henderson by making sexually offensive remarks and by frequently touching her in an offensive manner. Id. at 614. Ms. Henderson complained to her supervisors, but nothing was done until Sanchez was transferred to a different shift in 1995. Id. About a year and a half later, Sanchez was transferred



back to the same shift as Ms. Henderson and was stationed close by her on the production line. Id. Ms. Henderson complained that Sanchez had been stationed too close to her, but her supervisor told her there was no other place for him. Id. In fact, there were eight different production lines, each with more than twenty workers. Id. About a month after he returned to Ms. Henderson's shift, Sanchez resumed his sexual harassment. Id. Ms. Henderson complained to her supervisor and to Will Higginbotham, the manager of human resources. Id. As before, her supervisor did nothing. Id. Higginbotham told Ms. Henderson that her allegations were very serious and threatened her by stating that if they were unfounded, she might lose her job. Id.

In April 1997, Henderson told the company nurse and three other supervisors about the ongoing problems. Id. She also stated that another co-worker, Manuel Garcia, had commenced harassing her, and that two other co-workers might have overheard the harassing comments. Id. As part of the investigation, the supervisors asked the two witnesses if they had heard anything and they said that they had not, but one stated that the noise level in the plant kept her from overhearing other people's conversations. Id. Higginbotham also met with Sanchez and Garcia, and spoke with the second employee that Ms. Henderson thought might have overheard the harassment. Id. Sanchez and Garcia denied the harassment and the other employee said he had not heard anything. Id. Higginbotham told Sanchez and Garcia that they could be terminated for sexual harassment. Id. After this meeting with Higginbotham, the verbal harassment stopped; however, Sanchez continued to make offensive sexual gestures at Ms. Henderson. Id. She again complained, but nothing happened as a result of her complaint. Id. At the end of July 1997, Ms. Henderson resigned because of the ongoing harassment. Id. at 614-15.

The Eighth Circuit focused on whether Simmons Foods was deliberately indifferent to the risk that it was acting in violation of federal law. Id. at 618. Here, Ms. Henderson had complained more than forty times to a variety of supervisors, but court noted that only once had Simmons Foods acted upon her complaints over the two year period and that its response was "half-hearted." Id. at 619. The court also noted that Simmons Foods had placed Sanchez close to Henderson, in spite of Henderson's earlier complaints, failed to respond to her complaints, threatened her with termination for making the complaints, and minimized Sanchez' conduct. Id. The court found that all these facts together showed that:

Simmons deliberately downplayed Henderson's sexual harassment complaints, and, moreover, actually contributed to the escalation of a hostile work environment by its reassignment of Sanchez. We conclude therefore that Simmons, through its supervisors' conduct, displayed deliberate indifference to Henderson's federally protected rights.

Id. Thus, the Eighth Circuit affirmed the jury’s award of punitive damages. Id.

### **Eighth Circuit: Punitive Damages Not Allowed**

In a Title VII sexual harassment and retaliation case, the Eighth Circuit agreed with the district court that there was insufficient evidence of the requisite intentional unlawful discrimination to award punitive damages. Dhyne v. Meiners Thriftway, Inc., 184 F.3d 983, 988 (8th Cir. 1999) (upholding judgment as a matter of law for defendant on punitive damages). Ms. Dhyne was a supermarket cashier. Id. at 986. Shortly after she started working for defendants in March of 1996, a bagger, Rodney Davis, commenced sexually harassing her by calling her offensive names and commenting on her body, but he did this quietly and no one else ever overheard him. Id. Ms. Dhyne complained to her assistant manager, Tom Watson, who said he would speak with Davis. Id. The harassment continued and Ms. Dhyne complained again the following week; Watson said he would speak with Davis again. Id. Ms. Dhyne complained again in early June, and Watson told her that he had recommended that Davis be fired. Id. Several days later, after contacting an attorney, Ms. Dhyne complained to Dan Meiners, Director of Store Operations. Id. Some days later, Ms. Dhyne told Watson and Meiners that the harassment was continuing. Id. Only then did Meiners transfer Davis to a different shift where he had no further contact with Ms. Dhyne. Id. Messrs. Watson and Meiners testified that when they spoke with Davis about the allegations of sexual harassment, he stated first that Ms. Dhyne “had something against him,” and later that he believed that her “complaints were racially motivated.” Id. at 987. The other witnesses all “described Dhyne as a difficult and divisive co-worker.” Id.

The court applied Kolstad, noting that punitive damages are only available if the employer acts with “knowledge that it may be acting in violation of federal law.” Id. (citing Kolstad, 527 U.S. at 535). The court held that the delay by management in remedying the problem, while sufficient to make a claim of discrimination, could not support a finding of malice or reckless indifference. Id. at 988. In particular, where “no other employee corroborated Dhyne’s complaints of verbal rather than physical harassment, an employer must be allowed some time to gauge the credibility of the complainant and the seriousness of the situation.” Id. Therefore, the court upheld the lower court’s decision not to submit the punitive damages claim to the jury. Id.

### **Ninth Circuit: Punitive Damages Allowed**

In Title VII sex discrimination case, the Ninth Circuit clarified the Kolstad malice or reckless indifference requirement. Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002), cert. denied, 123 S. Ct. 854 (2003). The court emphasized that “in general, intentional discrimination is enough to establish punitive damages liability.” Hemmings, 285 F.3d at 1198. The rare cases in which one does not lead to the other are when a plaintiff employs a novel theory of discrimination or where the employer is actually completely unaware of anti-discrimination principles. Id. Here, the evidence supported a finding that Tidyman's was aware of the anti-discrimination laws. Id. at 1199. Tidyman's allegedly hired more women to managerial positions in an attempt to avoid exposure for discriminatory practices elsewhere in the company. Id. The plaintiffs also introduced evidence showing that Tidyman's harassed them after they complained of being excluded from decision making processes because of their sex. Id. The jury had awarded each plaintiff \$1 million in punitive damages, id. at 1197; the district court granted the employer's post-trial motion for judgment as a matter of law, and the Ninth Circuit reinstated the jury's award, subject to remittitur.

In a Section 1981 and state law racial discrimination case, an employee complained of offensive jokes, the anti-discrimination supervisor's repeated failure to prevent them, and that supervisor tacitly participated in the inappropriate conduct. Swinton v. Potomac Corp., 270 F.3d 794, 799 (9th Cir. 2001), cert denied, 535 U.S. 1018 (2002). The jury awarded \$1 million in punitive damages. The Ninth Circuit approved the Tenth Circuit's holding that a supervisor is a “manager” if he was charged with enforcing the employer's anti-discrimination policy and that a showing of good-faith efforts was impossible if the employer's agent in charge of enforcing its anti-discrimination policies engaged in the offending conduct. Id. at 810 (citing Deters v. Equifax Credit Info. Servs., Inc., 202 F.3d 1262 (10th Cir. 2000)). Thus, the court implicitly rejected the reasoning of Seventh Circuit in Cooke, supra. The plaintiff's direct supervisor, Pat Stewart, was designated in the employee manual as the proper recipient of harassment complaints by Stewart's employees, including the plaintiff, Mr. Swinton. Swinton, 270 F.3d at 810. Stewart laughed when other employees' made “nigger jokes,” did nothing to stop them, and never reported that behavior to higher management. Id. The employer claimed that Stewart was a “low-level supervisor” and thus not employed in a “managerial capacity.” Id. The Ninth Circuit held that vicarious liability was appropriate regardless of Stewart's position in the company hierarchy because he was explicitly charged with preventing discrimination vis-a-vis his employees, including Swinton. Id. at 810-11. The Ninth Circuit also noted that an employer's post-complaint remedial measures with regard to the discrimination can be relevant to testing its good-faith efforts. Id. at 814-15. If the plaintiff argues that punitive damages are necessary to teach the employer a lesson, or if the plaintiff filed suit immediately after the incident, then post-complaint remedial efforts go to the employer's good-faith efforts. Id. Here,

the district court excluded evidence of supervisors having attended anti-discrimination training seven months after Swinton was fired. Id. at 816. The Ninth Circuit held that the exclusion was within the trial court's discretion because the evidence was minimally persuasive and did not substantially affect the trial. Id.

In a Title VII sex discrimination case, the Ninth Circuit held that evidence of discriminatory acts by the employer against other women besides the plaintiff was relevant and admissible to show malice or reckless indifference. Lansdale v. Hi-Health Supermart Corp., 54 Fed. Appx. 268, 270 (9th Cir. 2002). The jury's award of punitive damages (amount not given) was affirmed.

### **Ninth Circuit: Remand for Further Proceedings**

The Ninth Circuit applied Kolstad in a Title VII sex discrimination and retaliation case, but remanded for further proceedings. Passantino v. Johnson & Johnson Consumer Prods. Inc., 212 F.3d 493 (9th Cir. 2000). Ms. Passantino was a mid-level manager in the military division of Johnson & Johnson Consumer Products Inc. ("CPI"). Id. at 499. Although she consistently received excellent performance reviews, her progress through the ranks ceased after ten years. Id. at 500. She began to suspect this was the result of sex discrimination, because (1) the division in which she worked was described as "an old boy network;" (2) her supervisor, Lew Williams, made derogatory statements about women, including that women buyers were "PMS" and "menstrual;" (3) two of her male co-workers "had a condescending attitude towards women;" and (4) "Most important, during her 1993 performance evaluation, Williams told Passantino that she should consider looking outside the company for employment because he did not believe that either the company or his boss was committed to promoting women." Id. After Ms. Passantino complained to Williams about this situation, the offensive behavior actually escalated and she sensed that she was no longer taken seriously. Id. at 500-01. In her next performance review, Williams criticized her by telling her "that it was her problem to get along with her co-workers." Id. at 500. Ms. Passantino applied for a promotion, but the position was instead filled by one of the men about whom she had complained. Id. at 501. She then learned of three new positions, but they were also filled by men before she even had a chance to apply for them. Id.

Ms. Passantino then contacted the EEO officer, who repeatedly warned her that "she would have to 'live with the burden of coming forward' because the decision to complain 'could have many ramifications.'" Id. She eventually filed a formal complaint with the Human Resources department. Id. She subsequently had two meetings with John Hogan, the Vice

President of Sales, and Williams; at the second meeting, Hogan told her that he had done a salary analysis and falsely stated that he had found no discrepancies or discrimination. Id. In this analysis, which compared performance ratings and salaries, the performance rating of one of the male co-workers about whom she had complained was falsely listed as being higher than it actually was. Id. At a division meeting shortly thereafter, Hogan said that everyone needed to “shape up and act professional” or risk losing their jobs, which Ms. Passantino took as a public rebuke for having complained. Id. at 502. Afterwards, her supervisor curtailed his communications with her, resulting in her losing sales opportunities. Id. She was offered numerous positions that, though presented as promotions, would actually have been demotions. Id. at 502-03. The Ninth Circuit noted, regarding these “promotions,” that the “district court stated that Hogan and Williams ‘were probably viewed by the jury as being caught in lies, having demeanors of untruthfulness, lacking credibility.’” Id. at 503 n.4.

The Ninth Circuit found that this “evidence was unquestionably sufficient . . . [to support] a punitive damages award.” Id. at 514. The court stated that the evidence showed “that CPI downgraded Passantino’s promotability status and offered her demotions in retaliation for her complaints. . . . that defense witnesses lied . . . about their actions, as part of a continuing effort to cover up their campaign against her, including giving her false or misleading information about potential jobs as well as about salaries,” and that the evidence of a pattern of discrimination, taken together, was sufficient to show that defendants were acting with knowledge that they might be violating federal laws. Id. at 516.

Nonetheless, the Ninth Circuit remanded the case for a new trial on punitive damages, because the record did not include information that was necessary to determine the availability of punitive damages under the Kolstad analysis. Id. at 516-17. First, more information was needed about the positions of Hogan and Williams within the corporate hierarchy, since Kolstad held that the vicarious liability defense is not available if the person whose conduct is discriminatory or retaliatory is “sufficiently high up within [the defendant-corporation that] they would be [the defendant-corporation’s] proxies.” Id. at 517. Thus, if Messrs. Hogan and Williams were found to be “proxies” of the corporate defendant, then CPI would be directly liable to Ms. Passantino and punitive damages would be available. Id.

Second, the court found that the record was insufficient to answer the question whether defendant’s anti-discrimination policy was implemented in good faith. Id. The court noted that, although there was evidence that the defendant had an anti-discrimination policy and complaint procedures, it had not demonstrated that “the policy was fairly and adequately enforced.” Id.

Therefore, the Ninth Circuit remanded the case to the district court for further proceedings on these two questions.

Two years after Passantino, in another Title VII case for sex discrimination, the Ninth Circuit expanded on its view of the Kolstad good-faith defense. Costa v. Desert Palace, Inc., 299 F.3d 838, 864-65 (9th Cir. 2002) (en banc), aff'd on other grounds sub nom. Desert Palace, Inc. v. Costa, 539 U.S. \_\_\_, 123 S. Ct. \_\_\_, 2003 WL 21310219 (U.S. June 9, 2003). The jury had awarded \$100,000 in punitive damages. Id. at 863-64. The court stated that Kolstad suggests that the court must consider the type of authority given to the offending employee, i.e., the employee's discretion and powers, when considering whether the employer has made sufficient efforts to enforce its anti-discrimination policy. Id. at 864. The Ninth Circuit concluded that a remand was necessary:

The jury's findings, which were quite well-supported, establish this requisite scienter [under Kolstad] and the additional, probative factor of egregious misconduct. However, we cannot equate "egregious" misconduct with a lack of "good faith" as a matter of law. Nor can we say that punitive damages are unavailable as a matter of law. We therefore remand for a retrial on the issue of punitive damages in light of Kolstad.

Id. at 865. The Supreme Court affirmed the Ninth Circuit's decision on other grounds, i.e., upholding the district court's use of a mixed motives jury instruction, so that a remand is still required on the punitive damages award. Desert Palace, 2003 WL 21310219, at \*8.

In a Title VII sex discrimination case, the Ninth Circuit held that the employer had not made a good-faith effort to enforce its anti-discrimination policies. Winarto v. Toshiba Am. Electronics Components, 274 F.3d 1276, 1291-02 (9th Cir. 2001), cert dismissed, 123 S. Ct. 816 (2003). The plaintiff, Ms. Winarto, was verbally and physically abused by a coworker on the basis of her sex and perceived sexual orientation. Id. at 1280. When Winarto told her supervisor about this abuse, he failed to memorialize her complaint or report it to higher management. Id. at 1292. Corporate management later told Winarto's supervisor that a warning to the abusive employee would suffice, but this employee was never disciplined, the abuse continued, and he was promoted a year after Winarto's departure. Id. The Ninth Circuit held that the anti-discrimination policy was not "fairly and adequately enforced." Id. at 1291. The jury deadlocked on the punitive damages award; the Ninth Circuit remanded for a new trial on punitive damages.

In a Title VII sex discrimination case, the Ninth Circuit stated that events occurring after the “critical events” of the discrimination could still be relevant to proving liability for punitive damages. EEOC v. Wal-Mart Stores, Inc., 35 Fed. Appx. 543, 545-46 (9th Cir. 2002). After not hiring Ms. Stern because she was pregnant, Wal-Mart attempted to cover-up its discriminatory acts by fabricating information on her employment application and by intentionally losing documentation of her interview process. Id. at 547. The Ninth Circuit concluded that “it is self-evident that this evidence is highly probative for a determination of punitive damages,” and should have been admitted at trial. Id. at 545.

### **Tenth Circuit: Punitive Damages Allowed**

The Tenth Circuit affirmed an award of \$295,000 in punitive damages in a Title VII sexual harassment case. Deters v. Equifax Credit Info. Serv., Inc., 202 F.3d 1262 (10th Cir. 2000). Ms. Deters worked in a branch office of a collection agency, Equifax, from August 1994 until October 1995. Id. at 1266. Her male co-workers commenced harassing her as soon as she started working at Equifax. Id. They would grab her, shout sexually degrading epithets at her, tell sexual jokes, leer at her, and talk about women’s body parts. Id. One of her co-workers grabbed her arm, saying that she was “a frail thing . . . if I was ever to have sex with you, I’d crush you like grapes.” Id. at 1267. Ms. Deters overheard her co-workers discussing the possibility of their having sex with her. Id. One co-worker regularly asked her to see him after work, squeezed her arm, and rubbed her leg. Id.

Ms. Deters also testified that her supervisor would call her at home at night, making it obvious that he wanted to go out with her, even though she had told him that she was not interested. Id. On one occasion, her supervisor required her to meet him in a restaurant, ostensibly to discuss her job. Id. However, he did not discuss anything official with her, because he was intoxicated; before she left, he grabbed her and kissed her. Id.

Ms. Deters routinely complained to Jim Taylor, the highest manager at her branch, who had the authority to hire, fire and discipline employees and was also the person designated by Equifax to implement the sexual harassment policy. Id. Taylor responded to Ms. Deters’ complaints by telling her that the co-workers about whom she was complaining were “revenue producers” and that she “was a non-revenue person.” Id. He also told Ms. Deters that the conduct was a by-product of the personalities of people who work in collection agencies, and that their actions were “friendly.” Id. The Tenth Circuit noted that Equifax’ head office had already received a complaint of sexual harassment by one of the male employees who was

harassing Ms. Deters, but the head office delayed investigating the complaint until after she quit her job in October 1995. Id. at 1267-68.

Equifax appealed the jury's verdict awarding \$295,000 in punitive damages, arguing that Taylor was merely negligent, as he did not know the details of what had occurred. Id. at 1268-69. The Tenth Circuit rejected this argument, finding that there was sufficient evidence presented that Taylor what was happening. Id. at 1269. The court explained that, under Kolstad, "Malice and reckless indifference . . . refer not to the egregiousness of the employer's conduct, but rather to the employer's knowledge that it may be acting in violation of federal law," and that "recklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment." Id.

Equifax also argued unsuccessfully that it could not be liable for punitive damages because Taylor was not acting in accordance with its anti-sexual harassment policies and thus, Equifax could invoke the good-faith efforts defense. Id. at 1271. The court similarly rejected this argument, holding that the good-faith efforts defense is only available in cases where the employer is vicariously liable. Id. Here, however, because Taylor was the person designated by Equifax to implement the sexual harassment policy, his failure to respond properly made Equifax directly liable, and not vicariously liable. Id. Given this direct liability, Equifax could not assert the good-faith efforts defense. Id. This is the first post-Kolstad case in the circuit courts to apply a theory of direct liability to the award of punitive damages.

In a Title VII sexual harassment case, the Tenth Circuit found reasonable basis for a lack of good-faith effort to enforce anti-discrimination law because of an employee's ignorance of the law and the employer's failure to act on a complaint. Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000). Ms. Cadena's supervisor, Charles Bauersfeld, subjected her to severe sexual harassment, verbal and physical. Cadena reported to management the harassing conduct of her supervisor, but Pacesetter failed to take any action. Id. In fact, management openly avowed knowing of and tolerating Bauersfeld's behavior. Id. at 1206. Ann Humphrey, the manager responsible for sexual harassment training at the office, testified that she did not believe that a male employee exposing his genitalia or grabbing a female employee's breasts would amount to harassment if he apologized afterwards. Id. The jury's punitive damages award of \$700,000 (\$300,000 after remittitur) was upheld.

### **Tenth Circuit: Remand for Further Proceedings**



The Tenth Circuit, in a Title VII sexual harassment case, reversed a directed verdict in favor of the defendant on punitive damages. Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177 (10th Cir. 1999). Ms. Knowlton commenced employment with Teltrust Phones as a sales representative in October 1990. Id. at 1180. In September 1992, she complained to the management of Teltrust, Inc., the parent corporation, that her supervisor, Mark Neihart, had been harassing her since she began working for Teltrust Phones. Id. Among other things, Neihart (1) propositioned Ms. Knowlton, (2) speculated about her sex life and her husband's infidelity, (3) told her about his sex life, (4) made lewd gestures, (5) told her sexually explicit jokes, (6) sent sexually suggestive messages to her pager, (7) told her about the size of his penis, and (7) placed on her desk a radish cut into the shape of a vagina and garnished with cheese spread. Id. at 1180-81. He withheld approval on contracts that she had made with new clients, saying that he would only approve them if she engaged in oral sex with him. Id. Because he would not approve the contracts, Knowlton lost several new clients. Id.

Before Ms. Knowlton's complaints, Teltrust Phones and Teltrust, Inc. had already learned of other incidents of inappropriate behavior by Neihart towards his female co-workers and subordinates. Id. at 1186. For example, another female worker had complained about him, and Neihart's immediate supervisor had heard him use inappropriate language with female co-workers and reported it to higher management, including Jerry Romney, the president of both Teltrust Phones and Teltrust, Inc. Id. at 1187. Neihart's supervisor had told Neihart that his behavior was inappropriate but had not formally reprimanded him. Id. Additionally, the employee who had complained earlier testified that, when she was hired, Romney had told her that "no fucking woman will ever tell me how to run my businesses." Id.

After Ms. Knowlton complained about Neihart's behavior, Neihart was "fired" from Teltrust Phones. Id. In fact, the very same day, Neihart was hired by Romney at Teltrust Communication Services, Inc., yet another subsidiary of Teltrust, Inc.; in his new position, Neihart's salary was \$8,000 higher and his office was larger. Id. Although Neihart was on a different floor, Ms. Knowlton still had to work with him. Id. She again complained, stating that the sexual harassment was continuing and that he was threatening to "get even" with her. Id. She was told by management that they were disappointed with her lack of satisfaction with the company's response to her complaints. Id.

The Tenth Circuit applied the Kolstad malice or reckless indifference standard to overturn the directed verdict for Teltrust, stating that:

[The] evidence would support a finding that prior to Knowlton's complaint, the management of Teltrust, Inc. was unmistakably aware that the environment at the three Teltrust entities, and specifically Neihart's behavior, was rife with foul language, sexual innuendo, and sexual advances which could reasonably be labeled as sexual harassment. Moreover, the management's reaction to Knowlton's complaint was unresponsive because she was assured continued contact with Neihart. Accordingly, the district court erred when it ruled that there was no evidence from which a jury could make a reasonable inference that Teltrust acted recklessly and with disregard for Knowlton's federally protected civil rights.

Id. Therefore, the court remanded for a jury trial on punitive damages. Id. at 1187-88.

### **Eleventh Circuit: Punitive Damages Allowed**

The Eleventh Circuit applied Kolstad in a race discrimination case, upholding the award of punitive damages. Alexander v. Fulton County, Ga., 207 F.3d 1303 (11th Cir. 2000). Alexander was a “reverse” race discrimination case brought against Fulton County, Georgia and its sheriff under Title VII, § 1981 and § 1983. Alexander, 207 F.3d at 1313-14. Eighteen white employees of the Fulton County Sheriff’s Department sued the county and the sheriff for racial discrimination in a broad array of employment actions, including discipline, promotions, assignments and transfers, reclassifications, access to promotional examinations and restoration of rank. Id. at 1336. The Eleventh Circuit concluded that, regarding the disciplinary actions, there was sufficient evidence that the white employees were punished more severely than were black employees in similar positions who had engaged in similar conduct, so that the jury could award compensatory damages. Id. The Eleventh Circuit then applied Kolstad, noting that punitive damages are available where there is a showing that the employer acted with the appropriate state of mind. Id. at 1337. The court explained that the state of mind necessary is “either an evil intention to deprive a plaintiff of his federally protected rights or a conscious indifference to these rights.” Id. (citing Kolstad, 527 U.S. at 535-36) (emphasis in original). The court pointed to the sheriff’s testimony that she knew that it is illegal to treat employees differently on the basis of race. Id. The court found that her testimony, which was sufficient to show that she treated people differently based on their race, supported the punitive damages awards to several of the plaintiffs. Id.

In another reverse race discrimination case under Section 1983, brought by white female librarians against the Atlanta public library system, the Eleventh Circuit upheld the punitive

damages award of \$13.3 million to the seven plaintiffs, *i.e.*, \$1.9 million per plaintiff. Bogle v. McClure, \_\_\_ F.3d \_\_\_, 2003 WL 21297118 (11th Cir. June 6, 2003). The Eleventh Circuit rejected defendants' argument "that they did not 'discriminate in the face of a perceived risk that [their] actions will violate federal law' as required by Kolstad," *id.* at \*10, since the defendants knew that their conduct was illegal:

At trial, however, Appellants' counsel admitted that Appellants "knew it was a violation of federal law to transfer people on the basis of race." This admission is not surprising considering that, at the time of the transfers, it was clearly established [that] intentional discrimination in the workplace on account of race violated federal law. See Alexander, 207 F.3d at 1321. Furthermore, there was evidence at trial that Appellants were warned by Fulton County Attorney Green, the Personnel Department, and even Hooker herself about significant legal problems with the transfers. Thus, there was sufficient evidence for a reasonable jury to award punitive damages.

Id. The Eleventh Circuit also held that the punitive damages awards did not violate due process, and satisfied the standards set forth by the Supreme Court's intervening punitive damages decision, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. \_\_\_, 123 S. Ct. 1513 (2003).

In a Pregnancy Discrimination Act case, the Eleventh Circuit also upheld the award of punitive damages. EEOC v. W & O, Inc., 213 F.3d 600 (11th Cir. 2000). Three women who had been employed by W&O, Inc. as waitresses at the Rustic Inn, sued their former employer for discrimination after they were forced to stop waiting tables during their pregnancies. *Id.* at 607-09. The Rustic Inn had a written policy in its employee handbook that waitresses could not wait tables after their fifth month of pregnancy. *Id.* at 607. They could continue to work as cashiers or hostesses -- positions that earned less money (*i.e.*, they would no longer receive tips). *Id.* The policy was promulgated contemporaneously with the congressional enactment of the Family and Medical Leave Act ("FMLA"). *Id.* Michael Diascro, the general manager of the restaurant, drafted the policy; in doing so, he did some research on the laws relating to pregnancy, including calling "Wage and Labor." *Id.* The night manager, James Donlin, also did some research on these laws; he called the "Labor Board" and learned that the law required that pregnant women be allowed to keep working as long as they could fulfill their duties. *Id.*

Nonetheless, the restaurant management implemented this policy. *Id.* When the EEOC asked the owner of the restaurant, Henry Oreal, about this policy, he stated that "no one is going to run around here pregnant and big like that. No pregnant women are going to tell me how long

they'll stay.” Id. After this litigation commenced, management replaced this policy with one that closely tracked the FMLA regulations. Id.

The three women who filed charges with the EEOC had all been forced to stop waiting tables while they were still able to do their work. Id. at 608-09. Each of the women objected, explaining that they could still work as waitresses and needed the income. Id. One of the women brought in a note from her physician which stated that she was still able to work. Id. at 608. She was allowed to work into her sixth month, but then was told she would not be able to wait tables any longer. Id. When she objected, saying that she could still work, Oreal told her that she was “too fat to be working in here.” Id. She was not allowed to come back to work after the birth of her child. Id. The other two plaintiffs were also forced to leave during their pregnancies. Id. at 608-09. Both were still capable of waiting tables when the restaurant management required them to stop. Id. Indeed, one found work at another restaurant, where she continued waiting tables into her ninth month. Id. at 609.

W & O argued that it was not liable for punitive damages because its motive in enacting the policy was benevolent – protecting the health of the mother and the unborn child. Id. at 611. The court explained that, under the Kolstad malice or reckless indifference standard, “the managers’ and owners’ alleged lack of ill will is not sufficient, in and of itself, to bar punitive damages.” Id. The Eleventh Circuit noted the managers’ research of the issue while drafting the policy, holding that “there was sufficient evidence for the jury to find that W & O acted with reckless indifference to the civil rights of its pregnant employees.” Id. at 611-12. The court stated that Diascro “could have used the FMLA regulations as the model for W & O’s pregnancy policy, instead he chose to draft this policy.” Id. The court also found that Oreal’s comments and some of the statements made by the managers “show[ed] an unwillingness to accede to the law. The jury would be entitled to find that W & O maintained the policy in the face of challenges until it was affirmatively found that it was illegal.” Id. at 612. Therefore, the Eleventh Circuit affirmed the award of punitive damages of \$100,000 to each plaintiff, finding that a reasonable jury could have found that the women were discharged solely because of their pregnancy and that the management knew that pregnancy discrimination violated federal law. Id.

### **Eleventh Circuit: Punitive Damages Not Allowed**

In a Title VII racial harassment case, the Eleventh Circuit upheld the district court’s decision not to submit punitive damages to the jury because the employer did not have “actual notice” but only “constructive notice” of the harassment. Miller v. Kenworth of Dothan, Inc.,

277 F.3d 1269, 1280 (11th Cir. 2002). Bradley Miller, a Mexican-American, told his direct supervisor, after being called several racial epithets, that his fellow employees “should watch what they say to me.” *Id.* While the harassment was so severe and pervasive as to put higher management on constructive notice of its existence and establish liability, the court held that Miller’s actions were insufficient to provide actual notice. *Id.* at 1278-9. Lacking actual notice, the court held that Kenworth could not have acted with malice or reckless indifference to Miller’s federal rights to support a claim for punitive damages. *Id.* at 1280.

37. The Application of *Kolstad* by the State Courts.

As of June 3, 2003, *Kolstad* has only been cited in fifteen reported decisions from ten states. Further, two of these decisions were unpublished trial court decisions from Connecticut of which one was reversed on appeal and the other involved a personal injuries arising from a car accident, another cited *Kolstad* solely in the dissent (Virginia), two applied *Kolstad* only to the Title VII claims since punitive damages were not available under the state law claims (Louisiana and New Hampshire), and one involved common law claims (Texas).<sup>4</sup> The following analysis summarizes the relatively few state courts that have applied *Kolstad* to state law employment discrimination claims. Critically, none of these differ significantly from the federal standard.

The Supreme Court of California, in a wrongful discharge in violation of public policy claim, had to address the scope of a state statute, Cal. Civil Code § 3294(b), that barred punitive damages against a corporation for conduct by its managing agents. *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 981 P.2d 944, 88 Cal. Rptr. 2d 19 (1999). The court held that only when actions are taken by “corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy” can the corporation be liable for punitive damages. *Id.* at 566-67, 981 P.2d at 947. In a footnote, the court discussed the implications of *Kolstad*, but without deciding the issue:

---

<sup>4</sup> See *Craine v. Trinity College*, 1999 WL 1315017, at \*8 (Conn. Super. Ct. Dec. 27, 1999), *rev’d* 259 Conn. 625, 791 A.2d 518 (2002); *Santillo v. Arredono*, 2001 WL 357630, at \*1 (Conn. Super. Ct. Mar. 21, 2001) (car accident case); *Hanley v. Doctors Hosp. of Shreveport*, 821 So. 2d 508, 525 (La. App. 2002) (Title VII punitive damages); *Mack v. City of Detroit*, 654 N.W.2d 563, 565 (Mich. 2002) (dicta); *Madeja v. MPB Corp.*, 821 A.2d 1034, 1048 (N.H. 2003) (Title VII claims); *Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576, 588 (Tex. App. — Hous. 2002) (common law claims); *Dep’t of Prof’l & Occupational Regulation v. Abateco Servs., Inc.*, 534 S.E.2d 352, 362, 33 Va. App. 473, 475 (2000) (cited in dissent).

Although the issue is not presented here, and we do not address it or offer our view on its merits, in future cases, if a company has a written policy that specifically forbids retaliation against employees who testify at unemployment hearings, it may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith. (See Kolstad . . . existence of written policy forbidding discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) may operate as a bar to punitive damage liability.).

Id. at 568 n.2, 981 P.2d at 948 n.2. This California statute governs punitive damages for discrimination and harassment claims under the California Fair Employment and Housing Act (“FEHA”), along with common-law claims (such as breach of contract). See Weeks v. Baker & McKenzie, 63 Cal. App. 4th 1128, 1147-48, 74 Cal. Rptr. 2d 510, 521, 76 FEP Cases 1219 (1998) (“FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA, including actions brought for sexual harassment.”) (collecting cases). Thus, plaintiffs in California cannot obtain punitive damages for state law claims, unless they can show that the conduct was taken by those corporate employees with substantial management authority.

The Supreme Court of New Jersey, in an age discrimination case under the New Jersey Law Against Discrimination, recognized that while there were minor semantic differences between Kolstad and New Jersey precedent, the similarities were greater:

Like the United States Supreme Court, we have recognized that the imposition of vicarious liability for punitive damages on employers based on the misconduct of employees requires a distinct method of analysis. And like the Supreme Court, we have afforded a form of safe haven for employers who promulgate and support an active, anti-harassment policy.

Cavuotti v. New Jersey Transit Corp., 161 N.J. 107, 120-21, 735 A.2d 548, 555-56 (N.J. 1999). In New Jersey, the conduct must be “especially egregious” for imposing punitive damages, id. at 113, as opposed to the “egregious” standard of Kolstad. The wrongdoer must have been part of the “upper management,” id. at 122, a fact-specific inquiry. Id. at 122-29 (exhaustive discussion of requisite analysis); see also Baker v. National State Bank, 161 N.J. 220, 225-26, 736 A.2d 462, 465 (N.J. 1999).

In two decisions, the New York Supreme Court, Appellate Division (the lower court in the state appellate hierarchy), applied Kolstad to plaintiffs' discrimination claims. See Davies v. Royal Air Maroc, 739 N.Y.S.2d 125, 291 A.D.2d 343 (2002) ("Defendant's offending conduct, as demonstrated at trial, while highly inappropriate, did not warrant an award of punitive damages.") (citing Kolstad); Umansky v. Masterpiece Int'l Ltd., 715 N.Y.S.2d 638, 639, 276 A.D.2d 692, 693 (2000) ("In applying this [Kolstad] standard, the plaintiff offered evidence that raised a question of fact as to whether the defendants deliberately discharged her knowing that such discharge was in violation of city law.") (citing Kolstad). Umansky was a disability claim under New York state and city law. Davies was a gender discrimination claim; although the source of law was not specified, it must have been state law since the court upheld an award of \$500,000 for emotional distress, which is in excess of the federal statutory cap.

The Texas Court of Appeals, in a sexual harassment case under the Texas Human Rights Act ("THRA"), held that Kolstad "merely settled the applicable law; it did not change the law" in Texas. Wal-Mart Stores, Inc. v. Itz, 21 S.W.3d 456, 479 (Tex. App. — Austin 2000). The court held that the evidence supported the \$150,000 award of punitive damages. Another division of this court, in ruling on the employer's appeal of a default judgment which awarded \$200,000 in punitive damages to a sexual harassment plaintiff, held that this award could not be sustained, since, under Kolstad, "there is no evidence of malice or reckless indifference to justify the imposition of punitive damages" under either Title VII or the THRA. Shoreline, Inc. v. Hisel, No. 13-01-621 CV, 2003 WL 21229098, at \*3 (Tex. App. — Corpus Christi 2003).

The Supreme Court of Appeals of West Virginia, in a disability discrimination case under the state Human Rights Act, upheld the award of punitive damages under the state common law standard for liability, which requires the finder of fact to find "that the defendant's conduct was malicious, oppressive, wanton, willful, reckless, or with criminal indifference to civil obligations." Haynes v. Rhone-Poulenc, Inc., 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (W. Va. 1999). The court took note of Kolstad, and concluded that even under its federal standard, the plaintiff would still be entitled to punitive damages:

We also note that the United States Supreme Court has recently addressed the standard for the award of punitive damages in a gender discrimination case, Kolstad . . . . Our Human Rights Act, as we have noted, does not establish a statutory standard for the award of punitive damages, or indeed for any other "damages," but rather gives the circuit court the power to award "any other legal and equitable relief as the court deems appropriate." W. Va. Code, § 5-11-13(c) [1998]. We turn to our established punitive damages jurisprudence for the

appropriate standards. However, even assuming *arguendo* that the federal statutory standard for an award of punitive damages, as interpreted in Kolstad, were applicable to the instant case, we conclude that the requisite malice and/or reckless indifference could have been found by the jury that would authorize its award of punitive damages.

Id. at 35 n.2, 521 S.E.2d at 348 n.2. Hence, the Kolstad “egregious” standard is commensurate with the standard for punitive damages under West Virginia law.

### 38. When Is a Supervisor Not a Supervisor?

An employer is vicariously liable under Title VII for harassing conduct taken by its supervisor(s) that leads to a tangible employment action against the employee. Ellerth, 524 U.S. at 760-62. As the Court recognized:

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. . . . Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Id. at 761-62; accord Faragher, 524 U.S. at 803 (“an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor.”). Therefore, the Supreme Court held that vicarious liability attaches to harassing actions taken by supervisors:

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.

Ellerth, 524 U.S. at 765; accord Faragher, 524 U.S. at 807 (quoting Ellerth). Thus, a threshold issue in determining the scope of the employer’s liability is whether the alleged harasser was the



plaintiff's supervisor, which requires a fact-specific analysis into the alleged harasser's authority over the plaintiff.

The Supreme Court has not adopted an express definition of who is a supervisor, although the Faragher Court did allude to several criteria. See Faragher, 524 U.S. at 803 (noting that a supervisor has the power "to hire and fire, and to set work schedules and pay rates") (quoting S. Estrich, "Sex at Work," 43 Stan. L. Rev. 813, 854 (1991)).

The EEOC, in response to Ellerth and Faragher, issued an Enforcement Guidance, "Vicarious Liability for Unlawful Harassment by Supervisors" (June 18, 1999) (reprinted in the FEP Manual, at 405:7651-7672 and online at <<http://www.eeoc.gov/docs/harassment.html>>). The EEOC applied agency principles to conclude that:

An individual qualifies as an employee's "supervisor" if:

- a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- b. the individual has authority to direct the employee's daily work activities.

Id. at 405:7654. The EEOC also recognized that even harassment by those who were outside the victim's supervisory chain of command could result in vicarious liability to the employer:

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power. The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

Id. at 405:7655.

The lower courts have looked to the supervisor's authority over the terms and conditions of the plaintiff's employment. The Seventh Circuit's framework has been adopted by several district courts. See Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033-34 (7th Cir. 1998). In Parkins, a Title VII sexual harassment and retaliation case, the Seventh Circuit commenced its analysis by noting that "Title VII provides no definition of the term

‘supervisor.’” Id. at 1033. The court turned to “the common law of agency and the purposes of Title VII.” Id. Under Faragher, “because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor.” Id. Thus, a distinction has to be made: “We have consistently distinguished employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers.” Id. In other words, “low-level supervisors . . . are equivalent to co-employees for purposes of Title VII.” Id. The court concluded that:

Hence, it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.

Id. at 1034. The Seventh Circuit found that Ms. Parkins’ alleged harassers were not supervisors, since both “were laborers who were required to account for their time on a time card, were paid an hourly wage, and received overtime pay. Neither ever substituted for a superintendent.” Although the two occasionally served as foremen, “any authority they had over Parkins was tenuous at best” because “she worked with approximately ten foremen at various sites.” Id. Therefore, the Seventh Circuit concluded that since “there is no evidence that either [harasser] enjoyed more than minimal authority, and exercised almost no control over truck drivers, they clearly were not supervisors with immediate or successively higher authority.” Id. at 1035.

Recently, the Second Circuit expressly rejected the Seventh Circuit’s Parkins decision, on the grounds that its approach conflicted with Ellerth and Faragher:

Ellerth and Faragher hold that an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims. The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates. We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the Parkins test.

Mack v. Otis Elevator Co., 326 F.3d 116, 127 (2d Cir. 2003). The Second Circuit noted that its position was consistent with the aforementioned EEOC's enforcement guidelines. Id.; see also T. Loomis, "Who's the Boss?," N.Y. L.J., May 22, 2003.

The Fourth Circuit, in a Title VII sexual harassment case brought by a police officer, looked at the employee's response to the alleged harassment as a reliable indicator of the relationship between the victim and her harasser. Mikels v. City of Durham, 183 F.3d 323 (4th Cir. 1999). The Fourth Circuit expanded upon the aforementioned language from Faragher regarding the employee's reaction to the harasser:

The determinant is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not. . . . The most powerful indicator of such a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority, though not exercised in the particular situation, to take tangible employment actions against the victim . . .

Id. (internal citation and quotation from Faragher omitted). For that reason, "where the level of authority had by a harasser over a victim — hence her special vulnerability to his harassment — is ambiguous, the tip-off may well be in her response to it." Id. at 334. More colloquially, "Does she feel free to 'walk away and tell the offender where to go,' or does she suffer the insufferable longer than she otherwise might?" Id. The Fourth Circuit found that the alleged harasser had "at best minimal" authority over the plaintiff which power "at most would involve the occasional authority to direct her operational conduct while on duty." Id. Furthermore, the plaintiff's own conduct in response to the harassment was telling: she "rebuffed him in an obscenity and profanity-laced outburst, rejected his immediately proffered apology, and the next day filed a formal grievance against him." Id. Her behavior was not congruent with what one might expect in response to harassment by a supervisor. Thus, the Fourth Circuit affirmed the grant of summary judgment for the defendant employer.

39. Employer Liability for Co-Worker and Customer Harassment.

Ellerth and Faragher concerned harassment of employees by their supervisors. The lower federal courts have also found, in some circumstances, that harassment by co-workers and third parties in the workplace (clients or customers), can also result in employer liability. *See, e.g.,* Watson v. Blue Circle, Inc., 324 F.3d 1252, 1258 n.2 (11th Cir. 2003) (“An employer may be found liable for the harassing conduct of its customers if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or should have known.”); Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) (*per curiam*) (“When an employee’s ability to perform his or her job is compromised by discriminatory acts including sexual harassment and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate.”); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 854 (1st Cir. 1998) (“other circuits, interpreting Title VII, have said that employers can be liable for a customer’s unwanted sexual advances, if the employer ratifies or acquiesces in the customer’s demands”); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073 (10th Cir. 1998) (“We agree with our sister circuits that an employer may be found liable for the harassing conduct of its customers.”); Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997) (“In light of these allegations, a fact finder could characterize Focus Homes’ response as implicitly or even explicitly requiring the appellants to endure repeated sexual assaults [by patients] as an essential part of their job.”); Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754, 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1077-84 (3d Cir. 1996) (regular and pervasive racial harassment by co-workers and supervisors established hostile environment claim); West v. Philadelphia Elec. Co., 45 F.3d 744, 755-56 (3d Cir. 1995) (same).

Regardless of whether harassment is by a customer or a co-worker, the appropriate standard for employer liability is negligence, not the aforementioned direct or vicarious liability for harassment by a supervisor. Lockard, 162 F.3d at 1074 (“the only basis for employer liability available is a negligence theory under Restatement (Second) of Agency § 219(2)(b)”).

The following recent federal appellate decisions are representative of those involving co-worker or customer harassment.

Ferris v. Delta Air Lines, Inc., 277 F.3d 128 (2d Cir. 2001). The Second Circuit held that where the plaintiff, a female flight attendant, was raped by a male co-worker [Young] during a layover in Rome, she could bring a Title VII sexually hostile work environment claim against her employer. Although the rape did not occur in a traditional workplace environment, the court recognized that because the plaintiff had to stay in a hotel room paid by the airline, along with other flight attendants, it was de facto part of the workplace. Id. at 135. Here, Delta “had notice of Young’s proclivity to rape co-workers,” so it did “not escape responsibility to warn or protect likely future victims.” Id. at 136. Indeed, “not only did Delta do nothing about it, but a Delta supervisor took affirmative steps to prevent the filing of a formal complaint that might have resulted in protective steps and even to prevent a prior victim from informally spreading cautionary words among the flight attendants about Young.” Id. Thus, the Second Circuit reversed the district court’s grant of summary judgment on the hostile work environment claim.

Haugerud v. Amery Sch. Dist., 259 F.3d 678 (7th Cir. 2001). The Seventh Circuit reversed the grant of summary judgment to the employer on her Title VII hostile work environment claim. The plaintiff, a school custodian, alleged numerous incidents of disparate treatment in which she and other female custodians were forced to do tasks that male custodians were not required to do, and that the male custodians made derogatory remarks in the presence of their supervisors, including that women “were not qualified to do their job because they were women and that they should not be paid as much as men,” and that the plaintiff was “nothing more than a fat-ass bitch.” Id. at 685-88. The Seventh Circuit recognized that while “none of these incidents were particularly severe, they are sufficiently pervasive, and they seem to have unreasonably interfered with her ability to do her job.” Id. at 694. Critically, the defendant failed to deny or explain “plaintiff’s most damaging allegation: that the male custodians were told not to help the female custodians.” Id. at 696. The Seventh Circuit concluded that the school district was liable for co-worker harassment and supervisor harassment because after the plaintiff reported her complaints, the employer “did nothing — no internal investigation was pursued and no remedial action was taken.” Id. at 699, 700.

EEOC v. Indiana Bell Tel. Co., 256 F.3d 516 (7th Cir. 2001) (en banc). The EEOC brought Title VII sexual harassment claims on behalf of numerous women who had been harassed by a single co-worker (Amos) over a nearly twenty-year period. His harassment included “telling female co-workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks (some times with his hands, sometimes with his erect penis), and allowing him to be seen masturbating at his desk.” Id. at 519. Despite repeated complaints, the employer took essentially no action to discipline the harasser; the one time that his termination was recommended, it was not

implemented because the company failed to act within 30 days of the recommendation, as required by the Collective Bargaining Agreement (“CBA”). Id. at 520. Not until another “public masturbation incident” was Amos finally terminated. Id. The Seventh Circuit concluded that “‘do nothing’ was the employer’s only strategy,” particularly where the employer knew about Amos’ conduct and his unwillingness to change for over a decade. Id. at 525.

The en banc Seventh Circuit rejected the employer’s attempt to claim that the CBA precluded it from taking disciplinary actions against Amos, where the employer speculated that Amos would request arbitration, and the arbitrator might find that Amos was not discharged for cause and would have to be reinstated. The Seventh Circuit tartly noted that employers cannot use a CBA to “avoid duties under federal law.” Id. Even if an arbitrator were to order reinstatement, the employer could place the harasser in an office by himself, isolated from female co-workers, and given make-work tasks. Id. at 524. More generally, the employer could challenge any such order by the arbitrator, since “no award that required an employer to tolerate an ongoing violation of this statute could be enforced.” Id. Under Supreme Court precedent, “an award that requires conduct ‘contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law’ must be set aside.” Id. (quoting Eastern Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 63 (2000)).

Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864 (9th Cir. 2001). In this case, which involved harassment of a male restaurant worker for failing to comply with stereotypes of masculinity, the Ninth Circuit held that the employer’s failure to take any reasonable response to Mr. Sanchez’s frequent complaints of harassment meant that the employer was liable for the co-worker harassment. Id. at 876. For the same reasons that the Ninth Circuit found that the employer could not invoke the affirmative defense to escape liability for the conduct of its supervisor (as discussed supra), the employer was negligent in failing to remedy the harassment and discipline those responsible for it. Id.

Little v. Windermere Relocation, Inc., 265 F.3d 903 (9th Cir. 2001). The Ninth Circuit held that an employer could be liable for sexual harassment by a customer (here, three rapes immediately following a client dinner), where “having out-of-office meetings with potential clients was a required part of the job,” the employee “was informed that reporting the rape would probably result in an adverse employment action, even to the point of jeopardizing her career,” and when she finally told the corporate president, he responded by decreasing her salary, referring her to corporate counsel, and terminating her after she complained about the change in her compensation. Id. at 911. The Ninth Circuit, based on the record evidence, concluded that “there is no evidence that Windermere took steps to prevent contact between Little and Guerrero

[the rapist customer], such as effectively removing Little from the account or informing Starbucks [the client] that it must replace the contact it used with Windermere.” Id. at 913. Although the Ninth Circuit reserved for the jury the determination of whether Windermere took appropriate remedial actions, it seems unlikely that Windermere will be able to prevail before the jury given its apparent “failure to take appropriate remedial measures.” Id.

Turnbull v. Topeka State Hosp., 255 F.3d 1238 (10th Cir. 2001), cert. denied, 536 U.S. 970 (2002). The plaintiff, a psychologist, was sexually assaulted by a patient at a state-run mental hospital. Id. at 1242-43. The Tenth Circuit, after noting that its precedent allowed liability for sexual harassment by nonemployees, including customers and group home residents, applied the negligence standard to reverse the district court’s grant of judgment as a matter of law on the plaintiff’s sexual harassment claims. First, the Tenth Circuit held that since “the atmosphere of sexual hostility at the hospital was pervasive” and well known to managers, and the plaintiff had complained “about general safety concerns with her supervisors on multiple occasions,” it was reasonable for a juror to conclude that the hospital “had either actual or constructive knowledge of the risk of sexual assault by patients. Id. at 1244. Second, the Tenth Circuit concluded that it was unlikely that the hospital had effectively responded to the known dangers, where the plaintiff identified numerous additional steps that could have been taken, including resuming certain safety measures that had been used in the past but subsequently abandoned. Id. at 1245. Thus, the Tenth Circuit reversed and remanded for a new trial on the hospital’s liability for the patient’s sexual harassment of the plaintiff.

It should be noted that the same result may not obtain under state anti-discrimination statutes, depending upon the statutory language. The California Court of Appeal recently held that, under the California Fair Employment and Housing Act, Cal. Gov’t Code § 12940, a California employer could not be held liable for sexual harassment by a customer or client, since the statute only prohibited workplace harassment by employees, agents, and supervisors. Salazar v. Diversified Paratransit, Inc., 126 Cal. Rptr. 2d. 475, 90 FEP Cases (BNA) 365 (Cal. App. 2d Dist. 2002). The majority opinion noted that when the California legislature amended this statute, an initial amendment that would have expanded the employer’s liability to cover harassment “by any person” was deleted in favor of the adopted language which only listed employees, agents and supervisors. Id. at 482-83. Hence, the majority opinion expressly rejected federal cases allowing an employee to recover under Title VII for harassment by customers and clients. Id. at 488 & n.7 (collecting cases). The lengthy dissent emphasized that “Clients are part of the work environment and can create a hostile environment,” id. at 500 (Klein, J., dissenting), and concluded that the majority opinion “requires an employee to choose

between quitting or submitting to the indignity of a customer's sexual, racial, or other harassment, [which] is at odds with the manifest purposes of the [statute]." Id.

However, in January 2003, the California Supreme Court granted certiorari, and vacated the lower appellate decision. Salazar v. Diversified Paratransit, Inc., 63 P.3d 215, 130 Cal. Rptr. 2d 656 (Cal. 2003). Briefing was completed as of May 30, 2003, but oral argument has not yet been set. In June 2003, another division of the California Court of Appeal similarly held that harassment by a customer, here a hospital nurse who was sexually harassed by a patient, was not actionable under the California statute. Carter v. California Dep't of Veterans Affairs, No. E030908, \_\_\_ Cal. Rptr. 2d. \_\_\_, 2003 WL 21279505 (Cal. App. 4th Dist. 2003).

### 35. Individual Liability.

Individual harassers are not liable for damages under Title VII, in contrast to their liability under Section 1981. Eleven of the twelve circuit courts that have ruled on this issue have held that relief under Title VII, pursuant to its statutory terms, can be obtained solely from employers, not individuals. See Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 180-81 (4th Cir. 1998); Wathen v. General Elec. Co., 115 F.3d 400, 406 (6th Cir. 1997); Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995); Williams v. Banning, 72 F.3d 552, 554 (7th Cir. 1995); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Smith v. St. Bernards Reg'l Med. Ctr., 19 F.3d 1254, 1255 (8th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993).

This leaves only the First Circuit, but it probably also will not recognize individual liability under Title VII. It should be noted that while most of the district courts in the First Circuit have rejected individual liability, a few have found individual liability. Compare Horney v. Westfield Gage Co., 95 F. Supp. 2d 29, 33 (D. Mass. 2000) (no individual liability) and Maldonado-Cordero v. AT&T, 73 F. Supp. 2d 177, 184 (D.P.R. 1999) (same) and Preyer v. Dartmouth College, 968 F. Supp. 20, 25 (D.N.H. 1997) (same) and Caldwell v. Federal Exp. Corp., 908 F. Supp. 29, 36 (D. Me. 1995) (same) with Wyss v. General Dynamics Corp., 24 F. Supp. 2d 202, 204-09 (D.R.I. 1998) (individual liability under Title VII) (collecting cases).

Many state employment discrimination statutes, even those that are generally modeled after Title VII, often have provisions allowing for individual liability, as for Section 1981 claims. See, e.g., Brown v. Scott Paper Worldwide Co., 143 Wash. 2d 349, 20 P.3d 921 (Wash. 2001);



Vivian v. Madison, 601 N.W.2d 872, 873-77 (Iowa 1999) (collecting cases); Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 889 (D.C. 1998); see generally S.C. Kief, “Individual Liability of Supervisors, Managers, Officers, or Co-Employees for Discriminatory Actions Under State Civil Rights Act,” 83 A.L.R.5th 1 (2000 & Supp. 2002) (collecting cases). California’s statute is unusual in that there is individual liability for harassment, but not for other kinds of discriminatory conduct. Reno v. Baird, 18 Cal. 4th 640, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 (1998).

#### 40. NATIONAL ORIGIN AND RELIGION HARASSMENT

Since the September 11, 2001 attacks, reported incidents of harassment because of national origin and because of religion became widely publicized. The EEOC reported “a significant increase” in the number of charges alleging discrimination because of national origin or discrimination because of religion. See EEOC, “Questions and Answers about Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs” <<http://www.eeoc.gov/facts/backlash-employer.html>> (July 16, 2002).

As of May 7, 2002, the EEOC received 488 charges filed by individuals who believed that they have experienced September 11 “backlash discrimination,” and harassment was alleged in 194 of these charges. See EEOC, “EEOC Provides Answers about Workplace Rights of Muslims, Arabs, South Asians and Sikhs,” <<http://www.eeoc.gov/press/5-15-02.html>> (May 15, 2002); see generally J. Edwards, “Post-Sept. 11 ‘Backlash’ Proves Difficult to Quantify,” N.J. L.J., June 12, 2002.

This section reviews the definitions of national origin and religion under Title VII and the elements necessary to prove these claims, and then surveys recent federal appellate cases that involved harassment and discrimination because of national origin and because of religion.

##### 36. Definition of Harassment Because of National Origin.

Under Title VII, it is unlawful for an employer to “discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . national origin[.]” 42 U.S.C. § 2000e-2(a)(1).

Although Title VII does not define “national origin,” the Supreme Court stated that the “term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.” Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973); accord Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 672 (9th Cir. 1988) (quoting congressional debate: “May I just make very clear that ‘national origin’ means national. It means the country from which you or your forebears came from.”) (quoting 110 Cong. Rec. 2549 (1964)). The EEOC similarly defines “national origin” broadly as including, but not limited to, “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 (2001). Even with these

definitions, the courts continue to struggle with the meaning of “national origin” because this is a complicated concept that is related to but distinct from other concepts such as ethnicity, citizenship, immigration status, and race. The EEOC recently issued updated guidance in this area. See EEOC Compliance Manual, Section 13, National Origin Discrimination <<http://www.eeoc.gov/docs/national-origin.html>> (Dec. 2, 2002).

### 37. Definition of Harassment Because of Religion.

Under Title VII, it is unlawful for an employer to “discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion[.]” 42 U.S.C. § 2000e-2(a)(1). Religion is broadly defined to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j).

Title VII has two religious exemptions: (1) the “religious educational institution” exemption and (2) the “owned, supported, controlled, or managed” by a “religious association” exemption. The first exemption, in Section 702(a), excludes “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a). The second exemption, in Section 703(e)(2), provides, in relevant part, that:

[I]t shall not be an unlawful employment practice for a school, college, university, or other education institution of learning to hire and employ employees of a particular religion if such a school, college, university, or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or religious corporation, association, or society . . .

42 U.S.C. § 2000e-2(e). Thus, practitioners faced with a defendant employer that might have some religious connection will need to ascertain at the outset whether either exemption will preclude the employee from raising a Title VII claim.

### 38. Elements of a National Origin or Religion Harassment Claim.

The legal framework for establishing a harassment claim because of national origin or because of religion is essentially the same as for proving sexual or racial harassment. The plaintiff must prove that (1) the harassment was based on membership in a protected class; (2) that the conduct was severe or pervasive; (3) and that there is a basis for employer liability. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). Harassment violates Title VII when it is both objectively and subjectively offensive: the environment must be “one that a reasonable person would find hostile and abusive, and one that the victim did in fact perceive to be so.” Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

39. National Origin Harassment and Discrimination Appellate Cases.

The following two sections have a representative sampling of recent appellate cases involving national origin harassment and/or discrimination claims.

41. Harassment or Discrimination Because of National Origin Found.

Cerros v. Steel Technologies, Inc., 288 F.3d 1040 (7th Cir. 2002). Tony Cerros, an Hispanic employee, claimed that he was subjected to a hostile work environment “because of his national origin and race.” Id. at 1042. Cerros alleged that some of his supervisors and co-workers “overtly espoused the offensive philosophy ‘if it ain’t white it ain’t right.’” Id. Over a two-year period, co-workers and supervisors, called Cerros racially derogatory names like “brown boy,” “spic,” “wetback,” “Julio” and “Javier.” Id. They also “talked down to him and muttered comments under their breath.” Id. Cerros transferred to another shift in order to avoid harassment by Jeff Colvin, a supervisor, but, despite Cerros’ protests, Colvin was transferred to the same shift. Id. Cerros was also subjected to racist graffiti, including: “spic,” “Go Back to Mexico,” “Tony Cerros is a Spic,” “KKK,” and “White Power.” Id. Steel removed the graffiti, but never conducted an investigation to determine the responsible parties. Id. The district court held that Cerros was not subject to impermissible discrimination or a hostile work environment because he was not subject to an adverse employment action. Id. at 1044.

While the Seventh Circuit agreed that Cerros had not been subject to an adverse employment action, it reversed the district court’s holding that the harassment was not sufficiently severe or pervasive. Id. at 1045. The Seventh Circuit indicated that while the district court properly considered the totality of the circumstances, the district court’s findings fell short of what Harris, Oncale, and Breeden require. Id. at 1045-48. Moreover, the district court failed to take underlying facts into account. Id. at 1046. The Seventh Circuit observed that the district court misunderstood the legal threshold for harassment cases since “This court has

found severe verbal harassment of the sort identified by the district court to be prohibited harassment, even when it did not occur every day.” Id. at 1047. The Seventh Circuit stated that “[w]hile there is no ‘magic number’ of slurs that indicate a hostile work environment, we have recognized that an unambiguously racial epithet falls on the ‘more severe’ end of the spectrum.” Id. (citation omitted). The Seventh Circuit concluded:

Ceros endured a workplace environment filled with slurs and graffiti based on his race and national origin. Steel not only tolerated the harassment, but even worse, according to the facts found by the district court, its supervisors contributed to the harassment. If severe enough, or pervasive enough, this is exactly the sort of conduct Title VII prohibits.

Id.

Chuang v. University of Calif. Davis, Bd. of Trs., 225 F.3d 1115 (9th Cir. 2000). Plaintiffs Ronald Y. Chuang and Linda Chuang alleged that university officials (“UCD”) discriminated against them on the basis of their race (Asian) and national origin (Chinese). Id. at 1119. The Chuangs alleged that (1) UCD failed to provide R. Chuang with a full-time-equivalent (FTE) position; (2) UCD forcibly relocated their laboratory; and (3) UCD failed to respond to R. Chuang’s complaints regarding the misappropriation of research funds. Id. at 1119-20. The Chuangs alleged that several harassing remarks were made: (1) when asked why a Chinese-American candidate had not been contacted, Dr. Cross replied that “two Chinks” in the department was enough and Dean Williams laughed in response; (2) when the Chuangs objected to their laboratory relocation, Dr. Hollinger said, “You should pray to your Buddha for help.” Id. 1121-22. The district court granted summary judgment in favor of the defendant.

The Ninth Circuit reversed, finding that Dr. R. Chuang established a *prima facie* case of discrimination with regard to his failure to receive an FTE position, that the forcible relocation of their laboratory would be an adverse employment action, and that the statement by Dr. Cross, combined with Dean Williams’ laughter would be direct evidence of race and national origin discrimination. Id. at 1125-29.

Dawavendewa v. Salt River Proj. Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998). Harold Dawavendewa, a member of the Hopi tribe, alleged that his employer discriminated against him on the basis of national origin when it denied him a position because he was not a member of the Navajo tribe; the employer had a lease agreement that allowed it to operate a station on Navajo land, provided that it, among other things, grant employment

preferences to members of the Navajo tribe. Id. at 1118. The district court held that Title VII exempts tribal preference policies and that it therefore did not need to decide whether discrimination on the basis of tribal membership constituted national origin discrimination under Title VII. Id. at 1119.

The Ninth Circuit reversed, first holding that discrimination on the basis of tribal membership does constitute national origin discrimination under Title VII: “Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a ‘national origin’ claim under Title VII.” Id. at 1120. The Ninth Circuit then stated that even if a tribe never had formal “nation” status, “Section 1606.1 of the [EEOC] regulations makes clear that discrimination based on one’s ancestor’s ‘place of origin’ is sufficient to state a cause of action. Accordingly, under case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of ‘national origin.’” Id. (citing 29 C.F.R. § 1606.1). The Ninth Circuit held that the employer’s policy of favoring members of the Navajo tribe did not fall within the tribal exemption provided by 42 U.S.C. § 2000e-2(i), which states, in relevant part, that:

[n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Agreeing with the EEOC’s 1988 Policy Statement, which concluded that the “extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII,” the Ninth Circuit reasoned that the phrase “because he is an Indian” means that “[t]he reason for the hiring must be because the person is an Indian, not because he is a Navajo, a male Indian, or a member of any other formal subset of a favored class.” Id. at 1121-22 (quoting Policy Statement on Indian Preference Under Title VII, Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16, 1988)). Therefore, The Ninth Circuit concluded that:

[P]rivate employers would have license to pass over those Native Americans who live on a particular reservation but who do not share the same tribal affiliation as the governing body of the reservation. Without a clear indication to the contrary, this appears to be the sort of individual discrimination wholly within the scope of Title VII.

Id. at 1124.

McCowan v. All Star Maint., Inc., 273 F.3d 917 (10th Cir. 2001). The plaintiffs, all of Mexican origin, brought suit against their employer for discrimination and wrongful termination on the basis of national origin. The plaintiffs, who had worked as painters for three weeks before being terminated, alleged that they were called, overheard, or were told about the following epithets: “wannabe cholos,” “fucking stupid Mexicans,” “my south of the border friend,” “fucking cholo attitudes,” “spik,” “burrito-eating motherfucker,” “worthless nigger,” “nigger for a day,” and “fucking painter.” *Id.* at 919-20. The employer argued that coarse language was part of the construction industry. The district court granted summary judgment in favor of the employer, holding that the alleged conduct was not severe or pervasive.

The Tenth Circuit reversed, holding that the lower court failed to evaluate the totality of the specific incidents alleged: “We have repeatedly stated that in a case alleging a violation of Title VII and the presence of a racially hostile work environment the existence of [racial] harassment must be determined in light of the record as a whole, and the trier of fact must examine the totality of the circumstances, including the context in which the alleged incidents occurred.” *Id.* at 925 (internal quotations and citations omitted). The Tenth Circuit noted that “[d]eponents uniformly stated everyone knew of the verbal abuse, noting that while some of the language was generic cursing, much had ethnic and racial overtones.” *Id.* at 924. The Tenth Circuit also indicated that the fact that the plaintiffs spent only between two to fifteen minutes in the office for a three-week period, before they were terminated, “cut[s] both ways.” Although the lower court concluded that the short exposure time meant that the work environment could not have been as offensive and racially hostile as alleged, the Tenth Circuit stated that “the shorter exposure time supports the equally plausible inference the abuse was so offensive as to taint the entire job site.” *Id.* at 926.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269 (11th Cir. 2002). Bradley Miller, a Mexican-American, alleged that he was subjected to an ethnically hostile work environment and that he was terminated for complaining about it. Shortly after Miller began working for Kenworth, his co-workers began calling him derogatory nicknames, such as “Julio,” “Chico,” and “Taco.” One co-worker, Randy Galpin, started calling him “Wetback,” “Spic,” and “Mexican Motherfucker.” *Id.* at 1273. Miller complained to Galpin’s direct supervisor, but Galpin was never disciplined. *Id.* Kenworth held a meeting regarding the use of ethnic slurs, during which employees were warned that they would be terminated for using ethnic slurs and told that they should report any use of ethnic slurs. *Id.* at 1274. After the meeting, all of Miller’s co-workers, except Galpin, stopped using derogatory nicknames; Galpin persisted in using these same epithets until Miller was fired.

The Eleventh Circuit held that “fair-minded jurors could have reasonably concluded that Miller suffered severe and pervasive harassment sufficient to alter the terms or conditions of his employment” because (1) the evidence established that the harassment was frequent -- Galpin “hurled ethnic slurs at Miller three to four times a day;” (2) the harassment was severe -- Galpin used the derogatory names in an intimidating manner, shouting them at Miller, “rising above the level of off-handed comments in the course of causal conversation;” (3) the incidents were humiliating and degrading to Miller; and (4) “Galpin’s behavior prevented Miller from performing his job.” Id. at 1276-77.

42. Harassment or Discrimination Because of National Origin Not Found.

Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002). Ramon Zapata-Matos, of Puerto Rican national origin, alleged that he was terminated because of his national origin. Zapata-Matos, who worked as General Manager for all operations in Puerto Rico, Mexico, and the Caribbean, alleged that after he expressed concerns that a decision would negatively impact the Puerto Rican market, the company’s president said, “Fuck Puerto Rico. . .” Id. at 43. The district court held that the plaintiff failed to establish a *prima facie* case. The employer claimed that the plaintiff was terminated not because of his national origin, but because of his management style; Zapata-Matos allegedly had an abusive and disrespectful management style, which resulted in the resignation of four employees. Id. at 43-44.

The First Circuit affirmed the district court’s decision, noting that the comment reported by the plaintiff was not discrimination on the basis of national origin, given the comment’s context: “The comment was clearly directed at Zapata’s view that the company’s concerns about mainland market losses should be subordinate to Zapata’s concern about his division. No rational fact finder could, in this context, conclude that this comment expressed discrimination against the company’s Puerto Rican employees.” Id. at 46.

Holtz v. Rockefeller & Co., 258 F.3d 62 (2d Cir. 2001). Plaintiff Laura Holtz, of English-German national origin, alleged, among other claims, that she was subjected to national origin discrimination by her employer. She alleged that she was not trained as promised, that her supervisor hired and trained women of Irish national origin, that “her supervisor and several co-workers formed ‘a little clique of Irish people and they would talk about being Irish a lot,’ and that she was ‘out of the loop.’” Id. at 84. The district court granted summary judgment in favor of the employer regarding the national origin discrimination claim, holding that the plaintiff had failed to establish a *prima facie* claim. The Second Circuit agreed, stating that: “Such allegations



far well short of the sort of ‘materially adverse change in the terms and conditions of employment’ that entitles a plaintiff to damages under Title VII.” Id. (citation omitted).

Merhab v. Illinois State Toll Highway Auth., 267 F.3d 710 (7th Cir. 2001). Merhab, of Lebanese national origin, alleged that his termination constituted national origin discrimination. He also alleged that his supervisor, Sharon Conrad, committed the following instances of harassment: yelling, humiliating, degrading, and demoralizing him in front of others; inciting another employee to file a baseless sexual harassment claim against him for staring; imitating his accent in a mocking fashion; and criticizing his work excessively. Id. at 712. The Seventh Circuit assumed without deciding that these allegations were actionable harassment, but held that Merhab’s national origin discrimination claim must fail because there was no direct evidence of discrimination. The Seventh Circuit noted that Merhab was discharged after he became enraged with Conrad and that “[f]iring him for threatening behavior was not treating him differently from how any other employee would have been treated.” Id. at 712-13.

40. Religion Harassment and Discrimination Appellate Cases.

The following two sections have a representative sampling of recent appellate cases involving religious harassment and/or discrimination claims.

Harassment or Discrimination Because of Religion Found.

Abramson v. William Paterson Coll. of N.J., 260 F.3d 265 (3d Cir. 2001). Abramson, an Orthodox Jew, asserted hostile work environment, religious discrimination, and unlawful retaliation claims against her employer. Abramson alleged that she was charged with sick days for days of work she missed because of Jewish holidays, that Department Chair Wepner screamed that she was tired of hearing about Abramson and her holidays, that she was continually questioned about her lack of availability on Friday and Saturday nights, and that Wepner’s secretary said in Wepner’s presence that “other faculty members are complaining about the way your religious absences inconvenience them.” Id. at 269-70. The district court held that a *prima facie* case was not established because Abramson failed to satisfy the first prong, the perception of a reasonable person of the protected status.

The Third Circuit reversed, holding that Abramson had satisfied the first prong because “almost all of the incidents alleged centered around Abramson’s insistence that she not work during the Sabbath. Therefore, we hold that where, as here, the evidence tends to show that the harasser’s conduct was intentionally directed toward the plaintiff because of her religion, the first

prong of the prima facie case is met.” Id. at 279. The Third Circuit stated that the district court had used the wrong approach:

Regardless of what a harasser’s intention is, if a plaintiff presents sufficient evidence to give rise to an inference of discrimination by offering proof that her 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.

Id. at 278-79 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The Third Circuit also held that a jury could find that the harassment here was pervasive because:

[t]he events alleged occurred over a period of two years and could be found to have infected Abramson’s work experience; even other faculty members mentioned it to Speert prior to Abramson’s filing suit. No one event alone stands out from the rest, but all of the events could be found to aggregate to create an environment hostile to a person of Abramson’s religion.

Id. at 279 (internal citations omitted).

Rubinstein v. Administrators of the Tulane Educ. Fund, 218 F.3d 392 (5th Cir. 2000). Professor Asher Rubinstein filed a Title VII and state law claim against his employer, Tulane University, alleging that he was not granted a raise because of his religion (Jewish). Id. at 396. Professor Rubenstein alleged the following harassing and discriminatory acts: (1) Professor Watts began referring to Rubinstein as a “Russian Yankee” and a “commie;” (2) Watts made anti-Semitic remarks, “such as a comment concerning placing a propeller on a yarmulke and a remark about Jewish frugality;” (3) when Rubinstein complained about receiving the lowest raise in the department, Van Buskirk said, “What are you going to do, sue me? Do you know what happens to people who sue their employer?;” (4) Rubinstein’s promotion request was denied; (5) Rubinstein again received the lowest raise in the department; and (6) Rubinstein’s promotion request was again denied. Id. at 396-97. The district court granted summary judgment in favor of Tulane for the religion discrimination claim.

The Fifth Circuit affirmed, noting that while Rubinstein had presented some evidence of pretext, there was insufficient evidence of discriminatory intent or motivation:

Even on the issue for which Rubinstein demonstrated some pretext, we find an overall lack of any evidence of discriminatory intent. While we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext, discrimination suits still require evidence of discrimination.

Id. at 400. The Fifth Circuit concluded by saying that the comments made by Watts, a member of the committees that make promotion and pay-raise decisions, and a comment by Professor Bruce, also a member of these committees, that if a Russian Jew could obtain tenure then anyone could, would not defeat summary judgment "standing alone" because "these comments are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment." Id. at 400-01.

Shanoff v. Illinois Dep't of Human Serv., 258 F.3d 696 (7th Cir. 2001). Shanoff alleged that he was subjected to a hostile work environment because his supervisor, Sylvia Riperton-Lewis, repeatedly harassed him because of his religion and race. Shanoff alleged six severe instances of harassment by his supervisor. Among other things, plaintiff alleged that he was called a "haughty Jew" and that he was told, "I know how to put you Jews in your place." Id. at 698-99. The district court granted summary judgment in favor of the employer, finding that the alleged harassment incidents that were severe did not occur within Title VII's statute of limitations and that the other alleged harassment incidents were not severe or pervasive enough to create a hostile work environment. Id. at 701.

The Seventh Circuit reversed, finding that the incidents of harassment that were not time-barred rose to the level of an objectively hostile work environment. Id. at 705-06. These incidents included: (1) after Shanoff informed his supervisor, Riperton-Lewis, that his health was failing because of her discriminatory conduct she said that she would see to it that "[his] white Jewish ass would be kept down;" (2) Riperton-Lewis said "good" after Shanoff said that his health was failing; (3) Riperton-Lewis prohibited Shanoff from teaching medical students in January 1998; (4) Riperton-Lewis said that she "knew how to handle white Jewish males, and once and for all [he] needed to leave Madden and get out of her hair;" and (5) Riperton-Lewis said, "I hate everything that you are." Id. at 704 (internal quotation marks omitted).

Venters v. Delphi, 123 F.3d 956 (7th Cir. 1997). After Venters was terminated from her radio dispatch position with the Delphi police department, she alleged that the new police chief, Larry Ives, subjected her to religious discrimination. Id. at 961. According to Venters, Ives believed that he had been sent by God to save as many people as possible. Venters alleged that

Ives made the following statements to her: “(1) that to be a good employee, a person had to be spiritually whole, and to be spiritually whole, a person had to be saved; (2) that Venters needed to pay attention when people were ministering to her because a person had a limited number of chances in their lifetime to accept God and be saved, and that Venters might be running out of chances; (3) that all individuals were surrounded by spirits, and that Venters’ ‘positive spirits’ were doing battle with her ‘negative spirits’; (4) that if Venters were to attend Ives’ church, the Assembly of God, she might feel the ‘altar call’ and be saved; (5) that the police station was ‘God’s house,’ and that if Venters were unwilling to play by God’s rules Ives would ‘trade’ her.” Id. at 962-63. Ives also reminded Venters that she could be dismissed at any time. Id. at 963. Ives told Venters that she had to choose whether to follow God’s way or Satan’s way and that if she chose to follow Satan’s way, then she would not continue working for Ives; that he was “convinced that she had had sexual relations with family members and perhaps even animals, and that she was sacrificing animals in Satan’s name”; that suicide would be preferable to continuing her life of sin; and that “he would not allow the ‘evil spirit that had taken [Venters’] soul’ to continue to live in the police department.” Id. at 964. After these comments, Venters told Ives that he had “crossed the line.” Id. Ultimately, Ives terminated Venters, and asserted three non-discriminatory reasons for the termination. The district court held that Venters did not have a religious discrimination claim under Title VII because she never informed her employer of her religious beliefs and never requested that her beliefs be accommodated. Id. at 961.

The Seventh Circuit disagreed, holding that “the accommodation framework . . . has no application when the employee alleges that he was fired because he did not share or follow his employer’s religious beliefs.” Id. at 972 (citation omitted). The plaintiff “need only show that her perceived religious shortcomings . . . played a motivating role in her discharge.” Id. (citing 42 U.S.C. § 2000e-2(m)). According to the Seventh Circuit: “the question . . . is whether the plaintiff has established a logical reason to believe that the decision [to terminate her] rests on a legally forbidden ground.” Id. (citation omitted).

The Seventh Circuit then observed that the forms of sexual harassment, quid pro quo and hostile environment, also described the forms of religious harassment and that the plaintiff had alleged both quid pro quo and hostile environment harassment. Id. at 974. Venters alleged quid pro quo harassment when she said that her supervisor made it clear to her that if she did not conform to his religious views, she would be terminated. Id. at 977. Additionally, based on Venters’ allegations, “a jury could reasonably characterize Venters’ work environment at the Delphi police station as hostile and abusive.” Id. at 976. Venters established both the subjective and objective elements required by a hostile environment claim because she made it clear that the remarks were offensive to her and a reasonable person would have found her work

environment hostile because harassing remarks “were uninvited, were intrusive, touched upon the most private aspects of her life, were delivered in an intimidating manner, in some cases were on their face scandalous, and were unrelenting.” Id. This case is unusual as an example of quid pro quo harassment applied to non-sexual harassment.

Campos v. Blue Springs, 289 F.3d 546 (8th Cir. 2002). Campos, a crisis counselor, alleged that her employer discriminated against her because she was not a Christian. When Campos told co-workers that she observed tenets of Native American spirituality, her immediate supervisor, Pamela Petrillo, began treating her differently. Id. at 549. Campos also alleged that Petrillo became unfriendly and critical; started implying that Campos might not be a good fit for the job; started excluding her from employee meetings, including meetings where employees discussed whether the unit could be transformed into a Christian counseling unit; unfairly criticized her for missing deadlines; and falsely accused her of making mistakes. Id. Additionally, Campos alleged that Petrillo passed her over for a team leader position she had been promised when hired and that told her that “she was not a good role model and that she needed to find a good Christian boyfriend to teach her to be submissive.” Id. Campos did not receive the \$10,000 in extra compensation she had been promised for conducting support groups, and Petrillo said that people “sometimes [have] to give up the things they need most in order to be a good Christian.” Id. After Petrillo accused Campos of misconduct because Campos had attended a meeting regarding her dissertation, which she needed to complete to obtain her counseling license, Campos resigned, citing Petrillo’s abusive behavior and intolerable working conditions as her reasons for resignation. Id. at 549-50. The jury found for Campos.

The Eighth Circuit affirmed the jury verdict, holding that there was sufficient evidence to allow the jury to find that Campos was forced to quit because she was not a Christian. Id. at 551. The court noted that “[d]irect evidence of discrimination may include evidence or remarks or comments which indicate discriminatory animus on the part of those with decisionmaking authority,” such as those made by Petrillo. Id. at 552.

## **2. Harassment or Discrimination Because of Religion Not Found.**

Freedman v. MCI Telecomms., Corp., 255 F.3d 840 (D.C. Cir. 2001). Freedman, an Orthodox Jew, alleged that his employer discriminated against him because of his religion. Freedman identified the following instances of discrimination: assigned to the night shift, denied training opportunities, subject to disparate treatment in the employer’s mentorship program, denied use of computers and tools, given inappropriate assignments, denied one-on-one feedback from supervisors that other employees received, treated badly by supervisor, discharged because

the joint operation of the other actions made him underqualified. The D.C. Circuit held that summary judgment was appropriate because each of the allegations, taken alone and collectively, either failed to rise to the level of an adverse employment action or lacked evidence of disparate treatment, or both. Id. at 844. While Freedman also alleged that a co-worker said, “Soon I’m going to be the only one at this terminal wearing a Yarmulka,” the D.C. Circuit concluded that “[A] singular stray comment does not a hostile environment make.” Id. at 848.

EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49 (1st Cir. 2002). The EEOC brought action against a labor organization (UIA), alleging that it had discriminated against employee David Cruz-Carrillo on the basis of religion. As a Seventh-Day Adventist, Cruz-Carrillo’s religion prohibited him from joining labor organizations. Id. at 51. After he told the organization that he opposed union membership, he was terminated for failing to join the union. Id. at 52. UIA indicated that Cruz-Carrillo had received written notification regarding the conditions of employment, which included union membership. Id. The district court granted partial summary judgment in favor of the EEOC, holding that when UIA discharged Cruz-Carrillo, it failed to present evidence demonstrating that accommodating his religious beliefs would cause undue hardship. Id. at 53.

The First Circuit reversed, holding that partial summary judgment was inappropriate because UIA raised a triable issue of fact: whether the employee’s opposition to union membership was the product of a “bona fide religious belief.” Id. at 55-57. UIA contested the sincerity of his religious belief and submitted evidence establishing that he “has, on more than a few occasions, taken actions that are at odds with his professed faith.” Id. at 55. For example, Cruz-Carrillo lied on an employment application, is divorced, took an oath before a notary before becoming a public employee, and works five days a week rather than six, id. at 56-57, all arguably contrary to his religion.

Knight v. Connecticut Dep’t of Pub. Health, 275 F.3d 156 (2d Cir. 2001). The plaintiffs, a nurse consultant and a sign language interpreter, alleged that their employer discriminated against them on the basis of religion. Both plaintiffs are born-again Christians, and “felt called to proselytize while working with clients.” Id. at 160. They claimed that they had the right to discuss their religious beliefs with clients while performing their duties. The district court held for the employer, finding that the state could reasonably place restrictions on the plaintiffs’ ability to speak about religion without infringing on their constitutional rights. Id. at 160.

The Second Circuit affirmed, holding that the plaintiffs failed to establish a prima facie case of religious discrimination because (1) “[n]either appellant can show the state was on notice

of their need to evangelize to clients,” and (2) “there is no evidence in the record showing appellants requested any sort of accommodation for their *need to evangelize*.” *Id.* at 167 (emphasis in original). The Second Circuit further stated that even assuming that the plaintiffs had established prima facie cases, the accommodation they sought was unreasonable: “Permitting appellants to evangelize while providing services to clients would jeopardize the state’s ability to provide services in a religion-neutral manner.” *Id.* at 168 (citations omitted).

Cosme v. Henderson, 287 F.3d 152 (2d Cir. 2002). Cosme, a letter carrier, alleged religious discrimination by his employer, claiming that the Postal Service did not reasonably accommodate his religious beliefs. Cosme is a member of the Worldwide Church of God, which requires that its members observe the Saturday Sabbath by refraining from work on the seventh day of the week. *Id.* at 154. On twelve different Saturdays, Cosme failed to report for work and was subsequently disciplined; the Postal Service withdrew its “Notice of Proposed Removal” against him after arranging a different work schedule with him. *Id.* at 154-56. When Cosme applied for a competitive law enforcement position within the Postal Service, he was rejected because the interviewer learned that Cosme had violated Postal Service driving policies twice and that he had failed to report to work on Saturdays several times because of his religion. *Id.* at 156. Cosme alleged that had the Postal Service accommodated his religious beliefs, then he would have received the law enforcement position he wanted.

The Second Circuit affirmed the district court’s holding that there was no religious discrimination since the employer’s multiple accommodation offers, which Cosme unreasonably rejected, fulfilled its Title VII statutory obligations. *Id.* at 157.

Virts v. Consolidated Freightways Corp. of Del., 285 F.3d 508 (6th Cir. 2002). Virts, a Christian, sued his employer, alleging religious discrimination and retaliatory discharge for failing to accommodate his religious beliefs. Virts worked as a truck driver and had the option of working “sleeper runs,” runs where two drivers are dispatched in a sleeper truck. *Id.* at 512. Virts wanted to work sleeper runs, but indicated that he could not go on sleeper runs with female drivers because of his religious beliefs -- he alleged that such runs would create the appearance of evil and could also lead to sexual thoughts and temptation. *Id.*

The Sixth Circuit’s analysis focused on whether the employer could reasonably accommodate Virts without undue hardship. The Sixth Circuit affirmed the district court’s grant of summary judgment in favor of the employer, holding that the employer could not reasonably accommodate Virts without violating the seniority provision of the collective bargaining

agreement which would adversely affect the contractual rights of other employees, so that the employer's accommodation of Virts would constitute an "undue hardship." Id. at 517, 521.

Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999). Mr. Hafford worked as a corrections officer and alleged discrimination and retaliation because of religion and race. Hafford identified the following instances of religious harassment: (1) during a meeting, the wardens "spoke in an offensive and contemptuous manner about his Muslim faith and accused him of participating in a holy war;" (2) a deputy warden threatened him with job loss and talked about the effect of Hafford's religious expression on "my Aryan Officers;" (3) a warden demanded that Hafford stop praying with the inmates and referred to Hafford's religion in a contemptuous manner;" and (4) when Hafford started reading the Koran during a meeting, the warden said, "That's the problem." Id. at 509. The district court granted summary judgment in favor of the defendant regarding the hostile work environment based on religion claim, concluding that the wardens' concerns about Hafford's praying with inmates were legitimate. Id. at 511.

The Sixth Circuit affirmed, stating that the wardens' concerns about fraternization of a correction officer with inmates were legitimate; that the 'mocking and contemptuous' comments were not sufficiently specified; and that "[t]he comments which are specified are not sufficient to meet the Supreme Court's standard that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment' and that 'conduct must be extreme to amount to a change in the terms and conditions of employment.'" Id. at 514-15 (quoting Faragher).

Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679 (9th Cir. 1998). Mary Tiano, a Roman Catholic, sued her employer, Dillard Department Stores ("Dillard's") for unlawful termination, alleging failure to reasonably accommodate her religious beliefs. She learned of an October pilgrimage to Medjugorje, Yugoslavia where people claimed that they could see visions of the Virgin Mary. Id. at 680. When Tiano requested unpaid leave to go on the pilgrimage, her employer denied the request, citing its no-leave policy for the month of October and the store's upcoming October anniversary sale. Id. at 680-81. Dillard's terminated Tiano after she went on this ten-day pilgrimage. Id. at 680. The district court found for Tiano, holding that she had established a prima facie case of religious discrimination and that Dillard's failed to demonstrate that it had made a reasonable effort to accommodate her religious beliefs. Id.

The Ninth Circuit reversed, holding that Tiano had not established a prima facie case of religious discrimination:



. . . in general, employees do not have an inflexible duty to reschedule their religious ceremonies. In a case such as this, however, where an employee maintains that her religious beliefs require her to attend a particular pilgrimage, she must prove that the temporal mandate was part of the bona fide religious belief. Otherwise, the employer is forced to accommodate the personal preferences of the employee--the timing of the trip. Title VII does not protect secular preferences.

Id. at 682 (internal quotations and citations omitted). The Ninth Circuit noted that “her lone unilateral statement that she ‘had to be there at that time’ was her only evidence.” Id. at 682. Further, the record contained evidence that contradicted Tiano’s claim that the temporal mandate was part of her bona fide religious belief: (1) “there is evidence that Tiano went to the E.E.O.C. to complain of religious discrimination only after she learned that her ticket for the pilgrimage was not refundable;” and (2) Tiano’s friend’s testimony “suggests that the timing of the trip was a personal preference, not part of a bona fide religious belief” because other group tours to that pilgrimage site were available. Id. at 682-83. Moreover, Tiano had vacation time available and Dillard’s frequently authorized unpaid leaves during non-holiday seasons. Thus, the Ninth Circuit concluded, “Tiano’s need to attend a pilgrimage to Medjugorje was not in conflict with her employment duties.” Id. at 683.

Thomas v. National Ass’n of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000). Thomas, a letter carrier with the United States Postal Service, sued his employer and his union, alleging that his termination for refusing to work on Saturdays because of his religious beliefs constituted religious discrimination in violation of Title VII. Thomas was a member of the Church of God, which required that its members strictly observe the Saturday Sabbath. Id. at 1153. He advised his manager of his religious beliefs and requested that he have all Saturdays off; the Postal Service approved twenty-five of his twenty-nine requests of take annual leave on Saturdays in 1994, approved twenty of his twenty-two requests to take annual leave on Saturdays in 1995, and agreed to let him trade shifts with other letter carriers willing to work on Saturdays. Id. at 1153. The Postal Service suggested that Thomas change crafts and bid on a position that would not require Saturday work; Thomas chose not to bid on such a position, and instead presented accommodation proposals to the union. The union rejected all of his proposals because they all violated the Local Memorandum of Understanding (LMOU). Id. Meanwhile, Thomas was absent without leave on those Saturdays he was assigned to work, for which he was subsequently disciplined, and then eventually terminated. Id. at 1153-54.

The district court entered summary judgment in favor of the Postal Service. The Tenth Circuit affirmed, noting that although “there is no dispute that Thomas established a prima facie case,” the Postal Service complied with Title VII by reasonably accommodating the plaintiff’s religious beliefs. Id. at 1156-57. The Tenth Circuit listed the numerous steps the Postal Service took to accommodate Thomas’ religious beliefs. Id. at 1156. The Tenth Circuit further noted that all five of Thomas’s accommodation requests violated the LMOU and that the Postal Service’s “duty to accommodate Thomas’s beliefs does not require the Postal Service to violate the LMOU.” Id. at 1156 (citations omitted).

Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997). Killinger, a professor, author, and preacher, alleged that because of his religious philosophy, he was denied the opportunity to teach at Samford University’s Divinity School, since Killinger and the Dean of the Divinity School had different theological views. Id. at 198. The district court granted summary judgment in favor of the Samford, holding that the Samford qualified for Title VII’s religious exemptions. Id. The Eleventh Circuit affirmed, indicating that Title VII’s Section 702 exemption “allows religious institutions to employ only persons whose beliefs are consistent with the employer’s when the work is connected with carrying out the institution’s activities. To us, a teaching job in a divinity school of a religious education institution is at the core of the Section 702 exemption: the inherent purpose of such schools is the study of God and God’s attributes.” Id. at 200.

The Eleventh Circuit also held that Samford qualified for an exemption under Section 703(e)(2). Noting that “we are aware of no precedent that speaks to the issue of what it means to be ‘owned, supported, controlled, or managed’ by a religious association, the Eleventh Circuit reasoned that because Section 703 is written in the disjunctive and requires only that a college be ‘in whole or in substantial part’ -- ‘owned, supported, controlled, *or* managed by a religious association,” the University is “in substantial part” “supported” by the Convention. Id.

## 5. THE CONSPIRACY STATUTES

The Reconstruction-era conspiracy statutes, 42 U.S.C. §§ 1985(3) and 1986, have been used, albeit infrequently, in employment discrimination litigation. The relevant statutory terms were set forth in § 2.B *supra*. The elements of a Section 1985(3) claim are:

A complaint must allege that the defendants did: (1) conspire or go in disguise on the highway or on the premises of another; (2) for the purpose of depriving, either directly or indirectly, and person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. It must then assert that one or more of the conspirators: (3) did, or caused to be done, any act in furtherance of the conspiracy; whereby another was (4a) injured in his person or property; or (4b) deprived of having and exercising any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) (internal quotation marks omitted). This statute was enacted pursuant to Section 2 of the Thirteenth Amendment; thus it protects “the victims of conspiratorial, racially discriminatory private action aimed at depriving them [African-Americans] of the basic rights that the law secures to all free men.” *Id.* at 105. The statutory language “means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Id.* at 102. The Griffin Court did not decide “whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable” under Section 1985(3). *Id.* at 102 n.9 (emphasis added).

The Supreme Court has not recognized any other type of discriminatory animus as falling within the protection of Section 1985(3). United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 837 (1983) (economic animus involving union activities not actionable under Section 1985(3)). The Scott Court suggested that the conspiracy statute was only intended to reach “the prevalent animus against Negroes and their supporters.” *Id.* at 836. However, the First, Second, Third, Fourth, Seventh, Eighth, Ninth and Eleventh Circuits have held that Section 1985(3) also “applies to conspiracies motivated by sex-based animus against women.” Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332, 1338-39 (11th Cir. 1999) (*en banc*) (collecting cases; the Sixth Circuit has also recognized this, but in dicta; the Fifth and Tenth Circuits have indicated “only in dicta” that women are not a Section 1985(3) protected class; the District of Columbia Circuit apparently has not addressed this issue).

There are four potential limitations for applying the conspiracy statutes to employment litigation. First, Section 1985(3) “creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right — to equal protection of the laws or equal privileges and immunities under the laws — is breached by a conspiracy in the manner defined by the section.” Great Am. Fed. Sav. & Loan Ass’n v. Novotny, 442 U.S. 366, 376 (1979). Therefore, the practitioner must plead conspiracy in connection with some other federal claim, such as Section 1981, to invoke the protections and remedies of Section 1985(3).

Second, the Supreme Court has held that a violation of Title VII cannot form the basis for a Section 1985(3) claim. Id. at 375-78. The rationale is that Title VII provides for an extensive statutory scheme, including precisely defined time limits, administrative processes, and remedies. Id. at 375-76. Thus, racial harassment and discrimination plaintiffs can plead conspiracy under Section 1981, but sexual harassment and discrimination plaintiffs cannot plead conspiracy under Title VII. Since some state anti-discrimination statutes mirror Title VII, courts likely will similarly hold that these state statutes cannot be combined with Section 1985(3). See, e.g., Traggis v. St. Barbara’s Greek Orthodox Church, 851 F.2d 584, 591 (2d Cir. 1988) (holding that Section 1985(3) “does not apply to private conspiracies to violate the Connecticut Human Rights and Opportunities Act” since its statutory scheme parallels Title VII). In contrast, state government employees can plead conspiracy under 42 U.S.C. § 1983, since the circuit courts have recognized that Section 1983 can be the basis for sex discrimination or harassment charge. Annis v. County of Westchester, 36 F.3d 251, 254-55 (2d Cir. 1994) (collecting cases).

Third, the defendants in most employment litigation comprise the employer and one or more of its supervisors or managers. As long as the supervisors or managers were acting within the scope of their employment, then there can be no conspiracy, as a matter of law, between the individual defendants and their employer, under the intracorporate conspiracy doctrine. Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972) (dismissing judgment for plaintiff on Section 1985(3) claim). As Judge (now Justice) Stevens concluded, “if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will not normally constitute the conspiracy contemplated by this statute.” Id.; see also Walker v. Woodward Governor Co., 631 F. Supp. 91, 93-94 (N.D. Ill. 1986) (collecting cases applying the “Dombrowski rule”).

This limitation itself has three exceptions which may allow the Section 1981 harassment plaintiff to proceed with her Section 1985(3) claim: (1) The individual defendants were acting outside the scope of their employment, through personal discriminatory bias or animus. Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 840 (6th Cir. 1994). (2) The “aim of the conspiracy exceeds the reach of legitimate corporate activity.” Id. at 840-41. (3) The corporation was

“formed for the purpose of depriving citizens of their civil rights,” such as the Klan. Id. at 840. One district court has recommended an expansive reading of these exceptions by concluding “that knowing acts of racial discrimination never fall within the ‘scope of employment’ protective sphere; corporate agents should be charged with the duty of carrying out corporate activities in an objective, non-discriminatory manner and should be held liable for violations of that duty.” Walker, 631 F. Supp. at 94-95.

Fourth, several district court cases from New York have held that no employment claims — not even Section 1981 claims — can be combined with a Section 1985(3) conspiracy claim. See Jenkins v. Arcade Bldg. Maintenance, 44 F. Supp. 2d 524, 532 (S.D.N.Y. 1999) (“it is unsettled whether § 1981 can be the basis of a conspiracy under [Section 1985(3)]; adopting holding of other New York courts “that if the claim is essentially one for employment discrimination then it is not actionable under the statute”); Graaf v. North Shore Univ. Hosp., 1 F. Supp. 2d 318, 323 (S.D.N.Y. 1998) (“It is well settled that plaintiffs cannot bring Section 1985 actions ‘based solely upon claims of employment discrimination.’”); Harris v. Niagara Mohawk Power Corp., 95-CV-788, 1998 WL 865566, at \*6 (N.D.N.Y. Dec. 7, 1998); Smith v. Local Union 28 Sheet Metal Workers, 877 F. Supp. 165, 172 n.12 (S.D.N.Y. 1995) (“Novotny . . . held that a private sector employer could not state a claim alleging a conspiracy to deprive him of equal protection of the laws based solely upon claims of employment discrimination.”), aff’d 100 F.3d 943 (2d Cir. 1996) (table); Ladson v. Ulltra East Parking Mgt. Corp., 853 F. Supp. 699, 704 n.6 (S.D.N.Y. 1994) (“The Court also declines to find that Plaintiff’s § 1981 cause of action provides the basis for a claim under § 1985.”). The New York district courts in these cases thus dismissed the Section 1981 plaintiff’s conspiracy claims under Section 1985(3). It is debatable whether these courts have correctly read Novotny, which only decided that Title VII claims could not be brought under Section 1985(3), and did not decide whether employment discrimination claims brought under other federal statutes were similarly barred.

However, the majority rule, including other cases not listed herein, is to the contrary. See, e.g., Johnson v. Greater S.E. Community Hosp. Corp., 903 F. Supp. 140, 153 (D.D.C. 1995) (allowing Section 1985(3) claim based on Section 1981); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 777-78 (N.D. Ill. 1993) (same); Alder v. Columbia Historical Soc’y, 690 F. Supp. 9, 15 (D.D.C. 1988) (same); Nieto v. United Auto Workers Local 598, 672 F. Supp. 987, 992 (E.D. Mich. 1987) (same); Thompson v. International Ass’n of Machinists & Aerospace Workers, 580 F. Supp. 662, 667-68 (D.D.C. 1984) (“Thompson I”) (same); Witten v. A.H. Smith & Co., 567 F. Supp. 1063 (D. Md. 1983) (same); Hudson v. Teamsters Local Union No. 957, 536 F. Supp. 1138 (S.D. Ohio 1982) (same).

Hence, there are few reported cases involving conspiracy claims by Section 1981 employment discrimination plaintiffs. The discussion herein is based upon Section 1981 conspiracy claims; for conspiracy claims invoking other constitutional and statutory provisions, see M.M. Cleary, “Termination of Agency or Employment Relationship as Depriving Person of Civil Rights in Violation of 42 U.S.C. § 1985(3),” 107 A.L.R. Fed. 686 (1997) (collecting cases).

The Section 1985(3) harassment plaintiff must name as defendants not only the corporation or other organizational entity, but also individual defendants. Cross v. General Motors Corp., 721 F.2d 1152, 1155 (8th Cir. 1983) (upholding dismissal since no individual defendants were named); Walker, 631 F. Supp. at 95 (dismissing claim since plaintiff “has failed to name as defendants any of the allegedly bigoted corporate employees”).

The courts have denied defendants’ motion to dismiss or for summary judgment on Section 1985(3) claims, provided that the plaintiff had a viable Section 1981 claim. See, e.g., Alder, 690 F. Supp. at 15; Hudson, 536 F. Supp. at 1147. However, when the plaintiff does not have a viable Section 1981 claim, then the Section 1985(3) claim must be dismissed. See, e.g., Johnson, 903 F. Supp. at 154 (“plaintiff failed to state a claim under § 1981”); Thompson v. International Ass’n of Machinists & Aerospace Workers, 614 F. Supp. 1002, 1010 (D.D.C. 1985) (“Thompson II”) (“Defendants correctly state that absent a finding for plaintiff on the § 1981 race discrimination claim, the § 1985(3) finding must be overturned.”).

Where the Section 1981 plaintiff has made only bare allegations or conclusory statements that a conspiracy existed, then the court may dismiss, or grant summary judgment to defendants on, the Section 1985(3) claim. See, e.g., Witten v. A.H. Smith & Co., 36 FEP Cases 271, 275 (D. Md. 1984) (plaintiff, “in his deposition, stated that he has no factual basis or support for his conspiracy allegation”). The plaintiff must plead factual allegations, i.e., “concerted action to discriminate against plaintiff on the basis of her race.” Thompson I, 580 F. Supp. at 668 (upon motion for dismissal, “plaintiff need not prove her claim but must only plead it, as she has done”). An example of an allegation sufficient to state a “colorable claim” was brought by a plaintiff who “alleged that she was fired in retaliation for her objection to what she believed was the discriminatory firing of Mrs. Jackson, a black woman.” Alder, 690 F. Supp. at 15. The rationale is that defendants should be given “fair notice as to the specific acts which [plaintiff] contends demonstrate a conspiracy” in order to defend this claim. Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1450 (9th Cir. 1994).

The conspiracy need not be successful to justify a Section 1985(3) claim. Vakharia, 824 F. Supp. at 777 (“we do believe . . . that a § 1985 claim can be based on a conspiracy (even an unsuccessful one) to violate § 1981”).

The employment discrimination plaintiff may attempt to plead in third party defendants as part of the Section 1985(3) conspiracy, not only to broaden the potential scope of recovery, but also to circumvent the intracorporate conspiracy doctrine. However, the plaintiff must show that the third party was actually part of the conspiracy, and not merely an unwitting third party. For example, a plaintiff who claimed that defendants had engaged an employment agency to carry out their discriminatory plans was unable to prove that this agency itself had acted with the requisite discriminatory animus, since the agency did nothing “more than employ in good faith the apparently legitimate employment criteria that his client provided to him.” Barbour v. Merrill, 48 F.3d 1270, 1281 (D.C. Circuit 1995) (otherwise “every search firm would be vulnerable to a conspiracy charge in every employment discrimination case”).

Since Section 1986, which “creates a cause of action for failure to prevent or aid in preventing a violation of Section 1985,” is contingent upon Section 1985, dismissal of a Section 1985(3) claim requires dismissal of the Section 1986 claim. Walker, 631 F. Supp. at 95.

## 6. PROCEDURAL ISSUES: RECENT DEVELOPMENTS

### 41. Status of At-Will Employees and Independent Contractors.

Section 1981 governs discrimination under contracts. Thus, the plaintiff must have a contractual relationship with the employer of the alleged racial harasser to bring a Section 1981 claim. There has been some litigation as to whether at-will employees or independent contractors can sue under Section 1981, with the courts split on the former category.

The Fourth and Fifth Circuits held that at-will employees are protected by Section 1981. Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1020 (4th Cir. 1999) (racial harassment and retaliation); Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1052 (5th Cir. 1998) (racial discrimination). Both courts relied on underlying state contract law to determine that at-will employees have a contractual relationship with their employer sufficient to bring a Section 1981 claim. Spriggs, 165 F.3d at 1019 (applying Maryland law); Fadeyi, 160 F.3d at 1050-51 (applying Texas law). District Courts in Alabama, Indiana, New York and Pennsylvania have also allowed such claims. Fadeyi, 160 F.3d at 1049 n.11 (collecting cases). Thus, it is possible that for the relatively few states which do not recognize a contractual relationship for at-will employees, such a plaintiff would not have a Section 1981 claim. Id. (noting that “more than 40 states recognize the employment-at-will relationship”).

In contrast, several district courts in have rejected Section 1981 claims by at-will employees. Jones v. Becker Group of O'Fallon Div., 38 F. Supp. 2d 793, 796-97 (E.D. Mo. 1999), aff'd 205 F.3d 1346 (8th Cir. 1999) (table); Blumenthal v. Murray, 995 F. Supp. 831, 835 (N.D. Ill. 1998); Hawkins v. Pepsico, Inc., 10 F. Supp. 2d 548, 554 (M.D.N.C. 1998); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 675 (E.D.N.Y. 1997), aff'd 162 F.3d 1148 (2d Cir. 1998) (table); Moscowitz v Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994); see also Spriggs, 165 F.3d at 1019-20 (criticizing these cases); Fadeyi, 160 F.3d at 1049 n.11 (collecting cases). Hawkins (from North Carolina) is now presumptively rejected, in light of the Fourth Circuit's ruling, which expressly disagreed with “these contrary cases.” Spriggs, 165 F.3d at 1019.

The Seventh Circuit (in dicta) has questioned whether, under Illinois law, an at-will employee has a contractual relationship under Section 1981, but did not decide that issue because the plaintiff was unable to prove her case. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998) (“we need not determine whether Gonzalez's at-will status provided adequate support for her section 1981 claim”). Pending resolution of this split, practitioners will need to (1) determine whether the applicable state contract law recognizes a contractual



relationship for at-will employees; and (2) analyze the reasoning of these cases to determine the best approaches for arguing whether an at-will employee has a Section 1981 cause of action for harassment. The Supreme Court recently held that at-will employees may state a claim under Section 1985. Haddle v. Garrison, 525 U.S. 121, 126 (1998).

In contrast, there has not been a comparable dispute regarding the validity of Section 1981 claims by independent contractors. The few courts to have addressed this issue have generally allowed independent contractors to bring such claims. See, e.g., Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 14 (1st Cir. 1999); Springer v. Seamen, 821 F.2d 871, 883 (1st Cir. 1987); Wright v. State Farm Mutual Auto. Ins. Co., 911 F. Supp. 1364, 1376 (D. Kan. 1995), aff'd 94 F.3d 657 (10th Cir. 1996) (table); Miller v. Advanced Studies, Inc., 635 F. Supp. 1196, 1199 n.4 (N.D. Ill. 1986).

For Title VII claims brought by independent contractors, the courts will look to the facts surrounding the relationship, based on the underlying economic realities and common-law agency principles, to determine whether there is an employment relationship. Miller, 635 F. Supp. at 1199 (collecting cases). However, the Seventh Circuit has recently suggested, in dicta, that these cases may no longer be good law:

To the extent that these cases provide that an employer can be held vicariously liable under Title VII for sexual harassment committed by an employee of an independent contractor (and not merely for its own negligence in addressing the problem), they would appear to be in tension with recent Supreme Court precedent, since an employee of an independent contractor typically cannot be considered an agent of the employer.

Berry v. Delta Airlines, Inc., 260 F.3d 803, 812 (7th Cir. 2001) (citing Ellerth and Faragher).

A burgeoning area in employment law is the rapid growth in “temporary” or “contingent” employees who are placed by a temporary employment agency (or staffing firm) at various client work sites. One issue is which entity — staffing firm, client, or both — constitutes the employer for Title VII purposes. The EEOC has surveyed the case law in this area, and has concluded that, in many circumstances, both entities can be held liable for discrimination or harassment suffered by temporary employees. See EEOC Notice, No. 915.002, “Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms,” at nn. 12, 14, 16 (Dec. 3, 1997) <<http://www.eeoc.gov/docs/conting.html>> (collecting cases). Practitioners faced with this

situation should consult this overview for further guidance on the applicable law and on the arguments to be made and rebutted by each side. The Eighth Circuit recently discussed this area, and concluded that nurses who were ostensibly independent contractors (i.e., placed by a contractor at a prison) were employees of both the contract company and the contracting entity, where the harassment occurred. Hunt v. Missouri, 297 F.3d 735, 741-43 (8th Cir. 2002). Critically, the contracting entity (the prison) exercised extensive control over the daily work of the nurses. Id.

For example, two decisions involving government contractors provide an extensive discussion of the extent to whether contract employees who are placed by a contractor at a federal agency worksite can bring a discrimination claim against the agency for discrimination or harassment allegedly conducted by federal employees. See Redd v. Summers, 232 F.3d 933 (D.C. Cir. 2000) (tour guide at Bureau of Engraving and Printing); King v. Dalton, 895 F. Supp. 831 (E.D. Va. 1995) (project coordinator at the Department of the Navy). Although both decisions ultimately found that neither plaintiff could bring an employment discrimination claim against the agency (as opposed to discrimination in the conduct of a federal program), because neither agency had sufficient control to be the statutory employer, these decisions do provide a useful framework for what the courts will look at in the context of contractors.

Finally, Title VII and Section 1981 do require an employment relationship. Thus, unpaid interns and volunteers lack standing to bring Title VII claims based on conduct in the workplace, absent any promise or other indication that their internship would likely result in future employment. See, e.g., Marvelli v. Chaps Community Health Ctr., 193 F. Supp. 2d 636, 659 (E.D.N.Y. 2002) (dismissing interns' hostile work environment claims, "because plaintiffs cannot raise an issue of fact that they were ever promised employment").

#### 42. Employer Status of Corporate Affiliates and Subsidiaries.

Who is the employer? In a world with complex corporate relationships, often the outgrowth of convoluted mergers and acquisitions, it can be difficult to determine which corporate entities are liable for discrimination and harassment. Plaintiffs desire to sue not only the employee's titular employer, but also the parent corporation, with its presumably deeper pockets; defendants desire to keep parent and affiliate corporations out of such litigation. Furthermore, since Title VII applies only to employers with fifteen or more employees, a corporate entity with fewer than fifteen employees is not subject to its proscriptions.

Traditionally, courts have used the four-factor “integrated enterprise” test, originally developed by the National Labor Relations Board (“NLRB”) for other purposes, to determine whether a corporate entity should be held liable for discrimination and harassment. See Papa v. Katy Indus., Inc., 166 F.3d 937, 939-40 (7th Cir. 1999) (collecting cases). Those factors are: “(1) interrelation of operations; (2) common management; (3) common ownership; and (4) centralized control of labor relations and personnel.” Id. at 939 (numbering added). However, as Chief Judge Posner noted, since this NLRB test was designed “to resolve issues of affiliate liability” under the NLRB laws, the factors are either vague or useless, and are not appropriate for the purpose of exempting small employers from Title VII. Id. at 940. Thus, he propounded three situations under which a parent or other affiliate could be found liable for discrimination. First, pursuant to “piercing the [corporate] veil” where the parent or affiliates has either neglected corporate formalities or held itself out as the real corporate party in place of the subsidiary. Id. at 940-41. Second, when “an enterprise might split itself up into a number of corporations . . . for the express purpose of avoiding liability under the discrimination laws.” Id. at 941. Third, when “the parent corporation might have directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining.” Id. The two consolidated cases in Papa both involved discrimination, but their approaches should be equally applicable to racial harassment claims. Although this decision is only binding within the Seventh Circuit, it will undoubtedly prove influential in other circuits, and should be carefully considered by practitioners suing or defending corporate entities.

#### 43. Employer Status of Public Entities.

Similarly, the aggregation of public entities -- state or local governmental -- for determining the fifteen-employee threshold of Title VII has proven a contentious issue. The aforementioned NLRB private sector test is inapposite for public entities, particularly the “common ownership” and “common management” elements. See Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332, 1342-43 (11th Cir. 1999) (en banc).

Thus, the Eleventh Circuit, based on underlying federalism concerns, began with the rebuttable presumption “that governmental subdivisions denominated as separate and distinct under state law should not be aggregated for purposes of Title VII.” Id. at 1345. This presumption could be rebutted either (1) “by evidence that a governmental entity was structured with the purpose of evading the reach of federal employment discrimination law” or (2) when “it is clearly outweighed by factors manifestly indicating that the public entities are so closely interrelated with respect to control of the fundamental aspects of the employment relationship that they should be counted together under Title VII.” Id. Lyes was a sex discrimination case,

and its approach will undoubtedly be applied by the courts to Title VII harassment cases involving state or local governmental entities.

44. Anti-Harassment Policies and the Unionized Workplace.

A case from the D.C. Circuit illustrates the complex interaction of labor and employment law. Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19 (D.C. Cir. 2001). The employer, who refurbishes rail cars for the Bay Area Rapid Transit system, had issued a new employee handbook which prohibited “using abusive or threatening language to anyone on Company premises;” the first violation could lead to suspension, and the second violation could lead to termination. Id. at 23. A unionization attempt subsequently ensued, and the NLRB, in response to the union’s unfair labor practice charge, held that this handbook provision was overly broad and an unfair labor practice. Id. at 24.

The D.C. Circuit vacated the NLRB’s ruling on the grounds that since employers “are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment,” it is reasonably necessary for employers to “consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook.” Id. at 27.

The D.C. Circuit expressed its incredulity at the position adopted by the NLRB and the intervenor Union that “it is perfectly acceptable to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity.” Id. at 26.

45. Extension of Weingarten Rights to Non-Unionized Workplaces.

Another D.C. Circuit case represents a significant extension of labor law rights to the non-unionized workforce. Epilepsy Foundation of N.E. Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied, 536 U.S. 904 (2002). The D.C. Circuit held that employees in non-unionized workplaces are entitled to be accompanied by a co-worker during an investigatory interview by the employer that might lead to disciplinary action. The D.C. Circuit affirmed the NLRB’s extension of NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), to nonunion employees. Epilepsy Foundation, 268 F.3d at 1099-1102. The D.C. Circuit recognized that “the presence of a coworker gives an employee a potential witness, advisor and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer.” Id. at 1100. However, the D.C. Circuit then held that the NLRB’s determination could not be retroactively applied, and thus did not protect the employees in this proceeding. Id.

at 1102-03; see generally A.C. Hodges, et al., “Weingarten in the Nonunion Workplace: Looking in the Funhouse Mirror,” 53 Labor L.J. 89 (2002).

This case is important for employment law practitioners, since an employee who alleges discrimination, including harassment, may also be subjected to real or pretextual investigations by the employer. By allowing such employees the right to have a co-worker present during interviews, the employee may be better able to rebut the employer’s allegations.

One shortcoming is that employers are under no obligation to post a notice or otherwise inform employees of their Weingarten rights, or other rights under the Section 7 of the NLRA, as commentators have noted. See “Attorneys Highlight Advantages, Problems of D.C. Circuit’s Weingarten Rights Ruling,” 70 U.S.L.W. 2304 (Nov. 20, 2001).

More problematic is that an employee’s sole remedy for violation of the NLRA would be to file an unfair labor practices charge with the NLRB. Under the Garmon pre-emption doctrine, an employee cannot seek judicial relief on matters within the NLRB’s primary jurisdiction. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748 n. 26 (1985) (“Garmon pre-emption accomplishes Congress’ purpose of creating an administrative agency in charge of creating detailed rules to implement the Act, rather than having the Act enforced and interpreted by the state or federal courts.”) (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-245 (1959)). There is no guarantee that the administrative agency process, which would entail a hearing before an administrative law judge, followed by an appeal to the NLRB, and a petition for review by the federal court of appeals, would operate in a timely manner to prevent the employer from disciplining an employee who asserted her Weingarten rights.

## 7. USE OF JURY AND TRIAL CONSULTANTS FOR HARASSMENT CASES.

Since only a minute percentage of civil cases actually go to trial, and the frequency of civil trials has been declining over the past decade, it is even more critical that employment litigators be especially well prepared for trials when they do occur.<sup>5</sup> Increasingly, employment litigators are turning to jury and trial consultants, and using mock jury panels or focus groups, in an attempt to identify the most persuasive issues and evidence to be presented at trial. These consultants can also provide guidance as to the likely composition of the local jury pool, and on individual factors that may be relevant in determining whether a juror should be kept or struck.

Employment litigators should consider using jury and trial consultants, particularly if there is uncertainty as to the likelihood and amount of the jury verdict, or as to what evidence should be emphasized. Historically, jury consultants focused on selecting the “right mix” of jurors during voir dire. More recently, these consultants have expanded their services to providing focus groups and mock trials to provide the attorneys with an independent assessment of the merits of their case and guidance on how best to present their evidence. See C.S. Clark, “Savvy Jury Selection: Lessons from the Experts,” Washington Lawyer (Jan. 2001); S.L. Yarbrough, “The Jury Consultant — Friend or Foe of Justice,” 54 SMU L. Rev. 1885 (2001). In essence, a trial consultant provides a fresh set of eyes that can help the attorneys — who have been too closely bound to the case for too long — view the case from the perspective of lay jurors who have no prior exposure to the case.

Unlike some categories of expert witnesses, there is no accreditation agency, licensing body, or other professional standard-bearer for the field of jury and trial consultants. There is a trade association, “American Society of Trial Consultants” (<http://www.astcweb.org>), but it appears to have no formal professional prerequisites for membership, as evidenced by entries in its online directory, which includes students still enrolled in college programs. Thus, attorneys need to proceed with care, and should carefully investigate prospective consultants, including interviewing their former clients. Ideally, a trial consultant should be retained after the judge has

---

<sup>5</sup> For example, in the U.S. District Court for the District of Columbia, the percentage of civil cases terminated through trial decreased from 2.7% in 1996 to 1.6% in 2001. See District of Columbia Circuit Reports (1998; 2000; 2002). The comparable statistics for the D.C. Superior Court show a decrease from 4.1% in 1997 to 2.7% in 2001. See District of Columbia Courts, 2001 Annual Report, at 81-82 (2002); see generally H.V. Sanborn, “The Vanishing Trial,” ABA J., Oct. 2002, at 24.

ruled on the defendant's summary judgment motion and it is highly likely that the opposing party will not settle before trial, but with sufficient lead time before the start of trial.

The costs for using a trial consultant can vary from several thousand dollars to tens of thousands of dollars in those cases where the client is willing to pay for extensive consulting, multiple focus groups, or large numbers of mock jurors.

Customarily, a trial consultant will assemble a focus group or mock jury who meet in a large room, where the attorneys will present a synopsis of their evidence (both testamentary and documentary), along with that of the opposing side, and the participants will provide their candid oral and written feedback at various stages before and after their deliberations. The trial consultant will also provide her feedback, not only on the mock deliberations, but also on the attorney's opening statements and examinations to be used during the real trial. The deliberations may be televised or viewed by the attorneys through one-way mirrors, allowing for an unique perspective into the jury's decision-making process. See Carolyn S. Koch, "Improving the Odds: Using Mock Trials to Hone Strategies," 24 The Trial Lawyer 116 (2001).

The feedback provided by the trial consultant and the lay participants may guide the attorneys in sharpening the focus of their opening and closing arguments and in deciding which witnesses to present and which documentary exhibits to emphasize — and, perhaps more importantly, which lines of testimony should be de-emphasized or omitted entirely. Further, since the attorneys who retain the trial consultant need to prepare a summary of the opposing side's case to present to the mock jury, that can force the attorneys to see weaknesses of their client's case, thereby helping prepare the client and the client's witnesses for cross-examination.

Some trial consultants now provide "Internet juries," i.e., laypersons who review the evidence from their home computers and vote electronically. See R. Gordon, "Trial Research in the Age of Technology," Trial, June 2000, at 64. While these may cost less than in-person focus groups, they lack the interaction that occurs when six to twelve individuals are brought together and forced to reach a common conclusion, and they also preclude the attorneys from judging the non-verbal reactions of the lay participants. See Yarbrough, 54 SMU L. Rev., supra at 1897-99 (discussing limitations of Internet focus groups).

## 8. JURY INSTRUCTIONS

It is essential to prepare jury instructions that fairly and accurately set forth the appropriate legal standards and remedies. The complexity, for harassment claims in employment litigation, is that these standards and remedies may differ from one statute to the next. Thus, a case which involves three theories of liability -- Section 1981, Title VII, and the equivalent state or local anti-discrimination statute -- may require three sets of jury instructions on certain issues. Practitioners should research the appropriate jury instructions for their jurisdiction prior to the close of discovery, as there may be an aspect unique to one statutory theory of liability for which specific discovery will need to be conducted. Although it is beyond the scope of this paper to compile all available published jury instructions for harassment claims, the following sources, some of which are annotated to the case law, have potential value:

American Bar Association, Section of Litigation, Employment and Labor Relations Law Committee, Model Jury Instructions: Employment Litigation (1994).

E.J. Devitt, et al., Federal Jury Practice and Instructions, Civil and Criminal (5th ed. 2000).

Fifth Circuit Pattern Jury Instructions (Civil Cases) (1999). Also available on the Internet at: [http://www.lb5.uscourts.gov/juryinstructions/cf\\_Jury.cfm](http://www.lb5.uscourts.gov/juryinstructions/cf_Jury.cfm).

Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Apr. 2001) (especially Chapter 5, covering Employment Cases). Also available on the Internet at: <http://www.ca8.uscourts.gov/rules/civilman01.pdf>.

Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit (2001) (especially Chapter 11, covering Civil Rights Actions). Also available on the Internet at: [www.ce9.uscourts.gov/web/sdocuments.nsf/civil+jury](http://www.ce9.uscourts.gov/web/sdocuments.nsf/civil+jury).

Eleventh Circuit Pattern Jury Instructions (Civil Cases) (1999). Also available on the Internet at: <http://www.ca11.uscourts.gov/documents/doc.html>.

In addition, there are published jury instructions for many states which incorporate the relevant state anti-discrimination statutes, include jury instructions for statutory and common-law claims (such as breach of contract, promissory estoppel, and workplace torts), and provide general instructions on damages under state law. These are usually published by state and local bar associations.



## 8. STATE LAW CLAIMS

### Overview.

As part of the parallel protections afforded under the federal system, all but one of the fifty states, together with the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands, provide some level of protection to victims of harassment and discrimination through a state-level statutory scheme. Some state statutes mirror the federal statutes; others provide broader remedies; yet others provide less protection than under the federal scheme. The coverage (minimum employer size), charge filing procedures, and statute of limitations often differs from one jurisdiction to another. Only one state — Alabama — does not have a state race or sex discrimination statute; and three jurisdictions — American Samoa, Georgia and Mississippi — limit the protections of their race and sex discrimination statutes to state government employees.

At least twelve states and the District of Columbia prohibit sexual orientation discrimination in employment. See FEP Manual, at 451:115 (2002) (California, Connecticut, District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin). An additional nine states prohibit sexual orientation discrimination in public employment. Id. (Alaska, Colorado, Delaware, Illinois, Indiana, Montana, New York, Pennsylvania, and Washington).

### Supplemental Jurisdiction.

Section 1367 of the Judiciary and Judicial Procedure title provides the federal courts with supplemental jurisdiction over state law claims “that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). This allows the plaintiff who is bringing claims under both federal and state anti-discrimination statutes to consolidate her pleadings in the federal court. There are several limitations to this provision, which allow the federal court the discretionary power to decline the exercise of supplemental jurisdiction over state law claims, if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). The second and third limitations are the most important for employment discrimination plaintiffs. If the plaintiff has one federal anti-discrimination statutory claim, an analogous state anti-discrimination statutory claim, and a large number of other state statutory or common-law claims, then the latter may be viewed as substantially predominating over the sole federal claim, under Section 1367(c)(2). Equally important is that if the federal court decides to dismiss the federal claim(s) before it, then the court may decline to hear the remaining state law claim(s), under Section 1367(c)(3). When this has occurred, then the plaintiff has either 30 days after dismissal or the period of time allowed under state law for tolling of state claims to refile her claim in state court. 28 U.S.C. § 1367(d). Thus, the practitioner will need to act promptly to maintain the state law claim(s), if the federal court dismisses the federal claim(s).

For state government employees, there is an important constraint recently established by the Supreme Court — Section 1367 does not toll the statute of limitations against nonconsenting state employees. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002). In Raygor, the plaintiffs had filed federal and state age discrimination claims in federal court, but the district court dismissed the federal claims pursuant to Eleventh Amendment immunity, and declined to exercise supplemental jurisdiction over the state claims. Id. at 536-37. The plaintiffs appealed to the Eighth Circuit, but withdrew their appeal after the Supreme Court decided Kimel. Id. at 537-38. The plaintiffs refiled their state claims in the Minnesota state courts. Id. at 538. The defendant moved for summary judgment based on statute of limitations, since the state statute only allowed 45 days to file a lawsuit after receiving a right-to-sue letter from the Minnesota Department of Human Rights. Id. The state trial court granted defendant’s motion; the intermediate appellate court reversed, and the state supreme court reversed again. Id. at 538-39. The U.S. Supreme Court affirmed, holding that Section 1367(d) does not “toll the period of limitations for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds.” Id. at 548. Therefore, practitioners representing state government employees will invariably be forced into state court at the first instance, and be

limited to state law claims, except for those few federal claims (i.e., Title VII, FMLA and Equal Pay Act) that still can be brought against state governments.<sup>6</sup>

### State Anti-Discrimination Laws.

This section tabulates, in alphabetical order, the state-level discrimination statutes. In some states, the statutes governing public employees are codified separately and are not listed herein. Also, some states have separately codified their state-level Equal Pay Act, Family and Medical Leave Act, and/or disability discrimination statute, which are not listed separately herein. Practitioners can review these statutes through the Fair Employment Practices Manual (Volumes 8A and 8B), or through several legal Internet websites that provide links to the online statutes of the states and territories:

Cornell Legal Information Institute <<http://www.law.cornell.edu/states/index.html>>  
Georgetown Univ. Law Center <<http://www.ll.georgetown.edu/states/index.cfm>>  
Piper Resources <<http://www.statelocalgov.net/index.cfm>>  
Library of Congress Law Library <<http://lcweb.loc.gov/global/state/stategov.html>>  
Univ. of Michigan <<http://www.lib.umich.edu/govdocs/state.html>>

However, neither the FEP Manual nor the Internet versions are annotated to the case law, for which the practitioner will need to turn to the proprietary annotated statutes, either printed or online (Lexis / Westlaw) versions. For private sector employees, Alabama only protects against age discrimination.

Alabama Age Discrimination Law, §§ 25-1-20 to 25-1-29.

Alaska Human Rights Law, Alaska Stat. §§ 18.80.010 to 18.80.300.

American Samoa (government employees only, Am. Samoa Admin. Code §§ 4.0106, 4.0802(b)).

Arizona Civil Rights Act, Ariz. Rev. Stat. §§ 41-1401 to 41-1493.

Arkansas Civil Rights Act of 1993, Ark. Code §§ 16-123-101 to 16-123-108.

---

<sup>6</sup> The Supreme Court recently held that the state sovereign immunity under Section 1367(d) did not extend to political subdivisions of a state, such as county or municipal governments. Jinks v. Richland County, 538 U.S. \_\_\_, 123 S. Ct. 1667, 1673 (2003).

California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 to 12996.  
Colorado Anti-Discrimination Act of 1957, Colo. Rev. Stat. §§ 24-34-301 to 24-34-804.  
Connecticut Human Rights and Opportunities Law, Conn. Gen. Stat. §§ 46a-51 to 46a-104.  
Delaware, Del. Code Ann. tit. 19, §§ 710 to 718.  
District of Columbia Human Rights Act, D.C. Code Ann. §§ 2-1401 to 2-1411.06.  
Florida Civil Human Rights Act, Fla. Stat. Ch. 760.01 to 760.11.  
Georgia (government employees only, Ga. Code Ann. §§ 45-19-20 to 45-19-45).  
Guam Employment Relations Act, 22 Guam Code Ann. §§ 5201 to 5212.  
Hawai'i, Haw. Rev. Stat. §§ 378-1 to 378-69.  
Idaho, Idaho Code §§ 67-5901 to 67-5912.  
Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-101 to 5/9-102.  
Indiana Civil Rights Law, Ind. Code §§ 22-9-1-1 to 22-9-8-3.  
Iowa Civil Rights Act of 1965, Iowa Code §§ 216.1 to 216.20.  
Kansas Act Against Discrimination, Kan. Stat. Ann. §§ 44-1001 to 44-1110.  
Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. §§ 344.010 to 344.990.  
Louisiana Employment Discrimination Law, La. Rev. Stat. Ann. tit. 23, §§ 301 to 369.  
Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5, §§ 4551 to 4634.  
Maryland, Md. Ann. Code art. 49B, §§ 1-43.  
Massachusetts, Mass. Gen Laws ch. 151B, §§ 1-10.  
Michigan Civil Rights Act, Mich. Comp. Laws §§ 37.2101 to 37.2804.  
Minnesota Human Rights Act, Minn. Stat. §§ 363.01 to 363.20.  
Mississippi (government employees only, Miss. Code Ann. §§ 25-9-103, 25-9-149).  
Missouri Human Rights Law, Mo. Rev. Stat. §§ 213.010 to 213.137.  
Montana Human Rights Act, Mont. Code Ann. §§ 49-1-101 to 49-4-217.  
Nebraska, Neb. Rev. Stat. §§ 48-1101 to 48-1126.  
Nevada, Nev. Rev. Stat. §§ 613.310 to 613.435.  
New Hampshire Law Against Discrimination, N.H. Rev. Stat. Ann. §§ 354-A:1 to 354-A:26.  
New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-1 to 10:5-42.  
New Mexico Human Rights Act, N.M. Stat. Ann. §§ 28-1-1 to 28-1-15.  
New York Human Rights Law, N.Y. Exec. Law §§ 290 to 301.  
North Carolina Equal Employment Practices Act, N.C. Gen. Stat. §§ 143-422.1 to 143-422.3.  
North Dakota Human Rights Act, N.D. Cent. Code §§ 14-02.4-01 to 14-02.4-21.  
Northern Mariana Islands, N. Mar. I. Const. art. I, § 6.  
Ohio, Ohio Rev. Code Ann. §§ 4112.01 to 4112.99.  
Oklahoma Anti-Discrimination Act, Okla Stat. tit. 25, §§ 1101 to 1901.  
Oregon, Or. Rev. Stat. §§ 659A.001 to 659A.990.  
Pennsylvania Human Relations Act, Pa. Cons. Stat. tit. 43, §§ 951 to 963.

Puerto Rico, P.R. Laws Ann. tit. 7, §§ 146 to 151, tit. 29, § 155, tit. 75, §§ 1321 to 1324.  
Rhode Island State Fair Employment Practices Act, R.I. Gen. Laws §§ 28-5-1 to 28-5-42.  
South Carolina Human Affairs Law, S.C. Code Ann. §§ 1-13-10 to 1-13-110.  
South Dakota Human Relations Act of 1972, S.D. Codified Laws §§ 20-13-1 to 20-13-56.  
Tennessee Anti-Discrimination Act, Tenn. Code. Ann. §§ 4-21-101 to 4-21-903.  
Texas Employment Discrimination Law, Tex. Labor Code Ann. §§ 21.001 to 21.556.  
Utah Antidiscrimination Act, Utah Code Ann. §§ 34A-5-101 to 34A-5-108.  
Vermont, Vt. Stat. Ann. tit. 21, §§ 494 to 497.  
Virginia Human Rights Act, Va. Code Ann. §§ 2.1-714 to 2.1-725.  
Virgin Islands Discrimination in Employment Law, V.I. Code Ann. tit. 24, §§ 451 to 462.  
Washington Law Against Discrimination, Wash. Rev. Code §§ 49.60.010 to 49.60.390.  
West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 to 5-11-21.  
Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31 to 111.395.  
Wyoming Fair Employment Practices Act of 1965, Wyo. Stat. Ann. §§ 27-9-101 to 27-9-106.

Another layer of statutory protection is provided by various counties and cities, which have their own anti-discrimination ordinances. For example, within the state of Maryland, several counties (including Anne Arundel, Baltimore City, Howard, Montgomery and Prince George's) have such ordinances, which supplement the Maryland state statute. Similarly, Los Angeles and New York City, to name only two cities, have municipal ordinances governing discrimination. This chapter does not compile these local ordinances, but practitioners should be prepared to determine their applicability in particular cases.

## **9. RIGHTS OF THE ACCUSED HARASSER**

Once an employer has determined, or had the court determine on its behalf, that a supervisor or co-worker has harassed an employee, the employer may decide to transfer, demote, or terminate the accused harasser. Not surprisingly, the harasser can attempt to “turn the tables” on the employer by claiming that this adverse employment action itself constituted a violation of the anti-discrimination laws, breached his employment contract, or violated another statutory or common law right. Even less surprising is the general antipathy by the courts to such claims. Although most such reverse claims have involved sexual harassers, the courts have also upheld the termination of racial harassers. See, e.g., Willoughby v. Potomac Elec. Power Co., 100 F.3d 999, 1001-04 (D.C. Cir. 1996); Newton v. Department of the Air Force, 85 F.3d 595, 599-600 (Fed. Cir. 1996); see generally Lindemann & Grossman, Employment Discrimination Law, at 545-48 (3d ed. Supp. 2000) (collecting cases); H.A. Cominsky, “Beware of the Alleged Harasser — Lawsuits by Those Accused of Sexual Harassment,” 12 Labor Lawyer 277 (1996); C.W. Veidt, “Where There’s Smoke, There Must be Fire: Rights of the Accused Sexual Harasser,” 19 Rev. Litig. 71 (2000).

However, harassers may still be able to seek common-law relief. For example, the Supreme Court of Maine held that an accused harasser who was terminated could seek economic damages from one of his former coworkers for defamation and interference with advantageous economic relations based upon the coworker having reported his allegedly harassing conduct to management. Cole v. Chandler, 752 A.2d 1189, 1198, 16 IER Cases 628 (Me. 2000).

## **10. CONCLUSION**

Harassment based on an employee’s protected status is invidious and egregious for its victims and can adversely affect the entire workplace. Therefore, practitioners representing both employees and employers should work to mitigate and greatly reduce its incidence in the workplace by ensuring that the entire workforce is properly informed as to (1) their rights to work in an atmosphere free of discrimination and harassment, and (2) their obligations to maintain such a workplace. This preventive medicine will serve the socially desirable goals of the anti-discrimination statutes and should reduce the need for litigation to resolve harassment and discrimination in the workplace.