# March 2011 Update on Two Aspects of the Law on Harassment: (1) What is Severe or Pervasive Enough to State a Claim and (2) What Suffices as Training that Effectively Avoids Harassment and/or Discrimination[1]

***Sheila Engelmeier, Esq.[2]**
**612-455-7723**
sheilae@e-ulaw.com

**Sue Fischer, Esq.**
**612-455-7727**
suef@e-ulaw.com

**Charles Firth, Esq.**
**612-455-7724**
charlief@e-ulaw.com

**Engelmeier & Umanah, P.A.**
**706 Second Avenue South**
**Suite 1100**
**Minneapolis, MN 55402**

*** MSBA Certified Labor and Employment Law Specialist**

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## 1. What is Considered Severe or Pervasive for the Purposes of a Hostile Environment Sexual Harassment Claim?

When viewed historically, the case law in the area of harassment in general, and sexual harassment in particular, seems to trend, in spurts, from pro-employee to pro-employer. The developments in the last many years show that the pendulum has swung towards the employer, quite emphatically. Even when an employee is subjected to exceedingly bad behavior in the workplace, it is becoming increasingly more difficult for employees to maintain a successful sexual harassment case; however, the pro-employer decisions are not universal. This article examines the developments in the harassment law in cases involving bad behavior and violence in the workplace and work-related settings.

### I. "BOORISH BEHAVIOR"

Behavior that is inappropriate, rude and/or offensive is not always actionable. In the past many years, employees have had a very difficult time convincing courts that "boorish"[3] behavior can support a successful claim for sexual harassment. For the cases that are actually reaching trial, plaintiffs are still more likely to prevail than not;[4] however, the courts nearly all over the country appear to be taking a firmer stance on what is bad enough behavior to amount to actionable sexual harassment so as to allow the plaintiff to overcome the hurdle of summary judgment.

#### A. Behavior that is Boorish and/or Offensive, but does Not Support a Successful Sexual Harassment Claim

There are many recent examples of court decisions, both inside and outside of the Ninth Circuit, where behavior was found to be crude, rude and offensive, but not bad enough to support a successful sexual harassment claim.[5] Often these cases involved decisions where courts held that the alleged harassing behavior was not bad enough to constitute an objectively hostile work environment.

##### (1) The Eighth Circuit

*Duncan v. General Motors Corp.* is a great example of how one case can create enough momentum to swing the pendulum one way or the other. 300 F.3d 928 (8th Cir. 2002). In

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[3] A review of the sexual harassment case law over the last many years suggests that "boorish" is a word courts often use to describe conduct that they do not view as objectively offensive (and, therefore, something short of sexual harassment). In this sense, "boorish" is often used by courts in a way that is inconsistent with the traditional dictionary definition of the phrase. The Merriam Webster Dictionary defines boorish as "crude insensitivity."

[4] Jury Verdict Research's Employment Practice Liability Verdicts and Settlements publication indicates that from 2000 to 2006 plaintiffs won discrimination awards in over 60% of the claims tried to a jury. 39% of those discrimination claims were based on sex and the median jury award for a sex discrimination claim was $200,000.

[5] *Also consider Lamont v. Independent School District No. 278*, No. A10-543 (Minn. Ct. App. 2011) (stating that "the unambiguous language of the MHRA requires appellant to present evidence of harassment based on sexuality, not gender;" a decision that explicitly distinguishes sex harassment claims brought under the MHRA from claims brought under Title VII, which allows sex harassment claims that allege harassment based on gender).

*Duncan*, a female employee alleged several instances where a male employee engaged in boorish behavior she found offensive. She claimed the male employee propositioned her during an offsite meeting at a local restaurant. *Id*. at 931. She also claimed that the male employee made her work on his computer, which had a screen saver of a naked woman. *Id*. The male employee unnecessarily touched her hand and kept a child's pacifier that was shaped like a penis in his office. *Id*. The male employee also asked the female employee to type a document entitled "He-Men Women Hater's Club" that included statements such as "sperm has a right to live" and "all great chiefs of the world are men." *Id*. at 932. The Eighth Circuit Court of Appeals overturned a seven-figure jury verdict and held that the female employee failed to prove a prima facie case of sexual harassment and overturned the District Court's entry of judgment in favor of the female employee. *Id*. at 933.[6] The Court of Appeals determined that a jury could not reasonably find that the gender of the female employee was the overriding theme of the incidents, and find that the female employee was subjected to unfavorable conditions of employment that the members of the opposite sex were not.

The Court concluded that the female employee failed to show the alleged harassment was so severe or pervasive as to alter a term, condition, or privilege of her employment. *Id*. at 934. The Court explained employees have a "high" threshold to meet in order to prove an actionable harm. Courts will evaluate the "frequency of the conduct, its severity and whether it is physically threatening or humiliating." *Id*. The Court held that the female employee failed to show that the workplace occurrences were objectively severe and extreme. *Id*.

A number of district court and appellate cases have followed *Duncan*'s reasoning.[7] For example, *Pirie v. The Conley Group, Inc.*, is a district court case in the Eighth Circuit that was decided after *Duncan* and also found in favor of the employer. *Pirie v. The Conley Group, Inc.*, No. 4:02-CV-40578, 2004 WL 180259 (S.D. Iowa Jan. 7, 2004). In *Pirie*, a female employee alleged sexual harassment by a coworker. The female employee complained of one incident where she was alone with a male coworker during a shift together as security officers. *Id*. at *1. The female employee said that the male employee engaged in inappropriate sexual banter, discussing his sex life and asked about her intimate relations. *Id*. The female plaintiff said that this inappropriate banter lasted for one hour. During this time, the male employee's banter focused on the size of his penis and he repeatedly offered to display it for her. *Id*. The female plaintiff declined many times, but the male employee turned out the lights and unzipped his pants and displayed his penis to her. *Id*. at *2.

The Court found that this incident was not severe or pervasive enough to alter the term or conditions of the plaintiff's employment. *Id*. at *13. The Court explained that there is no bright-line test to determine whether or not an environment is sufficiently hostile, but said some of the factors that ought to be considered are the frequency and severity of the conduct, whether it was physically threatening and whether or not it unreasonably interfered with an employee's work performance. *Id*. at *7. The Court also said, "the standards for judging hostility of the work environment are demanding" in order to make sure Title VII does not become a "general civility code." *Id*.

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[6] Certiorari was denied by the United States Supreme Court.

[7] *Also see Geist-Miller v. Mitchell*, 783 N.W.2d 197 (Minn. Ct. App. 2010) (adopting *Duncan* and its progeny for purposes of claims brought in Minnesota state court under MHRA, Minn. Stat. § 363A.08.)

The Court found that the behavior of the male employee went beyond sexual banter and innuendos. *Id*. at *10. However, in order for behavior to be sexual harassment, there usually needs to be more than one incident. A single incident can be sufficient for a sexual harassment claim, but generally it must include either violence or the serious threat of violence. *Id.* The Court concluded the incident was not sexual harassment, as it lasted approximately one hour and "consisted of inappropriate sexual banter, and, ultimately, in the three-minute penis display." *Id*. at *13. The Court noted that the male employee did not demand the female employee perform any sexual act or any sexual favors. *Id*.

In probably the most-troubling case along the string of post-*Duncan* cases, *LeGrand v. Arch*, *Duncan* was specifically referenced as authority in support of the case's dismissal. 394 F.3d 1098 (8th Cir. 2005). In *LeGrand*, the plaintiff worked for ARCHS, a non-profit that sought to revitalize local communities. The plaintiff claimed that a priest and Board member ARCHS, Father Nutt, propositioned and harassed him on three separate occasions. Specifically, the plaintiff alleged that: (1) he asked the plaintiff to watch pornographic movies with him and "jerk off with him" to relieve stress; (2) he told the plaintiff that he would move up in the organization if he jerked off the priest's penis, grabbed the plaintiff's buttocks, reached for his genitals and kissed him on the mouth; and (3) he grabbed the plaintiff's thigh. However, the Court noted that, in light of *Duncan*, the aforementioned behavior is not enough to constitute sexual harassment. In support of its decision, the Court noted that in order to be actionable the conduct had to be more than crude or unpleasant.

In a recent case, eleven female employees filed claims against their employer alleging sexual harassment by more than ten on-site supervisors and project managers.[8] The allegations for each plaintiff ranged from multiple instances of being cornered in rooms or hallways where the harassers would hug them, kiss them, put their hands inside the plaintiffs' shirts and feel their breasts; one plaintiff was pushed on a bed and the on-site manager threw himself on top of her; the harassers would slap the plaintiffs' butts, touch their thighs, legs, hands, shoulders, and backs; and each plaintiff alleged constant sexual comments from the harassers, comments about their appearance, and often the harassers' persistent confessions of their love for the plaintiffs. *Sandoval (III) v. American Bldg. Maintenance Industries, Inc.*, 2010 WL 5356490 at 7-13 (D.

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[8] Eight female employees filed sexual harassment claims under Title VII and the MHRA against ABMI. ABMI informed the plaintiffs that ABMK was their employer, not ABMI. More than one month after the deadline for the plaintiffs to amend their complaint had passed, plaintiffs filed an amended complaint adding three new plaintiffs and adding ABMK as a defendant. The district court granted ABMK's motion to dismiss the original plaintiffs, decided that ABMI was not plaintiffs' employer and therefore granted ABMI's motion for summary judgment with respect to the original plaintiffs, and granted ABMI and ABMK's motions for summary judgment against the timely added plaintiffs on the merits of their claims.

On appeal, the 8th Circuit affirmed the majority of the district court's rulings. However, the Court reversed and remanded the district court's dismissal of two of the timely added plaintiffs' hostile workplace claims, "with instructions to consider the evidence of widespread sexual harassment." *Sandoval (II) v. American Bldg. Maintenance Industries, Inc.*, 578 F.3d 787, 803 (8th Cir. 2009). The Court said that although "the evidence [of widespread sexual harassment] cannot be used to prove the timely plaintiffs found their workplace subjectively hostile, it is highly relevant to prove the sexual harassment was severe and pervasive." *Sandoval (II)* at 803.

Minn. 2010). One plaintiff alleged that her harasser pressured her to have sex with him, threatening to fire her if she refused. *Sandoval III* at 9. In fact, she alleges that on three separate occasions her harasser threatened that she would lose her job if she would not have sex with him, and that although the plaintiff refused, but did not physically resist because she was afraid of him, the harasser had sex with her. *Id*. Each plaintiff complained about at least some of these incidents to persons designated by the employer to hear complaints.

On remand, the district court first considered the original plaintiffs' quid pro quo sexual harassment claims against ABMK. The court systematically granted ABMK's motions for summary judgment against each of the eight original plaintiffs, ruling that the harassers do not fit the definition of "supervisor" for purposes of Title VII and the MHRA. "[The non-exempt supervisors and project managers'] work duties were substantially limited to performing [their] own work and supervising other employees' cleaning work." *Sandoval III* at 9. "[P]laintiffs have not adduced evidence creating a genuine issue of fact dispute that plaintiffs' accused harassers had authority to take tangible employments action (*sic*) against them, and no reasonable fact-finder could find that the harassers were supervisors for the purposes of Title VII and the MHRA." *Sandoval III* at 18.

Addressing the plaintiffs' hostile work environment claim, the district court decided that the defendants had neither actual nor constructive knowledge to impute any possible liability on the employers. The court came to its decision despite following the 8th Circuit's instructions to determine whether evidence of widespread sexual harassment was sufficient to put ABMK on constructive notice of sexual harassment in the workplace. Specifically, the court looked to the nature of the plaintiffs' complaints to the employer about the harassing conduct, and whether those complaints amounted to constructive knowledge. *Sandoval III* at 23-29. In each case the court ruled in favor of the employer.

(2) The Seventh Circuit

In *Lara v. Diamond Detective Agency*, a male employee made comments such as "look at the tits on her" and told a female employee that her "tits looked nice in that sweater." *Lara v. Diamond Detective Agency*, No. 04 C 4822, 2006 WL 87592, *1 (N.D. Ill. Jan. 9, 2006). The male employee attempted to peer down the same female employee's shirt to see her breasts, asked her out on a date and would make comments about how she smelled on a daily basis. *Id*. at *2. The Court found that the female employee had not alleged any behavior that rose to the level of an objectively hostile work environment. *Id*. at *3. When analyzing the female employee's hostile work environment claim, the Court further explained just how high the threshold is for a plaintiff to overcome to succeed. The Court said that in order for a plaintiff to succeed on a hostile work environment claim the plaintiff had to show that the workplace is "hellish." *Id*. at *4. The Court then held that no reasonable jury could find that the behavior of the male employee was objectively hostile "such that it rose to the level of being hostile or offensive, let alone being 'hellish'." *Id*.

The Court specifically analyzed the three incidents alleged by the plaintiff. The Court found that the male employee's attempt to look down the female employee's shirt was no worse than a poke to the buttocks or unwanted touches or attempted kisses; conduct which is not actionable in the Seventh Circuit. *Id*. The male employee's comments about another female's

breasts were considered a second-hand comment because it was not directed at the plaintiff; rather, it was merely said in the plaintiff's presence. *Id*. at *5.[9] Finally, the male employee's daily comments about how the plaintiff smelled might have been frequent, but the Court found that it was not severe, physically threatening, did not interfere with the plaintiff's work performance and was not of a sexual nature. *Id*.

(3) Other Jurisdictions

In *Simmons v. Mobile Infirmary Medical Center*, a male employee touched a female employee's breasts four to five times, put his hands on her hips and pressed her body against his once and pulled his chair up next to hers and touched her leg with his leg. *Simmons v. Mobile Infirmary Medical Center*, 391 F. Supp. 2d 1124, 1128 (S.D. Ala. 2005). The Court found that the conduct alleged was not objectively severe or pervasive enough to alter the terms or conditions of the plaintiff's employment. *Id*. at 1132-33. The Court explained that the incidents that the plaintiff complained about occurred over five years of working together with the male employee.

The Court also found that the conduct alleged by the plaintiff was not subjectively severe or pervasive enough to alter the terms or conditions of the plaintiff's employment. *Id*. at 1134. The Court noted that the plaintiff failed to complain or protest the alleged harassment when it was occurring. The Court said that since she did not complain or protest at the time of the harassment it suggested she did not perceive the conduct as offensive at the time. *Id*. Further, the Court explained that the plaintiff did not report any of the conduct for over ten months and waited over four months after the last time the male employee allegedly touched her breast to complain. While the Court acknowledged the plaintiff's argument that she was afraid to report the conduct, the Court discounted that fear because the plaintiff did not offer a basis for her fears. *Id*.

In *Clark v. UPS, Inc.*, two female plaintiffs complained about the sexually harassing behavior of a supervisor at work. *Clark v. UPS, Inc.*, 400 F.3d 341 (6th Cir. 2005). The first female employee, Knoop, alleged that the male supervisor did the following: told sexual jokes in front of her, twice placed his vibrating pager on her upper thigh and asked what she was wearing under her overalls. *Id*. at 344. The second female employee, Clark, claimed that the male supervisor did the following: asked if she wanted chips and then placed the bag in front of his crotch, told her she did a good job in his dream, showed her an email depicting two cartoons in a sexual act, and placed his vibrating pager on her waist/thigh as he passed her in the hall. *Id*. at 345-46.

On review of the grant of the employer's motion for summary judgment, the Court found that the first female plaintiff's claim was not substantial enough to satisfy a prima facie showing of sexual harassment. *Id*. at 352. The Court explained that Knoop's allegations were isolated

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[9] The logic in *Lara* may be inconsistent with the recent United States Supreme Court's February 28, 2008 decision in *Sprint/United Management Co. v. Mendelsohn,* 128 S.Ct. 1140 (2008) (finding "me-too" evidence is admissible, depending on the circumstances). According to the Supreme Court, the question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case..

instances and not enough to amount to an "ongoing" situation and the employer was entitled to summary judgment. However, the Court held that the employer was not entitled to summary judgment with respect to the second plaintiff. *Id*. The Court found that although the second plaintiff alleged similar behavior, she presented more of an "ongoing pattern of unwanted conduct and attention" by the male supervisor. The Court specifically noted that the second plaintiff alleged seventeen incidents of harassment in total and that it was a "closer case" with respect to her claim. ***Id.*** The Court overturned the district court's grant of summary judgment for the employer with respect to only the second plaintiff's claim. *Id*.

In a recent Second Circuit case, a female Deputy Sheriff Jailor brought a sexual harassment claim against her employer after she was "subject to graphic live sex in the workplace when a female visitor masturbated in front of a male inmate in violation of well established jail policies." *Kleehammer v. Monroe County*, 2010 WL 4053943 (W.D.N.Y. 2010). "Plaintiff was compelled to watch as there was no supervisor present and was told by male co-workers to 'just sit there.'" *Kleehammer* at 1. Plaintiff complained to management about the incident, as well as her co-workers' lewd comments during the incident.

The court stated that "the offensive utterances are not alleged to have been frequent, severe, or physically threatening or humiliating." *Id*. at 7. Additionally, the court found that liability is not imputed to the employer in this case for failing to investigate plaintiff's complaint. Thus, the court ruled that failed to plead a "plausible" hostile environment claim. *Id*.

(4) Race Cases

The same reasoning applied to sexual harassment claims has been extended to racial harassment claims as well. For example, another Eighth Circuit case since *Duncan*, *Singletary v. Missouri Department of Corrections*, indicates that the pendulum may be swinging towards employers even with respect to race harassment issues. 423 F.3d 886 (8th Cir. 2005). In *Singletary*, on several occasions, the managers and coworkers of Mr. Singletary, an African-American man, chastised him by calling him racist names, such as "shiny face" and by using the "n-word." In addition, co-workers of Mr. Singletary conjured up false allegations that he was engaging in wrongdoing and his car was even vandalized while it was in the parking-lot at work. Local law enforcement determined that the vandalism was likely caused by one of his co-workers. However, the Court found these incidents to not be severe or pervasive enough to be harassment because the "n-word" was not used in front of him, and the hostility against him could have been attributed to the fact that he was an investigator - not because of his race.[10] Further, the Court discounted the vandalism issue noting that there was not enough proof to conclude that it was because of his race.

Similarly, in *Bainbridge v. Loffredo Gardens, Inc.* a male employee asserted a hostile work environment claim based on racial comments made about Asians, blacks and other minorities. *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756 (8th Cir. 2004). The plaintiff, who was married to a Japanese woman, claimed that coworkers made racially offensive remarks about Asians, such as "Jap," "nip," and "gook," approximately once a month over a two-year

[10] As with *Lara*, the *Singletary* case (as well as *Bainbridge* case) could be at odds with the United States Supreme Court decision in *Sprint/United Management Co. v. Mendelsohn*.

period. The plaintiff told of specific instances where one employee called another employee a "Jap," and also referred to a customer as such. *Id*. at 759. The employees used other racial slurs, including "spic," "wetback," "monkey," and "nigger." *Id*. The plaintiff complained to his supervisor about the offensive behavior and left for a scheduled vacation. Six days later, before the plaintiff returned, the employer sent him a letter stating his employment was terminated because his interpersonal skills with subordinates were problematic.

The Court found that the racial slurs did not create a hostile work environment. *Id*. at 760. The Court explained that the racial remarks were sporadic, and not about the employee, his wife or their marriage. Also, the Court noted that the racial remarks were about competitors, other employees or customers, and the plaintiff only overheard some of the remarks. *Id*. Thus, the Court concluded, the remarks were not "so severe or pervasive that it altered the terms or conditions of [the plaintiff's] employment." *Id*.

The Court did, however, find that the plaintiff had enough circumstantial evidence to put his retaliation claim in front of a jury. *Id*. at 761. The Court found that the plaintiff was able to establish a causal connection between the protected activity and his firing due to the timing between the two events. *Id*. The plaintiff had left for a previously scheduled vacation immediately after his last complaint and was fired before he even returned to work. The Court explained that the plaintiff had no extensive disciplinary record, his records indicated more than satisfactory performance, and he had consistently received raises during his employment. *Id*. The Court concluded, "[A] reasonable jury could infer [the employer] tried to paper [the employee's] file to justify his termination." *Id*.

### B. "Boorish" Behavior in the Ninth Circuit

Although some of the most egregious and shocking cases come from outside of the Ninth Circuit, the Ninth Circuit is not wholly unfamiliar with the "boorish" distinction. However, the majority of the cases within the jurisdiction of the Ninth Circuit do not use the term "boorish" to describe conduct which does not amount to actionable sexual harassment.[11] Nevertheless, the word is still used along with other characterizations such as, "horseplay," "teasing" and "flirting." As one court put it, "[t]he requirement that actionable conduct be severe or pervasive is 'crucial' in that it prevents ordinary socializing in the workplace, horseplay, simple teasing or flirtation from becoming prohibited sexual discrimination … Title VII does not provide a remedy for boorish behavior or bad taste." *Torres v. Borrego*, No. Civ. 04-248 *15 (D.N.M. 2005) (citation omitted).

### C. A Brief Word About Washington State Courts

While the focus of this piece is primarily on the trends of the federal courts, it is important to include a short excerpt of what is severe or pervasive enough to state a claim for hostile environment sexual harassment in Washington state court. This is especially true because our case law review suggests that success in Washington State Court for plaintiff-employees is much higher in claims for sexual harassment than when pursuing such a claim in federal court.

[11] This is evidenced by an electronic case law search for the term "boorish" in the 9th Circuit, which only turned up seven cases.

That is, while the federal courts appear to be quick to dismiss a case on summary judgment, the trend in Washington state court suggests that they are more reluctant to award summary judgment in favor of defendant-employers.[12] In fact, in one case, the Washington Court of Appeals actually used evidence of conduct described as "boorish" as its basis to reverse the district court's grant of summary judgment in favor of the defendant-employer.[13] As such, it is important for employers to keep in mind that the safety net that recent federal case law has provided them for cases brought in federal court may not be there to protect them in state courts, including in Washington.

### D. Some Behavior That Can be Described as "Boorish" Does Support a Successful Hostile Environment Sexual Harassment Claim

When viewed in their larger context, cases throughout the country over the last many years involving sexual harassment based on a hostile work environment theory highlight the difficulties plaintiffs have surviving even the summary judgment stage. However, plaintiffs have not been wholly unsuccessful in their sexual harassment claims.

#### (1) The Eighth Circuit

For example, in the Eighth Circuit, after the *Duncan* decision discussed above, a female employee asserting a hostile work environment claim again faced the Court of Appeals. Unlike the female employee in *Duncan*, however, this plaintiff prevailed.

In *Eich v. Board of Regents*, a female employee alleged sexual harassment and retaliation in violation of Title VII. *Eich v. Board of Regents*, 350 F.3d 752 (8th Cir. 2003). Her claim went to trial, where the jury found for the plaintiff on both the sexual harassment claim and also on her retaliation claim. *Id*. at 754. After trial, the District Court granted the defendant employer's motion for judgment as a matter of law. *Id*. The Court of Appeals reversed and directed the District Court to reinstate the jury verdict in favor of the plaintiff. *Id*.

In *Eich*, the female plaintiff alleged continuous sexual harassment over a period of seven years. *Id*. at 755. She specifically claimed that two male employees, one of whom was her supervisor, instigated the acts of harassment. She said one of the male employees brushed up against her breasts, frequently ran his fingers through her hair, rubbed her shoulders, ran his finger up her spine, told her how pretty she was, and asked her to run off with him. He also stood behind her and simulated a sexual act, grabbed her leg and attempted to look down her blouse. *Id*. She said that the other male employee made comments about her body, hair and

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[12] *See Stolt v. Annie Wright School*, 138 Wash. App. 1028 (2007) (holding that intimidating telephone calls and public ridicule was sufficient to raise a genuine issue of material of fact that the plaintiff was harassed); *Campbell v. State*, 118 P.3d 888 (Wash. Ct. App. 2005) (holding that offensive emails singling out the plaintiff and evidence that the plaintiff being yelled at and mocked in front of others was sufficient evidence to create a genuine issue of material fact that the plaintiff was harassed).

[13] *Adams v. Able Building Supply Inc.*, 57 P.3d 280 (Wash. Ct. App. 2002) (holding that evidence of a supervisor's uncontrollable temper, random and unpredictable episodes of verbal abuse, and public humiliation towards all employees was sufficient evidence for a jury to decide whether the exhibitions merely reflected a gruff management style or were sufficiently severe and pervasive to alter the conditions of employment).

face, commented on her chest size, rubbed his hand up and down her legs and rubbed or pressed up against her when they talked. The female employee reported these acts throughout the seven years numerous times and had documented at least sixteen such reports. She reported the conduct to the male employee's supervisor, the employer's director of human resources and the employer's affirmative action/equal employment opportunity officer. *Id*. at 756. In the last year of the seven-year period there was some form of harassing behavior occurring on an almost daily basis.

The Court of Appeals found that the facts alleged by the female plaintiff were sufficient to show that the harassment was severe or pervasive, as well as objectively hostile. The District Court had relied on *Duncan* in its decision in favor of the employer. However, the Court of Appeals distinguished the *Eich* case from *Duncan* and said that if the Court is to rely on *Duncan*, it must "rely solely upon what the *Duncan* majority's opinion reflects as being the facts of the case." *Id*. at 760. The facts in the *Eich* case were different because the plaintiff "experienced more than the mere touching of the hand." *Id*. at 761. The plaintiff in *Eich* was "subjected to a long series of incidents of sexual harassment in her workplace which went far beyond 'gender related jokes and occasional teasing.'" *Id*.

Interestingly, the Court in *Eich* noted that it was "a case involving the question of human dignity." *Id*. at 754. The Court went on to say that by ignoring sexual harassment complaints "employers should take notice that they are not only condoning the psychological harm to their employees, but they are creating a loss of work efficiency within their own work environment." *Id*. at 762. The Court "condemned" sexual abuse in the workplace and continued to "express hope that employers will strive to create a changed environment such that men and women of every race, color or creed can feel free to work without a hostile environment." *Id*.

(2) The Eleventh Circuit

In a recent case out of the Eleventh Circuit, *Reeves v. C.H. Robinson Worldwide, Inc*., the Eleventh Circuit Court of Appeals held that a plaintiff can bring a claim for hostile work environment based on "sex specific" language even when the language is not directed at the plaintiff. *Reeves v. C.H. Robinson Worldwide, Inc.*, No. 07-10270, 2008 WL 184882 (11th Cir. April 28, 2008). In Reeves, the plaintiff, a Transportation sales representative, brought a sexual harassment claim based on a hostile work environment against her employer, C.H. Robinson Worldwide. *Id*. at *2. The plaintiff alleged that throughout the course of her employment she was subjected to a sexually derogatory environment. Specifically, she alleged that her coworkers used words like "bitch," "cunt" and "whore," albeit in reference to other women, on a daily basis. *Id*. The district court entered Summary Judgment in favor of the defendant-employer on the grounds that, because the allegations were not directed at plaintiff, the harassment was not "based on" the plaintiff's sex. *Id*. at *6.

In reversing the district court, the Eleventh Circuit Court of Appeals reasoned that "sex specific" language can be considered to be "based on" sex so as to support a claim for sex harassment hostile work environment claim even when the language does not target the plaintiff. Id. at *9. In its reasoning, the court stated that the sex specific words such as "bitch," "whore," and "cunt" may be more degrading to women than men. Id. at *10. In addition to holding that words not directed at the plaintiff herself can support a sex harassment hostile work environment

claim, the court further held that although such terms may not be sufficiently "severe," the conduct may be pervasive, or frequent, enough to have unreasonably interfered with her job performance. *Id*. at *19.

(3) The Ninth Circuit

In a case in the Ninth Circuit, *Galdamez v. Patter*, the plaintiff, a postmaster, brought an action against the postal service for the harassment she was subjected to by members of the community in which she worked. 415 F.3d 1015 (9th Cir. 2005). According to the plaintiff's allegations, upon accepting a position with the post-office, the plaintiff began to receive hostile comments from customers and other residents based upon her race, accent, and national origin. *Id.* Specifically, she received a letter from a customer promising to "get rid of you foreigner," another customer warned the plaintiff that their town was a "redneck town" and that everyone would get together to "come and kill [her]," and one postal worker gave the plaintiff a list of townspeople who would "not think twice" about "get[ting] together and kill[ing]" her. *Id.* at 1024 In addition, the plaintiff's car was vandalized in the parking lot. These comments, the threats, and the vandalism took place over the course of three years. *Id.*

Although the district court originally dismissed her claim, the 9th Circuit Court of Appeals reversed the district court's ruling, holding that a reasonable juror could find that the harassment was actionable, that management-level Postal Service employees knew or should have known about it while it was happening, and they failed to take steps to deter it. *Id.* at 1025.

(4) Other Race Cases

The United States Supreme Court decided a racial discrimination case in 2006 that involved an issue similar to those addressed in the sexual harassment cases discussed here. Specifically, in the discrimination (rather than harassment) context, the Supreme Court noted that use of the word "boy" can have a racial overtone by itself, without more.[14] The case involved two male African-American employees who did not receive promotions they had applied for and the employer selected two white males instead. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). The two African-American employees alleged discrimination on the basis of race and offered evidence that they were the superior candidates for the positions. After a jury trial where the plaintiffs were awarded compensatory and punitive damages, the District Court granted the defendant employer's motion for judgment as a matter of law. *Id*. The Court of Appeals affirmed in part and reversed in part. For one of the plaintiffs, the Court of Appeals found that

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[14] Although, at first glance, it appears that this case may be used by plaintiffs to slow the momentum of the pendulum swinging in favor of employers, recent case law suggests that, although this case changes the terminology that may be evidence of racial animus, plaintiffs are still required to overcome the hurdle that the use of the "racial animus" was severe or pervasive. *Garcia v. Illinois State Police*, No. 05-3273, 2008 WL 1806128, n. 19 (C.D.Ill. April 18, 2008) (stating that the racially neutral phrases, even if construed in the plaintiff's favor, are "insufficient to show any harassment based on race"); *Washington v. Kroger Co.*, No. 05-16328, 2007 WL 433519 (11th Cir. February 8, 2007) (holding that the term "boy," though demeaning, was not severe or extreme). *Alexander v. Opelika City Bd of Educ.*, No. 3:06-cv-0498-WKW, 2008 WL 401353 (M.D.Ala. Feb. 12, 2008) ("[e]ven assuming each use of the term "boy" was motivated by racial animus, … the court finds the frequency and severity of the alleged harassment to be inadequate to support a prima facie claim for hostile work environment").

there was insufficient evidence to show pretext and unlawful discrimination. For the other plaintiff, the Court of Appeals found that there was enough evidence to go to the jury and affirmed the District Court's alternative remedy of a new trial because the evidence did not support the decision to grant punitive damages. *Id*.

The Supreme Court's opinion lacks a lot of detail about the facts alleged by the two plaintiffs, but its analysis regarding the use of the term "boy" is interesting. The Court of Appeals held that the use of the word "boy" alone could not be evidence of discrimination. However, the Supreme Court disagreed with that analysis and found that while the use of the word "boy" does not always evidence racial animus, "it does not follow that the term, standing alone, is always benign." The Supreme Court said that the speaker's meaning depends on several factors, such as "context, inflection, tone of voice, local custom, and historical usage." *Id*. The Supreme Court held that the Court of Appeals' holding that "modifiers or qualifications are necessary in all instances to render the disputed term probative of bias" was erroneous. *Id*

## II. VIOLENCE

Violence in the workplace has received a lot of attention lately, particularly in the last five years. Many employers now have comprehensive workplace violence programs.[15] Both physically threatening and assaultive behavior and sexually assaultive behavior are fairly regularly addressed in the sexual harassment case law.

### A. Physical Assault or Threats

Physical assaults and threats in the workplace can be part of a successful sexual harassment claim. Plaintiffs may claim that physical assaults and threats were part of the same harassing behavior that gives rise to a sexual harassment claim or they could use instances of physical assault or threats to extend the period in which they have to seek redress for the harassing behavior.

#### (1) Physical Assault or Threats as Part of a Sexual Harassment Claim

In *Brown v. City of Cleveland*, a male employee's threatening behavior was presented in support of a hostile environment sexual harassment claim and a retaliation claim. *Brown v. City of Cleveland*, No. 1:03CV2600, 2005 WL 1705761 (N.D. Ohio July 21, 2005). A female employee complained that a male employee was making comments such as "I am sick of working with this f—ing bitch" and that she complained to her supervisor. The female employee also alleged that the male employee called her a "piece of sh—" and a "psycho" during a meeting, and she filed an Incident Report with the City, alleging workplace violence after the meeting. *Id*. at *1. The female employee also claimed that the male employee stated, "[W]hy

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[15] A Google search on the Internet reveals that violence in the workplace is a hot topic. For example, www.workplace-violence-hq.com offers guidance and training on how to protect employees from violence and rage in the workplace. And, many employers (especially government employers) post their workplace violence programs and related information on the web. See, e.g., OSHA's Workplace Violence Policy at www.osha.gov/SLTC/workplaceviolence/index.html.

don't you wear lipstick? Why don't you wear makeup? Why don't you dress like a lady?" *Id*. The City discharged the female employee after the same male employee that the plaintiff claimed was acting in a threatening manner claimed that she almost hit him with a truck. The female employee later filed suit alleging sexual harassment based on a hostile work environment theory and retaliatory discharge.

The Court held that the female employee had successfully set forth a prima facie case of retaliation by alleging she was fired after complaining of sexual harassment. *Id*. at *4. The City tried to claim that there was no connection between the plaintiff's discharge and her complaints of sexual harassment because she complained of workplace violence in her last complaint, not sexual harassment. *Id*. The Court found that while the plaintiff's last complaint before her discharge was of workplace violence, she had complained about sexual harassment "at a time both near to, and intertwined with" the workplace violence complaints. *Id*.

In *Griffin v. Delage Landen Fin. Services*, evidence of a physical assault was part of the plaintiff's claim of sexual harassment. *Griffin v. Delage Landen Fin. Services*, No. 04 CV 5352, 2005 WL 3307535 (E.D. Pa. Dec. 5, 2005). A female employee was claiming a hostile work environment in violation of Title VII and retaliation. Her claim stemmed from a romantic relationship she had with a coworker. The relationship ended and the male employee was later promoted. The female employee was concerned about working with the male employee and informed company officials about those concerns. She met the male employee for dinner, where he became angry after learning she contacted company officials. *Id*. at *1. The female employee alleges that the male employee followed her home, verbally abused her, warned her to find another job and physically assaulted her. *Id*. The female employee claims she complained about the away from work assault and her employers took no action. She also alleged that the male employee subsequently created a hostile work environment that the company refused to address. *Id*.

The female employee wanted to admit evidence of the physical assault at trial as part of her sexual harassment and retaliation claim. She claimed that her pre-assault notice to the company of her concerns about the male employee gave them notice to prevent the threat from the male employee. *Id*. at *3. The Court held that the physical assault evidence was relevant, and thus admissible, but *only* for purposes of establishing a factual context for the plaintiff's meetings with company officials. *Id*. The Court explained that evidence of the assault would help the jury to understand the relationship between the female and male employee, the nature of the break-up and how those events might have led to a hostile work environment or retaliation. *Id*. However, the Court limited testimony about the graphic aspects of the assault. The plaintiff was not allowed to give a "blow-by-blow" of the assault. *Id*. at *4. She also was not allowed to show color photographs of her bruises from the assault since the parties stipulated that she received medical treatment for her injuries. *Id*. at *3. The Court concluded that evidence of the assault could only be used to explain how the plaintiff believes her break-up with the male employee and subsequent assault led to retaliation by the employer. *Id*. It was not allowed as part of the evidence supporting the sexual harassment claim.

In a case out of the Ninth Circuit, *EEOC v. NEA-Alaska*, a number of female employees complained of threatening behavior by a male employee. 422 F.3d 840 (9th Cir 2005). The female employees specifically alleged numerous episodes where the male employee would shout

in a loud and hostile manner at female employees. *Id*. at 843. The female employees alleged that the shouting was frequent, profane, public and occurred with little or no provocation. *Id*. The female employees alleged that the verbally threatening behavior was accompanied by a hostile physical element as well. *Id*. The female employees said that the male employee regularly came up behind them silently, stood over them and watched for no apparent reason. The female employees also alleged that the male employee lunged at one of them and shook his fist at her. *Id*. The district court granted summary judgment finding that no reasonable jury could conclude that the physically threatening acts could be sexual harassment because they were not "because of sex".

The Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment to the employer, holding that there was sufficient evidence to conclude that the alleged harassment was both because of sex and sufficiently severe enough to support a hostile work environment claim. *Id*. at 847. The Court found that physically hostile acts do not need to be overtly sexual or gender-specific in content to constitute sexual harassment. *Id*. at 844. The Court explained that one way of claiming sexual harassment is to compare how the alleged harasser treated members of both sexes. If the male employee sought to drive women out of the organization so that men could fill their positions, the harassment would be "because of sex." *Id*. For example, if "an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men" his motive could be "because of sex" just as much as if his motive involved sexual frustration, desire, or simply a motive to exclude women from the workplace." *Id*. at 845.

(2) Physical Assault or Threats Used in Conjunction with a Sexual Harassment Claim in Order to Extend Time Limits

In *Bunda v. Potter*, a female employee complained of sexual harassment and unwanted physical sexual contact over a period of three years. *Bunda v. Potter*, 369 F. Supp. 2d 1039 (N.D. Iowa 2005). The female employee specifically complained of her male supervisor grabbing her buttocks, rubbing up against her, and pinching her buttock. *Id*. at 1043. The female employee complained to supervisors at work in late 1998, early 1999 and 2000. *Id*. The female employee alleged the male employee's behavior was all part of a continuing pattern of harassment and thus her timely administrative complaint as to the 2000 incidents encompasses all of the incidents. *Id*. at 1050.[16]

The Court found that a lengthy hiatus between the incidents of harassment does not prevent a successful sexual harassment claim if the harassing acts are part of the same unlawful employment practice. *Id*. The Court specifically found, in this instance, the harasser was the same male employee and the harassment was generally of the same "nature" even though only some of the harassment involved physical contact. *Id*. The Court added that it could not "imagine that continuous sexual harassment by the same harasser could be construed *not to be* part of the same unlawful practice, simply because the harasser might be wise enough to change the nature of his harassment periodically from physical to verbal harassment." *Id*. at 1053. The

[16] Allegations of physical threats and assaults will undoubtedly be used in the future by employees to try to extend the period during which evidence of a "continuous" pattern of harassment is admissible.

Court denied the defendant's summary judgment motion on the plaintiff's claims of hostile environment sexual harassment and retaliation. *Id*. at 1062.

B. Sexual Assault

Sexual assaults and rape are a particular form of physical assault that occasionally appears in sexual harassment claims. Employers cannot necessarily escape liability simply because a sexual assault or rape took place off the employer's premises or if only one instance of sexual assault or rape occurred.

(1) Sexual Harassment Claims Where a Sexual Assault Took Place Off the Work Premises

In *Paugh v. P.J. Snappers*, a male employee raped a female job applicant. *Paugh v. P.J. Snappers*, No. 2004-T-0029, 2005 WL 407592 (Ohio App. Feb. 18, 2005). The female applicant went to a restaurant and bar to apply for a job. She consumed alcohol with the male manager and discussed possible employment. The male manager made advances on the applicant and rubbed her shoulders. The female job applicant went to the restroom and returned to the bar and continued drinking her drink. *Id*. at *1. The female applicant's next memory is waking up the following morning in the male manager's bedroom. *Id*. A rape kit later revealed that more than one man's semen was found in her. *Id*.

The Court presumed the female job applicant was an employee for purposes of the summary judgment motion, but held that "reasonable minds could not find that the actions of [the male manager] were within the scope of his employment." *Id*. at *3. The Court explained that the manager's actions were not intended to facilitate or promote the business purposes of the bar and restaurant. The Court also said that any employee or patron of the bar could have put a drug in the female applicant's drink when she left it unattended at the bar to go to the restroom. The rape occurred after hours and not at the bar and restaurant. *Id*. at *4. Thus, the Court concluded the employer could not be held liable for either hostile environment or quid pro quo sexual harassment. *Id*.

In *Ferris v. Delta Air Lines, Inc.*, a male flight attendant while on a layover between flights raped a female flight attendant. *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2nd Cir. 2001). The District Court granted summary judgment to Delta Air Lines because the male flight attendant had no supervisory authority over the female flight attendant and because there was no evidence that Delta had encouraged flight attendants to visit each other's rooms. Thus, the District Court held, the rape did not occur in the work environment.

The Court of Appeals for the Second Circuit reversed. *Id*. at 135. The Court of Appeals found that "the circumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday." *Id*. The Court explained that most flight attendants do not have family or friends, or their own residences, in places where they have brief layovers in foreign countries. Most flight attendants stay in a block of hotel rooms reserved and paid for by the airline. The

airline also provides ground transportation from the airport to the hotel. Even though the airline might not directly tell its employees what to do during the layover, "the circumstances of the employment" tend to result in flight attendants socializing in each other's hotel rooms as a matter of course. *Id.*

(2) When One Instance of Sexual Assault is Enough to Support a Sexual Harassment Claim

In *Ferris*, a case described above, the Second Circuit Court of Appeals made clear that "a single incident of rape can satisfy the first prong of employer liability under a hostile work environment theory." 277 F.3d at 136. The *Ferris* court also noted that other courts have found, "[E]ven 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." *Id*. (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2nd Cir. 1995)).

For example, in *Little v. Windermere Relocation, Inc.*, an employer was found liable for a hostile work environment claim based on their response, or lack thereof, to a female employee's rape by a male client. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002). In this case a female employee was raped by a client whose account she managed. She reported the rape to a coworker. The coworker told her not to tell anyone in management. However, within nine days, the female employee did report the rape to the Vice President designated in the company's harassment policy as a complaint-receiving manager. *Id*. at 965. The Vice President told her that she should try and put it behind her and she should stop working on the client's account. *Id*. The female employee reported the rape to her own manager as well. The manager said that he didn't want to hear about the rape, that the female employee would have to respond to his attorneys and immediately restructured her salary in such a way that resulted in an immediate pay reduction. *Id*. The female employee's manager also continued to ask her about the status of the client's account over the next six weeks.

The female employee filed suit, alleging that the employer's response to the rape created a hostile work environment. The Court of Appeals overturned the District Court's grant of summary judgment for the employer. The Court of Appeals explained that "rape is unquestionably among the most severe forms of sexual harassment" and that "being raped is, at minimum, an act of discrimination based on sex." *Id*. at 967-68. The Court of Appeals also found that having out-of-office meetings with potential clients was a required part of the job and thus the rape occurred while in the course and scope of employment. Additionally, the company's "failure to take immediate and effective corrective action allowed the effects of the rape to permeate [the female employee's] work environment and alter it irrevocably." *Id*. at 967.

## CONCLUSION

Overall, courts are granting summary judgment in favor of employers and overturning sexual harassment verdicts in favor of employees more easily and this outcome is no different in the Ninth Circuit. Even where an employee was subjected to grossly inappropriate behavior, employers are successfully defending sexual harassment cases. Moreover, courts sometimes find that violent and/or threatening behavior cannot be evidence of sexual harassment, as it is not

"because of sex." Sexual violence, on the other hand, may still suffice to support a sexual harassment claim, even when it includes an off-site and/or single incident of sexual assault. Finally, an employer's reaction to complaints of violence and/or sexual assault will be one factor courts look at in determining whether a hostile environment claim is actionable.

## 2. Training to Create a Respectful Work Environment: Discrimination and Harassment Training

Recognizing that federal and state laws require employers to make a "good faith effort"[17] to promote prevention of harassment and discrimination, as well as to take remedial corrective action, employers must properly train employees regarding harassment and discrimination issues. The purpose of the information contained in this article is to discuss why it is crucial for companies to deliver timely and effective training and what constitutes effective training which will have a positive impact on the workplace. Armed with this information, employers can effectively meet their legal obligations to comply with anti-harassment and discrimination laws, by training employees, and can create a good work environment.

### I. Reasons to Train Employees

Employers continue to face challenges as the nation struggles through its difficult economic times. The EEOC released its annual report for the fiscal year ending September 30, 2010.[18] The figures show that employers need to give thorough consideration and exercise the utmost care when making employment decisions during these rocky times. In the EEOC's last fiscal year, an all time high 99,922 charges were filed, resulting in an all-time high $319.4 million in monetary benefits. Problems, complications and distractions caused by allegations of harassment and discrimination in the workplace are serious. Accordingly, proper, prompt and consistent attention must be paid to the area of prevention. The most effective way to achieve that goal is through regular training.

There are many reasons why an employer needs to train employees. First, the courts and the Equal Employment Opportunity Commission[19] ("EEOC") say you should train.

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17 "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" and the "purposes underlying Title VII are similarly advanced where employers are encouraged to adopt anti-discrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118, 2129 (1999).

18 The EEOC Enforcement and Litigation statistics can be found at http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; and http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

19 The Equal Employment Opportunities Commission ("EEOC") is the federal agency that enforces the following laws: Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin; Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination; Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older; Title I of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments; Section 501 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified individuals with disabilities who work in the federal government; and Civil Rights Act of 1991, which provides

Significantly, courts view proper employment training as an essential part of an employer's duty to comply with the employment laws that prohibit harassment and discrimination. Second, training is the most effective means of educating employees about workplace policies, rules and complaint procedures. Third, under certain circumstances, training helps employers avoid liability by providing an affirmative defense to a claim of harassment alleged to have been perpetrated by a manager or supervisor. Finally, providing effective training to all employees makes a favorable impact on employees and creates a workplace environment free from harassment and discrimination.

## II. Background

We have known for quite some time that generally it is necessary for employers to establish, communicate and distribute, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated in 1998, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257, 2270 (1998). While the Court noted that this "is not necessary in every instance as a matter of law," failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. The majority of employers have taken the Supreme Court's emphasis seriously and now have in place anti-harassment policies.

The EEOC and several courts around the country have indicated that employers may risk stiff penalties and lose a defense to a harassment or discrimination claim unless the employer provides harassment and discrimination avoidance training to its employees and managers. For example, in 1999 the United States Supreme Court[20] resolved a debate in the lower courts as to what type of conduct is sufficient to impose punitive damages for discriminatory conduct. In doing so, the Court stated that employers who make good faith efforts to comply with federal anti-discrimination laws may avoid punitive damages. Most significantly, the Court determined that an employer will not be held' "vicariously liable [for punitive damages] for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." *Kolstad,* 119 S.Ct. at 2129 (quotation omitted). The Court clearly sent a message to employers to "educate themselves and their employees on Title VII's [the federal discrimination and harassment law's] prohibitions." *Id.*

It is not enough, however, for an employer to only have an anti-harassment and discrimination policy. Indeed, it is well established that an employer's duty to exercise reasonable care includes training employees on anti-harassment and discrimination issues. Courts have made it clear that employers must train not only about sexual harassment and discrimination, but on all types of workplace harassment and discrimination. A 1999 Tenth Circuit case emphasized that an employer's "good-faith efforts" means more than simply issuing a policy against discrimination. In *EEOC v. WalMart Stores, Inc.,*[21] the court held that the employer's company-wide policy against discrimination and special anti-

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monetary damages in cases of intentional employment discrimination. The EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

20 *Kolstad v. American Dental Association,* 119 S.Ct. 2118 (1999).

21 *EEOC v. WalMart Stores, Inc.,* 187 F.3d 1241 (10th Cir. 1999).

discrimination handbook were insufficient to preclude a punitive damages award where the company did not train its managers about discrimination and its anti-discrimination handbook was not widely disseminated. Again, in *Derijk v. Southland Corp*., the court found that it was not enough that the employer had a policy and the policy was posted, the employer was required to take the extra step to train the employee on the policy.[22] The courts are sending clear messages that employers should seriously consider the need to conduct training to avoid liability, and more significantly, prevent discriminatory conduct before it happens.

## III. Manager and Supervisor Training

In addition to training all employees, employers must train managers and supervisors on how to model appropriate, respectful behavior, supervise employees and recognize inappropriate behavior to avoid harassment and discrimination, respond immediately to conduct that could be harassing or discriminatory and appropriately respond to complaints of improper conduct. The EEOC has advised that an "employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result."[23] As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Faragher v. City of Boca Raton,* 118 S.Ct. 2275, 2291 (1998).

According to the 1999 EEOC Guidelines, manager and supervisor training "should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation." Because this information and the actions required of supervisors and managers are complex, managers and supervisors require effective training on the substantive material, and not simply basic information given in a brief video, bulletin or "sit in a seat" type of training.

Effective training also provides employers with an affirmative defense against harassment claims and minimizes the risk of punitive damages. In *Ellerth* and *Faragher*, the Supreme Court ruled that employers can be "vicariously liable" for harassment by supervisors.[24] However, if the harassment did not result in a tangible job action, such as discharge, demotion or undesirable reassignment, the employer can raise an affirmative defense that it exercised "reasonable care" to prevent and correct the harassment, and that the employee unreasonably failed to use its complaint procedure.[25]

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[22] *Derijk v. Southland Corp*., 313 F. Supp. 2d 1128 (Utah 2003).

[23] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

[24] *See also Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558 (Minn. S.Ct. 2008), adopting the *Faragher-Ellerth* federal standard to apply to claims brought in Minnesota state courts under the MHRA).

[25] The Court adopted the following holding in both *Ellerth and Faragher:*

"An employer is subject to vicarious liability to a victimized, employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense necessarily 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

In the alternative, an employer's failure to provide training for managers and supervisors will not only limit the company's ability to use the affirmative defense, but will also increase the company's risk of punitive damages. As one court stated, "leaving a manager in ignorance . . . of the basic features of [employment] laws is an 'extraordinary mistake', for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference." *Mathis v. Phillips Chevrolet, Inc.,* 269 F.3d 771 (7th Cir. 2001). If an employer has not properly trained its managers, then a jury could infer "reckless indifference" and award punitive damages.

In April 2006, the EEOC once again reinforced the importance of training managers.[26] It provided the following examples of "best practices for employers – proactive measures designed to reduce the likelihood of Title VII violations and to address impediments to equal employment opportunity":

- Develop a strong EEO policy that is embraced by the CEO and top executives, **train managers** and employees on its contents, enforce it, and **hold company managers accountable.**

- Make sure decisions are transparent (to the extent feasible) and documented. The reasons for employment decisions should be well explained to affected persons. **Make sure managers maintain records** for at least the statutorily-required periods.[27]

## IV. Quality of Training

Since the 1998 *Ellerth* and *Faragher* cases, companies are aware that training – in addition to implementing and disseminating anti-harassment and discrimination policies – is required under the law. However, courts' concerns have since evolved beyond whether training is conducted, and have focused on how and in what manner the training is conducted in assessing whether it is appropriate and effective in preventing harassment and discrimination. Recently, courts have analyzed the quality of an employer's training in assessing the viability of the *Ellerth* and *Faragher* affirmative defense. In analyzing training quality, the courts have examined elements such as the frequency and recency of the training, whether the accused harasser actually received training, and the length and quality of the training.

## V. Training Issues

1. Harassment training not conducted at regular intervals, with no refresher sessions for employees who have received training: Even when an employer provides training, it may not be enough to escape summary judgment. *See Diaz v. Swift-Eckrich, Inc.,* 318 F.3d 796 (Ark. 2003) (denying summary judgment where a question of material fact existed as to the promptness and adequacy of the employee training session because it occurred over a year after the harassment began and was reported).

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unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 118 S.Ct. at 2270.

[26] EEOC Compliance Manual: Section 15 on "Race and Color Discrimination" (April 2006).

[27] Id. at p. 53 (emphasis added).

2. Failure to document supervisors' participation in training: Even if an employer contends that it provided training for all managers, it must be able to demonstrate who actually attended the training. *See Soto* v. *John Morrell & Co.*, 285 F.Supp.2d 1146, 1165 (N.D. Iowa 2003) (denying employer's motion for judgment as a matter of law that company supervisors were trained in regard to sexual harassment because records were ambiguous regarding who attended the training sessions and whether sexual harassment training was actually provided to company supervisors).

3. Training too short: Some courts have suggested that brief training sessions will not be sufficient to comply with the law. A Missouri court granted injunctive relief, ordering a company to revamp its orientation program for all new employees to include two hours of training on sexual harassment. The two hours of sexual harassment training was to be provided by an outside contractor or a "qualified trainer" employed by the company. In addition, the company was ordered to also give two hours of sexual harassment training to all employees who have received less than two hours of sexual harassment training in the last twelve months. Lastly, the company was required to provide two-hours of training on sexual harassment to all of its employees each year for three years. *Huffman and EEOC v. New Prime, Inc.*, 2003 WL 24009005, 3 (W.D. Mo. 2003). *See also Wagner v.. Dillard Dep't Stores*, WL 2000 1229648 (M.D.N.C. 2000) (holding employer's posting on a bulletin board and providing a brief training video were insufficient to comply with Title VII requirements), affirmed in part, reversed in part by *Wagner v. Dillard Dep't Stores*, 17 Fed. Appx. 141 (4th Cir. August 27, 2001). *Mancini v. Township of Teaneck*, 794 A.2d 185 (2002) (despite the fact that the defendant-employer showed a 20-minute video once a year, the court said that the defendant-employer "just did not get it" and "did nothing to curtail or prevent sexual harassment from occurring"). *Dillard Department Stores, Inc. v. Gonzales*, 72 S.W.3d 398 (Tex App. 2002) (where general harassment training took ten-minutes of an orientation program lasting several hours, the court said that the defendant-employer did not take reasonable steps to prevent sexual harassment).

4. Timely training: Some courts suggest that the training must have occurred during the relevant time period at issue. (*McArdle v. Arms Acres, Inc.*, 2009 WL 755287 at 13 (S.D.N.Y. 2009) (stating that material factual disputes were present where employer waited ten days to take any remedial action after harassed employee reported that a co-worker kissed her at work; and whether employer made a good faith effort to enforce its sexual harassment policy prior to that incident where the parties disputed whether sexual harassment training had taken place in the two years prior to the reported incident)[28]; *Green v. Coach, Inc.*, 218 F. Supp. 2d 404 (S.D.N.Y. 2002) ("[A] dearth of antidiscrimination training during the time period at issue in this lawsuit could actually lead a jury to infer that [the employer] did not, in fact, make a good faith effort to enforce such policies."); *see also David v. Caterpillar*, 324 F.3d 851, 865 (7th Cir. 2003) (rejecting the idea that "good deeds taken by the employer

[28] *Citing Green v. Coach, Inc.*, 218 F. Supp. 2d 404 (S.D.N.Y. 2002) (Noting, "a dearth of antidiscrimination training during the time period at issue in this lawsuit could actually lead a jury to infer that [the employer] did not, in fact, make a good faith effort to enforce such policies.")

after it has made an unlawful employment decision somehow insulate the employer from an award of punitive damages"). If training occurred more than a year after the alleged harassment began, then the training may not be adequate. *See Diaz v. Swift-Eckrish, Inc.*, 318 F.3d 796 (Ark. 2003).

5. Unqualified trainers may create liability or produce unfavorable discoverable evidence: Notes taken by a diversity trainer regarding managers' racial and gender bias may later be used as evidence of discrimination. *See Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992). Other cases have been brought by participants for discriminatory comments made by trainers.

6. Training insufficient to avoid punitive damages where company managers and executives act contrary to policy and training guidelines: Even where a company has an anti-harassment and discrimination policy and conducts extensive training, evidence that the managers and executives engage in discriminatory conduct is sufficient to submit the issue of punitive damages to the jury. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir. 2000); *see also EEOC v. WalMart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (holding evidence was sufficient to award punitive damages notwithstanding the fact that employer had a written sexual harassment policy and policy of encouraging employees with concerns to make a complaint because employer minimized the complaints and performed cursory investigation); *Valentin v. Municipality of Aguadilla*, 447 F.2d 85 (1st Cir. 2006) (court of appeals upheld a jury award of over $1 million in damages to a female police officer where the commissioner and mayor failed to properly investigate plaintiff's complaints of sexual harassment and retaliation).

7. Training insufficient under the circumstances: One court opined that training that may be adequate in one circumstance may be inadequate in others. In *Baty*, an employee complained of various incidents of harassment and, as a result, the employer conducted two separate forty-five minute post-incident training sessions for management and non-management employees. During the training sessions, the employer provided examples of sexual harassment and showed a video. However, the court said that such a "small amount of training was insufficient to avoid liability given the severity of the complaints of the employee." *Baty v. Willamette Industries Inc.*, 172 F.3d 1232 (10th Cir. 1999).

## VI. Mandatory Training

Some states have now adopted regulations requiring employers to provide harassment training for all employees and additional training specific to managers and supervisors. For example, in 2005, California enacted the AB1825 legislation that requires employers with fifty or more employees to provide at least two hours of sexual harassment training and education to all supervisors. (Cal. Gov. Code § 12950.1 (2005)). (On its face, this appears to require qualifying employers with just one employee in California.) Once every two years, a two-hour session on the prevention and correction of sexual harassment must be provided. *Id.* Further, the training must be effective and interactive.

Other states also require harassment training. Connecticut requires employers with fifty or more employees to provide two hours of harassment training to all supervisory employees within six months of the assumption of a supervisory position. (Conn. Gen. Stat. § 46a-54(15)(B)). Similarly, Maine requires sexual harassment training for all companies that have fifteen or more employees within one year of the commencement of employment.[29] In addition, training for managers and supervisors must include information regarding their specific responsibilities to take "immediate and appropriate corrective action" in responding to complaints.

While other states have not adopted specific regulations requiring harassment training, in light of the recent enactments in other states and the recent case law, it is prudent for all employers to properly train employees, managers and supervisors. More significantly, it is clear that the training must be effective. Below are recommendations for training that is effective. As we have seen, and as courts have observed, interactive training will satisfy an employer's legal obligation, but more importantly it constitutes training that works.

## VII. What Makes Training "Work"?

**Definition of "work": –** training that educates, in a manner that makes a "dent", and has a positive affect on the workplace.

**Training that works includes:**

1. Training that appeals to all three learning styles.

2. Training that promotes participants talking with a facilitator and with each other about the subject at hand.

3. Training that has a purpose that makes sense to the participants.

4. Training in which the participants understand the *reasons* for the training and the policies and in which these reasons matter to the participants.

5. Training that enlightens – teaches a skill set that the participant didn't have and/or provides a perspective that the participant hadn't considered or, better yet, both.

6. Training that is, at least in part, not tell-directed, but rather "aha" directed, meaning learning that comes from within the participant and is a revelation to the participant.

7. Training that uses humor, but is not over the line and does not hurt anyone's feelings.

8. Training that really covers the materials in depth, rather than just glossing over items, so that the training is comprehensive and can be reported as such.

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[29] 26 ME Rev. Stat. §807 (2007).

9. Training that seems relevant ("rings true") to the participants' world, including their work experiences.

10. Training that complies with particular legal requirements (i.e., Cal. Gov. Code § 12950.1).

11. Training that doesn't merge markedly different audiences in the same session.