THE JOKER'S WILD: UNDERSTANDING, PREVENTING AND RESPONDING TO HARASSMENT

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TRENDS IN HARASSMENT LAW, PART II

WHAT ARE THE COURTS SAYING ABOUT BOORISH BEHAVIOR AND VIOLENCE IN THE CONTEXT OF A SEXUAL HARASSMENT CASE?

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 few 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.

I. BOORISH BEHAVIOR

Behavior that is inappropriate, rude and/or offensive is not always actionable. In the past few years, employees have had a very difficult time convincing courts that "boorish"[1] 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;[2] however, the courts appear to be taking a firmer stance on what is bad enough behavior to amount to actionable sexual harassment.

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[1] A review of the recent sexual harassment case law 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.”

[2] Jury Verdict Research's Employment Practice Liability Verdicts and Settlements publication indicates that from 1998 to 2004 plaintiffs won discrimination awards in over 60% of the claims. 39% of those discrimination claims were based on sex and the median jury award for a sex discrimination claim was $186,250.

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 where behavior was found to be crude, rude and offensive, but not bad enough to support a successful sexual harassment claim. Often these cases involved decisions where courts held that the alleged harassing behavior was not bad enough to constitute an objectively hostile work environment.

For example, in *Duncan v. General Motors Corp.*, a female employee alleged several instances where a male employee engaged in boorish behavior she found offensive. *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002). She claimed the male employee propositioned a female employee during an offsite meeting at a local restaurant. *Id*. at 931. She also claimed that the male employee made the female employee 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 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. 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 could thus 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*.

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*.

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 *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 along 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. 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*.

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 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 *Singleton v. Dept. of Correctional Educ.*, a female employee claimed that her supervisor engaged in offensive conduct approximately four times a week from July 2000 until October 2001. *Singleton v. Dept. of Correctional Educ.*, 115 Fed. Appx. 119, 2004 WL 2603642 (4th Cir. 2004). The female employee specifically alleged that her male supervisor stated she should be "spanked" every day, insistently complimented her, stared at her breasts when he spoke to her, constantly told her about how attractive he found her, measured the length of her skirt on one occasion and made references to his physical fitness, considering his advanced age. *Id*. at 120. The plaintiff also alleged that the male supervisor asked her specifically if he made her nervous, to which she replied "yes." *Id*. The female employee complained of the harassment (soon after it began happening) to her immediate supervisor who did nothing to stop the harassment, even telling her on one occasion, "boys will be boys." *Id*. at 121.

The Court found that the conduct alleged by the female employee was not sufficiently severe or pervasive enough to alter the terms or conditions of her employment. *Id*. The Court noted that the standard for establishing sexual harassment is "rather high", and although the male supervisor's comments were offensive and boorish, they were not enough to constitute sexual harassment. *Id*. The Court specifically said that the behavior complained of was more like rude behavior, teasing and offhand comments that are not actionable. Interestingly, the Court gave examples of what the plaintiff did *not* allege. The Court said that the plaintiff did not allege that the male supervisor "ever requested a sexual act, touched her inappropriately, discussed sexual

subjects, showed her obscene materials, told her vulgar jokes or threatened her." *Id*. at 122.[3] Finally, the plaintiff failed to allege that the male supervisor's behavior ever interfered with her ability to perform her job.

The same reasoning applied to sexual harassment claims has been extended to racial harassment claims as well. For example, 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 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*.

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[3] As you can see from this article, however, other courts have determined that requesting a date and showing obscene materials (*Duncan*), inappropriate touching (*Simmons*), and telling vulgar jokes (*Clark*) are not enough to be actionable sexual harassment, rather than simply "boorish".

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

Recent cases involving sexual harassment based on a hostile work environment theory seem to indicate the difficulties plaintiffs have surviving even the summary judgment stage. However, plaintiffs have not been wholly unsuccessful in their sexual harassment claims.

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 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*.

The United States Supreme Court recently decided a racial discrimination case 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. 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.*, __ U.S. __, No. 05-379, 2006 WL 386343 (Feb. 21, 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 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.[4] 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

[4] 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., Guidance on Dealing with Workplace Violence at www.opm.gov/EmploymentandBenefits/Worklife/OfficialDocuments/handbookguides and OSHA's Workplace Violence Policy at www.osha.gov/SLTC/etools/workplaceviolence/viol.html.

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 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 *EEOC v. NEA-Alaska*, female employees complained of threatening behavior by a male employee. *EEOC v. NEA-Alaska*, 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 encompass all of the incidents. *Id*. at 1050.[5]

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

[5] 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.

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 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 appear 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. 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 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.

SHEILA ENGELMEIER'S ORAL PRESENTATION AT THE ABA'S MID-WINTER EEO CONFERENCE IN LA JOLLA, CALIFORNIA (MARCH 2006)

My name is Sheila Engelmeier and I've been practicing Labor & Employment law in Minneapolis for the past 20 years. I was asked to speak on trends in sexual harassment law as it relates to "boorish" behavior and violence in the workplace.

In surveying the law on this subtopic what I found is, to my mind, jaw-dropping. The first time I recall a court's use of the word "boorish," as used in the sexual harassment arena, causing my jaw to drop was in the Jones v. Clinton case where, as we all know, a federal district court in Arkansas concluded that, as a matter of law, the facts alleged by Jones were not severe or pervasive enough to create a hostile environment. Recall the facts alleged: the then-governor, while alone in a hotel room with the plaintiff employee during a work-related conference (a) pulled her towards him, put his hand on her leg, slid it toward her pelvic region while telling her he loved her curves and the way her hair flowed, and flashed his penis, commanding her to kiss it. The Court held that this, as a matter of law, was not severe or pervasive enough to create a hostile work environment. Rather, the conduct was just "boorish." Okay, well when I read that case many years ago, I thought it an aberration—after all, it would be hard for a federal district court judge to find against the sitting president. I figured the Plaintiff's lawyers must have forgotten to prepare Ms. Jones adequately for her deposition to cause her to remember that she had flashbacks of that penis frequently at work, causing her to feel sick and unable to do her job. And, I figured, the judge had the whole single-incident issue to justify the opinion.

Well, guess what folks? . . . . My jaw has dropped several times since Jones v. Clinton. In my regular updates of the law, I noticed a number of similar cases spattered throughout the country that I thought were head-shakers. I used to think flashing one's penis at work was a big

deal (and darn good evidence for an employee in a sexual harassment case) but, after reading dozens of national cases before writing this article and speaking today, I'm not so sure.

Seriously folks, as an employer's lawyer out there, if you are looking for cases to help you move for summary judgment in a sexual harassment case, I would do a search that includes the word "boorish" and the phrase "not sufficiently severe" and you'll hit a goldmine.

So, let's talk about that goldmine, and the violence issue, in its historical context. If one looks back to the Supreme Court's decisions in Meritor in 1986 and Harris v. Forklift Systems, in 1993, there is a lot of instruction about what a hostile work environment is and how such cases should be analyzed. For example, in Harris, the Supreme Court noted that the conduct doesn't have to be so bad that it causes a nervous breakdown, it just has to negatively affect the employee's performance and/or terms or conditions of employment. Scalia, in his concurring opinion in Harris basically noted that, in general, deciding whether conduct is merely unpleasant or sexual harassment should be left to the jury. Well here we are, 12-13 years after Harris, and many, many Courts are taking that question away from the jury either through summary judgment or by reevaluating a jury's analysis after a favorable decision at trial.

The other basic principal that shows up historically, throughout this jurisprudence, is a discussion of the spectrum of harassing behavior. On the one end you have sexual banter, jokes and immature behavior (that are not actionable because the civil rights laws are not a civility code requiring a pristine work environment) and on the other end of the spectrum you have behavior that is truly intimidating, often involving threats of physical violence. What I observed as a trend is this. On the spectrum of behavior that does not involve violence or threats, many courts are saying that it is not severe enough to be actionable harassment. But, when violence is

added to the mix, you get other courts saying that the violent and physically threatening behavior is not "because of sex," so it cannot be used to support a claim of a hostile work environment. We'll talk more about the violence issue in a minute; so let's go back to jaw dropping.

Remember, courts use the phrase "boorish behavior" as a descriptor for conduct that is really bad but, in the court's mind, not bad enough to create an actionable hostile work environment. In my materials on page two, I discuss the Duncan case, where the 8th Circuit, in a 2-1 decision, decided to overturn a $1M+ jury verdict (without attorneys' fees or punitive damages), finding that the conduct at issue in the case was not severe or pervasive enough to be actionable sexual harassment. This case, when it came out several years ago, was another jaw-dropper for me for a couple of reasons. First, the 8th Circuit had previously held (in Burns v. McGregor) that sexual harassment cannot be measured by splitting up the incidents into a discrete series of acts and analyzing them, one at a time. Second, the conduct at issue in Duncan was pretty severe—and it was perpetrated by a supervisor (at least according to the dissenting opinion, the perpetrator was a supervisor; from the majority, it appears the employee involved may have been considered by some to be a peer). Nonetheless, the Court dissected the incidents one by one and concluded that they were not enough. Here is what was not enough in Duncan—propositioning the employee, having a screen saver of a naked woman (a computer which the supervisor made the employee use), regularly touching her hand, comments about sperm having a right to live, noting "all great chiefs of the world are men" and posting a He-Man Woman Haters Club document, and having a child's pacifier shaped like a penis in his office. The perpetrator also forced the employee to draw a picture of his planter, which was in the shape of a penis, as part of consideration for a job (a task that he didn't ask other applicants to perform). According to the Court, a jury could not justifiably conclude on these facts, that gender was an

overriding theme of the incidents and the conduct was not severe or pervasive enough to meet the "high" threshold to prove actionable sexual harassment.

Notably, the 8th Circuit has had numerous similar cases since Duncan, but I don't want to focus too much on the 8th Circuit, where I'm from. Upon reflection, however, I draw two additional cases to your attention today. First, a race harassment case. Singletary v. Missouri Department of Corrections, 423 F.3d 886 (8th Cir. 2005). In Singletary, the managers and co-workers referred to Mr. Singletary by using the "n-word" on several occasions, co-workers trumped up false allegations of wrongdoing against him and his car was vandalized in the parking lot at work. Law enforcement folks who investigated the car vandalism concluded it was likely due to Mr. Singletary being targeted by his co-workers. The Court found these facts not severe or pervasive enough to be harassment because the "n-word" was not used in front of him, and the hostility against him might have been because he was an investigator—not because of his race. The Court discounted the vandalism issue noting there wasn't enough proof that it was due to his race.

Duncan was specifically referenced in another sexual harassment case as precedent requiring dismissal. In LeGrand v. ARCH, 394 F.3d 1098 (8th Cir. 2005), the Court described the following conduct as "three isolated incidents over a nine-month period," which were not physically violent or overtly threatening and were not severe or pervasive enough to be actionable sexual harassment:

A priest and Board member, Father Nutt, allegedly

*asked LeGrand to watch pornographic movies with him and "jerk off with him" to relieve stress;

*on a second incident, asked about pornographic movies again, suggested LeGrand would move up in the organization if he jerked off the priest's penis, grabbed LeGrand's buttocks, reached for his genitals and kissed him on the mouth; and

*grabbed LeGrand's thigh.

In light of Duncan, the Court in LeGrand said this is not enough to be sexual harassment.

In the materials at page three, I also cite Pirie v. The Conley Group. This case is interesting because it concerns another penis-flashing incident and a one-hour come-on session during which the perpetrator graphically described his sexual prowess, pursuits and interests. Although the employee and the perpetrator were isolated and alone in a dark area, the conduct was judged not to be threatening or violent, and insufficiently severe or pervasive to be a hostile work environment because the one incident amounted to "inappropriate sexual banter and a three-minute penis display." According to the Court, this did not meet the "demanding" standards necessary for sexual harassment. In Pirie, the Court sets forth a laundry list of 8th Circuit rulings, going both ways, on sexual harassment. And, it has a long discussion of the authority on the single-incident issue. So, if you ever have occasion to review those cases, Pirie is a good case to start with.

The 7th Circuit jurisprudence is much like the 8th Circuit jurisprudence, only worse for employees (i.e., 7th Circuit requires proof of psychological harm to make a sexual harassment claim). On this issue, consider Lara, on the bottom of page four of the materials. A supervisor's discussion of her breasts, others' breasts and asking her out of a date; frequently commenting on how she smelled; and looking down her shirt to see her breasts was not enough. According to the Court, in the 7th Circuit, the workplace must be "hellish' to be considered actionably severe or

pervasive sexual harassment. This Court does an extensive outline of the 7th circuit case law—noting things like kisses and pokes on the buttocks are not actionable in the 7th circuit as hostile environment. (So, you might ask yourself, aren't these assaults? Not in Lara. Because she used the same facts to support both claims, the Court held the tort claims were preempted by the civil rights law.)

Simmons, at page five of the materials, is an Alabama case holding that a supervisor's touching an employee's breasts four to five times over a several month period, putting his hands on her hips, pressing his body against hers once, and touching leg to leg on one occasion is NEITHER objectively or subjectively severe or pervasive. The Court said the conduct was not subjectively severe or pervasive because she didn't complain until two months after the last offensive act. The Court cited Jones v. Clinton in support of its opinion. In that case, the assault claim survived summary judgment.

Clark v. UPS is a similar case out of the 6th Circuit. A supervisor in this case told sexual jokes, placed his vibrating pager on employees' bodies, and made comments to employees. For one employee, the vibrator, plus the comments (asking what she was wearing for underwear) were not enough. For the other, whom the supervisor commented did a "good job in his dream," asked to eat a bag of chips he was holding in front of his crotch, and showed cartoon characters having sex, according to the Court, it was a "closer call," which was barely enough to go to the jury because she alleged "17 incidents of harassment," many of which took place in front of managers or were reported to managers.

Singleton, on page seven of the materials, is a 4th Circuit case finding that four-times-a-week offensive conduct is not enough to be severe or pervasive, as the plaintiff did not allege

that it adversely affected her ability to do a job. In Singleton, the Court noted several incidents that would be worse than what the plaintiff described, but these are actions that other courts have held are NOT enough to create a severe and pervasive hostile work environment.

Bainbridge is an example of a race harassment case where the court said the racial slurs used in the workplace (and referenced on page eight of my materials) were not severe or pervasive enough to create a hostile work environment. The employee did survive summary judgment on his retaliation claim (when he got fired while on vacation six days after he said he couldn't take the racial slurs anymore).

Finally, on pages eight and nine of my materials, I discuss a few cases where employees were successful. Eich, on page eight, I include in the materials because Judge Lay from the 8th Circuit does a nice job of laying out the history of the harassment laws. The conduct at issue in Eich is conduct, in my opinion, very similar to Duncan. In that case, the harassment occurred over a period of seven years and the employee complained about the conduct 16 times. (Let's hope this is not the new standard for what is enough to constitute severe or pervasive sexual harassment, or we will end up with pretty out-of-control workplaces.)

I think all of this discussion by the courts of what is not sexual is interesting when juxtaposed against the Supreme Court's decision in Ash v. Tyson Foods, discussed on pages 11 and 12 of my materials. The Supreme Court's comment that something doesn't have to be "obviously racial" to show racial animus hopefully might overflow into some of these harassment cases that conclude that, unless there are SLAP IN THE FACE obvious racial or sexual overtones, the conduct can't be because of a protected category.

VIOLENCE

As I said before, many courts are saying that threats or violence must be present in order for the situation to be severe enough to be considered a hostile work environment, and other courts are saying that when something is violent, it is not "because of sex" and therefore not relevant to a sexual harassment case.

On page 13 of my materials, I cite a case, Brown v. City of Cleveland, where the employer said that an employee's complaint about inappropriate name-calling and threats, which the employee labeled "workplace violence" after other complaints about sexual harassment, could not be protected activity. The Court disagreed.

The Griffin case, on page 14 of my materials, is an example of where the Court would not admit detailed evidence of away-from-work violence by the perpetrator towards the employee noting that it was not relevant to a sexual harassment case.

On page 15 of my materials, I set forth an example of a case where most of the harassing conduct was physically threatening and not necessarily sexual. There, in EEOC v. NEA-Alaska, the 9th Circuit said that although the conduct was bullying behavior and not necessarily sexual, the Court would not allow someone who felt comfortable bullying women get away with it just because he was in a predominantly female work environment.

The remainder of my article addresses two issues related to violence: (1) whether a single incident of rape, particularly rape outside of work, can be enough to be severe or pervasive sexual harassment and (2) how violent acts can be used in a hostile environment case to reach back over a longer period of time to allow more evidence supporting the harassment claim.

SO—I ASK MYSELF—WHAT THE HECK IS GOING ON HERE?

If you look carefully at these cases other themes emerge, apart from the obvious ones discussed above:

*Courts don't have much patience for employees who don't complain;

*Courts forgive employers who do the right thing, like appropriate training on the front end and firing the bad guy. (Delta, on page 14, didn't do that.)

*Courts are overly focused on the ways to get rid of employment claims. They use "because of sex" to dismiss sexual harassment claims. Note—employees need to focus more on state law. Many state laws do not have the "because of sex" component in them, including Minnesota, Iowa (definition used for state employees), Massachusetts and Wisconsin. Severe or pervasive conduct of a sexual nature that affects a term or condition of employment, and is unwelcome and objectively and subjectively offensive, is enough to be considered sexual harassment (without the "because of sex" component).

*Severe AND pervasive? Even though the law is that is need be severe OR pervasive, maybe the courts are actually applying a severe AND pervasive standard.

PREVENTING SEXUAL HARASSMENT

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AVOIDING WORKPLACE PROBLEMS AND LITIGATION:

WHAT ARE THE COURTS SAYING ABOUT BEST PRACTICES AND WHAT IS REQUIRED FOR TRAINING EMPLOYEES AND MANAGERS ABOUT AVOIDING HARASSMENT AND DISCRIMINATION IN THE WORKPLACE?

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DISCRIMINATION AND HARASSMENT TRAINING

Recognizing that federal and state laws require employers to make a "good faith effort"[6] 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 document 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.

Reasons to Train Employees

There are many reasons why an employer needs to train employees. First, the courts and the Equal Employment Opportunity Commission[7] ("EEOC") say you should train. 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.

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6 "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. 2188, 2129 (1999).

7 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 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.

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[8] 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.*,[9] the court held that the employer's company-wide policy against discrimination and special anti-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. 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.

Manager and Supervisor Training

In addition to training all employees, employers must train managers and supervisors how to model appropriate, respectful behavior, supervise employees and recognize inappropriate behavior to avoid harassment and discrimination, respond immediately to conduct that could be

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

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

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."[10] 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. However, if the harassment did not result in a tangible job action, such as discharge, demotion or undesireable 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.[11]

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.

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

[11] 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 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.

Just recently, in April 2006, the EEOC once again reinforced the importance of training managers.[12] 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.[13]

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 order to be considered appropriate and effective in preventing harassment and discrimination. Recently, courts have analyzed the quality of an employer's training in order to establish the *Ellerth* and *Faragher* affirmative defense. In its analysis of 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.

Training Issues

III. 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).

IV. 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 IT WAS AMBIGUOUS WHO ATTENDED THE TRAINING SESSIONS AND WHETHER SEXUAL HARASSMENT TRAINING WAS ACTUALLY PROVIDED TO COMPANY SUPERVISORS).

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

13 Id. at p. 53 (emphasis added).

V. 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, REQUIRING THE DEFENDANT 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 DEFENDANT. IN ADDITION, DEFENDANT WAS ORDERED TO ALSO GIVE TWO HOURS OF SEXUAL HARASSMENT TRAINING TO ALL EMPLOYEES WHO HAVE RECEIVED LESS THAN TWO HOURS OF SEXUAL HARASSMENT IN THE LAST TWELVE MONTHS. LASTLY, THE DEFENDANT 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).

VI. TIMELY TRAINING: SOME COURTS SUGGEST THAT THE TRAINING MUST HAVE OCCURRED DURING THE RELEVANT TIME PERIOD AT ISSUE. *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 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).

VII. 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.

VIII. 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 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*, NO. 04-2413 (1ST CIR., MAY 9, 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 INVESTIGATE PLAINTIFF'S COMPLAINTS OF SEXUAL HARASSMENT AND RETALIATION).

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, California recently enacted 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)). 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. 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 Minnesota has not adopted specific regulations requiring harassment training, in light of the recent enactments in other states and the recent case law, it is prudent that all employers should be properly training 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.

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.

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.

RESPONDING TO SEXUAL HARASSMENT

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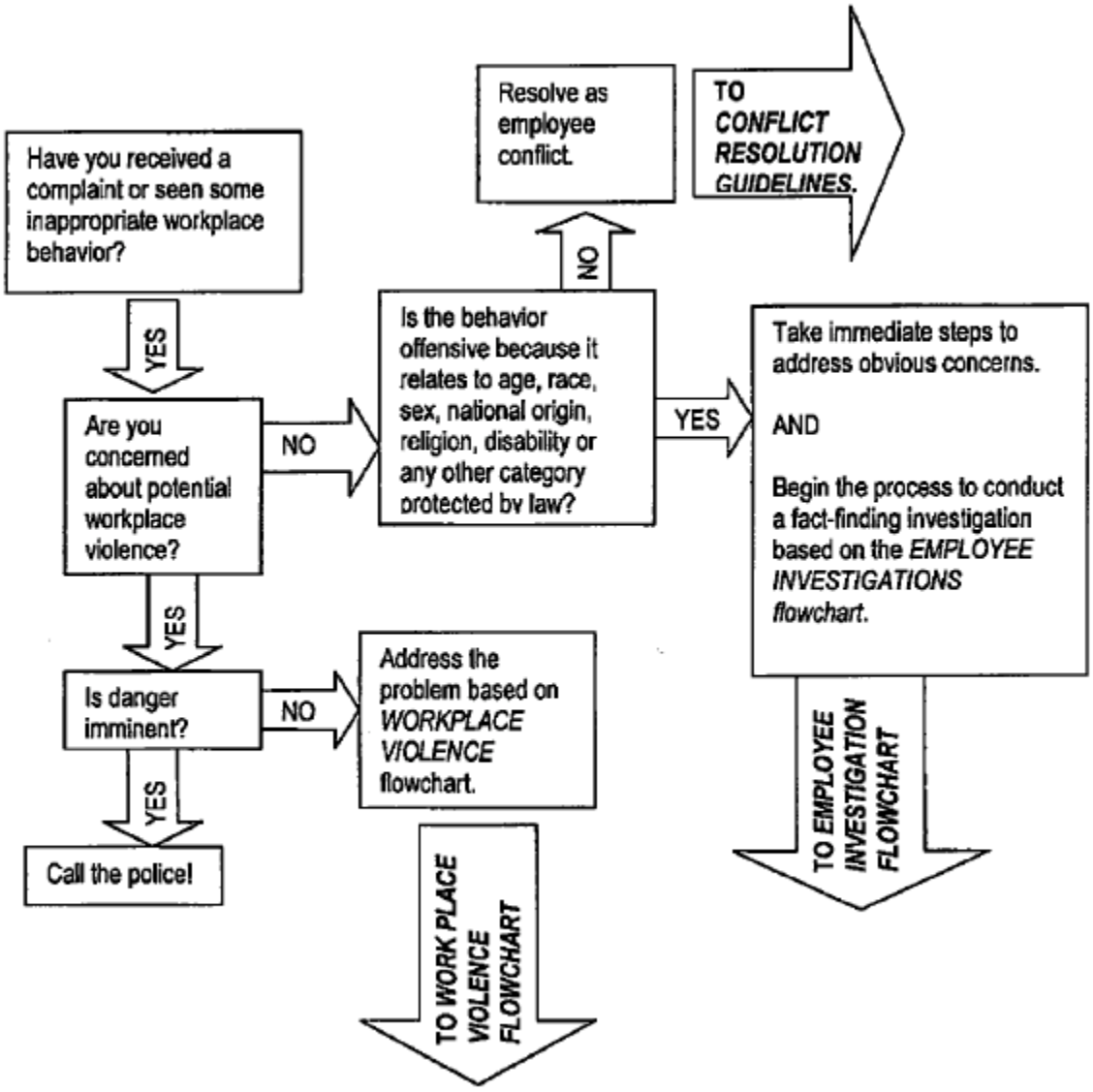
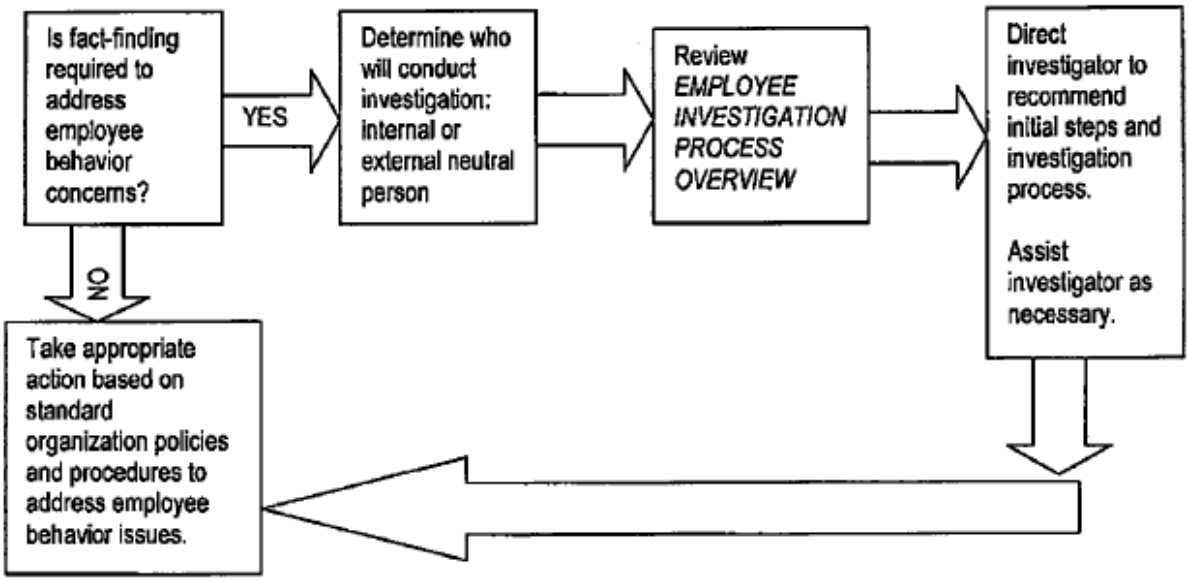
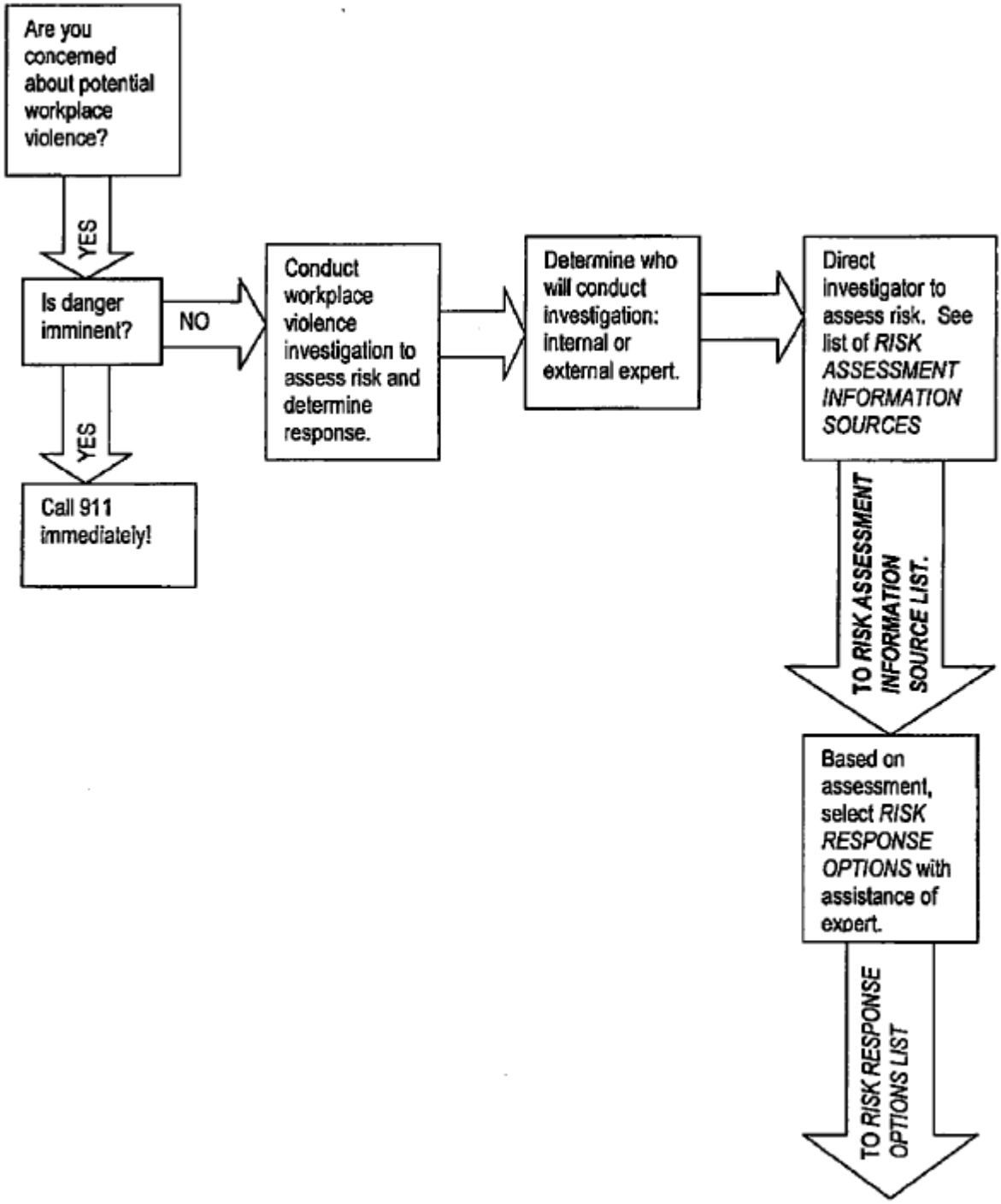
EMPLOYEE HARASSMENT



CONDUCTING EMPLOYEE INVESTIGATIONS



WORKPLACE VIOLENCE



WORKPLACE VIOLENCE RISK ASSESSMENT INFORMATION SOURCES

Depending on the situation, information may come from a variety of sources, including:

- Co-worker employees
- Violence targets
- Managers and supervisors
- Family
- Friends
- Law enforcement officials and criminal records
- Medical professionals
- Employee assistance professionals
- Personnel files
- Employee benefits files
- Military records
- Credit history

WORKPLACE VIOLENCE RISK RESPONSE OPTIONS LIST

Depending on circumstances, any or all of the following steps may be appropriate:

- Protect personal security of all persons involved
- Take personnel actions
- Secure the facility
- Mental health intervention
- Law enforcement intervention
- Emergency response intervention
- Public relations steps
- Legal steps, such as injunctive relief or restraining orders

CONFLICT RESOLUTION GUIDELINES

RESOLVING WORKPLACE CONFLICT WITHOUT MAKING THE SITUATION WORSE

Never underestimate the impact of effective employee communications in resolving workplace conflict. Approach resolution with an effective plan developed on the basis of joint thinking. Seldom is anything more important than achieving resolution of a disruptive situation. Give it your immediate time and attention.

1. Objectively assess the situation as first presented

   - Identify the players.
   - Identify the elements of a positive outcome.
   - *Identify the elements of a negative outcome.

2. Understand

   - The long-term impact of the situation and action to be taken.
   - *The historical context of the situation.
   - *The impact of the perception of power to be wielded by management in bringing about resolution.
   - *The value of leaving all players with the perception that (a) they were heard; and (b) they were treated fairly.

3. Identify and assess appropriateness of related employer policies

4. Determine the communication needs presented by the situation

   - Issues, interests, likely concerns, particular sensitivities of each player, including influences from outside the workplace.
   - Communication needs in the workplace generally, with sensitivity to need for confidentiality to the extent appropriate.

5. Coordinate an action plan with appropriate management players, including human resources

   - What to do.
   - Time line.
   - Political implications to be managed.

- Skills of participants vs. needs presented by situation.
- Who should do what, and in what order.

6. Implement the action plan
    - Take into account the workplace situation at the inception
        - All players feeling nervous and vulnerable.
        - Workplace disrupted.
        - Cultural norms suspended to some degree.
    - Take timely action.
    - Take action only with the knowledge and blessing of all interested layers of management.
    - Ensure that all individual communications are successful because they are perceived as:
        - Honest/direct.
        - Respectful.
        - Clear.
        - Consistent.
7. Be flexible. Always be prepared to revise the action plan in light of changing circumstances or new facts.

A BETTER SITUATION INCLUDES

- A SENSE AMONG ALL PLAYERS THAT THE PROCESS OF RESOLUTION WAS FAIR AND THEIR VIEWPOINTS WERE TAKEN INTO ACCOUNT.
- UNDERSTANDING AMONG THE PLAYERS OF HOW TO WORK TOGETHER IN THE FUTURE.
- REDUCTION OF WORKFORCE STRESS AND RESTORATION OF EQUILIBRIUM IN THE WORK ENVIRONMENT.
- PROTECTION OF THE EMPLOYER FROM LIABILITY.
- ADEQUATE FOLLOW UP

THE SITUATION IS WORSE IF

- EQUILIBRIUM IS NOT RESTORED AND THE WORKPLACE REMAINS DISRUPTED.
- EMPLOYEES ARE DISCOURAGED FROM BRINGING FUTURE CONCERNS TO MANAGEMENT.
- POTENTIAL EMPLOYER LIABILITY IS CAUSED BY THE MODE OF RESOLUTION.

EMPLOYEE INVESTIGATION PROCESS OVERVIEW OBJECTIVES

1. Assure full and fair opportunity for the alleged victim(s) to tell the story.
   - Adequate time
   - Appropriate place
   - Absence of intimidation and fear of retaliation
   - Belief in investigator's neutrality
2. Assure full and fair opportunity for the alleged wrongdoer(s) to tell the story.
   - Adequate time
   - Appropriate place
   - Absence of intimidation and fear of retaliation
   - Belief in investigator's neutrality
3. Develop all relevant evidence.
4. Complete the investigation on a timely basis.

PROCESS

1. Initial Interview
   - Identify issues
   - Gather facts
   - Identify documents and witnesses
   - Instill confidence
2. Planning
   - Determine complexity: issues, people
   - Determine whether one investigation/one investigator can do the job
   - Plan to obtain documents
   - Determine order of witness interviews

- Determine time frame
- Identify unique sensitivities of the situation
  - Internal and external politics
  - Biases of management, including desired outcome, if any
  - Biases of witnesses, including complainant
  - Sensitivities of witnesses, including:
    - Safety concerns
    - Communications/confidentiality concerns
    - Other unique vulnerabilities
- Assess and ensure your own neutrality
  - Assess personal biases
  - Continue this assessment throughout the course of the investigation
  - Take corrective action as required
- Inform and obtain assistance of management

3. Interim Steps
   - Removal of alleged victim
   - Removal of alleged harasser
4. Reviewing Documents/Planning Interviews
   - Review documents in advance
   - Prepare opening remarks to witnesses
   - Prepare interview questions
5. Conducting Interviews
   - Be flexible
   - Rely mostly on first-hand information, but use second-hand information to obtain additional potential sources of information.
   - Listen for clues

- Identify additional documents and witnesses
- Exhaust witness recollection
- Document

6. Evaluate Results

<u>Allow adequate time to reflect</u>

- Assess information gathered
- Determine need for additional information
- Balance:
  - The need for confidentiality and unreasonable intrusiveness (workplace and personal)
    vs.
    The need for completeness
  - The need for timeliness
    vs.
    The potential to appear overbearing and the need to allow elasticity in the process (for reflection and additional investigation steps)
  - The need to identify and understand relevant detail
    vs.
    The need to be able to see the "Big Picture"

7. Report Results

- Management
- Alleged victim
- Alleged harasser
- Witnesses
- Co-workers

INVESTIGATION OF SEXUAL HARASSMENT COMPLAINTS

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I. A TIMELY AND PROPER INVESTIGATION OF SEXUAL HARASSMENT COMPLAINTS IS ESSENTIAL IN ELIMINATING OR LIMITING POTENTIAL LIABILITY FOR EMPLOYERS TO BOTH THE COMPLAINANT AND ALLEGED HARASSER

A. What is a "timely response" to a sexual harassment complaint?

1. Depends on the nature of the allegations. Generally, serious complaints (i.e., touching, pornographic materials, and supervisor/subordinate sexual relationships) should be responded to immediately. Less serious complaints should be responded to as soon as possible and, as a rule of thumb, no longer than three to four days after the complaint has been received

2. The investigation should be completed as soon as possible without sacrificing thoroughness

B. Considerations in decision regarding timing of investigations

1. Is there a current victim protection issue?

2. Is there possible intimidation by the alleged harasser?

3. Is there a risk of retaliation by the alleged harasser?

4. Seriousness of the allegations

5. Impact on the alleged victim, the alleged perpetrator, other employees and the organization as a whole

C. Should Law Enforcement get involved?

1. An employer should consider reporting crimes to the police department (i.e., assault and criminal sexual conduct)

2. Many types of conduct constituting sexual harassment may not involve criminal conduct

D. **Should the Employer defer to police investigations?**

1. Generally, no. Employers should not wait until the police department has completed its investigation, nor should it rely on the police department's findings. The standards in determining criminal conduct and sexually harassing conduct are significantly different. Also, deferring to police department investigations may cause undue delay and allow further inappropriate behavior, including retaliation

2. Police do not have a right to be present during employer interviews

E. **What is a proper investigation?**

1. A thorough, well-documented investigation which is conducted by objective investigators who are trained in recognizing sexual harassment and investigative techniques

   Possible investigators:

   a. Human Resources

   b. Managers

   c. Outside consultants

   d. EEO Officers

   e. Employer's legal counsel

   f. Gender and diversity considerations

2. Investigators must demonstrate appropriate attitude and demeanor. For example, an investigator must:

   a. Be credible (in appearance, as well as style)

   b. Be courteous

   c. Be free of an appearance of favoritism and/or prejudice

   d. Be open-minded, with no appearance of assumptions about the complainant or the alleged harasser or the truth or falsity of the allegations

   e. Demonstrate that s/he takes all complaints seriously; and

   f. Approach the investigation as a fact-finder vs. disciplinarian

II. INVESTIGATION TECHNIQUES

A. Interviews

1. Always interview complainant and alleged harasser separately

    a. The alleged harasser does not have a right to confront his/her accuser. Requiring or allowing any type of meeting between the alleged harasser and the complainant is not recommended. Such meetings may intimidate the complainant, result in arguments between the alleged harasser and complainant, and are ripe situations for claims of retaliation

2. Whenever possible, the same investigator should interview all of the witnesses

3. Who should be interviewed?

    a. Complainant

    b. Witnesses and others with possible knowledge of the alleged conduct and/or situation

    c. Alleged harasser

    d. Additional witnesses suggested by alleged harasser, the complainant and the other witnesses

    This order for interviews is usually most effective; however, some situations may call for a different order

4. Interviewing tips for all interviewers:

    a. Conduct interviews in a comfortable and private place, where the person interviewed feels able to effectively communicate

    b. Ask open-ended questions – do not lead

    c. Ask for details: who, what, when, why, how, where, witnesses

    d. Note inconsistencies and follow up on them

    e. Observe interviewee's demeanor, attitude, etc.

    f. Ask about interviewee's feelings, but do not show your feelings

    g. Do not react with anger, embarrassment or improper humor

    h. Remain neutral. Remember, you are a fact-finder!

i. Do not legally characterize interviewee's descriptions of conduct (i.e., "sexual harassment," "harassment," or "illegal conduct")

j. Ask interviewees to keep interview confidential and explain why

k. Do not promise anyone confidentiality or any particular result from the investigation

l. Take detailed notes, including quotes

m. Distinguish fact from opinion and observations in your notes

n. In most cases, do not tape the interview. Taping tends to intimidate and often results in less thorough note-taking regarding demeanor, observations, etc. (not to mention . . . the investigator may not be as good as he or she thinks and may document something that would be better if it was not on tape)

o. In some cases, with a particularly vulnerable witness or alleged victim, a third party's presence in an interview is recommended

p. If a witness/employee refuses to participate in an interview or investigation, send confirmatory letter and advise them that disposition of the complaint will be made without their input. Also, the Employer's Sexual Harassment Policy and/or Discipline Policy should address a refusal to cooperate in sexual harassment investigations. For example, a refusal to meet with the employer regarding alleged harassment may subject the employee to disciplinary action for insubordination.

5. Tips for interviewing the complainant:

a. Obtain a detailed, factual account of the conduct and communication that the complainant is concerned about

b. Do not inadvertently supply details yourself

c. Ask for names of witnesses, if any, and names of others who may have relevant information

d. Inquire about the impact of the alleged harassing conduct

e. Appear concerned and empathetic about the complainant's concerns, and his/her embarrassment and fear of retaliation, if any

f. Inquire as to what s/he would like to see happen, but do not make any promises

g. Assure the complainant that his/her complaint will be handled as discreetly as possible; however, do not make promises of confidentiality

h. If the complainant expresses a desire that you not do anything with the information s/he tells you, explain that the employer must take appropriate action and why

i. Do not make any promises about who will be interviewed or when the investigation will be completed. You may give an estimate as to when the investigation will be completed, but make certain that you make clear there could be deviations from the estimate depending on what the investigation reveals

j. Ask the complainant to bring any retaliation to your attention and explain what that means

6. Tips for interviewing the alleged harasser:

a. If the alleged harasser is an employee covered by a collective bargaining agreement, allow Union representation at the interview

b. Be prepared for anger and defensiveness on the part of the alleged harasser

c. Insist on details of the alleged harasser's version of the facts. Do not settle for a general denial.

d. Do not merely state the complainant's allegations and ask the alleged harasser to simply verify or deny.

e. Assure the alleged harasser that the investigation will be conducted as discreetly as possible, but do not promise confidentiality.

f. Do not threaten

g. Do not describe what disciplinary action might be taken. Advise the alleged harasser that any decisions regarding disciplinary action will be made at the conclusion of the investigation.

h. Do not make any promises about when the investigation will be completed or who will be interviewed.

i. Do not promise the alleged harasser that s/he will be allowed to confront the complainant.

j. Do not reveal the names of witnesses (nor, in cases of danger, the name of the alleged victim)

k. Emphasize that no retaliation will be tolerated, regardless of whether the allegations are substantiated; also note that the alleged harasser will be subject to discipline for any retaliation perpetrated by him or her, either directly or indirectly

7. Interviewing tips for witnesses and other interviewees.

a. Do not limit yourself to witnesses suggested by the complainant and the alleged harasser.

b. Note any indication of bias on the part of the interviewee.

c. Explain as little as possible about the details of the allegations and of the investigation.

d. Appear at ease, matter-of-fact, and neutral

e. Label impressions about what you were told as your own

f. Ask the interviewee to keep the interview confidential and explain that comments or jokes about the investigation made to others may be harmful to the process of assessing the truth

g. Assure witnesses that they, too, will be protected against retaliation.

h. Thank the interviewee for his/her time and for participating in the important process of gathering information about what may or may not have occurred.

B. **Other investigative techniques**

1. Observation, i.e., in hallways, lunchroom, locker rooms, wash rooms

2. Surveillance

3. Scientific methods, i.e., handwriting and voice experts

4. Review relevant employee history

III. **INVESTIGATION CONCLUSIONS**

A. **Substantiated**

B. **Unsubstantiated**

C. **Unable to substantiate**

D. **Conclusions should not be made in isolation, but in consultation with others, i.e., Human Resources and other leaders in the employer's organization, and, in some cases, employer's legal counsel**

E. **Must reach conclusion and document basis for conclusion**

1. Reaching conclusion usually involves judgments regarding credibility. For example:

   a. Consider consistency and corroboration

   b. Relationship between complainant, alleged harasser and witnesses

   c. Complainant's and alleged harasser's individual histories

   d. Motivation to lie

   e. Demeanor and attitude

IV. DOCUMENTATION

A. **A detailed investigation report documenting interviews and conclusions should be placed in file that relates to the investigation of this allegation of sexual harassment**

B. **In the event of discipline, the discipline should be placed in the appropriate personnel files (but not the investigation report or anything about any witnesses)**

V. DISPOSITION OF SEXUAL HARASSMENT COMPLAINT

A. **Corrective action should be tailored to each particular situation. For example:**

1. Disciplinary action against harasser

2. Transfers, etc. to limit contact between harasser and victim

3. Training for harasser, manager or other employees

4. Written communication of Sexual Harassment Policy as reminder

5. Counseling for harasser and/or victim. If counseling is offered to the harasser, also offer it to the victim

NOTE: Disciplinary action must conform to any applicable- statutory and contractual requirements and limitations (i.e., public sector laws or collective bargaining agreements).

VI. REPORTING CONCLUSIONS OF INVESTIGATION AND DISPOSITION

A. Advise complainant, alleged harasser and others involved in the process that the process is complete and appropriate action has been taken to address the issues that were uncovered

1. Warn the alleged harasser in writing that s/he must not retaliate against the victim

VII. FOLLOW-UP

A. Invite complainant to report recurrences or retaliation

B. Monitor situation