I. Introduction

It has been almost forty years since the enactment of Title VII of the Civil Rights Act of 1964. By now, most employers are aware that harassment based on an individual’s race, sex, age, religion, national origin, disability, (at times) sexual orientation, or other protected status is unlawful, and they may be held liable for harassment occurring in the workplace. However, far fewer employers understand that their duty to eradicate harassment is an affirmative one, requiring action that goes beyond merely addressing employees’ complaints. As a result, charges of discrimination and harassment in the workplace remain at least as prevalent as they were ten years ago, if not more so.

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1 This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

2 Title VII prohibits employment discrimination based on race, color, religion, sex (including sexual harassment or pregnancy) or national origin. 42 USC § 2000-e et seq. Other related federal laws providing protection to employees include the Age Discrimination in Employment Act of 1967, 29 USC § 621 et seq, which prohibits age discrimination; the Equal Pay Act of 1963, 29 USC § 206(d), which prohibits gender-based wage discrimination; Title I of the Americans with Disabilities Act, 42 USC §11201, which prohibits discrimination based on disabilities; and sections of the Civil Rights Acts of 1866 and 1991, 42 USC §§ 1981 et seq, 1981a. Oregon has enacted its own laws prohibiting discrimination. See ORS Chapter 659A.

3 Although Title VII has been interpreted as inapplicable to sexual orientation discrimination, see, e.g., Desantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979); Klein v. McGowan, 36 F. Supp. 2d 885 (D. Minn. 1999) (rejecting Title VII claim based on perceived homosexuality, finding that such claims are excluded from protection under Title VII), state and/or local laws may nevertheless apply. See, e.g., Tanner v. Oregon Health Sciences University, 157 Or. App. 502, 515 (1998) (interpreting former ORS 659.030 to prohibit sexual orientation discrimination). In addition, Section 23.01.050 of the Code of the City of Portland (Oregon) provides that "it shall be unlawful to discriminate in employment on the basis of an individual's sexual orientation [or] gender identity *** by committing against any such individual any of the acts already made unlawful under ORS 659.030 when committed against the categories of persons listed therein."}

Despite the experience gleaned over the last 40 years, some types of harassment claims remain controversial and ill-defined. For example, while it is clear that same-sex harassment is actionable under federal law,\(^5\) claims based on sexual orientation are not.\(^6\) There is still relatively little precedent about the viability or parameters of a claim for disability harassment, although the existence of such a claim is often assumed by courts.\(^7\) It is clear, however, that the law will continue to change and develop over time and that employers must keep pace with new developments.

While the largest category of charges filed annually involve allegations of race discrimination, cases involving sex discrimination are not far behind.\(^8\) The principles developed in sexual harassment cases are widely applicable to unlawful harassment in general. Therefore, while the focus of this memorandum, and most of the cases cited in it, is on sexual harassment, the principles articulated generally apply to harassment on the basis of any protected status.

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\(^7\) See generally, Leah C. Meyers, *Disability Harassment: How Far Should the ADA Follow in the Footsteps of Title VII?*, 17 BYU J. Pub. L. 265, 288 (2003) (“While courts have not been consistent in discussing the existence of a disability harassment claim under the ADA, they have been unified in their proposal of how such a claim would be analyzed. The courts, ‘appropriately modifying the parallel Title VII methodology,’ specify a multi-part analysis. In order to prove disability harassment the claimant must show that: (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for harassment to the employer.”)

\(^8\) Of the total charges filed in 2002, many of which contained allegations based on more than one protected class, 29,910 were based on race, 25,536 were based on sex, 9,046 were based on national origin, 2,572 were based on religion, 19,921 were based on age, 15,964 were based on disability, and 22,768 were for retaliation. EEOC Charge Statistics, *supra* at n. 4. Over the ten-year period from 1992 to 2002, the number of race discrimination charges remained fairly steady. In comparison, State and local agencies processed 14,396 sexual harassment claims in 2002 as compared to 10,532 in 1992, an increase of almost 37%. Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 - FY 2002, [http://www.eeoc.gov/stats/harass.html](http://www.eeoc.gov/stats/harass.html). Moreover, this year the EEOC announced its largest sexual harassment settlement to date: $5.425 million on behalf of a class of female employees at a Brooklyn hospital. EEOC Commission Chair Cari M. Dominguez stated, "Sexual harassment in the workplace is not a thing of the past * * * To the contrary, it continues to be a serious problem for working women." EEOC Press Release dated 4/9/03, [http://www.eeoc.gov/press/4-9-03.html](http://www.eeoc.gov/press/4-9-03.html); see also, Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's Law Journal, *3 (2003) (noting that the incidence of sexual harassment has not changed in the last three decades).
II. Defining Harassment

An important first step in preventing unlawful harassment is understanding what it is. Given the broad disparity in rulings on the subject, this task is not always easy, particularly since the scope of acceptable conduct varies somewhat from case to case depending upon the court, the relationship and sensibilities of the parties, and the social climate of the workplace. A starting point, however, is the prohibition set forth in Title VII, which provides:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.\(^9\)

Although the term "harassment" does not appear in the statute, the United States Supreme Court has made it clear that harassment is a form of discrimination prohibited by Title VII.\(^10\) Harassment based on \(\text{any} \) protected status violates Title VII:

Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under the EEO statutes. Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action," such as hiring, firing, promotion, or demotion.\(^11\)

A. Sexual Harassment

The Equal Employment Opportunity Commission (EEOC) regulations define “sexual harassment” as follows:

(a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

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\(^10\) See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.”); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.”).  
(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.12

A plaintiff alleging sexual harassment must generally show that (1) he or she was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was severe or pervasive enough to alter the conditions of employment.13 The workplace must be both subjectively and objectively abusive.14

While the EEOC definition of sexual harassment suggests that sexual content is a necessary component of sexual harassment, this is not the case. Non-sexual harassment that is gender based may also constitute sexual harassment.15

B. Harassment Must Be Because of Sex

In Oncale v. Sundowner Offshore Services, Inc.,16 the Supreme Court explained that harassment is actionable if it is directed at an individual "because of" his or her sex:

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat [ion] *** because of *** sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."17

12 29 CFR §1602.4.
13 Bahri v. Home Depot USA, Inc., 242 F. Supp.2d 922, 950 (D. Or. 2002), citing Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995). The standard is substantially identical for other types of harassment claims. For example, to prove a race harassment claim, an employee must show that: (1) he was subjected to verbal or physical conduct of a racial nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment. Santana v. Westaff, Inc., 2003 U.S. Dist. LEXIS 8146, *8-9 (D. Or. 2003).
14 Bahri, 242 F. Supp.2d at 950 (“Whether the workplace is subjectively abusive depends on the plaintiff’s perspective and whether plaintiff indicated that the conduct was unwelcome. * * * Whether the workplace is objectively abusive is evaluated 'from the perspective of the reasonable person with the same fundamental characteristics' as the plaintiff.”)
In other words, if harassment is directed to both men and women, there is presumably no sex discrimination.\(^{18}\)

At first blush, the Court’s explanation of sexual harassment in \textit{Oncale} seems fairly straightforward. However, the application of the holding to the facts of the case seriously complicated the question of what constitutes harassment based on “sex.” At issue in \textit{Oncale} was whether same sex harassment was actionable. The plaintiff had worked with seven other men on an offshore oil platform, where he was subjected to repeated sex-related, vile and humiliating actions, including physical assaults and threatened rape. When no action was taken in response to his complaints, he quit and filed suit under Title VII. In finding same sex harassment actionable, the Court emphasized that sexual desire was not required to prove sexual harassment, nor was sexual conduct or connotation automatically actionable under Title VII.

\[\text{T}\text{he objective severity of sexual harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field--even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.}\(^{19}\)

\(^{18}\) \textit{See, e.g., Tracy v. Mortgage One, Inc.,} 1999 US Dist LEXIS 20914 (D. Or. 1999) (despite evidence that plaintiff’s supervisor stated “what does she know, she’s just a girl” and that he preferred to hire good looking women with large breasts, yelled at plaintiff, denied her tickets to sporting games because of her sex, and allegedly caused other female employees to quit, court granted employer’s motion for summary judgment on hostile environment claim where evidence established that supervisor was equally rude to both men and women).

\(^{19}\) \textit{Oncale,} 118 S.Ct. at 1002 (1998). The Court rejected the notion that liability for same-sex harassment will transform Title VII into a general civility code for the American workplace, any more than it did for opposite-sex harassment:

\[\text{T}\text{he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview." We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the} \]
According to the Court, any of the following examples would permit an inference of discrimination based on sex:

- Where the harasser and the victim are opposite sexes and the conduct involves explicit or implicit proposals of sexual activity;
- Where the harasser and the victim are of the same sex and there is credible evidence that the harasser is homosexual;
- When the harasser’s conduct is in such sex-specific and derogatory terms as to make it clear that the harasser is motivated by a general hostility to the presence of the same sex in the workplace;
- Where the plaintiff offers proof that the harasser treated men and women differently.\footnote{Id. at 1002.}

Unfortunately, the Court did not explain how any of its examples fit the facts before it. There were no women working on the platform, and the opinion contains no discussion of how the workers treated anyone but plaintiff. Therefore, it is unclear how the nature of the conduct, which was clearly sexual in nature, demonstrated that the plaintiff was treated differently “because of” sex.

The Court in \textit{Oncale} also left undisturbed earlier Circuit Court rulings that Title VII does not protect against sexual orientation discrimination. As a result, an individual subjected to the same type of sexual conduct at issue in \textit{Oncale} because of his or her actual or perceived sexual orientation would presumably fail to state a claim under Title VII.\footnote{This presumption seems to be supported by the Supreme Court’s decision, just days after its decision in \textit{Oncale}, to vacate and remand the Seventh Circuit’s opinion in \textit{Doe v. City of Belleville, Illinois}, 119 F.3d 563, 578, 580 (7th Cir. 1998), in which the plaintiffs were 16-year old twin brothers who sued the City for sexual harassment and constructive discharge. The focus of the Seventh Circuit’s opinion was the conduct directed at one of the twins, who was dubbed “queer,” “fag,” and “bitch” by older male co-workers, and subjected to constant taunting about his sexuality and repeated references to “taking him out to the woods” for sexual purposes. On one occasion, a male co-worker trapped him against a wall and grabbed him by the testicles, thereafter announcing, “Well, I guess he’s a guy.” The district court had dismissed the case, finding the conduct was motivated by the belief that plaintiffs were homosexual. Reversing the district court, the Seventh Circuit held same sex harassment is actionable under Title VII and that such claims may be proved from either the sexual character of the harassment itself or evidence of sexual stereotyping by the harassers. See also, e.g., \textit{Klein v. McGowan}, 36 F. Supp.2d 885 (D. Minn. 1999) (rejecting Title VII claim based on perceived homosexuality, finding that such claims are excluded from protection under Title VII; in same sex environment, plaintiff could not meet burden of showing one sex was treated differently); \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989) (sexual stereotyping is a form of discrimination based on sex); \textit{Nichols v. Azteca Restaurant Enterprises}, 256 F.3d 864, 874-75 (9th Cir. 2001) (harassment based upon perception that plaintiff is effeminate is...}}
banc, added to the confusion with its divided opinion in Rene v. MGM Grand Hotel, Inc. The majority found that Medina Rene, a openly gay employee who suffered “severe, pervasive, and unwelcome physical conduct of a sexual nature” by his same-sex co-workers, stated a valid claim of sex discrimination under federal law.

Rene worked as a butler at the MGM Grand Hotel in Las Vegas, Nevada, from 1993 to 1996. Rene’s supervisor and all of the other butlers on his floor were male. During his employment, Rene’s co-workers whistled and blew kisses at him, called him sweetheart, gave him sexually oriented gifts, forced him to look at pictures of men having sex, caressed and hugged him, and grabbed his crotch. Rene testified that he believed this behavior was directed at him because he is gay. The trial court dismissed Rene’s claim, finding Title VII’s prohibition on sex discrimination inapplicable to claims based on “sexual preference.” In a divided opinion, the Ninth Circuit reversed. Writing for a plurality of five justices, Justice Fletcher wrote:

    We would hold that an employee’s sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser [sic] have engaged in severe or pervasive unwelcome physical conduct of a sexual nature. We therefore would hold that the plaintiff in this case has stated a cause of action under Title VII.

In reaching this decision, the plurality relied on “two lessons” it gleaned from the Supreme Court’s opinion in Oncale: (1) “Title VII forbids severe or pervasive same-sex offensive sexual touching;” and (2) “offensive sexual touching is actionable discrimination even in a same-sex workforce.” It concluded that “Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination “in comparison to other men.”

In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive “physical conduct of a sexual nature” when that conduct is sufficiently severe or pervasive. Meritor, 477 U.S. at 65. It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or different genders. See Oncale, 523 U.S. at 79. And it prohibits such conduct without regard to the sexual orientation – real or perceived – of the victim.

There will be close cases on the question of what constitutes physical conduct of a sexual nature, for there are some physical assaults that are intended to inflict

23 305 F.3d at 1063.
24 305 F.3d at 1063-64.
25 Id. at 1067. (Opinion by Fletcher, J., joined by Justices Trott, Thomas, Graber, and Fisher).
26 Id. (Emphasis in original).
physical injury, but are not intended to have (and are not interpreted as having) sexual meaning. That is, there will be some cases in which a physical assault, even though directed at a sexually identifiable part of the body, does not give rise to a viable Title VII claim. But this is not such a case. Like the plaintiff in Oncale, Rene has alleged a physical assault of a sexual nature that is sufficient to survive a defense motion for summary judgment.27

The Ninth Circuit plurality appears to have eliminated from the definition of sexual harassment the requirement that the harassment be directed at an individual because of his or her sex, at least in circumstances where there has been a physical assault of a sexual nature.28 While Rene v. MGM Grand leaves employers in the Ninth Circuit with no hard and fast rule, it is clear that a claim involving a sexual assault will likely pass muster under Title VII, regardless of the sex of the harasser or the victim.

C. Harassment Must Be Severe and Pervasive

One of the most difficult factors to evaluate in a harassment case is whether the conduct is sufficiently severe and pervasive enough to support a claim of hostile work environment. In Faragher v. City of Boca Raton,29 the Court stated

We directed courts to determine whether an environment is sufficiently hostile or abusive by “looking at all the circumstances,” including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *** Most recently, we explained that Title VII does not prohibit “genuine but innocuous differences in the ways men

27 Id. at 1068. Three justices concurred in the plurality’s judgment, but not its reasoning, finding that the case presented an actionable claim of sexual stereotyping. Id. at 1068-69 (Pregerson, J., concurring, joined by Justices Trotter and Berzon), relying on Hopkins v. Price Waterhouse, 490 U.S. 228, 250-251 (1989) and Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874-875 (9th Cir. 2001). Justice Graber wrote separately to clarify that she joined in the plurality’s opinion because the facts were materially indistinguishable from those in Oncale, in which the Supreme Court reached the same result. However, she agreed with the dissent on two points the majority did not address: (1) Title VII does not protect employees from discrimination based on sexual orientation, and (2) Rene did not assert a theory of “sexual stereotyping.” Id. at 1069-1070. Justice Fisher, in a separate concurring opinion, agreed with the plurality that summary judgment was inappropriate where the inference of discrimination was “easy to draw” and the record contained ample evidence of sexual stereotyping. Id. at 1070. Four justices dissented, finding that the Ninth Circuit read out of Title VII the requirement that harassment be directed at an individual because of his or her protected status. While the dissent agreed with Justice Pregerson that a claim for harassment based on sexual stereotyping will lie under Title VII, it found that Rene failed to assert such a claim. Id. at 1076-10777 (Hug, J., dissenting, joined by Justices Schroeder, Fernandez, and Nelson.

28 Compare Heller v. Columbia Edgewater Country Club, 195 F. Supp.2d 1212 (D. Or. 2002), in which plaintiff, a lesbian, sued her former employer for discrimination under Title VII, Oregon law, and a Portland ordinance that prohibits sexual orientation discrimination. The court found that [former] ORS 659.030 prohibits discrimination based upon an employee’s sexual orientation and that Title VII prohibits discrimination based on gender stereotyping.

and women routinely interact with members of the same sex and of the opposite sex.” *** A recurring point in these opinions is that “simple teasing,” offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the “terms and conditions of employment.”

As demonstrated by the following cases, this standard is extremely subjective:

- **Endres v. Techneglas, Inc., 139 F. Supp. 2d 624 (M.D. Pa. 2001).**
  
  Although the employer claimed that one of the alleged harassers was simply difficult to work with and treated both men and women poorly, he had indicated that he preferred to work with men and there was evidence that his biggest problems were with women. He made a comment with respect to another woman that he “should have killed her.” There was also evidence of foul language and driving a fork-lift at women in a threatening manner. The court stated, “[f]rom his statements and the history of the women who worked with him, the jury may make the inference that [he] harassed plaintiff simply because she was a woman.” The court found that the harassment, which occurred daily over a two-month period, was pervasive and regular.

- **Kortan v. California Youth Authority, 217 F.3d 1104 (9th Cir. 2000).**
  
  The court held that a supervisor’s conduct was not severe or pervasive enough to support a hostile environment claim where he referred to women generally as “bitches “ and “histrionics,” he made specific negative references for a former co-worker, failed to take action to support plaintiff’s authority in the workplace, authored a letter plaintiff read that said “masturbate yourself” and used a other derogatory phrases in her presence, made a joke at plaintiff’s expense, stared at her, and his evaluation of plaintiff was upgraded upon an independent review. Most of the comments occurred on one day and were not “frequent, severe or abusive enough to interfere unreasonably” with plaintiff’s employment.

  
  Plaintiff pointed to comments regarding her “nice legs,” “tiny butt” or “tight ass,” a one-time use of the word “bitch,” comments regarding her shorts and an overheard remark regarding a blow job. The court said these allegations did not appear to be sufficient for plaintiff to meet her burden of demonstrating severity and pervasiveness.

- **Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999)**
  
  Alleged harassment by a supervisor was not sufficiently severe or pervasive to alter the terms or conditions of plaintiff’s employment where plaintiff alleged that her supervisor constantly stared at her, followed her around, looked her up and down, sniffed at her, once rubbed her hip with his hip, and stated he was getting “fired up.” Noting a myriad of cases rejecting claims with allegations as or more serious than the allegations at issue.

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30 *Id.* at 787-88 (internal citations omitted).
the court concluded that to allow such a case to go forward would trivialize true instances of sexual harassment.

- **Alfano v. Costello, 294 F.3d 365 (2nd Cir. 2002)**

Plaintiff introduced evidence of twelve incidents over a five-year period, four of which had some sexual overtones. She was told not eat certain foods because it was “seductive,” some food was arranged in her workplace mailbox in a sexually suggestive manner, an inappropriate cartoon was left for her, and a “joke” notice was posted in the visiting room regarding her dislike of carrots unless they were cut up. All the other incidents related to administrative and personnel decisions that plaintiff alleged occurred because of her sex. She claimed that she received improper counseling and discipline for various actions and that her employer made it more difficult for her to do her job by delaying its response to certain requests. The court found this evidence insufficient as a matter of law to establish a hostile work environment claim, noting that “many bosses are harsh, unjust, and rude.” The court reasoned that most of the incidents could “support no inference of sex-based hostility” toward plaintiff and “[n]o reasonable fact-finder could say that *** [her] workplace was ‘permeated with discriminatory intimidation, ridicule, and insult.’”

Despite the wide disparity in rulings on severity and pervasiveness, the courts are in general agreement that the more severe the conduct, the less often it needs to occur. In fact, a single instance of harassment, if severe enough, may support a hostile environment claim.31

### III. Employer Liability for Harassment

The standard for imposing liability on an employer depends upon whether or not the perpetrator of the harassment had supervisory authority over the victim. When the employee is subjected to harassment by a co-worker, a negligence standard applies. The employer will be liable if it knows or should have known of the conduct and fails to take prompt remedial measures to correct it.32 An employer may also be responsible for the acts of third parties (e.g., customers, suppliers) if the employer knows or should have known of the conduct and fails to take prompt remedial action.33

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31 Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2001) (a single incident of harassment, if serious enough, can irrevocably alter the terms and conditions of employment and rape is one of the most severe forms of harassment); *but see Brooks v. City of San Mateo*, 229 F.3d 917, 925-26 (9th Cir. Cal. 2000) (employee fondled once by co-worker who was immediately fired failed to state an actionable claim for harassment; “We need not decide whether a single instance of sexual harassment can ever be sufficient to establish a hostile work environment”).

32 29 CFR §1604.11(d).

33 29 CFR § 1604.11(e); *Little*, 301 F.3d at 968 (“employers are liable for harassing conduct by non-employees ‘where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.’”) *quoting Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir.1997).
With respect to harassment by supervisors, the standard for imposing liability is that set forth in two Supreme Court decisions, Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton. These cases hold that an employer is subject to vicarious liability for unlawful harassment by a supervisor with immediate or successively higher authority over the employee. However, the presumption of vicarious liability may be overcome if the harassment has not culminated in a tangible employment action (such as discharge, demotion, failure to promote, undesirable reassignment, or a change in pay or benefits), and the employer proves that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to prevent harm otherwise. While both Faragher and Ellerth involved sexual harassment, the EEOC and a number of courts have taken the position that the same standards apply to all types of harassment.

To take advantage of the Faragher/Ellerth affirmative defense, an employer will almost certainly need to have a written harassment policy and complaint procedure in place that affords employees multiple opportunities for corrective action that include bypassing the harasser. Moreover, once an employer is aware of a complaint, it is critical to act promptly to investigate and take remedial action. An employer who does so may be able to avoid liability even where harassment is found.

The Faragher/Ellerth affirmative defense is available only in cases involving supervisor harassment. However, as Oregon Court of Appeals explained in Garcez v. Freightliner Corp, "the principle embodied in the defense--that an employer can avoid liability in situations where it acts promptly to remedy harassment--is contained in the requirements for a prima facie case based on negligence." The main difference is that in cases involving co-worker

36 Faragher, 524 U.S. at 777; Ellerth, 524 U.S. at 765.
37 Ellerth, 524 U.S. at 765; see also Faragher, 524 U.S. at 807.
39 See, e.g., Lappin v. Laidlaw Transit, Inc., 179 F. Supp.2d 1111 (N.D.Cal. 2001), in which the employer had a sexual harassment policy and complaint procedure, but plaintiff only reported one physical fight or altercation between herself and one alleged harasser and never represented that the incident was sexual in nature. The employer immediately initiated an investigation that involved interviews of all witnesses and a meeting between all the parties, after which it issued a warning to the alleged harassers. The court concluded that the employer could not be liable for harassment based on what plaintiff reported and the warning was “an appropriate response under the circumstances.” See also, Kohler v. Inter-Tel Technologies, 244 F.3d 1167 (9th Cir. 2001) (no liability found where employer had an anti-harassment policy in effect, upon hearing employee’s complaint employer immediately commenced an investigation by a neutral third-party, employer offered to allow employee to return to work under new supervisor and the same terms and conditions of employment, employee refused to cooperate with investigation and did not respond to the employer’s offers, and employer reviewed harassment policy with alleged offender and reprimanded him even though no actionable harassment was confirmed).
40 Swinton v. Potomac Corp., 270 F.3d 794, 803 (9th Cir. 2001).
41 188 Or. App. 397, 72 P.3d 78 (2003).
harassment, plaintiff must prove the employer knew or should have known of the harassment and failed to take prompt corrective action. In cases of supervisor harassment, it is the employer that bears the burden of proof. Consequently, regardless of whether the alleged harasser is a supervisor or a co-worker, the best way to avoid liability is take prompt and effective remedial action.

IV. Keeping Harassment Out of the Workplace

The only guaranteed way to avoid harassment claims is to have no employees. However, the following steps may be employed to help keep harassment out of the workplace and prevent liability in the event harassment occurs despite the employer's best efforts.

A. Screen Applicants

An important first step in preventing workplace harassment is screening applicants. Careful screening may enable an employer to avoid hiring an employee who will expose the employer to claims of discrimination, harassment, wrongful discharge, negligent hiring, and other state law claims.

Most employers encounter difficulty obtaining employment references that go beyond "name, rank and serial number," due to employers' legitimate concern about exposure to liability for defamation and intentional interference with contract. Nevertheless, a diligent background search may reveal sufficient information to weed out applicants who are potential problem employees.

While it is unlikely that an applicant or former employer will reveal that the applicant engaged in prior incidents of unlawful harassment, there are other indicators that the individual could be a problem. Applicants with a history of short term employment, gaps in employment, violence, or an inability to get a long with co-workers, may have had problems with harassment in the past.

An employer's first opportunity to obtain information about an applicant is through the use of a written application. At a minimum, each applicant should be required to provide his or her complete education and employment history, references, criminal convictions, licenses and accreditation. The employer may also want to ask whether the applicant has previously worked or applied for work with this employer, or has relatives or friends who work for this employer. The applicant should be required to certify that the information provided on the application is truthful and accurate. The application should also require the applicant to authorize the employer to solicit information about the applicant's previous employment and background from third parties, to verify the information provided on the application.

B. Check References

To fully assess the information obtained on an application, the employer must know whether or not the information is true. Accordingly, all information obtained from an application should be verified. Employers may obtain a release from the applicant that authorizes named employers and/or third parties to release information. Former employers that are not willing to discuss the

42 Id., 188 Or. at 412; see also, Swinton, supra, note 40.
details of the applicant's performance may nevertheless be willing to say whether or not the employee is eligible for rehire, whether the employee had any problems with co-workers, or provide other insight into the applicant's work history. Employers may also ask applicants for copies of recent employment evaluations (Oregon law entitles every employee to a copy of his or her personnel file under ORS 652.750).

While employers may not automatically disqualify an applicant with a criminal conviction, they can certainly exclude an applicant with a history of violence from specific jobs that would place the employer or others at risk. Therefore, employers may wish to obtain consumer credit reports and/or criminal records checks. Unlike an ordinary credit report, a consumer credit report may include information about the consumer's general reputation, personal characteristics, and mode of living. The report may be based on a background investigation that includes personal interviews, not just credit history.

C. Conduct Interviews

Employers should follow up on information obtained through the application process. Applicants should be asked to explain any information that raises a red flag (e.g., convictions, gaps in employment, a series of short term employment, reasons for leaving previous employment, and an unwillingness to grant the employer permission to contact previous employers). Employers may ask whether the applicant has ever been accused of, or disciplined for unlawful harassment.

D. Have a Written Harassment Policy and Complaint Procedure

In Faragher v. City of Boca Raton, a lifeguard sued the City contending that she had been subjected to unwanted and repeated touching and sexual comments by two of her supervisors. The City had a harassment policy but it was not distributed to plaintiff or her supervisors, and the policy provided no assurance that the harassing supervisors could be bypassed when registering complaints. The Court held that, under these circumstances, the City was foreclosed from raising as an affirmative defense that it exercised reasonable care to prevent the supervisors' harassing conduct. Although the Supreme Court stated that an employer's failure to have a written harassment policy and complaint procedure was not always fatal, it is clear that most employers would be hard pressed to defend themselves without one.

At a minimum, a harassment policy should set forth in clear, understandable terms:

- A prohibition on harassment in any form on the basis of an individual's protected status, and that this prohibition extends to employees, customers, and vendors.
- A definition of "harassment."
- Specific examples of the type of conduct that is prohibited.

Employers who wish to obtain such reports must comply with the Fair Credit Reporting Act, 15 USCA § 1681.
• Circumstances in which the conduct is prohibited (e.g., in the workplace, on business trips, at work-related functions, etc.).

• A requirement that employees report harassment.

• The methods by which employees may report harassment, and the individuals authorized to receive a report.

• An explanation of what will happen when the employer receives a complaint, including the consequences of violating the employer’s harassment policy.

• A commitment to handle the complaint with discretion.

• A prohibition on any form of retaliation for reporting violations.

A harassment policy is not sufficient unless it is effective. Employers should not impose cumbersome reporting or other requirements that will deter employees from reporting incidents of harassment. Providing alternative avenues for reporting harassment will insure that employees are able to bypass the harasser in the event that a designated person is the perpetrator. Small employers may wish to designate a person outside the company as the person to whom complaints should be reported to eliminate the perception that the report will not be acted upon or that any investigation conducted may be biased.

Those individuals authorized to receive complaints should be required to immediately inform Human Resources or management of the complaint, so that prompt remedial action can be taken. The person(s) responsible for investigating harassment complaints should be thoroughly familiar with the employer's harassment policy and trained to conduct an investigation.

While it is acceptable for an employer to include its policy in an employee handbook, in reality, many employees never read them. Employers may choose to have their employees sign an acknowledgment that they received and read the handbook or, better still, sign a separate document that contains only the harassment policy and complaint procedure. The signed acknowledgment should be retained in the employees’ personnel files.

E. Provide Training

Even if employees read and sign a copy of the employer's harassment policy, the policy will not be effective if the employees do not understand what it means. Employees should receive training on the employer's harassment policy and complaint procedure, preferably as part of an orientation process, and periodically thereafter. The employer may wish to consider providing diversity training, and using professional trainers to increase employee awareness of the kinds of conduct that are prohibited.

Supervisors should be trained to recognize potential problems and immediately report and/or act on them. Too often, supervisors witness conduct that violates the employer's harassment policy, but fail to do anything about it because they don’t think the behavior constitutes harassment or no one complains.
F.  Set the Tone

Management employees set the standard for acceptable conduct in the workplace. Supervisors who engage in conduct that is inappropriate, or fail to address inappropriate conduct when they see it, send a dangerous message to employees, who will likely assume that the employer condones the behavior. Employees are far less likely to report harassment if they think the employer won't do anything about it.

By far the most likely scenario to result in a harassment complaint is a workplace relationship that has gone sour. Some employers have reacted to the fear of lawsuits by enacting policies prohibiting any fraternization or dating between co-workers, or limiting such relationships to employees who are not in the same chain of command. In the event of a violation, such policies may provide for the termination of both employees, the termination of the less senior employee, or for the employees to decide which of them will resign (failing which, the employer may fire one or both). While facially neutral, rules that require the discharge of the less senior employee may have a disparate impact on women (due to the effect of the "glass ceiling" or the less likely scenario of a male subordinate dating a female supervisor).

No fraternization policies typically prohibit employees from dating co-workers entirely, or prohibit dating relationships between supervisors and subordinates. This type of policy has been upheld in Oregon and many other states. However, such policies force employers to more closely monitor the existence of workplace relationships. Failure to do so may result in unequal application of the policy (real or perceived) and lead to claims of discrimination. On the other hand, monitoring employees' behavior may give rise to claims for invasion of privacy, particularly if the employer's means of monitoring employees is intrusive.

G.  Promptly Investigate and Resolve Complaints

The worst thing an employer can do when it receives a harassment complaint is to ignore it. Even if the employer believes the complaint is baseless or the complainant no longer works for the company, the employer should nevertheless conduct a thorough and unbiased investigation, and make no judgments until the investigation has been completed. The company wants to know (or should want to know) of any inappropriate behavior in the workplace and first impressions.


45See, e.g., Zentiska v. Pooler Motel, Ltd., 708 F. Supp. 1321 (S.D. Ga 1988) (employee established prima facie sex discrimination claim based on enforcement of no-dating policy where evidence showed male employees had not been disciplined for similar behavior).

may be wrong. Accordingly, the company should always follow its own procedures, and be open and receptive to complaints. The EEOC provides information on suggested procedures and investigative techniques.\footnote{See EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors, http://www.eeoc.gov/docs/harassment.html.}

Upon receiving a complaint, employers should take immediate action to eliminate the possibility of further harassment while the investigation is ongoing. If the complaint includes threats of violence or serious workplace disruptions, interaction between the complainant and the alleged harasser should be avoided (e.g., through reassignment to another supervisor, changing shifts, administrative leave, etc.).

Many companies will assign to a Human Resources representative or to an equal employment opportunity officer the task of conducting investigations and provide special training to those individuals. Special training is very helpful due to the complicated legal and potentially explosive emotional context in which these investigations typically occur. An employee subjected to improper investigative techniques may have a claim against the company (e.g., for false arrest, invasion of privacy, intentional infliction of emotional distress).

If the employer hires an attorney to conduct the investigation, the company’s communications with the attorney may be subject to attorney-client or work product privileges.\footnote{However, the attorney-client privilege may be waived if the attorney's investigation is used as an affirmative defense. For example, in \textit{Fultz v. Federal Sign}, 1995 WL 76874 *2-3 (N.D. Ill. Feb. 17, 1995), the court overruled defense counsel's attorney-client privilege objections to deposition questions in a sexual harassment case in which defense counsel had conducted the investigation. In so doing, the court stated: *** [I]f the investigation or its results is to be used as evidence at trial, then clearly the privilege which it enjoys would be waived. One cannot assert the attorney/client privilege to keep an opponent from discovering facts about an investigation when the investigation is to be used at trial as a defense to defeat the opponent's allegations. This would be a classic case of using the attorney/client privilege not as a shield, but as a sword. Defense wishes to have its cake and eat it too. *** While the investigation, having been conducted by retained counsel, would ordinarily be privileged, that privilege is lost once the claimant of the privilege asserts his right to use the investigation as part of his or her case in the litigation.}

Witness interviews are the core component of any harassment investigation. A fair and impartial investigation requires that the employer interview both the complainant and the alleged harasser to determine the facts. These individuals should be asked to identify any witnesses who would be able to corroborate their version of the events. As one court observed:

\begin{quote}
[The decision-maker] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial *** They can obtain information in any way they think best, always giving a fair opportunity to those
\end{quote}
who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.49

Witnesses with pertinent information should be interviewed promptly to determine the precise details of what transpired. It is not sufficient for an employee to state that he or she was sexually harassed or that a co-worker made an improper remark or advance. This sort of vague allegation is subject to interpretation by the complainant and the interviewer, and is neither helpful in gaining a true understanding of what happened nor testing the veracity of the witness.

Documentary evidence, if any, should also be gathered and retained. Such evidence may include written notes, correspondence, e-mail, and other communications. Further information may be available from security videotapes, time cards, telephone logs, and building and computer access records.

The employer should not draw conclusions before all of the appropriate witnesses are interviewed. Depending on the circumstances, it may be appropriate to re-interview witnesses. The investigator will ordinarily want to ask each witness general, open ended questions that include the following:

- Describe everything that happened in detail (every incident that occurred, exactly what this witness heard or saw);
- What was the context of the behavior - where were they, what were they doing, why were they there;
- When did the incident(s) occur;
- Who else was present and what, if anything, did they see or hear;
- What, if anything, did you do about the incident (for example, did the witness tell the harasser to stop);
- What, if anything, did you tell others about the incident;
- Have you heard anyone else discuss the incident and, if so, what did you hear.
- An amazing amount of information can be obtained simply by asking, "Is there anything else you think I should know about this matter?"

An employee-witness may not be receptive to the employer's request for an interview. The employee may refuse to answer questions or demand to have a lawyer present. Aside from the right to representation that may exist under certain collective bargaining agreements or when criminal action is being investigated by governmental authorities, employees do not have a right to counsel during a workplace investigation. Nonetheless, it may be appropriate to allow the employee to have a representative if the employee will cooperate more fully with a

representative present and the representative is not disruptive. Failure to cooperate in an investigation may be appropriate grounds for disciplinary action.

During the interviews, the investigator should avoid giving witnesses the impression that the employer has already made a decision, the decision will be made based solely on this witness' comments, or that the investigator believes the witness is or is not credible. The investigator's questions should be designed to elicit both positive and negative input from the witnesses, and provide background information only when necessary (e.g., ask what was said rather than did you say this). It is best to stick to asking the questions and avoid editorializing about the witness' answer or explaining what information has been obtained from others.

It is important to avoid making any promises about how the complaint will affect anyone's job, except to assure the complainant that no retaliation will be made for a complaint or report made in good faith. Witnesses should also be reminded that the company prohibits retaliation.

The investigator may wish to take notes to document the interviews. It is important to remember that in the event of litigation, these notes will be subject to discovery by the opposing party. Therefore, to the extent possible, the investigator should write down what was actually said, without characterization or embellishment of the witnesses' statements, and without documenting any conclusions. These documents, along with any documentation of the complaint, should be kept in a separate, confidential file.

The investigator should not promise confidentiality or anonymity to the complainant, the alleged harasser, or other witnesses. It is appropriate to provide some assurance that the complaint will be treated with discretion, and to maintain confidentiality of the complaint and the investigation as much as possible. The investigator should discuss the matter only on a strict need to know basis and should not engage in gossip.

Those interviewed should be told that they are not to discuss the matter with anyone at work and why. Breaches of confidentiality may subject the company or the witness to claims of invasion of privacy or defamation by the complainant and/or the harasser. In addition, breaches of confidentiality may subject employees to retaliatory actions by others. Finally, if the story gets out before interviews are conducted, witnesses may, intentionally or unintentionally, alter their version of the facts based on what they have learned from others.

There is no clear legal standard for making personnel decisions based on a workplace investigation, as there is in a criminal or civil case, where a decision must be made based on proof "beyond a reasonable doubt" or "by a preponderance of the evidence." It may be reasonable to adjust the proof required and/or the actions taken based on the seriousness of the allegations.

The results of an investigation may turn solely on the credibility of witnesses, particularly in a case where the only witnesses are the complainant and the alleged harasser. In making such determinations, the investigator should be able to explain why one witness was more credible (e.g., one witness had a greater motive to lie or a reputation for untruthfulness, there were inconsistencies in witnesses' stories, or one witness' body language was defensive and/or inappropriate to the context, as in not acting surprised upon hearing the allegation).
Although it may be disappointing after conducting a thorough and emotionally taxing investigation, there are times when no clear decision is possible. Sometimes the investigator simply cannot clearly confirm or rule out that the alleged conduct occurred. In these cases, a common approach is to re-instruct all parties on the company's discrimination and harassment policies and complaint procedure, and to conduct additional training of the individuals and/or the workforce on diversity and harassment issues.

At the conclusion of the investigation, the employer should notify the complainant and the alleged harasser of the decision reached, and why. If the employer determines that discipline is appropriate, the harasser should be informed of the consequences of any further transgressions, and that any form of retaliation is strictly prohibited. Any disciplinary action imposed should be documented and placed in the harasser's personnel file, keeping in mind that any such documentation should not contain an admission that the employer/employee violated the law (i.e., DO NOT say "this employee engaged in sexual harassment." Do say "this employee violated the employer's rule or policy.").

Documentation of the investigation should generally not be placed in the harasser's or complainant's file. Employees have the right to inspect their personnel files, and the investigation materials may contain confidential witness statements that would be inappropriate to provide to the target of the investigation or to the alleged victim. Keeping such material out of the complainant's file also insures that the report will not be used as a factor in making employment decisions about that individual.

H. Follow Up

After a decision is made, the employer should follow up with the complainant periodically to insure that there have been no further incidents of discrimination, harassment and/or retaliation.