

**CONDUCTING AND DOCUMENTING
UNLAWFUL
HARASSMENT INVESTIGATIONS**

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Introduction

From an employment prospective, two major consequences of World War II were: (1) the racial desegregation of the armed forces; and, (2) the acceptance of women working in the industrial workforce. The conclusion of the war did not end the desire of minorities and women for equal workforce treatment, nor cause a reversion to the pre-war complacency regarding one's "place in society."

I. History of the Prohibition Against Sexual Harassment.

Although race issues were not in the forefront of the headlines during Truman's presidency, nor during Eisenhower's two Korean War terms, they did represent wide spread and smoldering discontent during the 1950's. By the time of Kennedy's election in 1960, there were civil rights marches in the South, riots in the North and "civil disobedience" in many of the Country's highly populated areas.

Ohio was somewhat ahead of the curve by enacting its initial employment and housing discrimination law in 1959. The federal government did not enact a major "modern" civil rights law until the Civil Rights Act of 1964, which became effective in 1965, under President Johnson.

Interestingly, as originally conceived the 1964 Act did not prohibit discrimination based on sex¹. The southern Congressmen, who were resisting

¹ See, e.g., *Burlington Industries v Ellerth*, 524 US 742, 767, note 1 (Concurring Opinion) citing *Barnes v Costle*, 561 F. 2d 987 (D.C. Cir.-1977).

the Act's race discrimination provisions, believed that an eleventh hour amendment to include sex discrimination would sway northern Congressmen to kill the bill. They guessed wrong.

As enacted, Title VII prohibits employment discrimination on the basis of race or **sex**, among other things. Specifically, it states:

“It shall be an unfair employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions *or privileges* of employment, because of such individual's race, color, religion, sex or national origin.” (Emphasis added.)

Also of interest to curbstone historians is that Title VII does not include a word about “harassment”, either racial or sexual. Today, it may seem obvious that subjecting someone to harassment based on race or sex is not granting that person the same “terms, conditions *or privileges* of employment”² granted to males or non-minorities. It, however, took the Act's enforcement agency, the Equal Employment Opportunity Commission (EEOC), a full fifteen years to recognize that “sexual harassment” might be remediable under Title VII. In 1980, it published Guidelines (Attachment A) defining two types of sexual harassment (“*quid pro quo*” and “hostile environment”) and urging employers to promulgate policies prohibiting such practices. Essentially, the Guidelines define “sexual harassment” as unwelcome sexual advances, requests for sexual favors, and

² Ohio phraseology is “employment opportunities.”

other verbal or physical conduct of a sexual nature when submission thereto is (at least implicitly) a condition of the employee's employment or the employee's submission [to]... [or] (i) rejection [of such conduct] is used as a basis for employment decisions [*quid pro quo* type], or (ii) the conduct has the purpose or effect of unreasonably interfering with the employee's performance or creates an intimidating, hostile or offensive working environment [hostile environment type]).

Still, the Guidelines were only agency "guidelines"; they were not a public law enacted by Congress.

The Guidelines achieved the status of national "common law" in the Supreme Court's 1986 landmark decision of Meritor Savings Bank v. Vinson, 477 US 51. There, essentially deferring to the EEOC's experience, the Court concurred in its definitions of the two types of sexual harassment and found the hostile environment type to be "actionable" under Title VII³. It also relied upon the case of Rogers v. EEOC, 454 F. 2d 234 (CA 5 - 1971), *cert. denied*, 405 US 947 (1972) holding that Title VII affords employees the *right* to work in an environment free from unlawful discriminatory intimidation, ridicule and insults. (Rogers involved a Hispanic plaintiff.)

In Meritor, the Plaintiff had suffered no tangible job detriment, but she allegedly was exposed to continual sexual advances by her supervisor, in many

³ Arguably, this was *obiter dicta* as Ms. Vinson was subjected to *quid pro quo* type harassment by her supervisor, Taylor.

of which she “voluntarily participated”⁴. Meritor is important because there the Court made it clear that so-called “voluntary” participation can be coerced by the supervisor’s superior workforce power, even though such power is never actually exercised. Thus, the Court concurred in the agency’s Guidelines that *unwelcome* sexual advances can become unlawful (hostile environment) if they are so *severe or pervasive* as to adversely affect an employee’s performance (constitute a change in “conditions of employment”), even if no tangible “employment action” (typically a detrimental one) actually occurred. The Court specifically declined to equate *voluntary participation* with “welcomeness”; legally, they are not synonymous.

Another significant aspect of Meritor is the Court’s declination to rule affirmatively on the EEOC’s assertion that an employer should always be *vicariously* liable (“responsible for the act of another”) for a supervisor’s conduct of the hostile environment type. Note that the employer is vicariously liable where the supervisor engages in *quo pro quo* conduct (“this” for “that”). This is because it is the supervisor’s authority, *on behalf of the employer*, which gives him the power to grant or withhold raises, promotions, benefits or opportunities (including the opportunity to remain employed), depending on the subordinate’s response. Meritor’s unanswered question regarding an employer’s potential

⁴ Ms. Vinson admitted to having intercourse with Taylor 40 or 50 times. She never suffered any actual employment detriment during the period employed and, in fact, received one promotion.

vicarious liability for a supervisor's hostile environment sexual harassment remained open for 12 years.

After Meritor, lawyers who had disregarded the EEOC's 1980 Guidelines as not having the force of law suddenly began sending clients memos and Newsletters advising them to promptly promulgate policies prohibiting sexual harassment.

The EEOC's 1980 Guidelines only specify that "prevention is the best tool for the elimination of sexual harassment;" they do not expressly require the employer to conduct any investigation at all. Instead, they state:

"An employer should take all steps necessary to prevent sexual harassment from occurring, such as:

- affirmatively raising the subject
- expressing strong disapproval
- developing appropriate sanctions
- informing employees of their right to raise and how to raise the issue of harassment under Title VII, and
- developing methods to sensitize all concerned."

One of the other points of Meritor, although it seemed somewhat oblique, was that merely because the employer there had a "grievance procedure" (which the Plaintiff had not endeavored to use), such did not automatically insulate it from liability. This is because that procedure required the aggrieved first to report

her complaint to her immediate supervisor, Taylor, the alleged harasser. This is the genesis of the concept that only an *effective* anti-harassment policy can provide insulation against liability. Effectiveness is not tested by the mere words of the policy; its dissemination and administration also have relevance.

In 1988, in the wake of Meritor, the EEOC issued additional Guidance. This Guidance (N.-915-035) helped the agency's investigators resolve the "She said/He said" conundrum. Obviously, an employer's own investigators may use these same techniques. That Guidance was refined and republished as N.-915-050 (Attachment B) in 1990, twenty-five years after the statute's enactment. It is discussed *infra*.

Prior to 1998, there were hundreds of cases addressing an employer's liability for unlawful sexual harassment, with differing tests and differing results. One landmark case was Harris v. Forklift Systems, Inc., 510 US 17 (1993), which reaffirms the standards set forth in Meritor and holds that, in the hostile environment circumstance, neither an actual tangible job detriment nor a serious injury to the employee's psychological well-being is necessary for her to remain in Court in the face of a motion to dismiss or for summary judgment premised on the *injuria abseque damno* theory ("injury without damage").⁵ She, like the

⁵ In determining whether an Employer's work environment is "hostile," the courts are to consider all relevant facts ("totality of circumstances" test). See subsection IV (a), *infra*, for some of the major factors to be considered.

Hispanic Rogers, has the right to work in an environment free from unlawful discriminatory intimidation, ridicule and insults.

II. Current State of the Law.

Meritor blessed the EEOC's definition of two covered categories of sexual harassment. Pursuant to Meritor, an employer is strictly liable for *quid pro quo* harassment perpetrated by a supervisor, under the *respondeat superior* doctrine ("Let the master answer for the act of his servant").

While, per Harris, there is no need for an actual tangible job detriment or actual psychological injury, it nevertheless is necessary that the harasser have the power to *effectuate* an "employment action" including, for example, a promotion, if he is inclined to do so. Otherwise, there could be no *this* (sexual favors) for *that* (promotion, raise, favorable evaluation, avoidance of discipline or discharge, etc.). This is another way of saying that, under Meritor and Harris, a victim's co-workers can't commit *quid pro quo* violations because they have no power to grant or withhold the *quo* on the employer's behalf.

As to hostile environment offenses, an employer could become liable only if it knew or reasonably should have known of the offense and failed to take prompt and effective corrective action. Essentially, a due care (negligence) standard was applied. Once you know of the problem, you have a duty to fix it. But, if you don't know or have no reason to know of it, you have no such duty and aren't responsible for the damage caused. This is the genesis of the principle

that an employer should investigate every sexual harassment claim that is reported or of which it otherwise learns. Once an employer's official is advised of such a report, whether given by a victim or a by-stander, the employer is chargeable with knowledge of the alleged conduct. Even if the victim says: "I just wanted you to know about it;" or "I don't want you to do anything;" or "I don't want to get him in trouble," the employer *must* investigate or, if the victim has a latter change of heart, the employer may be found guilty of not taking "all steps necessary to prevent sexual harassment from occurring".

While an employer's strict liability for the *quid pro quo* conduct of a supervisor and its "negligence" liability for the hostile environment conduct of a co-worker remain as stated above, in June of 1998, the High Court decided two cases addressing the question it expressly declined to answer in 1986 (Meritor). Specifically: "Is the employer strictly liable where one of its supervisors--rather than a co-worker--subjects an employee only to hostile environment, rather than *quid pro quo*, harassment?" The cases are Faragher v. City of Boca Raton, (524 US 775) and Burlington Industries, Inc. v. Ellerth, (524 US 742). There, the Court answered the liability question with a resounding "Yes."

In these cases, the Court seems to engage in some rather tortured gymnastics of both language and logic in order to reach the result which, on a gut level, it wants. First, while it acknowledges that Meritor endorsed the EEOC's two classifications of sexual harassment, here it tells us that those definitions are

not exclusive, mutually or otherwise, and, while “somewhat” helpful in analysis, are not determinative of an employer’s liability.

Next, the Court buys into the Restatement of the Law of Agency. This treatise is a compilation of state common law principles by a group of lawyers and academicians who emphasize what they believe the law should be, as opposed to what it is. The Restatement is neither a duly enacted statute nor a compilation of actual decisions; it is a “secondary resource”. In these two cases, the Court characterizes the Restatement as setting forth “indefinite and malleable factors”, which it finds unsuitable for incorporation into the new federal common law which it is about to create.

Although the Court criticizes the Restatement, it looks to a subpart of its Section 219(2) for the proposition that an employer *is* liable for his servant’s tort “outside the scope of his employment” where the servant “was aided in accomplishing the tort by the existence of the agency relationship”. For example, if the employee is a heating and air conditioning repairman and he gains access to the customer’s home in response to a service call and, while there, steals a valuable object, the authors of the Restatement conclude it is more “just” for the employer to pay for that loss than to make the victim bear it alone. This is so even if the employer has and enforces a rule prohibiting employees from stealing while in a customer’s home. The rationale, although not articulated, is that it is the employer’s responsibility--not the customer’s--to select, train and monitor the

employee and to require him to conform to its no thievery policy. The employer, thus, must make recompense to the customer if the employee acts outside the scope of his employment by violating the policy.

In Faragher and Ellerth, the Court's majority discusses that, in theory, it "could" find hostile environment sexual harassment to be a well recognized "persistent problem in the work place," which an employer can "generally anticipate," i.e., be found to be on "constructive" notice. The Court, however, purports to reach a "contrary conclusion". Frankly, the Court's problem with the "relationship aided the tort" theory is that if an employer were *per se* liable for each instance of work place harassment "aided" by the perpetrator's relationship to it, the employer also would be automatically liable for any co-employee hostile environment sexual harassment, whether the employer knew or should have known about it and whether or not it tried to prevent the harassment. The employer would be *ipso facto* liable simply by virtue of the occurrence of the co-employee harassment.

In an effort to encourage what it perceives as the "preventive" aspect of Title VII, the Court crafted a previously non-existent test for employer liability. It said, in essence, we aren't really concerned with whether the supervisor's conduct falls into one of the two old *quid pro quo* or hostile environment classifications; those labels are basically irrelevant as to whether the Employer *should be* liable. Instead, we will adopt the "relationship aided the tort" theory

whenever an adverse employment action (by the immediate or higher level supervisor) toward the employee occurs. (Only supervisors, not co-employees, can perpetrate an adverse employment action on an employer's behalf.) Further, so the decisions' rationales go, we are going to charge the employer with constructive knowledge of the hostile environment sexual harassment by a supervisor whenever it occurs, regardless of the fact that the employer has some policy against it. (This holding basically repudiates the Court's earlier assertion that it was reaching a "contrary conclusion" as to whether hostile environment sexual harassment should be deemed a workplace problem that employers should "generally anticipate.")

Thus, the employer is presumptively liable for hostile environment sexual harassment if perpetrated by a supervisor, even if the employee experiences no adverse employment action. In order to accommodate the preventive aspect of Title VII and to encourage employers to do their utmost to prevent either type of sexual harassment, the Court now gives an employer the benefit of trying to prove an "affirmative defense" *if* no tangible "employment action" to the employee occurred. That new affirmative defense is composed of two elements.

Specifically, the Court said:

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

defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence....The defense comprises two necessary elements: (1) that the employer exercised *reasonable care to prevent and correct promptly* any sexually harassing behavior, and (2) that the plaintiff employee *unreasonably* failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” (Emphasis added).

Hence, if there is any tangible employment action--such as a demotion or poor evaluation⁶--the employer *is* vicariously liable for its agent’s conduct, even if the activity was merely offensive language of a sexual nature, rather than spurned requests for sexual favors. Where no tangible employment action occurs, the employer will be liable for the supervisor’s conduct *unless* it can carry the burden of proving the affirmative defense by a preponderance of the evidence⁷. Remember, sexual harassment cases under Title VII are civil cases, not criminal cases. The presumption of innocence applicable in criminal cases is not relevant here. Now, the question is whether the party with the burden of proof carries that burden.

In inverse order, the second element of the defense is that the victim “unreasonably” failed to take advantage of any preventive or corrective

⁶ Watch for future developments here. See “Issues to Consider” at Section IV, *infra*. The EEOC may be targeting the finding of Title VII violations in favor of employees denied promotion, etc. where the promotion instead is awarded to the supervisor’s paramour. The promotion would constitute “employment action”, even though it is not detrimental to the paramour.

⁷ “Preponderance” may be defined as that quantum of the overall evidence which makes it “more likely than not” that the asserted proposition is true or that the asserted fact did occur.

opportunities provided by the employer or to avoid harm otherwise. If the victim was required to make a first level report to her immediate supervisor and he was the alleged harasser, it probably would not be unreasonable for the employee to shun using the procedure. Likewise, if numerous other harassed females had reported their plight to the H.R. Director who simply shrugged and said "Boys will be boys," the victim likely would be excused from using the procedure due to its past record of ineffectuality.

The first element of the defense is that the Employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." The Faragher case is interesting here. There, the City had a sexual harassment policy which it had adopted in 1986 and revised and reissued in 1990.

Ms. Faragher was a life guard in the City's marine safety section and was being subjected to unwelcome offensive touching, as well as lewd remarks, by two of her male supervisors. She never complained to the City. In June of 1990, she resigned her job to enter law school. Interestingly, two months before her resignation, another female life guard did complain to the City about the *same* two male supervisors and it disciplined them by giving them the choice between unpaid disciplinary suspension or forfeiture of annual vacation type leave. If one knew nothing more, one might assume the City has a pretty good defense here; it had a recently revised and reissued it anti-sexual harassment policy and had

disciplined the same two supervisors for an earlier incident with a different female life guard. So, where did the wheels fall off? Ms. Faragher established that the revised policy was “only circulated to *some* employees, but the City completely failed to distribute it to any of the employees in the marine safety section”. Also, she showed that, notwithstanding having been disciplined in April for the sexual harassment of a different female life guard, the two supervisors continued to harass her until her June resignation. In other words, the City’s anti-harassment policy was blatantly *ineffectual*.

The Supreme Court held that *as a matter of law*, the City was not entitled to the benefit of the newly articulated affirmative defense because (i) it failed to disseminate its sexual harassment policy in Faragher’s section, (ii) it made no effort to keep track of the activities of the two supervisors after it disciplined them, and (iii) the policy contained no advice as to how a grievant could bypass an offending supervisor in registering her complaint. The City, therefore, had not exercised “reasonable care” to prevent sexual harassment and Faragher did not unreasonably fail to take advantage of the policy. She had never received it and nonetheless first would have had to lodge her complaint directly with the two perpetrators.

While neither the EEOC Guidelines nor any Supreme Court majority opinion specifically states that an Employer must conduct the prompt, impartial, thorough and effective investigation of any alleged sexual harassment, no matter

how trivial it may appear, have no doubt about it: You must investigate the complaints or you can't establish the first half of the Faragher/ Ellerth defense. Employers *will* be liable for hostile environment sexual harassment by supervisors unless they can prove *both* elements of the defense.

III. Pre-Investigation Matters.

In the eyes of some agencies: "If it isn't documented, it didn't happen." Lawyers, of course, prefer written documentation because it generally is admissible under the business record exception to the Hearsay rule. Further, it doesn't move away, die, forget or change its mind.

The obvious initial documentation required in defending against *any* unlawful harassment claim is the employer's written anti-harassment policy. That policy should include the requirements of the EEOC's 1980 Guidelines (Attachment A), as well as the following:

- A prohibition against all unlawful harassment, including sexual, racial, religious, national origin, ancestry, age, disability, handicap or veteran's status.⁸
- A definition of sexual harassment.

⁸ In Columbus, Ohio, an employer also should include sexual orientation harassment, although theoretically no civil action can be premised on Columbus' anti-sexual orientation discrimination in employment ordinance. With the Ohio Supreme Court's continual broadening of the "public policy" exception to the employment at will doctrine, query whether a "public policy" action *now* could be premised on a single City's ordinance? Also note that the Ohio General Assembly is considering a bill which would add sexual orientation to R. C. Chap 4112's prohibitions on discrimination in employment.

- An affirmative obligation to report any unlawful harassment experienced or observed.
- A requirement that employees cooperate truthfully in any unlawful harassment investigation.
- An assurance that no employee will experience retaliation by the employer, the accused supervisor or the accused co-employees for reporting an incident or cooperating in the investigation.
- Alternate authorized recipients for reports of unlawful harassment, other than the immediate supervisor or any other person in the employee's immediate chain of command.
- Advice on reporting unlawful harassment of an employee by third party non-employees, such as customers or suppliers.

It is also advisable to write the policy in clear language commonly understood in the workplace, including bi-lingual form if justified by workforce composition.

The policy, of course, must be "effective." In order to assure this, the policy should be:

- Distributed to every employee - get its receipt acknowledged in writing.
- Posted throughout the facility.
- Included in the Employee Handbook in conspicuous type.
- Redistributed periodically to all employees.
- Distributed to and covered with new employees as part of their orientation or initial hire paperwork.
- Republished periodically in the employer's newsletter or other house organ or included at least annually as a payroll envelope insert.

The H. R. professional naturally will have a current written record (“documentation”) of each of the above distribution or publication/republication dates.

The employer also should hold in-services or meet with all employees at least annually and discuss the policy, including questions and answers. Attendance sheets should be retained. If any employees are absent, makeup sessions should be scheduled. Some employers include attendance at the meeting as a check off item on the employee’s annual performance evaluation and presumptively could withhold an adjustment until the employee attends any necessary makeup session.

If the employer has a library of training tapes or an in-house web site, it would be prudent to include the policy and explanatory comments.

Additionally, the employer should train all employees on what the policy means and how to use it⁹. It is particularly important to give your supervisors special training on the subject. Supervisors who observe sexually or racially oriented graffiti in their department but do nothing about it can be the employer’s worst enemy if litigation ensues. Likewise, a supervisor who is told by a subordinate that she is receiving *unwelcome* sexual advances or being subject to physical/verbal sexually oriented conduct from her supervisor or co-employees

⁹ See, e.g., *Faragher* at 524 US 775, 803 and *Kolstad v American Dental Association*, 527 US 526 (1999).

and does not report such incident to the proper higher authorities is unknowingly setting the employer up for a claim that its policy is ineffectual and the employee therefore was not unreasonable in her failure to utilize it.

Next, the employer should decide, in advance, who will investigate a claim of unlawful harassment, when one is received. It is recommended that employers who do an investigation with in-house personnel use an investigative “team” approach, rather than a single investigator, with the team including at least one member of the same gender as the victim. A team gives the employer two or more potential witnesses regarding what actually occurred during an investigation if, for any reason, a dissatisfied victim or a disgruntled disciplined perpetrator subsequently wants to contest the facts.

If the investigation will be conducted by in-house personnel, such as H. R. professionals, they should be trained in advance on proper investigation techniques and documentation requirements. Some employers have a set of written Investigation Guidelines in their supervisors/managers manual. If an employer opts to do that, it is important that the Guidelines have flexibility and expressly provide they are neither mandatory nor exclusive as to the investigative procedures that may be utilized. Flexibility is necessary to meet varying factual situations. Specified non-exclusivity is important because, if a step or procedure is skipped as unnecessary in a given case, the whole investigation could be vulnerable if the manual describes that step as obligatory.

Depending on an employer's circumstance, it generally is prudent *not* to utilize the victim's or the perpetrator's own supervisor as one of the investigators. That supervisor could come into the situation with a pre-conceived notion about the probable outcome. The employer wants to make the investigation impervious to any claim that it was conducted by biased personnel. While a party's supervisor might be considered for inclusion on a multi-member investigation team, the better practice is that only well trained personnel from departments other than the ones involved be utilized as in-house investigators.

In selecting an in-house investigator or team, the employer should be mindful of the fact that, if litigation eventuates, the investigation's effectiveness probably will be attacked. The investigators may will have to defend to a jury their procedures and conclusions. Thus, in selecting in-house investigators, the following characteristics are important:

- Skilled in interviewing.
- Perceived as credible by both the Company and other employees
- Perceived as capable of maintaining confidentiality.
- Knowledgeable about unlawful discrimination and applicable Company policies.
- Properly trained.
- Unbiased.
- Able to prepare accurate and comprehensive interview notes
- Able to write a cogent final report

- Able to function as competent, articulate, and credible trial witnesses.

The employer, of course, has the option of using one or more external professional investigators. That option may be a good one. It deserves careful consideration. This issue is discussed further at subsection K of the following Section.

IV. **Issues to Consider.**

A. **Recognizing “Sexual Harassment.”**

Harassment because of one’s color, race, religion, national origin, age or disability/handicap is fairly easily recognized. Neither the *quid pro quo* nor the “welcomeness” concept is applicable.

Sexual harassment, on the other hand, is unique because of the “welcomeness” factor. The elements necessary to make a prima facie court case should be considered by the investigators in determining whether the perpetrator’s conduct in fact constitutes sexual harassment. In either a *quid pro quo* or a hostile environment case, the complaining party would have to establish:

- Complainant belongs to a protected class. Typically this means female, but that is no longer necessarily so. (See, Oncale v. Sundowner Offshore Services, Inc., discussed *infra*.)
- Complainant was subjected to *unwelcome* sexual harassment. The conduct must be unwelcome in the sense that the victim did not solicit or incite it, and in the sense that the victim regarded it as undesirable or offensive.

- The harassment was based on complainant's sex.
- The harassment affected a term, condition or privilege of complainant's employment. Only unwelcome sexual conduct that constitutes a term or condition of employment (express or *implied*) constitutes a violation.

In the hostile environment context (as opposed to the *quid pro quo* context), the harassment additionally must be "severe or pervasive" in nature. Specifically, it must be so severe or so pervasive as to have altered the conditions of the complainant's employment and to have created an objectively and subjectively "abusive" work environment.¹⁰ Here, the central inquiry is whether the conduct "unreasonably interferes with the individual's work performance" or creates "an intimidating, hostile, or offensive working environment." Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would not establish hostile environment sexual harassment. Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Unless the conduct is quite severe, a single incident, or isolated incidents of offensive sexual conduct or remarks, generally do not create an

¹⁰ The objective test is based on a "reasonable person" standard. (Some Circuits use, instead, a "reasonable woman" standard where the complainant is female.) The "subjective" standard is whether, factually, the conduct was actually rather than allegedly offensive to the complainant.

abusive environment. “Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.” A hostile environment claim generally requires a showing of a pattern of offensive conduct.

Note, however, that a single, *unusually severe* incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less is the need to show a repetitive series of incidents. This is particularly true when the harassment is physical. The EEOC will *presume* that the unwelcome, intentional touching of a victim’s intimate body areas is sufficiently offensive to alter the condition of her working environment and to constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim’s working environment.

The factors to examine when considering whether the subject conduct altered the victim’s conditions of employment and created an abusive work environment include, without limitation: (1) was the conduct physical or verbal, or both, (2) how frequently was it repeated, (3) was it hostile and patently offensive, (4) was the harasser a supervisor or a co-employee, (5) did others join in perpetrating the harassment, and (6) was the harassment directed at more than one individual. A judgment must be made based on these and any other relevant factors as to whether the environment was in fact *abusive* or merely

annoying. If it was merely annoying, it should be corrected, but that does not constitute the requisite “hostile” environment and no violation should be found.

B. “Reverse” Sexual Harassment.

While most sexual harassment situations involve a female victim and a male perpetrator, the theme of the movie “Disclosure” is not totally fanciful. Occasionally, a female supervisor does make unwelcome sexual advances toward a male subordinate. Be aware of that possibility and treat it with all due sincerity and importance under your policy.

C. Same Gender Sexual Harassment.

In Oncale v. Sundowner Offshore Services, Inc., 523 US 75 (1998), mentioned *supra*, the Plaintiff was a young man who signed on to work on an offshore oil drilling rig where he and the seven or eight other male employees would be without female companionship for long stretches of time. As time wore on, the more hard bitten roustabouts began making sexually oriented comments and physical gestures toward him to such an extent that he reported to his supervisor he feared he would be raped. (His own supervisor was one of his harassers.) The supervisor ignored or laughed off these reports. Oncale quit employment claiming “constructive discharge” and sued Sundowner on the theory of unlawful sexual harassment. Sundowner’s defense was that members of one sex could not sexually harass members of the same gender and that, in any event, males are not a “protected class” under Title VII. The Supreme Court

reinstated Oncale's suit, holding that Title VII did not preclude same sex discrimination and that the harassing conduct need not be motivated by actual sexual desire. If the harassment was sufficiently severe and pervasive to affect his conditions of employment and was directed at him "because of his sex," he was entitled to the protection of Title VII.¹¹

D. Sexual Favoritism.

The EEOC takes the position that promotion of a female because she engages in a consensual (welcome) sexual relationship with her supervisor is not actionable under Title VII because other female candidates for such promotional position are not treated any less favorably than are male candidates for the position. On the other hand, where the first female permits herself to be "coerced" into the sexual relationship in order to get the promotion, though not welcoming such relationship, the coercive act was unlawful and anyone who experiences a detriment by virtue of it has standing to complain that they have been discriminated against due to *quid pro quo* harassment. The EEOC further takes the position that where general sexual favoritism permeates the workplace, persons who choose not to participate and find it offensive have standing to claim hostile environment harassment.

¹¹ Note: This is not a holding which would protect a gay man from harassment because of his sexual orientation. To date, no court has held that Title VII prohibits discrimination because of one's sexual preference. See, e.g., *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327 (CA 9 - 1979).

E. Non Sexual “Sex Based” Harassment.

While its 1980 Guidelines focus on harassment of a sexual nature, the EEOC also notes that non-sexual sex-based harassment--that is, harassment not involving sexual activity or language--also can give rise to a Title VII violation if it is “sufficiently patterned or pervasive” and directed at employees because of their sex. Example: The supervisor, either male or female, who refers to all female employees as “dumb broads”.

F. Downside of an Invalid Conclusion.

If, with no investigation, or only a shoddy one, the employer discharges an accused supervisor for sexual harassment and such did not in fact occur, the employer may face litigation premised on defamation, infliction of emotional distress or various legal theories of “wrongfully discharge,” i.e., without just cause.

While there are no guaranties that a dischargee will not sue the former employer, a thorough and impartial investigation is probably the best insurance that the employer ultimately will prevail. Typically, even where a contract for a specific term is in place, an employer is held only to a “good faith belief” standard with respect to having just cause for the discharge. Courts recognize that not every employer has a trained staff of professional investigators at its beck and call. The standard is not that the employee was proven guilty “beyond a reasonable doubt” as applicable in a criminal proceeding. The “good

faith belief” standard, however, mandates that some investigation be conducted before the discharge decision is reached. Obviously, the more thorough and impartial the investigation, the more likely it is a jury would find the employer to have acted in “good faith.”

The employer still must utilize the information generated by the investigation only in a highly judicious (“need to know”) manner; otherwise colorably valid defamation, infliction of emotional distress or “humiliating discharge”¹² litigation may ensue.

G. Disciplining or Threatening to Discipline the Alleged Victim for Filing a False Claim.

Employers should recognize that sometimes, like beauty, sexual harassment is only in the eye of the beholder. While a requirement that all employees truthfully cooperate in sexual harassment investigations is recommended, that requirement is more directed at the perpetrator and the other witnesses, rather than at the victim. Additionally, many employees may not appreciate the difference between an intentionally “false” report and one whose allegations simply can not be proven. The employee filing such a report may not understand the technical definition of sexual harassment or may simply lack sufficient evidence to substantiate that it occurred. Thus, it is recommended that

¹² Ohio recognizes the tort of “humiliating discharge.” This deals not with the employer’s justification for discharging the employee, but the manner in which the discharge was effectuated. Having the dischargee paraded out in front of the rest of the workforce at high noon with all of his personal effects in hand and while in the grasp of security forces is not a good idea.

the anti-harassment policy itself *not* threaten discipline against an alleged victim for filing a false report, because such could be deemed to render the policy ineffectual due to its “chilling” effect.

If the employer, however, has other policies or rules of conduct which prohibit dishonesty and the investigators fairly conclude that the purported victim filed against the claimed harasser not only a false report, but did so with *actual malice*, then such rules properly may be invoked.

H. Retaliation.

Just like threatening to discipline a “false accuser”, the employer should proceed with extreme caution before taking any action which has the appearance of being retaliatory against an alleged victim, a vindicated perpetrator or a third party witness.

Upon initially receiving a report of sexual harassment, the employer should immediately separate the victim and the alleged perpetrator, if that is possible. Always move the alleged perpetrator as the first recourse, with a brief explanation that it is for his own good pending the outcome of the investigation. Assure him that he will receive a fair opportunity to present his defenses. If it is physically or operationally impossible to move the alleged perpetrator, consider moving the alleged victim, but only with her concurrence. If she refuses to concur, document that fact with a Memo to File and ask her to sign an acknowledgment of its accuracy. If she declines to sign, call in a witness who

then can verify such declination. Have the witness “attest” in writing that the complainant was offered, but declined, the transfer and also declined to sign the acknowledgment documentation. ***(As a shorthand reference to this process of writing up any matter, having its accuracy acknowledged by the signature of the party or witness who advised you of it, and having a third party witness verify the foregoing if the party or witness declines to sign the acknowledgment, will hereinafter be called “attestation”).***

If it is impossible to move either party, set forth in writing the conditions under which their future interactions are to occur, pending conclusion of the investigation. Give each a copy of such conditions and ask for a signature acknowledging receipt. Again, if either party declines to sign, get your “attestation” documentation by a disinterested witness.

I. Fair Credit Reporting Act.

In April of 1999, the Federal Trade Commission issued an opinion letter (*Vail*, April 5, 1999) to the effect that employers using third party investigators had to comply with the requirements of the FCRA for doing an investigative credit report. Specifically, the alleged perpetrator’s written consent, among other things, had to be obtained before the investigation could proceed. While it is suspected that most alleged perpetrators cooperated in order to clear their names, know that on January 6, 2004, President Bush signed a bill granting specific exemption from the Act’s requirements for sexual harassment

investigations being conducted by third party investigators. H. R. 2622-60 adds new § 611 to the FCRA.

J. Weingarten Rights.

It is not widely known that several years ago, under the “concerted activities for mutual aid and protection” provision of Section 7 of the NLRA, the National Labor Relations Board extended its Weingarten rights doctrine to the non-unionized segment of the workforce. This means that if you are conducting the interview of an employee which could lead to his being disciplined and he asks for the presence of a third party witness, it is an unfair labor practice to deny that request. As a practical matter, this may be rather academic as most accused supervisors seemingly prefer to keep the investigation private. Nevertheless, if an accused harasser in *either* the unionized or the non-unionized context requests having a witness present, your choices are to grant the request or proceed with the investigation without conducting that interview.

K. Use of Legal Counsel as the Investigator.

There are several issues involved in using the employer’s usual outside legal counsel as the investigator. One is a potential *practical* “conflict of interest” for the lawyer. If such attorney senses that the employer has a certain predilection on how the investigation should come out, the attorney’s independent professional judgment might be strained trying to develop evidence to justify the client’s desired outcome. There also could be a claim that such

attorney is not “impartial” since, to a degree, his income depends on satisfying the employer.

Other concerns are the attorney-client privilege and the attorney “work product” privilege. Frankly, it is believed that concerns about waiving the attorney-client or the attorney work product privilege are overblown here; after all, the investigation is being conducted to provide the employer with a liability defense. Thus, it seems an employer would want to show that the investigation was “prompt, thorough, impartial and effective.” Endeavoring to hide the investigation’s details behind the attorney-client or work product privilege seems futile at best and likely to cause juror suspicion at worst. Obviously, however, where the employer’s regular attorney agrees to conduct the investigation, the attorney should be careful to set forth legal conclusions or legal advice regarding the investigation (or its outcome) in documents separate from those pertaining to the mechanics of the investigation or its conclusions and mark the separate documents with the privilege claimed to be applicable.

The real issue in using the employer’s regular outside counsel as the investigator is that if the attorney is going to be a litigation witness, ethically he or she can’t also serve as the employer’s lawyer for the case, nor may any of their partners or associates. Thus, perhaps the best solution--if you want a lawyer to do the investigation--is to use someone other than the Company’s usual attorney for that purpose. The Company’s regular attorney, of course, may

assist in selection of the outside lawyer and may have preliminary communications with him or her on behalf of the client. Be sure to select someone knowledgeable in sex discrimination law.

V. Conducting and Documenting the Investigation.

A. Act Promptly.

Title VII doesn't specify that an employer must conduct any investigation, let alone a "prompt" one. Thus, there are no specific timeliness guidelines in the Act or regulations. One court has held that commencing the investigation within 12 hours after the report was sufficiently prompt. Another has held that deferring for 24 hours after the report was not sufficiently prompt. Probably neither case is dispositive. Rather, what constitutes a reasonably "prompt" investigation will be gauged by the existent facts. If a female employee reports to H. R. that her supervisor just tried to rape her and she fears returning to the department because then he might complete the act, a 12 hour delay could be too long, particularly if she is told: "Go back to work and we'll get back to you in a few days."

The employer typically would be given sufficient time to get its investigation "act" together, so long as it takes reasonable protective action on behalf of the victim in the meantime, such as moving the accused supervisor to another location or assuring that the victim and harasser are not left alone together at work. Protective action for the victim's benefit always should be

initiated *immediately* if there is any threat of sexual assault, physical harm or even severe humiliation. In those instances, take the protective action first and then launch the investigation as soon as practical. On the other hand, where the victim's complaint is about something like excessive "cheese cake" photos or sexually oriented graffiti that has been up in her department for months, there is substantially less urgency as to when to start the investigation.

The prudent employer will document the time when the harassment complaint is first received, when steps (if any) were taken to protect the victim and when the investigation was launched. If any reasonable delays are encountered, document what those delays were and when they were encountered. Again, the most accessible form of documentation is the ever popular "Memo to File." Having a prescribed investigative procedure that requires documenting every step of the investigation will assist in having the Memos to File admitted into evidence as business records.

B. Interviewing the Victim.

Next, interview the victim. Assure her of protection from retaliation for having made the report. It is desirable to get her statement in writing. Sometimes employees bring such statements when they come in. At other times, it may be necessary for the "intake official" to assist in preparing the statement, or to prepare it for the victim from the interview notes. In such cases,

the investigator should have the victim acknowledge in writing the statement's accuracy or, if she declines, get attestation to that fact by an impartial witness.

If the victim submits her own statement with the initial report, go over it with her and make sure it is sufficiently detailed. As in a "from scratch" interview, ask the journalist's typical six questions of *who, what, where, when, why and how?* Also use those questions to flesh out the details of the employee's previously prepared statement (if any). Proceed using typical investigative or discovery deposition type questions like: "How do you know that?"; "Who else saw that?"; "Do you have any evidence of that?"; etc.

Be sure to ask the victim if there is any *tangible* evidence that tends to corroborate the happening of an event, such as emails, notes, gifts or other remembrances from the perpetrator.

A victim's accurate written statement helps assure that you investigate all of her germane allegations but don't go off on any wild goose chases. Remember, however, that the victim may be under substantial stress at the time of her initial report. End the first interview with open ended questions like "Is there anything else you would like to (or can) tell me?" Also, always invite her to come back and supplement the statement at any time during the investigation if she thinks of additional facts.

It is imperative to ask the victim if she is familiar with the employer's anti-sexual harassment policy and when/how she learned of it. Record those facts. If there was any substantial time lag between the harassing incident(s) and the time she reported, ask her to explain the reason for that delay.

The employee's "final" statement should contain some succinct acknowledgement that it contains all of the specific incidents about which she complains. This is helpful in heading off future attacks on the investigation as incomplete or less than thorough.

Finally, always thank the alleged victim for using the policy and reaffirm the employer's commitment to protect her from retaliation. Do not promise the victim complete confidentiality. Instead, advise her that her report will be kept "as confidential as possible" but, to the extent that disclosure is necessary, it will be handled discreetly and only on a "need to know" basis. Document that you gave her those assurances and get her acknowledgement or independent attestation of them.

C. Develop an Investigation Plan.

Next, develop a specifically designed "Plan" for each investigation. This, of course, would include which potential witnesses to interview and in what order. It, naturally, will include interviewing the alleged harasser at some point. It also should include, if available, provisions for verifying (or discrediting) the victim's report independently of her own testimony or that of other witnesses,

including the perpetrator. Frequently overlooked resources are employee timecards or simply a calendar. An employee may claim that an incident occurred in a certain location on a specified date. Checking the calendar may establish that the reported date falls on a weekend and that the facility where the incident allegedly occurred was totally locked and inaccessible at that time. That doesn't necessarily mean the incident didn't happen at all, but it may indicate that either the victim's credibility or memory is shaky. The employer doesn't want to discipline an alleged perpetrator on the basis of inaccurate information. A check of the supervisor's timecards, the Company's sign-in/sign out log book, or the supervisor's travel itinerary could establish that he was not in the situs facility or, perhaps, not even in town when the incident allegedly occurred. If the independent records cast any doubt on the victim's report, give her the opportunity to explain any incongruities before concluding that the report is invalid.

The Investigation Plan also should endeavor to identify "developed" witnesses not specified by the victim. If, for example, the investigators know that either John Doe or Mary Roe are virtually always in the alleged incident's vicinity at the time it reportedly occurred, look them up and ascertain whether they were there then and whether they observed anything. It is wise for the investigator to visit the site to ascertain how it is laid out and what is visible (and audible) from where. Document the interview with John Doe or Mary Roe and get the witnesses' signed statements or get an acknowledgment of the accuracy of the

investigator's notes. Invite Doe/Roe to contact you again during the course of the investigation if they recall any additional details. Again, give all non-party witnesses assurance of protection from retaliation and get a written acknowledgment or third party attestation that the assurance was given.

D. Interviewing the Alleged Perpetrator.

If protective action for the victim has been implemented, the alleged perpetrator probably already knows that an investigation is underway. Usually, your Investigation Plan will call for him to be the next interviewee. This would give the investigators the two poles between which most of the facts will fall and sharpen their ability to seek more precise information from the other witnesses.

Sometimes there may be a reason to defer interviewing the alleged perpetrator, such as his unavailability or where there are only a few prospective corroborating witnesses. Typically, however, it is not efficient to rush out and interview 8-10 prospective other witnesses only to learn--after you finally interview the perpetrator--that he has an alibi or some other defense that requires you to re-interview all of the other witnesses in order to validate or discredit it.

Assuming the alleged perpetrator knows why he is present, assure him that only one side of the story has been heard thus far and the whole story needs to be heard before any decision can be reached. Some accused individuals are righteously indignant or even angry. Be prepared to deal with the anger, but advise the alleged perpetrator that it will not particularly help his

cause. Use the old Dragnet line: "All I want are the facts". The investigator obviously will need to give the perpetrator sufficient information so he can identify the incident in question, but it is desirable to initially use open-ended questions so he can fully present his version. For example, one might say: "A female employee has alleged that you made a sexually oriented proposition to her on an out-of-town business trip last month; tell me about that trip".

As the story unfolds, you can press for the who, what, where, when, why and how details, but try not to interrupt the perpetrator's dialogue flow to the point of distraction. You can always go back over your notes and fill in the finer points after you have heard the gist of his story.

The alleged perpetrator, too, may be under substantial stress upon being called in so, as with other witnesses, invite him to contact you later in the course of the investigation if he subsequently recalls additional details, remembers the identity of potential corroborating witnesses or finds any tangible evidence supporting his position. Remember, the investigation is not an academic "test" where the participants have a set amount of time to complete their answers. It is better to give everyone ample time to produce all the relevant evidence than to rush the investigation to conclusion by some arbitrary deadline.

Also ask the perpetrator if there is any reason the victim might have an axe to grind against him, as well as for any documentation or favorable

witnesses that might corroborate either the “axe to grind” theory or the “welcomeness” defense, if applicable.

Ask the perpetrator to provide either his written statement regarding the incident or to acknowledge the accuracy of your notes on the topic. Some investigators prefer to draft the statement for the witness from their notes in order to avoid insertion of irrelevant extraneous matters or arguments into the statement.

Whether or not used as a basis for the perpetrator’s or any witness’ statement, your “interview notes” should contain only a summary of the individual’s oral comments, not any subjective impression or observations as to that witness’ likely truthfulness, forthcoming nature or apparent evasiveness. If you need to record your subjective impressions somewhere for later review, do it in a separate “confidential” or “attorney work product” (if applicable) Memo to the File.

Tell the perpetrator that while you must interview the witnesses he identifies (as well as those identified by the victim), you will not discuss the matter with any of his non-involved co-employees and will caution each witness interviewed to keep the matter confidential. Thus, if others learn of the investigation, a possible source of their knowledge might well be the perpetrator himself. Accordingly, it would be beneficial for the perpetrator to keep confidential the fact that an investigation is being conducted.

Inform the perpetrator that he will be advised of the outcome of the investigation and the employer will inform others regarding it only on a “need to know” basis. Also tell him that, pending the investigation’s outcome, all information pertaining to the matter, including the victim’s complaint, will be kept in a separate Investigation File and will not be deposited in anyone’s personnel file.

It is recommended that you close the perpetrator’s interview by asking if he has anything else to add. Remind him again of the opportunity to submit any additional facts or evidence he recalls or comes across prior to the investigation’s close. Do not, however, commit to close the investigation by any given date but, rather, tell him it will proceed as expeditiously as possible and, if pushed, give only an estimate of the probably closure date. Tell him, if such is the case, that the investigation is just getting underway and you can’t predict when a conclusion will be reached because all potential witnesses need to be interviewed and all tangible evidence must be reviewed.

If the perpetrator declines to furnish a written statement, at least try to get a written acknowledgement that your interview notes are accurate and cover all the relevant facts he has relayed to you. Again, get attestation from an impartial witness or one of your co-investigators if the perpetrator declines.

E. Allowing the Victim a Rebuttal Opportunity.

Many enforcement agencies have the charging party (victim) tell her story first, then have the perpetrator give his “position statement”. They then share the essence of that position statement with the victim and ask her how she would “rebut” any portions she controverts. This is an appropriate procedure and fleshes out the issues between the parties directly involved. It is not necessary if the harasser simply denies that the incident occurred or states: “You have no proof of that, except her word.” Where, however, the perpetrator claims the victim did have an axe to grind or “welcomed” his advances, seeking the victim’s rebuttal may be prudent before interviewing other witnesses.

F. Interviewing the “Other Witnesses”.

Always start by giving assurance of protection against retaliation by the accused supervisor or the employer. (A general assurance of non-retaliation by anyone on behalf of the employer is adequate where, for some reason, you do not wish to reveal the identity of the accused at this early point in the investigation.) If the witness is a co-employee remind him/her of the employer’s “truthful cooperation” policy, if necessary, but avoid *coercion* of any witness. Your case could go South if, in the course of the trial, the plaintiff cross-examines that witness and he disclaims the accuracy of his prior statement on the grounds that it was coerced from him.

If the witness is an independent contractor, a vendor or some other non-employee of the employer, you can not resort to the employer's truthful cooperation policy, but you can assure the witness that the employer will appreciate the anticipated cooperation.

It is not recommended that you review in detail with the non-party witnesses each principal's version of the incident. Rather, give a brief sketch of the victim's allegations and the perpetrator's defense(s) and ask what, if anything, the witness personally observed or otherwise knows about the alleged incident. Initially, be very non-directive so as not to skew the witness' testimony in favor of either party. Again, do not be intrusive with questions about "details." After you have heard essentially the witness' full story, then go back over your notes and fill in any missing details or clarify ambiguities.

As usual, you should try to get a written statement from each witness or an acknowledgement that the interviewer's notes are accurate. Where the witness who "does not want to get involved" declines to give either a statement or an acknowledgement, document those facts and the reasons therefor, if ascertainable. (At this point attestation by an independent witness is not always necessary because the investigators themselves can testify that witness "x" related something to them, but declined to put it in writing for "y" reason.)

Also as usual, invite the witness to submit any additional details recalled or any tangible evidence located before the investigation concludes. Remember to advise any witness that it may be necessary to speak with him or her again in the event either party or any other witness asserts new or additional “facts” on which the witness may have input. Close with the typical open ended questions about whether there is anything else the witness can or would like to tell you.

G. Reaching a Decision.

Since perpetrators rarely commit harassment out in the open, reaching a conclusion may require the investigators to make a “credibility” determination as to which party is being truthful. Always scrutinize which party has something to gain by being less than truthful. (The “self-interest” test.) Also weigh the credibility of non-party witnesses as to whether they have something to gain by shading their story in favor of either the victim or the perpetrator. It is not improper to give greater weight to the testimony of any witness, including a party, who appears to be completely open and forthcoming as opposed to one who appears to be evasive or concealing.

Remember that an investigation has at least three possible outcomes: (i) unlawful harassment did occur, (ii) unlawful harassment did not occur, or (iii) the victim’s allegations could not be substantiated. This latter outcome is like the old Scottish verdict of “not proven guilty”. Simply because,

however, the only evidence a victim can produce is her own word (which the perpetrator denies), such does not necessitate a “no harassment” or “allegations could not be substantiated” outcome. In 1990 the EEOC published its Policy Guidance N.-915-050 (Attachment B) which provides its investigators with ways for resolving the “He said/She said” issue. It contains the following excerpted resolution mechanisms (reasonable inferences) that may be utilized by an employer’s investigators within the “totality of circumstances” context:

- When there is some indication of welcomeness or when the credibility of the parties is at issue, the victim’s claim will be considerably strengthened if she made a contemporaneous complaint or protest.
- A contemporaneous complaint or protest may provide persuasive evidence that the alleged sexual harassment in fact occurred; thus, it is important to develop detailed evidence regarding the circumstances and nature of such complaints or protests, whether to the harasser, higher management, co-workers or others.
- If the victim failed to complain or delayed in complaining, the investigator should ascertain why.
- Particularly when the alleged harasser may have some reason to believe that the advances would be welcome (e.g., a prior consensual relationship), it is important the victim communicated to him that the conduct was unwelcome.
- When an employee at first willingly participates in conduct of a sexual nature, but then ceases...the employee has the burden of showing that any further sexual conduct was unwelcome...the employee must have clearly notified the alleged harasser that his conduct is no longer welcome.
- When welcomeness is at issue, the investigation should determine whether the victim’s conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome [e.g., did she allow the harasser to come into to her home alone at night after the alleged harassment occurred and, if so, why?].

- In some cases the courts have considered whether the complainant welcomed the sexual conduct by acting in a sexually aggressive manner, used sexually oriented language, or solicited the sexual conduct. [The past conduct of the alleged victim, however, *must relate to the alleged harasser*, not to others.]
- A victim's account must be sufficiently detailed and internally consistent so as to be plausible and the lack of corroborative evidence, where such evidence logically should exist, would undermine the allegations.
- Testimony should be obtained from persons who observed the victim's demeanor immediately after an alleged incident of harassment--such as co-workers, a doctor or a counselor. Other employees ["developed witnesses"] should be asked if they noticed changes in the victim's behavior at work or in the alleged harasser's treatment of her.
- Evidence that other employees were sexually harassed by the same person is relevant.

Even where the above inferences have been resorted to, sometimes it is not possible to reach a definite conclusion. In that case, it is recommended the victim be advised the investigators did not find sufficient evidence to conclude that unlawful harassment in fact had been committed. The victim nevertheless should be thanked for using the procedure and for bringing the matter to management's attention. Be sure to invite her to return if any repeat of the perceived harassment or any perceived retaliation occurs.

The accused perpetrator should be advised that while there was insufficient evidence to substantiate the claim, the employer is in dead earnestness about compliance with its no harassment policy and he should consider himself duly notified of that commitment. Particularly where the accused used poor judgment by engaging in conduct that did not quite rise to the

level of unlawful sexual harassment, he should be admonished that if some future incident of sexual harassment is proven, he will have no reason to expect lenient treatment then. Also, assuming the alleged harasser is a supervisor, he should be reminded that under no circumstances may he take any action which might appear to be retaliatory against the asserted victim or other witnesses without the prior clearance of higher management.

VI. Taking Appropriate Action.

Appropriate corrective action is a two part process. First, if the victim suffered any tangible detriment because of the harassment, make her whole. For example, if she used three days of paid sick leave in order to avoid the boss when he was "coming on" to her particularly strongly, restore those paid sick leave days. If she had no paid sick leave but nevertheless took the avoidance days without pay, grant her the pay she otherwise would have earned.

The second part of the procedure is addressing the proper discipline for the harasser. Disciplining an employee for violating your anti-harassment policy is similar for disciplining him for violating any other policy. In other words, make the punishment fit the crime, depending on the seriousness of the violation, the quality of the employee's work record, and whether this is a repeat violation. Generally, the corrective action should reflect the severity of the conduct and may range from reprimand to discharge.

Some people believe, incorrectly, that discharge is the only acceptable penalty and that they must have a “zero tolerance” policy in order to protect themselves from suit. The court decisions require only that the punishment be *designed to put an end to the harassment*. Where, for example, the perpetrator sincerely--but mistakenly--believed that his sexual attention was welcomed by the victim, things like written warnings, required sensitivity training or profession counseling or even an apology to the victim may be sufficient if the employer *reasonably* believes such will put an end to the undesirable conduct. Disciplinary suspensions, probationary status, “Final Warnings” and last chance agreements also may be appropriate corrective actions short of discharge, depending on the severity of the perpetrator’s offense.

One significant difference between violating the employer’s anti-harassment policy and its “no smoking on the loading dock” policy is that harassment always involves another individual whose thoughts and feelings require consideration. Probably more than one employer has fired a perpetrator only to have the victim come in a few days later and say: “Gee, if I’d have known he was going to get fired, I wouldn’t have report it; what he did wasn’t all that bad--I didn’t want him to get fired, I only wanted him to stop” (or “I only wanted him to apologize”). If the investigators conclude that unlawful harassment did occur, it is prudent to discuss with the victim the discipline the employer contemplates before it is invoked. That does not mean that the victim gets the ultimate “say so” on what the penalty will be, but it does mean she should be

consulted as to the sufficiency of the proposed discipline. If she indicates that it is too severe, one would, of course, document that fact before proceeding to mete out some lesser penalty than originally contemplated.

A good rule of thumb is to follow your progressive discipline model, but treat the harassment as a “very serious” violation if you have some that do not mandate immediate discharge. Where sexual assault or other aggressive physical action is involved, however, apply the same rule as would apply to any other act of violence which, hopefully, is discharge for the first offense.

Also, unlike the City of Boca Raton, if you conclude the supervisor committed unlawful harassment but decide to keep him on a second chance basis, *monitor* his subsequent conduct. Check periodically with the female employees under his charge. This is simply akin to unannounced drug or alcohol screening for an employee who is allowed to return or continue to work under a Last Chance Sobriety Agreement.

Further, whether you discharge the supervisor or keep him after some lesser discipline, don’t hand him a defamation, invasion of privacy, infliction of emotional distress or other tort case against you. Share information about the investigation or its outcome only with your higher managerial employees and then only on a “need to know” basis. While your employment policies may require insertion of a record of the discipline in the perpetrator’s personnel folder, it is preferable that all documents pertaining to the investigation be kept, instead,

in a separate Investigation File to which all corporate employees other than H.R. officials are denied access, except in connection with some future major employment decision about the employee, such as consideration for a substantial promotion (or him again being accused again of sexual harassment). If documents about the investigation are deposited in the supervisor's personnel folder where other Company personnel might easily view them, the perpetrator could be stuck with an irreparable black mark for the balance of his career with the Company.

Finally, if you do anything less than discharging the perpetrator, you should always *follow up* with the victim to assure that the objectionable conduct has stopped and that she has experienced no retaliation. Do it periodically, not just once, and do it even though you have invited her to report any reoccurrence/retaliation to you. She may be being subjected to more harassment or to retaliation, but fear reporting it because the supervisor wasn't discharged for the earlier offense.

VII. Conclusion.

Conducting prompt, impartial, thorough and effective investigations, followed with appropriate disciplining of the perpetrator and periodic follow-up with the victim, is an employer's best defense to liability for unlawful harassment in its workplace.