

**SEXUAL HARASSMENT IN THE WORKPLACE:
INCLUDING CONDUCTING INVESTIGATIONS
AND LITIGATION DEVELOPMENTS**

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**SEXUAL HARASSMENT IN THE WORKPLACE:
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I. SCOPE OF ARTICLE

This article provides an overview of recent sexual harassment law to outline the state of sexual harassment law as it currently exists. This article will touch upon, but will not cover, the issue of damages since that is more appropriately covered by other sections.

II. ELEMENTS OF A SEXUAL HARASSMENT CLAIM

The elements of a sexual harassment claim are as follows:

- 1) the harassment was unwelcome,
- 2) the harassment was based on sex,
- 3) the harassment affected a term, condition, or privilege of employment; and
- 4) liability imputable to the employer.

Mota v. The University of Texas Houston Health Science Center, 261 F.3d 512, 523 (5th Cir. 2001).

A. UNWELCOME SEXUAL HARASSMENT

One would suspect that defining the contours of what is unwelcome would be self-evident. Usually this is the case, but certain situations involve not only factual disputes regarding whether the conduct was unwelcome, but legal disputes, as well.

1. Quid Pro Quo or Tangible Job Detriment Sexual Harassment.

For example, sometimes a client has engaged in a sexual relationship with the harasser, but at some point decides that it must end and notifies the harasser that she no longer wishes to engage in such sexual conduct.

Of course, in *Meritor*, the United States Supreme Court held that a claim of sexual harassment may arise where a female subordinate employee agrees to engage in an unwanted sexual relationship in order to keep her job. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 68-69 (1986). The Court in *Meritor* rejected the employer's defense that the sexual relationship was voluntary, focusing instead on whether the advances were unwelcome. *Id.*

Most courts hold that an employee who communicates to her employer that the relationship is over, has the right, like any other worker, to reject the employer's sexual advances without threat of punishment. See *Richard v. Ledford*, 767 F. Supp. 1425, 1428 (E.D. Tenn. 1990). Other courts find that there is no claim under Title VII for failing to continue a sexual relationship finding that the reason for the employer's treatment of the plaintiff was because the plaintiff was a former lover and not because of her gender. See *Kepler v. Hensdale Township High School District*, 715 F. Supp. 862, 869 (N.D. Ill. 1989).

2. Hostile Work Environment Sexual Harassment.

Simply because there is consensual conduct between the plaintiff and the harasser, it does not necessarily follow that the plaintiff voluntarily chose to submit to the hostile work environment or that the plaintiff invited the hostile work environment. *Pipkins v. City of Temple Terrace, Florida*, 267 F.3d 1197 (11th Cir. 2001). In hostile work environment cases, welcome sexual harassment is an oxymoron. *Carr v. Allison Gas Turbine*, 32 F.3d 1007, 1008 (7th Cir. 1994). Obviously, if a plaintiff has proved that she was subjected to an abusive and hostile work environment because of her sex, this can only be because such harassment was unwelcome.

Nonetheless, there is some uncertainty as to the standard of conduct in which the plaintiff must engage, in order for the conduct to be deemed welcome. Some courts have held that in order for the conduct at issue to be welcome, the plaintiff must have enjoyed or appeared to have enjoyed the harasser's treatment. *Reid v. Shepard*, 939 F.2d 484 (7th Cir. 1991); *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir. 2002) (Plaintiff's alleged statements regarding her sexual habits were not probative as to the welcomeness of any harassing conduct by her coworkers). Other courts suggest that the fact that the plaintiff participated in the general office environment banter does not mean that the plaintiff invited the hostile and abusive work environment. *Kimzey v. Walmart Stores, Inc.*, 907 F. Supp. 1306, 1309 (D. Mo. 1995), *aff'd in relevant part*, 107 F.3d 568 (8th Cir. 1997) (rejecting defendant's claim that plaintiff's use of crude language showed that the harassment was welcome); see also *Smith v. Norwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1414 (10th Cir. 1997) (the

fact that plaintiff engaged in casual joking in the office did not negate finding that supervisor subjected female account representatives to severe and pervasive sexual harassment).

Finally, the fact that there was a delay between the time the harassment began and the time a complaint was made is not necessarily evidence of welcomeness. *Townsend v. Indiana University*, 995 F.2d 691, 693 (7th Cir. 1993) (a few victims of sexual harassment make a contemporaneous complaint, particularly if the harassment occurs in an occupation traditionally dominated by members of the opposite sex); *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 560 (7th Cir. 1992).

B. HARASSMENT BASED ON SEX

The Supreme Court and the Fifth Circuit have consistently confirmed that sexual harassment is not about harassment that merely has a sexual content. Rather, it is about harassment because of gender. Lawyers sometimes fall into the trap of thinking that any sexual conduct or remark constitutes sexual harassment. However, sexual harassment is actionable only to the extent that it constitutes discrimination because of gender. If the conduct at issue was not targeted towards a person because of his or her gender, or if the harassment does not tend to undermine the competency of that gender or demean them, it may not be unlawful sexual harassment at all. See *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259-61 (1st Cir. 1999); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498 (6th Cir. 2001) (different experiences of male and female employees established that the employees who were being grabbed or poked in the genitals received this treatment in a discriminatory manner because of their male gender).

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998), established that same-sex sexual harassment is actionable under Title VII. In doing so, the Court in *Oncale* made important comments regarding the underlying nature of sexual harassment.

Oncale explains that Title VII was not intended to be a general civility code for the workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). As the Court stated:

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 the members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

Id. at 1002 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993)). Further:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involved explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.

Id.

Along those same lines, the Fifth Circuit recently examined the underpinnings of sexual harassment law in *Butler v. Ysleta Independent School District*, 161 F.3d 263 (1998). In *Butler*, the court noted:

Contrary to the children's rhyme, all insults, like sticks and stones, can hurt, but this does not mean that all insults are tortuous . . . the core component of [hostile work environment] harassment is conduct designed to undermine a woman's competence.

161 F.3d at 270, (citing Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1769 (1998)). In fact, the *Butler* court further noted:

That some of the letters plaintiffs received contained sexual content is irrelevant. To be sure, sexualized comments or pictures can undermine competence; for example, a cartoon suggesting that women are incapable of teaching on account of their sex might undermine the ability of women to teach. A plaintiff, however, must show that implicit or explicit in the sexual content is the message that plaintiff is incompetent because of her sex, and the plaintiffs cannot draw such a connection here.

Id. Accordingly, the court held that the plaintiffs did not show actionable sexual harassment. *Id.*; see also *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d. 958 (8th Cir.

1999) (profanity directed at both men and women fails to establish harassment because of sex).

Likewise, it is important to note that sexual harassment does not necessarily involve sexual conduct. As the Court stated in *Oncale*:

But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex specific terms and derogatory terms by another woman as to make clear that the harasser is motivated by general hostilities to the presence of women in the workplace.

Oncale, 523 U.S. at 80; see also *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (sexual harassment need not be overtly sexual or sexually explicit to be actionable; if harassing behavior is directed at women and motivated by anti-female animus, then may it constitute discrimination based upon sex under Title VII).

In *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999), for example, the plaintiff claimed that a co-worker assaulted (but not sexually) women, and not men. The defendant argued that, because the assault at issue was not sexual in nature and happened only once to the plaintiff, it could not be deemed severe or pervasive enough to constitute sexual harassment. The Seventh Circuit rejected this argument, citing *Oncale*, and held that actionable conduct need not be motivated by sexual desire. The court noted that because there was evidence that the harasser targeted women for assaults, and because the assault at issue was serious (causing wrist damage that required surgery), the harassment was because of sex and severe. *Id.* at 534; see also *Leopold v. Baccarat, Inc.*, 174 F.3d 261, 269 n. 8 (2d Cir. 1999) (jury could infer that comment by male supervisor that he wanted to hire young and sexy workers referred to women only).

The language in *Oncale*, of course, is especially important to keep in mind in same-sex sexual harassment cases because it helps to distinguish between horseplay, even of a sexual nature, among members of the same sex, from harassment motivated by gender. The bottom line, according to the Court, is that the plaintiff must show that the conduct actually constituted *discrimination* because of sex. 523 U.S. 80. Compare *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001) (Plaintiff's claim that he was discriminated against because of his sexual orientation failed to allege that harassers were motivated

by sexual desire, or that they possessed hostility to the presence of men in the workplace, or that plaintiff failed to comply with societal stereotypes of how men ought to behave or that as a man he was treated differently than female co-workers); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001) (verbal abuse directed at plaintiff was based on the perception that he was effeminate and, therefore occurred because of sex, because plaintiff failed to conform to a male stereotype).

It is important to note that harassment or discrimination because of sexual orientation is not unlawful under Title VII. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 243 F. 3d 1206, 1208 (9th Cir. 2001) (finding that the Supreme Court in *Oncale* “simply rejected the Fifth Circuit’s holding that same-sex harassment could never be actionable under Title VII,” before the Appellate Court determined that discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260-61 (1st Cir. 1999). However, cast in another way, harassment targeted at male homosexuals might be unlawful if the harassment did not exist against similarly situated females. *Id.* In a same-sex harassment case, the Supreme Court in *Oncale* noted that harassment committed by someone of the same gender could be deemed sex-based if there was 1) credible evidence that the harasser is a homosexual, or 2) proof that the plaintiff was harassed in such sex-specific and derogatory terms so as to reveal an animus against persons of the plaintiff’s sex. *Oncale*, 523 U.S. at 80; *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999). Accordingly, the Sixth Circuit in *Yeary v. Goodwill Industries-Knoxville*, 107 F.3d 443 (6th Cir. 1997), upheld a same sex harassment claim where the harasser found the victim sexually attractive.

Where there could be any question that the harassment was because of sex, it is important to establish the gender-based nature of the harassment in discovery. Typically, this would involve discovery that is common in all discrimination cases. This proof can be particularly important where some of the evidence of harassment appears, in isolation, sex-neutral. With proof of anti-female animus, for example, a factfinder may infer that other conduct was similarly motivated by such animus. See *O’Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999); *Carter v. Chrysler Corp.*, 173 F.3d 693, 700-01 (8th Cir. 1999).

The following may constitute proof that the harassment was based on sex:

- 1) proof that the conduct was accompanied by sexist epithets or slurs (just as in a racial harassment or discrimination case plaintiff might

provide evidence of racial slurs). See *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999); *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999); see also *Carter v. Chrysler Corp.*, 173 F.3d 693, 700-01 (8th Cir. 1999) (gender based insults give rise to inference of discrimination based upon sex).¹

- 2) evidence of disparate treatment, or evidence of discrepancies in how the alleged harasser treats members of each sex in a mixed-sex workplace. *Smith*, 189 F.3d at 533 (citing *Oncale*, 523 U.S. at 81); see also *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1159 (8th Cir. 1999) (testimony that harasser did not treat men the way plaintiff was treated supports inference that conduct was because of sex); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1008-09 (7th Cir. 1999) (most direct route of demonstrating that harassment is because of sex is to show that men and women were treated differently at the workplace).
- 3) evidence that others of the same sex were subjected to hostile work environment. See *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 109-111 (3d Cir. 1999) (evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory).

C. HARASSMENT THAT ALTERS A TERM, CONDITION OR PRIVILEGE OF EMPLOYMENT

We know from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), that the harassment does not have to cause an employee to have a nervous breakdown before it affects a term or condition of employment. The question remains however: how serious must the harassment be before it becomes actionable?

1. Factors in determining whether hostile work environment alters a term or condition of employment.

Under *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), in order to demonstrate a claim of hostile work environment sexual harassment, plaintiff must show that the work place was permeated with discriminatory intimidation,

¹ But keep in mind that proof of slurs alone is frequently held insufficiently severe or pervasive enough to alter a term, condition, or privilege of employment unless constant in nature. See *infra.*; see also *Williams v. County of Westchester*, 171 F.3d 98 (2d Cir. 1999).

ridicule, insult sufficiently severe or pervasive enough to alter the conditions of the victim's employment and created an abusive working environment. Accordingly, in determining whether or not the harassment is sufficiently severe to alter a term or condition of employment, the court should consider the following:

- 1) The frequency of the harassment,
- 2) its severity,
- 3) whether the conduct is physically threatening or humiliating or a mere offensive utterance, and
- 4) whether the conduct unreasonably interferes with the employee's work performance.

Harris, 510 U.S. at 23; *Mota v. University of Texas*, 261 F.3d 512, 523-24 (5th Cir. 2001).

Of course, as the Court in *Harris* held, although psychological harm should be taken into account, sexual harassment comes into play before a nervous breakdown, and proof of such injury is not necessary to prevail in a sexual harassment claim. *Id.* Nonetheless, 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. *Id.* at 21. Accordingly, simple teasing, offhand comments, and isolated instances (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Clark County School District v. Breedon*, 121 S. Ct. 1508, 1510 (2001) (single statement insufficient); *Oncale*, 523 U.S. at 80; *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Title VII does not prohibit the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender related jokes, and occasional teasing. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The harassment must objectively and subjectively alter a term or condition of employment. In determining the objective standard, the harassment should be viewed from the point of view of a reasonable person in the plaintiff's position. See *Harris*, 510 U.S. at 22; *Price v. Dolphin Services, Inc.*, 2000 WL 1789962 (E.D. La. Dec. 5, 2000) (objective severity of harassment must be viewed from the perspective of a reasonable person and requires consideration of the social context). However, where an employee has not alleged any physical conduct that made her feel threatened and she refuses the employer's offer of

reassignment, the Fifth Circuit has found that a harasser's conduct, while unacceptable and rude, fell short of creating an abusive environment. See *Cain v. Blackwell*, 246 F. 3d 758, 760 (5th Cir. 2001).

Second, if the victim does not subjectively believe the environment to be abusive or hostile, then the conduct obviously has not actually altered the conditions of the plaintiff's employment, and therefore there is no Title VII violation. *Harris*, 510 U.S. at 21-22. As one might imagine, this subjective element and the issue of unwelcomeness may in fact overlap considerably in certain cases.

Some courts tend to emphasize the effect the harassment had on plaintiff's job. See, e.g., *Gonzalez v. Sea Mar*, 99 F. Supp. 2d 753 (E.D. La. 2000) (comments regarding plaintiff's pregnancy did not create a hostile work environment; no evidence that harasser's conduct impacted plaintiff's work); *Pfeil v. Intercom Telecommunications*, 90 F. Supp. 2d 742 (N.D. Tex. 2000) (flirtatious comments not so extreme or severe to prevent the plaintiff from succeeding in the workplace or destroying her opportunity to succeed in the workplace).

Here, the proper discovery can help prove if the harassment altered a term or condition of employment. One court indicated the following questions would help resolve the issue:

- 1) Did the harassment change the nature of plaintiff's job?
- 2) Did the harassment change how plaintiff felt about her job?
- 3) Did the harassment interfere with plaintiff's job performance or make it more difficult to do her job?
- 4) Did the harassment change the way people treated her on the job?

Holbrook v. Reno, 196 F.3d 255, 262-63 (D.C. Cir. 1999).

For example, the Fifth Circuit noted that harassment altered the terms or conditions of employment when it was constant and caused co-workers to ostracize and make fun of the plaintiff. *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606 (5th Cir. 1999).

2. Severity or pervasiveness of harassment.

Other courts focus on whether the harassment was severe or pervasive.² One court has noted that, “there is no minimum number of incidents required to establish a hostile work environment,” as even one act of harassment will suffice if it is egregious. *Worth v. Tyler II, Co.*, 276 F.3d 249, 268 (7th Cir. 2001) (direct contact with an intimate part body part constitutes one of the most severe forms of sexual harassment). For a good summary of the various cases on both sides of the issue, see the majority opinion (citing cases finding for the employer) and the dissent (citing opinions holding for the plaintiff) in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999).

In *Shepherd v. Comptroller of Public Accounts of Texas*, 168 F.3d 871 (5th Cir. 1999), the Fifth Circuit revisited the issue of whether harassing conduct was sufficiently severe or pervasive to alter a term condition or privilege of employment under Title VII. In *Shepherd*, a co-worker on one occasion stood in front of Plaintiff’s desk and said, “Your elbows are the same color as your nipples.” The harasser also stated to the plaintiff that she had big thighs and simulated looking under her dress. Further, plaintiff claimed that the harasser stood over her desk on several occasions and attempted to look down her clothing. On other occasions, the harasser touched the plaintiff’s arm and rubbed one of his hands from her shoulder to her wrist. On two other occasions, the harasser patted his lap and told the plaintiff, “Here’s your seat.” The harasser never propositioned her, asked her out on a date, or suggested that he would like to sleep with her. The touching stopped when the harasser was reassigned to a different agency. The plaintiff confirmed that other than the above instances, she engaged in friendly discussions with the harasser on almost a daily basis.

The court in *Shepherd* held that the conduct outlined above was insufficient to constitute an alteration of the terms and conditions of Plaintiff’s employment. The court relegated such conduct to boorish and offensive conduct that was not simple teasing, off-hand comments and isolated incidences. Finding that the comments were not severe, the court found that the comments were mere utterances of epithets that engendered offensive feelings and were too tepid to amount to actionable harassment. *Id.* at 874.

The court emphasized that none of the actions physically threatened the plaintiff. Furthermore, the conduct did not unreasonably interfere with plaintiff’s performance or undermine her workplace competency. *Id.* Furthermore, there

² As one court has noted, the Supreme Court has repeatedly referred to conduct as being “severe **or** pervasive,” using the disjunctive, as a test for whether the conduct at issue alters the terms and conditions of the employment relationship. *Smith*, 189 F.3d at 533.

was not evidence of an atmosphere of sexual inequality in the office. *Id.* at 875. Accordingly, the Fifth Circuit affirmed summary judgment for the employer because the harassment was not sufficient to affect a term condition or privilege of employment. *Id.*

3. Vulgar Language

When the allegations concern mainly vulgar language without physical contact, courts consistently hold that the language must be fairly frequent and regular to be actionable. Compare *Frapella-Crosby v. Horizon Healthcare*, 97 F.3d 803 (5th Cir. 1996) (supervisor inquired about plaintiff's sexual activity or made offensive sexual comments two to three times a week, sometimes in front of co-workers; court affirmed the district court's holding that such conduct created a hostile work environment), with *DeAngelis v. El Paso Mun. Police Officer's Ass'n*, 51 F.3d 591, 595-96 (5th Cir. 1995) (four printed derogatory references to the plaintiff at irregular intervals in 2-1/2 years held not sufficiently severe and pervasive to create a hostile work environment); see also *Hoffmann-La Roche, Inc. v. Zeltwanger*, 2002 W.L. 42881 (Tex.App.–Corpus Christi 2002) (Plaintiff's supervisor continually told dirty jokes, talked about topless dancers, talked about the girls he "screwed" in college, made references to his "ding-dong" and about how he whipped it out when he was in school, and went into explicit details about sexual encounters, which amounted to a hostile work environment); *Green v. Industrial Specialty Contractors, Inc.*, 1 S.W.3d 126 (Tex.App. - Houston [1st Dist.] 1999, no pet.) (comments directed at plaintiff, and four other comments not directed at her to which she was privy, over a six-month period did not amount to a hostile work environment).

Numerous courts, including the Fifth Circuit, have confirmed that whether the environment is hostile or abusive is determined by looking at all the circumstances. *Shepherd v. Comptroller of Public Accounts of Texas*, 168 F.3d 871, 874 (5th Cir. 1999); *Conto v. Concord Hospital, Inc.* 265 F.3d 79, 81 (1st Cir. 2001) (determination necessarily entailed a fact-specific assessment of all the attendant circumstances); *Carter v. Chrysler Corp.*, 173 F.3d 693, 207 (8th Cir. 1999) (the conduct must be looked at as a whole); *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997) (a work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a discrete series of incidents); *Jackson v. Quanex Corp.*, 191 F.3d 647, 659 (6th Cir. 1999) (the district court abandoned its responsibility to consider all of the circumstances, facts, which in this case could have led reasonable jurors to conclude that Jackson was a victim of a racially hostile work environment); *Williams v. General Motors Corp.*, 187 F.3d 553, 562 (6th Cir.

1999) (the court must consider the totality of circumstances in determining whether an environment is hostile or abusive).

Accordingly, proof of harassment directed at others of the plaintiff's gender is relevant to demonstrate an abusive or hostile work environment. See *Jackson v. Quanex Corp.*, 191 F.3d 647, 659-662 (court has deemed probative remarks that demeaned women generally while not demeaning any one woman in particular); *Carter v. Chrysler Corp.*, 173 F.3d at 701, n. 7 (8th Cir. 1999) (that plaintiff learned of abusive graffiti secondhand does not preclude its effect on the hostile work environment; this evidence is still relevant to whether plaintiff reasonably perceived conduct to be abusive); *Hurley v. Atlantic City Police Department*, 174 F.3d at 110 (evidence that women other than plaintiff were subjected to hostile work environment deemed relevant to demonstrating that abusive work environment existed).

4. Blue Collar Work Environments

Also, while some courts have suggested that a higher threshold of conduct is necessary for certain blue collar environments, other courts have rejected this notion. See *Williams v. General Motors Corp.*, 187 F.3d at 564. As the court in *Williams* noted, longstanding or traditional hostility toward women should not excuse hostile work environment harassment. As the court stated:

We do not believe that a woman who chooses to work in the male dominated trades relinquishes her right to be free from sexual harassment; indeed we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment.

Williams, 187 F.3d at 564.

However, in extraordinarily rare situations some harassment might be a byproduct of the job. In *Cain v. Blackwell*, 246 F.3d 758 (5th Cir. 2001), for example, the plaintiff, a nursing home worker, complained that she was subjected of numerous sexual comments and advances from an elderly patient with Alzheimer's and Parkinson's diseases. Noting that the plaintiff was not threatened or subjected to physical conduct, the court held that such "unacceptable but pitiable conduct" "in this context" and "given the circumstances" could not unreasonably interfere with plaintiff's work or create an abusive work environment. *Id.* at 760-61.

5. Fact issue for the jury

Finally, counsel should note that generally whether harassing behavior was sufficient to create hostile work environment is intensely a fact based issue. *Curry v. District of Columbia*, 195 F.3d 654, 665 n. 3 (D.C. Cir. 1999); *Howard v. Burns Bros.*, 149 F.3d 835, 840 (8th Cir. 1998); *Beard v. Flying J., Inc.*, 266 F.3d 792, 798 (8th Cir. 2001).

D. EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT

The United States Supreme Court recently expanded liability for supervisory harassment in two important sexual harassment cases: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

1. *Faragher v. City of Boca Raton*.

In *Faragher*, the plaintiff alleged that her supervisors had subjected her to offensive touching and sexual comments. Plaintiff alleged that two male supervisors created a sexually hostile atmosphere by touching female employees, making demeaning references to women, and propositioning female lifeguards for sexual favors. Plaintiff and other female employees spoke to a third supervisor (outside of plaintiff's reporting chain) about the other supervisors' behavior. That third supervisor, however, did not report the complaints to any city official. Two months before plaintiff resigned in June 1990, a former lifeguard wrote to the city's personnel director complaining that the two supervisors had been harassing female lifeguards. The city investigated the complaint and ultimately reprimanded the two men for improper behavior. After plaintiff resigned, she sued both supervisors and the city for sexual harassment. Significantly, the city never circulated its sexual harassment policy to its employees, including the lifeguards working at the beach.

In *Faragher*, the Court held that because sexual harassment by a supervisor is made possible by the abuse of the supervisor's authority, under principles of agency, the employer should be vicariously liable for the supervisor's sexual harassment. *Id.* at 801-808. Accordingly, since the plaintiff's sexual harassment in *Faragher* was at the hands of a supervisor, the employer was held vicariously liable for that harassment. The Court also adopted an affirmative defense for the employer comprised of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexual harassment; and (2) that the employee unreasonably failed to take

advantage of any preventive or corrective opportunities provided by the employer. *Id.* at 807.

The Court in *Faragher* noted that the employer in this case would appear to have no prospect of demonstrating the affirmative defense since the district court found that the city entirely failed to disseminate its policy against sexual harassment. *Id.* The Supreme Court therefore reversed the judgment of the Eleventh Circuit Court of Appeals and reinstated the judgment of the district court in favor of the plaintiff. *Id.* at 810-811.

2. *Burlington Industries v. Ellerth.*

In *Ellerth*, the plaintiff similarly alleged that her supervisor had made sexually offensive comments toward her. Here, however, Ellerth's supervisor supposedly threatened to deny Ellerth tangible job benefits if she did not succumb to his advances. On one occasion, the supervisor told Ellerth to "loosen up" and that he "could make [her] life very hard or very easy at Burlington." The supervisor, however, did not carry out the threats and Ellerth did not lose any tangible job benefits. The supervisor even gave her a promotion, but qualified the promotion announcement by telling Ellerth that "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." Ellerth finally quit her job, but never told anyone in authority about the alleged harassment until three weeks after leaving Burlington. She then sued the company for engaging in sexual harassment and forcing her constructive discharge.

The difficulty here was in determining the appropriate standard of liability for the company because even though the threats that Ellerth's supervisor was making had all the markings of *quid pro quo* sexual harassment, the supervisor in fact took no action against the plaintiff. The Supreme Court therefore quickly dismissed the label of *quid pro quo* as being of limited utility. *Ellerth*, 524 U.S. at 751. The Court stated that because no tangible employment action had been taken against plaintiff, the theory of liability was more appropriately defined under a hostile work environment sexual harassment theory. Similar to its holding in *Ellerth*, the Court announced that if an employee is subjected to sexual harassment by a supervisor that does not result in a tangible employment action, the employer is vicariously liable. However, the employer is entitled to raise an affirmative defense that the employer exercised reasonable care to prevent and remedy the sexual harassment and that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.* at 2270.

3. The Ellerth/Faragher standard of Employer Liability.

Analyzing these cases together, the Supreme Court developed a new liability standard in supervisor sexual harassment cases. The Court concluded that when a supervisor has taken a tangible employment action, namely, the classic *quid pro quo* case, the employer is strictly liable. Absent any tangible employment action, the employer is subject to liability for the supervisor's harassing conduct, but the employer can rebut the liability presumption with an affirmative defense. This defense is in large part based on the existence and effectiveness of an employer's sexual harassment prevention system, including its policies, procedures, and employee training programs. These cases do not modify the "negligence" liability standard in nonsupervisory, coworker sexual harassment cases -- the plaintiff must still prove that the employer knew or should have known of the harassment and failed to make prompt remedial action.

III. EFFECT OF ELLERTH AND FARAGHER

Since the Supreme Court's pronouncement in *Ellerth* and *Faragher*, the standards for employer liability vary depending on who the harasser is and what type of harassment is alleged. For a Fifth Circuit roadmap of the test, see *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000).

A. TANGIBLE JOB DETRIMENT (QUID PRO QUO) HARASSMENT

1. Automatic Liability.

If the Plaintiff has alleged that she has suffered a tangible job detriment as a result of the sexual harassment, the employer is automatically liable for the harassment. This would be analogous, for example, to a typical Title VII case, in which it was alleged that the employer discriminated against the plaintiff. It does not matter who did the discriminating, as long as the plaintiff suffered a tangible job detriment. For example, it has never been questioned that if an employee gets terminated because of her race, the employer is automatically liable. Similarly, when the Plaintiff in a sexual harassment case suffers tangible job detriment, the employer is likewise liable.

2. Definition of Tangible Job Detriment.

The real issue then, is what constitutes a tangible job detriment? Here, *Ellerth* provides substantial guidance:

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. 742, 761 (1998). In other words, a tangible employment action in most cases inflicts direct economic harm and must involve an official act by the company. *Ellerth*, 524 U.S. at 760; *Mota v. University of Texas*, 261 F.3d 512, 520 (5th Cir. 2001). As *Ellerth* indicates, typically a tangible job detriment must be an action that a supervisor or some other person acting with the authority of the company could take. *Id.* at 2269. Obviously, such decisions as hiring, firing, failure to promote, and decisions involving significant changes in pay or benefits, would be considered tangible job employment actions. Such actions, however, must “have more than a ‘mere tangential effect on a possible future ultimate employment decision.’” *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 191 (5th Cir. 2001); *Mota v. University of Texas*, 261 F.3d 512, 519 (5th Cir. 2001).

However, with respect to reassignment with significantly different responsibilities, as the court stated, this is less than clear. As the Fifth Circuit has stated, “employment actions are not adverse where pay, benefits, and level of responsibility remain the same.” *Watts v. Kroger Co.*, 170 F.3d 505, 512 (5th Cir. 1999). Job transfers are common, and it is often a point of dispute between employer and employee as to whether the transfer was a favorable or unfavorable one and, likewise, whether the reassignment involved significantly different responsibilities. While most of the time a tangible job detriment inflicts direct economic harm on the plaintiff, the Court noted that a job transfer often does not. While tangible job detriment should be easy to show where the pay or benefits of the plaintiff is affected, the issue about job transfer is extremely unclear. Compare, *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001) (evidence insufficient to establish that plaintiff suffered an adverse employment action when transferred from a unit considered prestigious and desirable to another unit on the police force where the transfer involved no loss in pay or benefits) and *Hunt v. Rapides Healthcare System, Inc., LLC*, 2001 WL 1650961 (5th Cir. 2001) (transfer to night shift with same pay and benefits not a tangible employment action), with *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992) (held that a reasonable trier of fact could conclude that the transfer of two sheriff's deputies from duty in the law enforcement section of the sheriff's office to duty as jail guards in the detention center was an adverse employment action) and *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir. 1999) (transfer deemed adverse employment action).

According to the Fifth Circuit, changing the plaintiff's work schedule and asking the plaintiff to perform tasks she had never been asked to perform before, are not tangible employment actions. *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999). As the court noted, changing the employee's work schedule does not change the employee's employment status. *Id.* Similarly, expanding job duties of the plaintiff (who worked as a produce clerk in a grocery store) to include mopping, cleaning the chrome in the produce department, and checking with her supervisor before she took breaks caused no change in plaintiff's employment status. *Id.*; see also *Price v. Danka Corp.*, 2000 WL 274276 (N.D. Tex. 2000) (stating that the Fifth circuit defines adverse employment actions as ultimate employment decisions relating to hiring, granting leave, discharging, promoting, and compensating and does not include such tangential actions as disciplinary filings, supervisor's reprimands, or even poor performance by the employee -- anything which might jeopardize employment in the future).

The Fifth Circuit has recently emphasized the nature of economic harm present in a tangible employment action finding that discontinuation of \$2500 stipend, as well as denial of paid and unpaid leave, all qualified as adverse employment actions. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 522 (5th Cir. 2001). See also *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 193 (5th Cir. 2001) (denial of \$57 per month pay increase, to employee with a salary of \$20,924.97, constituted an adverse employment action).

Other courts have similarly noted that what may change the employee's status are changes that significantly affect plaintiff's ability to earn income. For example, in *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 152-53 (3d Cir. 1999), the court held that the following were tangible job detriments because each significantly affected the plaintiff's ability to earn her pay: removal of a secretary, forcing plaintiff to vacate her office, and files vital to plaintiff's work that turned up missing under suspicious circumstances. Accordingly, it may be important to analyze whether there is any potential future economic impact to the plaintiff that would result from the employer's actions. I would argue that where a plaintiff has been transferred, and the potential for future commissions, bonuses, or general advancement within the company has been affected, for example, then a tangible employment action has occurred.

3. Constructive Discharge.

Interestingly, courts seem divided on whether constructive discharge is a tangible job detriment rendering the employer automatically liable. A few

courts have held, based upon *Ellerth*, that constructive discharge is not a tangible job detriment. *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 294-95 (2nd Cir. 1999); see also *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (applying requirement that plaintiff give employer opportunity to resolve underlying hostile environment before holding employer liable for constructive discharge); *Brown v. Dr. Pepper/Seven Up, Inc.* 2000 WL 370669 (N.D. Tex. 2000) (constructive discharge is inapplicable where plaintiff is demoted to vice president of a department and when such transfer is not career ending). But see *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456 (Tex. App. - Austin 2000, no pet.) (plaintiff was constructively discharged when she was not given a requested transfer from the reach of her harassing supervisor and because the constructive discharge was a tangible employment action, the *Ellerth* affirmative defense was not available); *Cherry v. Menard*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000) (constructive discharge is a tangible employment action under *Ellerth* as it has precisely the same sort of significant change in employment status and inflicts precisely the same sort of "economic harm" as any other firing). Another court held that where constructive discharge was based in part on a tangible employment action (removal of plaintiff's office and secretary), the constructive discharge then becomes a tangible employment action as well. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999).

B. HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

1. Supervisory Sexual Harassment

a. Automatic Vicarious Liability.

If the harasser is a supervisor with immediate authority over the employee or higher, the employer is vicariously liable for the hostile work environment sexual harassment suffered by the plaintiff. This vicarious liability theory is supplemental to an employer's duty to reasonably prevent sexual harassment occurring to its employees. However, as set forth by *Ellerth* and *Faragher*, it is no doubt easier to obtain liability against the employer on this theory than it is on a negligence theory, and for this reason, *Ellerth* and *Faragher* were significant victories for plaintiffs. According to the Supreme Court in *Ellerth* and *Faragher*, sexual harassment on the part of the plaintiff's supervisor or above renders the employer automatically liable. See also *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (employee with immediate or successively higher authority over the plaintiff renders employer automatically liable under *Ellerth* and *Faragher*). However, the employer has a two-pronged affirmative defense available to it.

b. Employer's Two Prong Affirmative Defense.

Where the supervisory sexual harassment did not result in a tangible job detriment to the plaintiff, the Supreme Court provided employers with a significant two-prong affirmative defense. Under this defense, the employer must prove:

- 1) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
- 2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer or to avoid harm otherwise.

It is the defendant employer's burden to both plead and prove (by a preponderance of the evidence) both elements of this affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-808. However, the plaintiff's attorney will attempt to rebut the elements of the employer's two-pronged affirmative defense.

- (1) Employer's claim that it had an adequate policy against sexual harassment.

Normally, proof that an employer (1) has an *effective* policy against sexual harassment, and (2) endeavors to investigate and remedy sexual harassment, will be sufficient to meet the first element of the affirmative defense. *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 295 (2d Cir. 1999); see also *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (existence of anti-harassment policy and no evidence that it was defective or dysfunctional strongly indicates that employer exercised reasonable care to prevent and correct sexual harassment). Plaintiff's counsel may focus on the defects in an employer's sexual harassment policy and the timeliness and sufficiency of the employer's actions.

- (a) The effectiveness of the employer's sexual harassment policy.

At least one court has held that the mere existence of the policy is not enough. See *Conto v. Concord Hospital*, 2000 WL 1513798 (D.N.H. 2000) (the existence of a written anti-harassment policy does not indicate its effectiveness and fails to meet the first prong of the *Ellerth* affirmative defense). See also, *Kennedy v. Wal-Mart Stores, Inc.*, 2001 WL 876729 (10th Cir. 2001) (employer's

“zero tolerance” policy towards sexual harassment was insufficient where employer failed to take reasonable care in implementing the policy).

If an employer has a sexual harassment policy that requires an employee to complain to a person who is inaccessible, then the courts will consider the policy to be ineffective. See, e.g., *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1999) (holding that complaint policy was deficient where the policy allowed employees to bypass the supervisor and complain to the director of personnel services, but the director was inaccessible due to hours of duty and location in a separate facility). Also, an employer cannot satisfy the first element of an affirmative defense if its management officials discourage use of sexual harassment complaint procedures. *Smith v. First Union National Bank*, 2000 Lexis U.S. App. 683 (4th Cir. 2000).

For example, in *Williams v. Spartan Communications*, 210 F.3d 364 (4th Cir. 2000), the court reversed summary judgment on employee's hostile environment claim because the employer failed the first prong of its affirmative defense. While plaintiff admitted that she knew of defendant's anti-harassment policy, attended a meeting on the policy and employer forced harasser to resign as soon as it learned of plaintiff's allegations, the court stated that a prompt response to complaints of harassment made pursuant to a policy banning harassment does not necessarily establish the first prong of the affirmative defense. Rather, the court found substantial evidence to indicate the employer's policy was not an effective preventive program, noting specifically that Spartan disseminated an anti-harassment policy which failed to provide that complainants would be free from retaliation, and yet warned that false reports of harassment would subject a complainant to disciplinary action, including termination.

(b) The timing and sufficiency of the employer's actions.

Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harasser, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment. See *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (citations omitted); *Curry v. District of Columbia*, 195 F.3d 654, 662 n. 17 (D.C. Cir. 1999).

Upon receiving a complaint, an employer must act promptly. If the employer, through an agent with authority to receive notice of sexual harassment complaints, has notice of a complaint, the employer has duty to take action; if it does not, it cannot demonstrate the first element of its affirmative defense. See *Sims v. Health Midwest Physician Services Corp.*, 196 F.3d 915 (8th Cir. 1999); see also *EEOC v. Dinuba Medical Clinic*, 222 F.3d 580 (9th Cir. 2000) (if the employer has a policy against harassment but ignores complaints, the policy is ineffective and the employer cannot successfully resort to an affirmative defense). Nonetheless, whoever complains must at least give enough information to serve notice that sexual harassment is being complained of, and accordingly a response by the employer is necessary. See *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 n.3 (7th Cir. 1999); *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999) (plaintiff's complaint included nonsensical comments but set forth the necessary information in a manner sufficiently intelligible to warrant attention). Cf. *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294-95 (3d Cir. 1999) (employer has constructive notice of sexual harassment where information is sufficient to raise probability of sexual harassment).

The employee should identify and verbalize any failure to remedy the situation. For example, in *Lunde v. Big B, Inc.* 117 F. Supp. 2d 1275 (M.D. Ala. 2000), the court found the employer exercised reasonable care to prevent sexual harassment and that the plaintiff took advantage of only one of several mechanisms provided by the employer to eliminate the sexual harassment. Further, the employer's response was *per se* reasonable in addressing the instant harassment where the plaintiff, in response to the employer's questions, stated that "things are pretty good," even though the harassment apparently continued.

The steps taken by the employer upon receiving a complaint of sexual harassment are critical. For example, some courts have held that merely indicating to the harasser that there is a policy against sexual harassment is insufficient to constitute a prompt, remedial action. *Jackson v. Quanex Corp.*, 191 F.3d 647, 665 (6th Cir. 1999); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998). Instead, remedial measure must be calculated to end the current harassment and deter future harassment, *Yamaguchi v. United States Dept. of the Air Force*, 109 F.3d 1475, 1482 (1997), and therefore must take some action against a harasser. *Id.* at 1483. *But see Knabe v. Boury Corp.*, 114 F.3d 407, 412, n. 8, 414 (3d Cir. 1997) (remedial measure may be adequate even if it fails to stop harassment, as long as measures were reasonably calculated to deter harassment, no further punitive action is necessary). Sometimes courts note that the adequacy of the employer's action is a question for the factfinder. *Paroline v. Unisys Corp.*, 879 F.2d 100, 106-107 (4th Cir. 1989), *vacated in part on*

other grounds, 900 F.2d 27 (4th Cir. 1990) (*en banc*); *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999).

Recently, the Fifth Circuit noted that while an “employer need not use the most serious sanction available to punish an offender,” it cannot ignore reasonable evidence of harassment and tell the victim and the perpetrator of the harassment simply to work things out. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 525 (5th Cir. 2001).

Of course, when dealing with a repeat offender, the employer is obligated to respond to any repeat conduct; and whether the employer’s next response is reasonable may very well depend on whether the employer aggressively stiffens its discipline or vainly hopes that no response, or the same response as before, will be effective. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998). In one case, the court held that there was a fact issue as to the first element of the affirmative defense when a plaintiff made a second complaint against the harasser (that the harasser had been glaring at her and that all the employer did in response was tell the harasser about the complaint, warn him against the objectionable conduct and request that he voluntarily transfer). In view of the fact that by this time the harasser was a repeat offender the court held that reasonable persons could disagree on the adequacy of the employer’s response once it knew of the second complaint. *Curry*, 195 F.3d at 662. Interestingly, repeat conduct may show the unreasonableness of the prior responses. *Adler*, 144 F.3d at 676.

Furthermore, evidence of pervasive harassment may show that the employer’s policy is ineffective. *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 111 (3d Cir. 1999) (it is hard to imagine evidence more relevant to the issue of whether a sexual harassment policy was generally effective than evidence that male officers did not respect it and that female officers were not protected by it).

Also, an employer that allows its supervisors to operate in relative isolation, with unchecked authority, may be precluded from establishing the first element of its affirmative defense. *Faragher*, 524 U.S. at 808 (employer failed to exercise reasonable care to prevent sexual harassment in part because supervisors were completely isolated from the city’s higher management); *Rubidoux v. Colorado Mental Health Inst.*, 173 F.3d 1293 (10th Cir. 1999).

In *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 616 (5th Cir. 1999), the Fifth Circuit reviewed the sufficiency of the employer’s response in a sexual harassment case under a direct negligence theory of liability (as

opposed to the *Ellerth-Faragher* affirmative defense framework for supervisory harassment).³ In *Skidmore*, the harasser was instructed to leave the plaintiff alone and plaintiff was transferred to another shift. The harassment stopped at this point, but the plaintiff remained uncomfortable. *Id.* at 616. The Fifth Circuit found that employer's actions constituted prompt remedial action as a matter of law despite the fact that the employer never investigated the allegations until months later (when an EEOC charge was filed), did not reprimand the harasser, and made no follow-up inquiry to the plaintiff to determine whether the harassment had in fact ended. *Id.* at 616.

Generally an employer must be given some time to gauge the credibility of the complainant and the seriousness of the situation. *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 988 (8th Cir. 1999). Taking only eleven days to investigate a complaint and meaningfully address and take action in response is sufficient to establish first element of affirmative defense. *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999).

(c) Workplace investigations bottom line:
state of mind of employer

What is the effect of the recent case law on workplace investigations? Clearly, the courts look to the state of mind of the employer. Even if the plaintiff was harassed, if it appears that the employer tried to prevent the sexual harassment to start out with, and it acted reasonably once it learned of the sexual harassment, the employer frequently is not liable. A few things stand out here:

An employer cannot just rest on its sexual harassment policy. Obviously, the employer must have such a policy (with provisions against retaliation), but by itself that will rarely be enough. The employer must make sure that

- 1) the policy is widely disseminated;
- 2) reaffirm the policy during any sexual harassment investigation;

³ This distinction is important. Under the *Ellerth-Faragher* affirmative defense for supervisory harassment, as noted above, it is the employer's burden to establish it acted reasonably to remedy the sexual harassment promptly. Under a negligence theory for co-worker harassment, it is the plaintiff's burden to establish that the employer failed to take effective action. *Skidmore*, 188 F.3d at 616.

- 3) guard against retaliation⁴; and
- 4) make sure that no one has unchecked power to prevent sexual harassment from coming to light.

In the investigation itself, again, courts will look at the state of mind of the employer, and analyze:

- 1) whether the employer interviewed all complainants and witnesses known to have potential knowledge relating to the sexual harassment;
- 2) obtained all potential documentation relating to the sexual harassment, such as e-mails, love letters, cards, gifts, etc.; and
- 3) what action was taken in light of what a reasonable investigation would have or did reveal.

Since state of mind of the employer is so critical it is important for the employer to document its investigation so that it can easily demonstrate what it did and why. Likewise, getting signed, written statements of the witnesses is crucial. Without such statement, the employer could be vulnerable if the employer takes no action on a complaint because all of the witnesses deny observing any evidence of sexual harassment, but the witnesses later, in litigation (i.e. in deposition) testify that they clearly and specifically told the employer's sexual harassment investigator about the sexual harassment. Once the employer has witness statements, it might not matter much what the witnesses say (absent evidence of coercion) because the employer can reasonably argue that it relied upon the statements given to them at the time.

⁴ Interestingly, however, some courts have held that other employees who testify as witnesses in the company's internal investigation of sexual harassment enjoy no legal protection from retaliation under Title VII. See *Graves v. Komet*, 982 S.W.2d 551 (Tex. App. - San Antonio 1998, no writ). Nonetheless, such retaliation could be evidence of the employer's failure to reasonably prevent sexual harassment, or at least, hostile animus towards persons supporting a sexual harassment claim. Cf. *Mota v. University of Texas*, 261 F.3d 512, 525 (retaliation against sexual harassment complainant "undermines [employer's] claim that it was attempting to prevent future harassment"). Moreover, if such retaliation is well known, it could be evidence that future employees use to excuse themselves from the requirement that they complain promptly, if at all.

(2) Failure of employee to take advantage of preventive opportunities or otherwise avoid harm.

The essence of the second element of the employer's affirmative defense is that the Plaintiff behaved unreasonably in avoiding or correcting the sexual harassment.

(a) Failure to Complain

Typically, an employer attempts to demonstrate the second element of its affirmative defense by showing that plaintiff failed to use the sexual harassment complaint procedures set forth by the employer. Normally, this type of proof is deemed sufficient to meet the second element of the employer's affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806-807.

When plaintiffs fail to complain under an employer's sexual harassment policy, generalized fear of retribution will not suffice to excuse such failure. See *Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261, 269 (4th Cir. 2001) (rejecting plaintiff's reasons for her failure to complain, including fear of reprisal, need for time to gather evidence, waiting to determine if harasser was a predator or easily rebuffed); *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 295 (2d Cir. 1999); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 n.3 (7th Cir. 1999); see also *Bartkowiak v. Quantum Chemical Corp.*, 35 S.W. 3d 103 (Tex. App. - Amarillo 2000) (affirming summary judgment because employee did not report complaints of conduct, and the employer's past record of reasonable response to similar complaints); *Childress v. Petsmart, Inc.*, 104 F. Supp. 2d 705 (W.D. Texas 2000) (conduct amounted to more than just socializing in the workplace, horseplay, intersexual flirtation, gender-related jokes, the sporadic use of abusive language, and/or occasional teasing, but, where the employer provided several avenues for bringing claims to the company's attention and the plaintiff did not avail herself of any of these options the employer has established the burden of its affirmative defense).⁵ *But see Maple v. Publications International, Ltd.* 2000 WL 1029112 (N.D. Ill. 2000) (fear of retaliation from reporting harassment coupled with general belief among employees that human resources would fail to address the complaint does not make delay in

⁵ Moreover, as noted above, the complaint should be sufficient to alert the employer that sexual harassment is being complained of, and accordingly a response by the employer is necessary. See *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 n.3 (7th Cir. 1999). *Cf. Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294-95 (3d Cir. 1999) (employer has constructive notice of sexual harassment where information is sufficient to raise probability of sexual harassment).

filing complaint fatal as a matter of law. But note that the plaintiff did complain to superior's supervisor); *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 525-26 (5th Cir. 2001) (repeated threats of retaliation justified delay of eight to nine months in making complaint).

Otherwise, of course, the employer's sexual harassment policy would do little good under the *Ellerth-Faragher* test; the plaintiff could simply say that he or she was afraid to complain, and the affirmative defense would fail. Instead, it is apparent that plaintiff's fear of complaining must be based upon some specific corroborating evidence in order to defeat the affirmative defense (i.e. specific threat made by a supervisor, pervasive sexual harassment, employer history of retaliation, or at least failure to act, upon complaints of sexual harassment). See *Mota, supra*, at 525-26. Cf. *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 111 (3d Cir. 1999) (evidence of pervasive sexual harassment makes retaliation claims more credible, because harasser may be expected to resent attempts to curb their male prerogatives).

The plaintiff does not have to complain according to the employer's harassment policy in order to defeat the second element of the affirmative defense. In *Watts v. Kroger Co.*, 170 F.3d 505, 510-11 (5th Cir. 1999), the court noted, for example, that a plaintiff need not complain of sexual harassment using the employer's anti-harassment procedures as long as plaintiff reasonably takes advantage of some corrective opportunity. In *Watts*, the plaintiff complained of sexual harassment in a union grievance, which the court found sufficient to defeat the employer's affirmative defense. *Id.*

(b) Timing of Employee's Complaint.

The Fifth Circuit has held that a delay of approximately three months in reporting sexual harassment creates a fact issue for the jury on the second prong of the employer's affirmative defense. *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999) (harassment intensified in the spring of 1994, complaint filed on July 19, 1994). Two years, however, has been held to be an unreasonable delay. *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999). Recently, a delay of seven months was considered an unreasonable failure to take advantage of an employer's corrective procedures where the harassment is pervasive. *Gawley v. Indiana University*, 276 F.3d 301, 312 (7th Cir. 2001). But, the Fifth Circuit has determined that where repeated threats of retaliation by an influential supervisor are involved, an eight or nine month delay is not unreasonable. *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 525 (5th Cir. 2001).

The employer may also demonstrate that an earlier complaint would have prevented sexual harassment. The defendant must show that, as a matter of law, a reasonable person in the plaintiff's shoes would have complained or taken other action to avoid the harm early enough to prevent the harassment from being severe or pervasive. *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999).

(c) Failure to otherwise avoid harm

In proving the second element of its affirmative defense, an employer is not limited to showing that a plaintiff failed to complain pursuant to its sexual harassment policy. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 765; *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 n. 4 (5th Cir. 1999). An employer may also demonstrate the second element of its affirmative defense by showing that the plaintiff otherwise failed to exercise reasonable care to avoid harm. *Faragher*, 524 U.S. at 807; *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 n.4 (5th Cir. 1999).

Interestingly, the Fifth Circuit has concluded that it is not unreasonable for a plaintiff to refuse to settle an EEOC charge if hostility is continuing. *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000) (further, defendants failed to show they exercised reasonable care in investigating plaintiff's charges).

(i) Failure to provide accurate information

The Fifth Circuit has relied upon the fact that a plaintiff initially denied sexual harassment (and delayed ultimately complaining of sexual harassment) to deny a plaintiff's claim of sexual harassment. *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971-72 (5th Cir. 1999). According to the Fifth Circuit, if the employee gives misleading information to the employer, this thwarts the purposes of Title VII because the employer must be able to rely on what the employee tells them. Moreover, the Fifth Circuit has determined that an employee's failure to keep an employer informed about continued harassment, after the employer's initial prompt remedial action, meets the second prong of the affirmative defense set forth in *Ellerth*. *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 299 (5th Cir. 2001).

However, in *Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 526 (5th Cir. 2001), the court held that a jury could find that the plaintiff's failure to disclose tapes of recorded conversations between himself and the perpetrator was unreasonable in light of Plaintiff's belief that providing such evidence was futile.

(ii) Failure to avoid harasser

By permitting repetition of sexual advances (voluntarily remaining alone with harasser, accepting invitations to go to bar, etc.), one court has held that plaintiff unreasonably failed to avoid harm and therefore employer demonstrated the second element of its affirmative defense. *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999).

c. Unanswered Questions

Although the Court intended to adopt a simple and easy to administer test for determining employer liability, some questions persist.

(1) Required content of sexual harassment policy

First, what does a sexual harassment policy need to contain before it satisfies the affirmative defense? While unclear, it is apparent that any harassment policy must have procedures to conduct a thorough investigation of all complaints, assure no retaliation, provide for an effective by-pass mechanism if the harasser is in the chain of command, be widely disseminated to all employees, and that anti-sexual harassment training should be conducted for all employees. Finally, of course, the sexual harassment policy must be followed as a matter of practice. If all these are met, it can be expected that most courts will hold that the policy system in place by the employer meets the first prong of the affirmative defense.

(2) Employer liability when remedial action promptly remedies the sexual harassment

When the harassment is promptly resolved due to effective remedial action by the employer, is there employer liability? *Faragher* seems to suggest, by holding that employer liability for sexual harassment by a supervisor is automatic, that even if the company promptly and effectively takes remedial actions against the harasser, that there can still be employer liability.⁶ Moreover, the affirmative defense as set forth by the Supreme Court in *Ellerth* and *Faragher*, requires the employer to show both that the employee failed to reasonably take advantage of the employer's procedures and that the employer had reasonable procedures in place to prevent sexual harassment.

⁶ Of course, if the plaintiff complained quickly and the employer took prompt and effective remedial action, it is less likely that the harassment will be deemed serious and pervasive enough to be actionable in any event.

Obviously, where the employee immediately takes advantage of those procedures, the prong of the affirmative defense related to the employee's conduct is not met.

This issue was recently addressed by Judge Jones of the Fifth Circuit in *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999). According to Judge Jones' opinion, the vicarious liability theory provided under *Ellerth* and *Faragher* does not apply when the plaintiff promptly complains of sexual harassment and the employer promptly and effectively remedies the sexual harassment.⁷ *Id.* Under this fact scenario, Judge Jones reasoned that it makes no sense to hold the employer responsible for the harassment. *Id.* Nonetheless, and fortunately for plaintiffs, the panel could not agree on an opinion, and therefore, Judge Jones' opinion was not the opinion of the court and has no precedential value. See *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Wiener, J., concurring).

Moreover, the only Appellate Court to address *Indest's* modified employer defense has rejected the analytical framework as harboring "several major problems" not the least of which is *Indest's* unreasonable rejection of the "remarkably straightforward" framework outlined in *Faragher* and *Burlington*. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (employer's prompt corrective action cannot be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee).

(3) Which supervisors will create vicarious liability?

Who exactly is a supervisor with authority over the employee? Reporting lines are often blurred among companies, and undoubtedly a point of contention in lawsuits will be whether or not the alleged harasser had any actual authority over the plaintiff. *Hall v. Bodine Electric Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (employee with "marginal direction" over plaintiff's work insufficient to impute vicarious liability to the employer, though employee responsible for training, directing work and performance evaluations). Accordingly, it is important to determine whether or not the alleged harasser had any ability to affect the terms or conditions of the plaintiff's employment, the plaintiff's performance evaluations, or otherwise affect the plaintiff's employment relationship. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (holding that

⁷ The other members of the panel, Judge Wiener and Judge Ferguson, concurred in the judgment only.

supervisor does not need to have ultimate authority to hire and fire to qualify as an employer so long as the supervisor has significant input into personnel decisions); *Reinhold v. Commonwealth of Virginia*, 135 F.3d 920, 934 (4th Cir. 1998) (holding that where the supervisor had authority to alter the plaintiff's work assignments and shift responsibilities, a jury could conclude that the harasser exercised sufficient authority over the plaintiff to be a supervisor for purposes of Title VII liability); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (noting that normally a supervisor sufficient to invoke automatic liability has at least some power to fire, hire, demote, promote, transfer, or discipline the plaintiff); *Rosales v. City of San Antonio*, (W.D. Tex. 2001) (finding that where "crew leader" did not have the authority to fire, reward, promote or significantly discipline the plaintiff he could not be construed as a supervisor).

It should be noted that at least one court has held that an agent does not have to possess any of these powers alone to be a supervisor; it is enough to show that the agent has some authority (even as a member of a three person team) to take these actions. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 154-55 (3d Cir. 1999).

In *Ellerth* and *Faragher*, the Supreme Court seemed to focus on two facts that distinguish a supervisor from a co-worker as far as sexual harassment is concerned. First, the Court noted that a harasser is aided by its supervisory agency in committing the harassment. *Ellerth*, 524 U.S. 742 at 762; see also *Curry v. District of Columbia*, 195 F.3d 654, 659 (D.C. Cir. 1999); *Mikels v. City of Durham*, 183 F.3d 323, 331-32 (4th Cir. 1999). As the court in *Mikels* stated, "the fundamental determinant . . . is not, therefore, the harasser's formal rank vis-a-vis that of the victim . . . but whether the particular conduct was aided by the agency relation." 183 F.3d at 331-332. Secondly, the employer has a greater opportunity to correct the misconduct of its supervisors and the employee has a greater ability to avoid harassment of a co-worker. *Curry*, 195 F.3d at 660.

Accordingly, in close cases, the plaintiff's response to the harasser may give some indication of the harasser's status over the plaintiff; if the victim is free to walk away, for example, that might indicate the lack of authority over the victim, and vice-versa. See *Mikels v. City of Durham*, 183 F.3d at 333-34. Also, the relative isolation and unchecked authority of the supervisor would similarly demonstrate the power that the harasser had over the victim. *Id.*

Accordingly, when supervisory status is at issue, plaintiffs should emphasize the degree of power possessed by the harasser over the plaintiff (harassment aided by agency) and the plaintiff's relative inability to avoid the harassment

and the employer's control, and the extent to which that control is exercised, over the harasser.

(4) Coercion into a sexual relationship.

Finally, *Ellerth* and *Faragher* did not address the situation in which an employee is coerced into a sexual relationship with a supervisor that the employee does not want, in order to obtain a job or employment benefit. While this is certainly actionable sexual harassment under *Meritor*, it is unclear based upon *Ellerth* and *Faragher* which standard of liability will apply for employers in this situation.

2. Co-worker or Non-worker Sexual Harassment

a. Negligence Theory.

Ellerth and *Faragher* both confirmed that employers are subject to liability for their own negligence in failing to prevent harassment. This, of course, is not vicarious liability but liability based upon the employer's direct negligence. *Ellerth* and *Faragher* confirmed the well-established negligence standard that an employer is liable for any harassment if the employer knew or should have known about the harassment but failed to stop it. *Ellerth*, 524 U.S. at 759. While the automatic vicarious liability theory applies when a supervisor or above is the harasser, that theory of liability is not available when it is merely a co-worker or non-employee who is harassing the plaintiff.⁸

b. Fifth Circuit Law under Negligence Theory.

A recent exposition on the negligence theory of sexual harassment liability was provided in *Sharp v. City of Houston*, 164 F.3d 923 (5th Cir.1999), and *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998).

In *Sharp*, even though arguably there was supervisory harassment, the court affirmed employer liability on a negligence theory because the district court's judgment, occurring prior to *Ellerth* and *Faragher*, was based only upon

⁸ Sexual harassment occurs not only between workers; it is clear that if an employer knew or should have known that a non-worker, such as a customer, vendor or other third-party, is sexually harassing one of its employees, the employer has a duty to prevent such harassments. See *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) (finding actionable sexual harassment of a waitress by two male customers who regularly frequented restaurant); *Folkerson v. Circus Circus Enterprises Inc.*, 107 F.3d 754 (9th Cir. 1997).

a negligence theory finding. Moreover, as noted above, an employer is always liable for its own negligence and therefore if a court has determined that an employer is liable under a negligence theory, it need not go further and determine whether the employer is also liable under the supplemental theory of vicarious liability.

Under a negligence theory of liability, the plaintiff must first prove that the employer knew or should have known about the harassment. In other words, the plaintiff must prove that the company had actual or constructive notice of the sexual harassment. Without such knowledge, there is obviously no duty on behalf of the employer to act at all. In order to show actual notice, the plaintiff must show that someone with authority to discipline the harasser or to take other remedial actions was notified of the harassment. *Sharp*, 164 F.3d at 929; *Nash v. Electrospace Systems, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993). Normally, this would be the harasser's supervisor or above, someone in the human resources department, or someone authorized by company policy to receive harassment complaints. Likewise, for the plaintiff to demonstrate constructive knowledge, the plaintiff must show that someone with remedial power over the harasser should have known about the sexual harassment. *Sharp*, 164 F.3d at 930.

In determining whether such a person should have known about the sexual harassment at issue, one must examine what knowledge these employees should have had in the exercise of reasonable care. *Id.* at 931. There can be constructive notice in two situations; where the employer, through supervisory agents, is provided with enough information to raise the probability of sexual harassment, or where the harassment is so pervasive and open that a reasonable employer would have been aware of it. *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 295 (3d Cir. 1999). Where the harassment is sufficiently pervasive, for example, the employer has constructive notice of the harassment. See *Williamson v. City of Houston*, 148 F.3d 462, 465 (5th Cir. 1998); see also *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999).⁹

Moreover, the employer has a duty to exercise reasonable care to insure that a supervisor does not use his power to engage in and conceal sexual harassment. *Sharp*, 164 F.3d at 931. This duty can be of particular use to plaintiffs in sexual harassment cases as it was to the plaintiff in *Sharp*. In *Sharp*, the court noted that there was evidence that the harasser's supervisor exerted almost no supervisory authority over the harasser and that such negligent failure

⁹ In *Jackson*, the court noted that racially offensive graffiti was in restrooms commonly used by supervisory foreman, and yet the employer was slow to eliminate the graffiti and made no effort to find out who put it up. *Id.* at 663.

to supervise violated even internal HPD procedures. *Id.* Moreover, the court noted that there was evidence that “HPD tolerated and even fostered an attitude of fierce loyalty and protectiveness within its ranks, to the point that officers refused to address or report each other’s misconduct.” *Id.* Accordingly, this code of silence may have “prevented fellow officers from doing anything about the harassment that they saw on a daily basis.” *Id.*

Finally, the court noted that there was evidence that:

[The plaintiff] had no real way to escape the situation - no viable means of reporting or addressing the harassment she endured. Having given total and effectively unfettered control of Mounted Patrol to [the harasser], and having established a strict chain of command whereby an officer could be disciplined for bypassing the immediate supervisor, the city needed to provide an effective way around that hierarchy, so that someone subject to harassment by a supervisor could report the harassment and allow the city to remedy it.

Id.

Therefore, due to “HPD’s structure and customs, [plaintiff] faced an unfortunate dilemma: report the harassment and lose her career, or endure the harassment and lose her dignity.” *Id.* Since the employer’s bypass mechanism around the supervisor was ineffective, the court held that the city, through the exercise of reasonable care, should have known about the harassment but failed to stop it. *Id.* at 931-32.

In *Williamson*, the plaintiff, a Houston police officer, was sexually harassed by a co-worker. She complained to her boss, who was also the harasser’s supervisor, about the sexual harassment. At a later time, after no action had been taken regarding the sexual harassment despite her complaints to her supervisor, she filed an internal affairs complaint at her supervisor’s direction. During the internal affairs investigation, the plaintiff filed a charge of sexual harassment with the Equal Employment Opportunity Commission, and thereafter filed her lawsuit. *Williamson*, 148 F.3d at 464.

The City of Houston claimed that it was not liable for any sexual harassment occurring prior to the internal affairs investigation because her supervisor’s knowledge of the harassment should not be imputed to the City of Houston. *Id.* at 465. Judge Benavides, however, writing for the Fifth Circuit, held that under the *Ellerth* and *Faragher* principles, the supervisor’s knowledge of the

harassment was imputed to the city in determining whether the city could be held liable for negligently failing to take proper remedial action. *Id.* at 466-467. The court first noted that the supervisor had the authority to address the harassment problem since the supervisor was the harasser's boss. More importantly, however, the court noted that since the supervisor was one of the persons to whom a sexual harassment complaint could be made, the supervisor's knowledge was imputed to the city. *Id.* at 466-67. The court noted that under the Houston Police Department's policy, the supervisor had the authority to accept sexual harassment complaints and had an affirmative duty to pass such complaints up the chain of command. *Id.* at 466 n. 1. The court recognized that Title VII was designed to prevent discrimination and harassment by fostering the creation of effective anti-harassment policies and grievance mechanisms. *Id.* at 466.

Accordingly, the court held that:

When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to accept notice of harassment problems . . . To allow employers to escape liability when, as here, the complainant has followed the employer's policy for reporting harassment would undermine these goals.

Id. at 466-67.

However, the city argued that because department policy indicated that if a complaint to a supervisor did not lead to a satisfactory resolution, the employee should go directly to the director of affirmative action, the supervisor's knowledge should not be imputed to the city, because the plaintiff in this case had in fact not taken the second step of going to affirmative action after being dissatisfied with her initial complaint. The court disposed of this argument as well noting that:

If the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, the notice to that individual is sufficient to hold the employer liable.

Id. at 467. No further complaint was deemed necessary in order for notice to be imputed to the city. *Id.*; see also *Sims v. Health Midwest Physician Services Corp.*, 196 F.3d 915 (8th Cir. 1999) (complaint to one delegated with authority

to receive notice of sexual harassment complaint triggers employer's duty to take action).

If the client complains internally, however, some courts have held that other employees who testify in the company's internal investigation of sexual harassment enjoy no legal protection under Title VII. See *Graves v. Komet*, 982 S.W.2d 551 (Tex. App. - San Antonio 1998, no writ).

C. EMPLOYER INVESTIGATES THE COMPLAINT PROPERLY AND PROMPTLY REMEDIES THE SEXUAL HARASSMENT.

Under *Indest v. Freeman Decorating, Inc.*, assuming the client has complained quickly, there will be no liability for sexual harassment, because presumably the client's concerns regarding sexual harassment have been taken care of. Under *Ellerth* and *Faragher* there is liability even if the employee waits for a long time to complain, unless the employer had a proper policy on sexual harassment and the employee did not take reasonable advantage of it. Under *Ellerth* and *Faragher*, if the client doesn't have a good reason for not complaining quickly, there probably will not be any employer liability.

1. Vicarious Liability.

After *Ellerth* and *Faragher*, it is apparent that an employer's policies regarding sexual harassment are now more determinative than ever. Accordingly, one of the major issues for discovery in almost any sexual harassment case should be the company's policies regarding sexual harassment and their history in dealing with sexual harassment complaints. If the client did not follow the employer's published sexual harassment policy, and there is no proof of the company failing to follow its own policy on sexual harassment, a generalized fear of retaliation by the plaintiff will probably not satisfy the court. See *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143 (E.D. Cal. 1998) (granting summary judgment to employer because of employer's 2-year delay in making sexual harassment complaint with no evidence to support belief that employer's policy against sexual harassment would not be enforced).

If, however, the plaintiff did report the harassment to someone authorized to receive such complaints under company policy, then the plaintiff's actions should be sufficient even if the plaintiff did not take the complaint to a higher level after it appeared that no action was taken on her initial complaint. *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998) provides substantial assistance to plaintiff's in this area. In *Williamson*, as noted above, the court held that if a plaintiff reports the harassment to a person designated by the sexual

harassment policy, then the employer has knowledge of the harassment, and must take appropriate action to remedy it.

Moreover, it is important to discover whether the employer's sexual harassment policy was effectively communicated to managers and employees, and whether the policy was followed. If not, the plaintiff has a strong argument that the employer is not entitled to its affirmative defense under *Faragher* and *Ellerth*. See *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 40-41 (Tex. App. -- Austin 1998, no writ).