Gender Discrimination at Work:
Panelists' Perspectives on Problems & Possibilities in 2018

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29th Annual Labor and Employment Law Institute
State Bar of Texas Labor & Employment Law Section
August 24-25, 2018
Marriott Marquis, Houston

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Chapter One

TOPIC ONE:
SEXUAL HARASSMENT

Unlawful Harassment and Common Problems
(with attached appendix)

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Gender Discrimination

29th Annual Labor and Employment Law Institute
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Chapter One: Unlawful Harassment: Common Problems

I. It's Everywhere – The "#MeToo Movement"

Tarana Burke started the "Me Too" movement in 2007 to help victims of sexual harassment and assault with a website, www.metoo.org. It didn't get much air time until, ten years later, actress Alyssa Milano invited people to use a #MeToo hashtag to show just how big the problem happens to be in the United States and beyond. She tweeted:

> If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

According to Facebook, within a few days, 45% of users in the US had at least one friend who had posted #MeToo on their timeline.[1] I think that may have been the day I learned how to tweet – because I joined that crowd of people, mostly women, but certainly some men as well, who responded:

> ***Me too***.

A. Just how big is the problem?

It depends on who you ask, and how it's asked. According to a 2018 Study on Sexual Harassment and Assault,[2] sexual harassment and assault pose a significant problem, especially for women:

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[1] Report cites to *"More than 12M 'Me Too' Facebook posts, comments, reactions in 24 hours."* **CBS News**. 17 October 2017. https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

[2] Survey by Stop Street Harassment; January 2018. The survey was not limited to the workplace; it included incidents on the street, in school, and in people's own residences. *See* http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf. This report presents the findings of a nationally representative survey of approximately 1,000 women and 1,000 men, ages 18 and up conducted online using the GfK Knowledge Panel, the largest probability based online panel, representative of the general population. GfK, a top surveying firm, conducted the survey in January 2018, and the UC San Diego Center on Gender Equity and Health conducted all data analyses.

81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime;

38% of the women reported sexual harassment that occurred in their workplace;

77% of the women and 34% of the men experienced verbal sexual harassment;

51% of the women and 17% of the men were sexually touched in an unwelcome way; and

27% (almost one third) of the women and 7% of the men survived sexual assault.

Other surveys have been narrower in focus, but still show a widespread problem in the United States' workforce:

22% of employed women said they had been sexually harassed at work – late summer 2017 Pew Research Center poll.

35% of women said they had personally experienced sexual harassment or abuse at work – November 2017 NPR/PBS NewsHour survey of registered voters.

30% of women reported being sexually harassed at work – October 2017 online poll by YouGov/Economist.

B. What is the public describing as intolerable sexual harassment?

The women – and men – who have publically related their personal experiences of sexual harassment and abuse by many of the men identified above are not relating what, to them, were stray, offensive remarks. They report being deeply offended, and often sought counseling. Here are some of their allegations:

He regularly made comments to gauge her interest in a sexual relationship, including saying he was having "sexual fantasies" about her.[3]

He put his arm around one woman and groped her breast; he forcibly kissed and groped another, and attempted to kiss another on stage; two women said he touched

[3] Lauren Greene, former communications director of Rep. Blake Farenthold. https://www.nytimes.com/2017/12/01/us/politics/farenthold-sexual-harassement-settlement-taxpayers-congress.html

their behinds.[4]

He made lewd sexual remarks about female colleagues; he once invited a female employee to his secluded office, then showed her his penis; he gave one female colleague a sex toy with "an explicit note about how he wanted to use it on her," reportedly quizzed female producers about their sex lives, and played a crass, office-themed version of the game "fuck, marry, or kill."[5]

During a dinner meeting, he kept bringing up relationships and sex, calling one ex his first "sex girlfriend."[6]

He made unwanted sexual advances, groped and grabbed women, walked naked in front of them or made lewd phone calls – one to an assistant late at night or early in the morning to describe his fantasies of her swimming naked in a hotel pool as he watched from his bedroom.[7]

He subjected them to unwanted sexual comments or physical contact, including kissing, hugging and groping, and told colleagues that one woman exercised naked.[8]

C. The immediate fallout of the #MeToo Movement: It's money that makes the world go round, not respect.

Milano's tweet followed by only a couple of weeks the New York Times article of October 5, 2017, detailing decades of allegations of sexual harassment against **Harvey Weinstein**. Among the individuals who first came forward with such allegations were actresses Rose McGowan and Ashley Judd. At last count, 84 women had accused him of sexual assault and sexual harassment; one woman has sued him for sex trafficking. Weinstein was fired from the Weinstein Company almost immediately and later expelled from the Academy of Motion Pictures Arts and Sciences.

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[4] Stephanie Kemplin, Leeann Tweeden, and two unnamed women about Sen. Al Franken. http://time.com/5042931/al-franken-accusers/

[5] Various female colleagues and female producers about Matt Lauer. https://www.vanityfair.com/hollywood/2017/11/matt-lauer-sexual-misconduct-allegations

[6] Rebecca Hersher about Michael Orskes. https://www.vox.com/identities/2017/11/1/16593128/michael-oreskes-npr-sexual-harassment

[7] Kyle Godfrey-Ryan, an assistant to Charlie Rose in the mid-2000s. https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.abc1c49cc36a

[8] Fifteen women, including female colleagues, individuals he had just met, and the former clerk to another federal judge made these accusations against Chief Judge Alex Kozinski (9th Cir.) https://www.law.com/americanlawyer/sites/americanlawyer/2017/12/13/lets-talk-about-kozinskis-victim-heidi-bond/?slreturn=20180128162506

Imagine how much money the other owners of the Weinstein Company would have lost had they stuck by Harvey, had he not been forced out immediately? Fed by social media – like Milano's tweet, consumer boycotts would have started overnight.

Since the Times article and the immediate shaming and economic punishment of Weinstein, dozens more wealthy, powerful, and influential men in the film industry, television and radio, politics, sports industries, and business have been accused of sexual harassment or assault, and have quickly – without litigation – lost their positions of power. And what is driving that? Money, not a suddenly-acquired sensitivity to victims of sexual harassment and other forms of abuse.

These are the men whose conduct – or whose public perceptions of misconduct – are most likely to cost their companies, their shareholders, their fellow Board members, money. People like **Matt Lauer** of The Today Show; **Michael Orskes** of NPR, **Charlie Rose** of PBS and CBS, **Rep. Blake Farenthold** (R–Texas), **Senator Al Franken** (D–Minnesota), **Rep. John Conyers** (D–Michigan), **Chief Judge Alex Kozinski** (U.S. Court of Appeals for the Ninth Circuit), **President Donald Trump** (at least 13 women have accused him of sexual improprieties, including groping), **Warren Moon**, NFL Hall of Fame quarterback, **Russell Simmons,** entrepreneur & co-founder of Def Jam Recordings, **Garrison Keillor** , Creator and former host of "A Prairie Home Companion," **Glenn Thrush**, New York Times White House reporter, **Judge Roy Moore** (former Chief Justice, Supreme Court of Alabama); **Roy Price**, Amazon executive, and more.....

II. How would these incidents of sexual harassment fare under judicial scrutiny – would the judges consider the conduct as described "bad enough" to make a case? – *i.e. The courts draw the line at what is actionable at a much different point than people generally think.*

A. How the Supreme Court described unlawful sexual harassment.

The first time the Supreme Court addressed sexual harassment as a violation of Title VII, it described the kind of conduct that it would find:

> "discriminatory **intimidation**, **ridicule**, and **insult**," that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an **abusive working environment.**"[9]

In 1993, the Court sought to describe this standard as "tak[ing] a middle path" between conduct that:

What is merely offensive	➔➔ ☹ ←←	that which causes a tangible psychological injury

[9] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986).

> So long as the environment would reasonably be perceived – and is perceived – as **hostile or abusive**, there is no need for the environment also to be psychologically injurious. The question of whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances.[10]

It then set forth what sort of facts a court should consider in assessing the question as to whether the conduct rises to the level of violating the law:

- the frequency of the conduct;
- its severity;
- whether it is physically threatening or humiliating, or a mere offensive utterance; and
- whether it unreasonably interferes with an employee's work performance.

B. The Fifth Circuit's history – results vary widely over the years.

In *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803-805 (5th Cir.1996), the Fifth Circuit upheld a jury verdict based on evidence that the plaintiff's supervisor, the director of nursing at the nursing home where she was employed, frequently commented on her sexual life and inquired about her sexual activity; and made comments of this nature to her about two or three times a week, for example: attributing her large number of children to a proclivity to engage in sexual activity; joking to a group of people at the work facility that plaintiff did not know how to use condoms; and frequently questioning both her and a co-worker about where they had been the night before, whether they had taken men home, and whether they "got any."

But, the evidence presented in *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317 (5th Cir. 2004) was **not enough**. The plaintiff showed that, over the course of a year and a half, a male co-worker: "(1) ... once made a remark to [plaintiff] about another employee's body, (2) ... once slapped her on the behind with a newspaper, (3) ... 'grabbed or brushed' against [her] breasts and behind, (4) ... once held her cheeks and tried to kiss her, (5) ... asked [her] to come to the office early so that they could be alone, and (6) ... once stood in the door of the bathroom while she was washing her hands" was just not severe or pervasive enough.

> The courts should look at the totality of the circumstances – both at what the plaintiff herself experienced as well as what was going on in the workplace, and how other women were treated:
>
> Disaggregating the claims "robs the incidents of their cumulative effect", just as " '[a] play cannot be understood on the basis of some of its scenes but only on its entire performance,

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[10] *Harris v. Forklift Sys.,* 510 U.S. 17, 23 (1993).

> ... similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.'

Donaldson v. CDB Inc., 335 F. App'x 494, 503 (5th Cir. 2009). For five months, the general manager made sexually offensive comments to the plaintiff's co-workers and to her directly. They were pretty sick – saying one woman smelled "skanky" and so must be on her period, suggesting that all the flies in the lobby had come from between a woman's legs, asking the plaintiff about her boyfriend and their sexual activities, suggested that she buy new bras, and told her to have sex with a mechanic so he could get a free oil change. And, when she told him to stop, he said he knew the law and as long as he didn't touch her, there was nothing wrong with his behavior. He was wrong.

See also Derouen v. Carquest Auto Parts, Inc., 2001 WL 1223628, at *1 (5th Cir. Sept. 24, 2001) (holding that plaintiff's allegations that a co-worker attempted to grab her breast and later touched and rubbed her thigh, that customers made sexually threatening remarks, and that supervisors did not respond to her complaints about these incidents, did not support a hostile work environment claim); *Shepherd v. Comptroller of Pub. Accounts of State of Tex*., 168 F.3d 871, 874 (5th Cir. 1999) (several instances of unwanted touching, attempting to look down employee's clothing, and making offensive remarks did not render work environment objectively hostile); *Paul v. Northrop Grumman Ship Sys.*, 309 Fed.Appx. 825 (5th Cir. 2009) (single incident in which coworker "chested up" to female employee's breasts in 30-second confrontation, then followed employee as she tried to separate herself and placed his arm around her waist then rubbed his pelvic region across her hips and buttocks, was not so severe or pervasive); *Barnett v. Boeing Co.*, 306 Fed.Appx. 875 (5th Cir. 2009) (holding that the following was not sufficiently severe or pervasive: coworker leered at the employee, touched her in sexually inappropriate and unwelcome ways, and actively intimidated her after she complained of his action).

C. The dismissive tone often used to rule "as a matter of law" that the harassment just was not bad enough.

Most of the women and men who have come forward with their reports of intolerable sexual harassment over the past two years would, I believe, be surprised to learn that the courts do not think that what they endured was "bad enough" that it violated their legal rights. Here are some common observations that appear in judges' opinions when they decide that the conduct was not "bad enough" to take up any more judicial resources – and dismiss the case on summary judgment – before the facts see the light of day and before a jury – a cross-section of the American public – gets to weigh in on the question.

Commonly used dismissive characterizations of the complaints of sexual harassment brought forward:

> "**[Just] the ordinary tribulations of the workplace**, such as the sporadic use of abusive language." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

> "**Simple teasing, offhand comments, and isolated incidents**." *See, e.g.*, *Silva v. City of Hidalgo, Tex.*, 575 F. App'x 419, 426 (5th Cir. 2014). The supervisor told her that her pants were a little tight and that she looked good, held his hands in front of his chest as though he

were holding something up; and made comments such as "mmm" when she leaned over his desk.

The comments and behavior were just "boorish and puerile." *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 2014 WL 4104410 (E.D. La. Aug. 19, 2014). Here, the executive director and the plaintiff's boss made frequent comments about her appearance in front of co-workers that embarrassed her and made her feel uncomfortable; one pressured her to travel on overnight work trips with him, one often stared at her, looking from head to toe as if he were undressing her with his eyes; commented on her personal life during a work-related meeting; remarked that her miscarriage was due to her pre-marital "fornication;" and blocked her office door, refusing to move, then brushed against her as she walked out.

Only a Few Harsh Words or Cold-Shouldering. *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 564 (5th Cir.1998) ("It is a simple fact that in a workplace, some workers will not get along with one another, and this Court will not elevate a few harsh words or 'cold-shouldering' to the level of an actionable offense.").

Not Physically Threatening – Just Two Drunks and a Shotgun. *Olmeda v. Cameron Int'l Corp*., 2015 WL 4254157, at *1 (E.D. La. July 13, 2015). The apparent plan was to scare the plaintiff – a co-worker who is half white and half Hispanic – by firing a shotgun in the vicinity of his moving vehicle. Two white coworkers were drunk, and, after driving about 30 miles, they pulled up behind the plaintiff and fired a shotgun – twice. The first shot went as planned. The second was aimed at the plaintiff's truck. In deciding that the harassment was not sufficiently severe or pervasive, this federal judge remarked that the behavior was "not physically threatening." I kid you not.

Just "petty slights or minor annoyances that ... all employees experience." *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 786-87 (2018).

D. When will the Courts' Opinions Reflect Current Society?

The courts are out of step with what the public thinks. Many judges seem to believe that the majority of people with jobs work commonly find themselves in jobs where they are miserable – where rudeness is a daily occurrence, as is disrespect, profanity, favoritism, and personal insults and animosity. Where that assumption came from is a mystery to a lot of us. But, with that assumption as a common starting point, judges then compare what they have internalized as being typical of most work environments – and then compare what the plaintiff says to that fictional world. And, not surprisingly, they often find the employee's experience not nearly as bad as the nightmare they imagine constitutes a typical work day.

Perhaps, now that many victims are describing in public what they experienced, and now that it is being obvious that the general public is horrified to hear that things like that occur, perhaps this will have an impact on what judges think about the typical work environment. And perhaps they will start realizing that, as removed as they are from the regular workaday, assessments of what constitutes a "hostile and abusive" work environment would be more realistic in our society if they

were made by jurors.

III. Most victims of sexual harassment and abuse in the workplace are not reporting it – how would that fare under the scrutiny of the federal courts today?

A. Despite the widespread phenomena, few people contemporaneously report harassment.

Most of the individuals who have stepped forward over the course of the last year and a half and raised these complaints did not do so at the time of their occurrence. A multitude of articles have addressed the reluctance of many of these victims to speak sooner, but one puts is best:

> A world of hurt often awaits survivors who come forward. Ask yourself, honestly, what you would do in their shoes.[11]

According to a recent survey by the Society for Human Resource Management:

> **76%** of non-manager employees who experienced sexual harassment did not report it for many reasons, including fear of retaliation or a belief nothing would change.[12]

And, the January 2018 Report on Sexual Harassment revealed an even bigger problem:

> Notably, **only 1 in 10 women** filed an official complaint or report to an authority figure, including filing a police report. The figure was even lower for men: 1 in 20. Also, nearly 1 in 10 women sought a new job assignment, changed jobs or quit a job due to the abuse, as did 1 in 20 men.[13]

The EEOC's 2016 Select Task Force on the Study of Harassment in the Workplace reported a similar problem – noting that about **75%** of those who experienced harassment did not report it to anyone in authority or file any formal complaint:

> **Workplace Harassment Too Often Goes Unreported**. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser,

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[11] Heidi Stevens, *Why didn't these women come forward sooner? Ronan Farrow has answers,*" CHICAGO TRIBUNE (November 7, 2017).

[12] HARASSMENT-FREE WORKPLACE SERIES: *A Focus on Sexual Harassment – Organizations must proactively create a culture that does not tolerate sexual harassment*. (January 31, 2018). https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/workplace-sexual-harassment.aspx

[13] *See supra* n.2 at page 33.

deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. **Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.** Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.[14]

B. The courts' imposition of a duty on the plaintiffs to report, regardless of fear – called a duty to "avoid harm."

A common theme in sexual harassment decisions today is the question of whether the plaintiff him- or herself "did the right thing" and reported the misconduct to someone in authority – someone who could do something about it. And, if they did not, they often see their cases dismissed on summary judgment with no jury assessing whether their failure to report was reasonable, even understandable, under the circumstances.

1. The justification for this duty according to the Supreme Court.

The notion of the plaintiff's duty to report – "to avoid harm" – was developed by the Supreme Court in two companion cases decided in the late 1990s: *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The Court agreed that, even if an employer had neither actual nor constructive knowledge that one of its supervisors was engaging in sexual harassment – it could still be held liable for that supervisor's unlawful conduct. But, it rejected the notion that this was a strict liability standard.

The vicarious liability theory, the Court observed, is advantageous when the plaintiff lacks proof of the employer's actual or constructive knowledge of the harassment, meaning that she or he cannot argue that the employer is liable for its own negligence. Even without that evidence, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor[15] with immediate (or successively higher) authority over the employee. **But**, if no tangible employment action is taken, the employer may raise an affirmative defense to liability or

[14] *See* Full Report at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[15] A few years later, the Court clarified that the vicarious liability theory does not apply to every situation when the harasser has supervisory authority over the victim; it is available only when the supervisor engaging in the harassment is empowered to take tangible employment actions against the employee. *Vance v. Ball State Univ*., 570 U.S. 421, 424 (2013). See also *Morrow v. Kroger Limited Partnership I*, 681 Fed.Appx. 377, 2017 WL 1013072 (5th Cir.), *cert. denied*, 138 S.Ct. 238 (2017) (meat market manager prepared performance evaluations, made schedules, and boasted he could influence hiring decisions; but, he did not having hiring or firing authority – so, plaintiffs not entitled to argue employer's vicarious liability for his harassment of two young women who worked under him – and no evidence of negligence as employer took action within days of their complaints).

damages, subject to proof by a preponderance of the evidence. To prevail on the affirmative defense, the employer must prove:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[16]

The Court deliberately focused the elements of the affirmative defense on what it viewed as the primary objective of Title VII, which was not to provide redress, but to avoid harm.[17] The first element was thus designed to measure what the employer has done to fulfill its affirmative obligation to prevent violations – and is usually satisfied with proof that it adopted a written policy describing and prohibiting unlawful sexual harassment and advising employees with knowledge/complaints of such to report it to someone or another in management or Human Resources.

The second element asks what the employee did to fulfill her or his coordinate duty to avoid or mitigate harm. And, in an encouraging note, the Court advised employers that they would usually meet the burden as to the second prong with proof of the employee's "**unreasonable failure to use any complaint procedure provided by the employer.**"[18]

And it does not seem to bother most judges to make decisions about what is and is not "reasonable" as a matter of law – forget asking a cross-section of Americans who work for a living what they might think.

2. Recent case law shows how easy it is for employers to win on this argument.

This second step in the affirmative defense is often the downfall of many plaintiffs' cases today. On the one hand, employers have generally been savvy enough to draft a policy that sounds really good on paper:[19] it announces in no uncertain terms that the company is absolutely, 100% opposed to sexual harassment, it states a commitment to eradicating the phenomena, and it advises employees to please bring the problem to the company's attention (thereby fulfilling its "commitment" to Title VII).

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[16] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[17] *Faragher*, 524 U.S. at 806.

[18] *Ellerth*, 524 U.S. at 745.

[19] *See Equal Employment Opportunity Comm'n v. Dolgencorp, LLC,* 2018 WL 2124098, at *6 (N.D. Miss. May 8, 2018), wherein U.S. District Court Judge Michael P. Mills observed, it takes only "minimally competent corporate counsel" to draft anti-harassment policies and procedures that "look good on paper."

And it is not at all difficult to write a policy that would survive most courts' scrutiny – just do an internet search. The 2016 EEOC Task Force on Sexual Harassment Report, which I highly recommend for reading, has several "Checklists for Employers," including one in which it recommends the kinds of pronouncements that should appear in a "good" sexual harassment policy. A good policy will have the following:

- An unequivocal statement that harassment based on any protected characteristic will not be tolerated;

- An easy-to-understand description of prohibited conduct, including examples;

- A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees;

- A statement that the reporting system will provide a prompt, thorough, and impartial investigation;

- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation;

- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation;

- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred;

- An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors;

- A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately; and

- Is written in clear, simple words, in all languages commonly used by members of the workforce.[20]

Sounds good, doesn't it?

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[20] Checklist for Employers No. 2: https://www.eeoc.gov/eeoc/task_force/harassment/checklist2.cfm

Unfortunately, the 2016 EEOC Task Force did not offer any kind of checklists that would be helpful to employees – or warn them that, unless they have some hard evidence on which they based their decision to not report the problem, they will lose. Because, without some kind of "evidence" satisfactory to the judge who is second-guessing the plaintiff's failure to report, they will find themselves castigated for not being brave enough to stand up for what's right, for letting "vague, unsubstantiated fears" get in the way of the duty they have as citizens to ensure that this Congressional law is followed throughout all workplaces.

See, e.g., Moore v. Bolivar County, 2017 WL 5973039 (N.D. Ms. 12/01/2017). The plaintiff testified that he did not follow BCRCF's harassment reporting procedures because **he "didn't want to bring any more harm to [himself] at that point.... And in the other instances where [he] had to file a grievance, it pretty much backfired against [him]**." Put simply, the plaintiff was "trying to keep [his] job." But, according to this federal judge, this testimony amounted to little more than a recitation of the plaintiff's own "subjective fears of reprisal," which did not defeat the *Ellerth/Faragher* defense.

The court in *Moore* relied on an earlier Fifth Circuit case – *Harper v. City of Jackson Mun. Sch. Dist.*, 149 Fed.Appx. 295, 302 (5th Cir. 2005) – for this principle:

> For Title VII to be properly facilitated, the reasons for not complaining about harassment should be substantial and based upon objective evidence that some **significant retaliation** will take place.

And, where did this legal pronouncement come from? Curiously, *Harper* relied on a decision earlier released by another judge from the Northern District of Mississippi: *Young v. R.R. Morrison and Son Inc*., 159 F.Supp.2d 921, 927 (N.D. Miss. 2000)). There, the plaintiff explained that she did not report her harassment because the harasser had threatened to fire her if she did. And, she had observed that the guy had "weathered the storms of complaints about him before." But, that was not enough – there was **no evidence that the employer had ever taken any adverse tangible employment action against complaining employees**."

See also Alamo Heights Independent School District v. Clark, 544 S.W.3d 755, 786-87 (2018). The TCHRA does not protect employees from all retaliatory employment action, only from actions that are "materially adverse." Materially adverse "means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." This objective materiality requirement is necessary "to separate significant from trivial harms."

> "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience."
>
> Retaliation is not actionable if it consists of being excluded from meetings, being micro-managed, being ostracized unfairly criticized, or having to endure frequent heated exchanges – those are "petty annoyances, not conduct likely to deter an employee from making a discrimination complaint."

> The same is true for not sharing food, interfering with personal property, and intentionally annoying behavior such as playing loud music.

See also Johnson v. LaShip, LLC, 2018 WL 2735486, at *4 (E.D. La. June 7, 2018). As to the first prong, an employer generally exercises reasonable care when it "provide[s] a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense."As to the second prong, an employee generally must take advantage of a reasonable reporting process before resigning and **may be required to make multiple attempts to report sexual harassment**.

But see Arredondo v. Estrda, 2015 WL 4523545 *7 (S.D.Tx. July 27, 2015). There was evidence there is evidence that "supervisors ruled their crews with iron fists. According to the Plaintiffs, the spoken or unspoken messages that permeated the workplace, included that they had to "get along to go along" and "what happens here stays here." They quickly learned that supervisors were not to be questioned and that doing so would not end well for them. And those supervisors who were aware of Estrada's conduct were not interested in stopping it. Based upon the working environment, Plaintiffs feared retaliation if they were to take advantage of any complaint procedure that went over the head of any immediate supervisor.

> It is for a jury to decide if Weatherford knew or should have known of the intimidation of the crews and whether the complaint procedures were reasonable under those circumstances. It is for a jury to decide whether Plaintiffs were unreasonable in not invoking the complaint procedures in an attempt to stop Estrada's behavior, given the corporate culture.

C. The Third Circuit gets it right, noting what we are learning today from victims of harassment and abuse who had been closeted for years.

In a very recent opinion – *Minarsky v. Susquehanna County*, 895 F.3d 303 (3rd Cir. 2018) – the Third Circuit took specific note of what society is learning, and what the courts should be paying attention to, about victims of sexual harassment – what they are saying about their experiences, and why the vast majority of them did not report the misconduct at the time it occurred. The knowledge we have been receiving over the past two years, the Court noted, pointed to the need for a jury to assess whether a victim's decision to not report harassment w as, not just reasonable, but understandable under the circumstances.

Here, the plaintiff was the part-time secretary for the Director of Susquehanna County's Department of Veterans Affairs who, she alleged, made unwanted sexual advances towards her for years. The district court found in the employer's favor under its *Faragher/Ellerth* affirmative defense and granted summary judgment. The Third Circuit reversed.

> The policy: According to the policy, an employee could report any harassment to their supervisor; if the supervisor is the source of the harassment, the employee could report this to the Chief County Clerk or a County Commissioner.
>
> The plaintiff's failure to report: Not once during this four-year course of harassment

> did the plaintiff report her boss' misconduct to either the County Clerk or a County Commissioner. She testified that she feared elevating the claims to County administrators, explaining that her boss had repeatedly warned her not to trust them, that they were likely to terminate her. She also testified that, whenever she tried to assert herself, the man would become nasty and ill-tempered. She also saw him engage in similar misconduct towards other women, and never get in trouble for it.
>
> And, she discovered, the County Clerk had even reprimanded the Director for similar conduct, but he never changed his ways – and no one checked on her. And, while she did not know this at the time, the evidence came out that he had actually been reprimanded twice for this kind of inappropriate behavior, but neither incident was noted in his personnel file. Even worse – the evidence shows that the Director had even made inappropriate advances to two of the women in authority: the County Clerk herself and a female County Commissioner – and yet neither of them did nothing about it.[21]

The district court, relying on earlier rulings from the Third Circuit, held that the plaintiff's "**prolonged failure to report misconduct, when a policy existed to report the conduct, was unreasonable as a matter of law**." While it noted that there could be situations where an employee's failure to follow the policy and report a problem could be reasonable, the fear of retaliation had to be "grounded in fact," distinguishing this case from a situation in which the plaintiff based her fear of retaliation on having seen other employees suffer retaliation when they did follow the anti-harassment policy.

The Third Circuit reversed, observing that "County officials were faced with indicators that [the Director's] behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward [his] harassment." And it posed a few questions:

> Was the policy in place effective? Knowing of [the Director's] behavior, and knowing that [the plaintiff] worked alone with [him] every Friday, should someone have ensured that she was not being victimized? Was his [ultimate] termination not so much a reflection of the policy's effectiveness, but rather, did it evidence the County's exasperation, much like the straw that broke the camel's back?

Id. at 312-13. The court offered not answers to the questions, instead noting that a jury would be in a better position to answer them than would a judge deciding the case under Rule 56.

The court then proceeded to its assessment of the County's argument that it was entitled to summary judgment under the second prong of the *Faragher/Ellerth* affirmative defense. This was not, however, a set of facts that presented a question to be answered as a matter of law. Instead, the court held, **the assessment of whether an employee's fear of retaliation for reporting harassment was reasonable is one best left to a jury**, citing what our society has recently been

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[21] In other words, neither of these women – who held the highest positions one could hold in the County – did nothing when the Director sexually harassed them. And, yet, the County argued that this part-time secretary should have – because it was her duty.

learning from victims of sexual harassment and abuse:

> This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.

Id. at 313 n.12. Still, the Third Circuit had to recognize that the district court's assessment had relied on two of its earlier decisions, and so the court had to acknowledge that it had indeed used this language in those opinions. Nonetheless, it took pains to step back from that absolute pronouncement, saying:

> [A] mere failure to report one's harassment is not *per se* unreasonable. Moreover, the passage of time is just one factor in the analysis. Workplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury, in certain cases. If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.

Id. at 314.

IV. The disappearing ability to hold employers liable for their own negligence when a supervisor is the harasser – *i.e., Negligence is not just for co-workers or customers*.

> Bonus: Attached chart walks through the theories of employer liability – negligence, vicarious liability, and alter ego.

The problem: For several years now, lawyers and judges have been limiting their application of

employer liability theories when the sexual harasser is a supervisor to only one theory – the vicarious liability standard. This reflects a misunderstanding of the law. Lawyers and judges are too often ignoring, and sometimes even affirmatively rejecting, the possibility that the employer's liability could be established under the often more easily proved theory of negligence: when an employer knows or should have known about the harassment and failed to take prompt remedial action.

A. The origin of the problem: the companion cases of *Faragher* and *Ellerth* and the notion of vicarious liability for supervisory harassment:

Before the *Faragher* and *Ellerth* decisions in 1998, an employer's liability was most-often established with evidence of the employer's actual or constructive knowledge of the harassment and its failure to prevent or correct it (aka take "prompt remedial action."). *See, e.g., Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (upholding employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (employer liable where hotel manager did not respond to complaints about supervisors' harassment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (holding employer liable for harassment by co-workers because supervisor knew of the harassment but did nothing).

But, negligence was not the focus of those two 1998 cases; instead, these two decisions focused on an argument in favor of strict liability for employers whose supervisory personnel engage in unlawful harassment. To address that argument, the Court reminded us that, in 1986, it advised that courts look to common law theories of agency when deciding employer liability for unlawful harassment,[22] and focused on section 219 of the Restatement of Agency (2nd) for guidance on how the more commonly accepted principles of agency could apply in the context of employer liability for sexual harassment. This section provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment;
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> > (a) the master intended the conduct or the consequences, or
> >
> > (b) the master was negligent or reckless, or
> >
> > (c) the conduct violated a non-delegable duty of the master, or
> >
> > (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

[22] *(citing Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

In *Ellerth,* the Court's analysis took it through each section and subsection, as follows:

> First, the Court noted that, under the general rule, sexual harassment by a supervisor will not be considered as conduct within the scope of employment, as that term is used in §219(1). .
>
> Second, the Court observed that employer liability can be established under §219(2)(a) "where the agent's high rank in the company makes him or her the employer's alter ego."[23]
>
> As to subsection (2)(b), the Court acknowledged that an employer is negligent, and therefore subject to liability, if it knew or should have known about sexual harassment and failed to stop it. Negligence, the Court noted, thus "sets a minimum standard for Title VII liability."
>
> Finally, the Court acknowledged that, in some cases, an employer can be vicariously liable for sexual harassment committed by its supervisory personnel under §219(2)(d).

The Supreme Court has not once rejected the notion that an employer can be found liable for sexual harassment by its supervisory personnel under the negligence theory. Speaking of a supervisor's sexual harassment, the Court in *Ellerth* first noted that, "[A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment." It then observed that, in fact, "**Negligence sets a minimum standard for Title VII liability**." 524 U.S. at 759. And, in *Faragher*, the Court observed in its concluding remarks that the evidence in the case could have also supported liability under the negligence theory. *See also Vance v. Ball State Univ*., 570 U.S. 421, 424 (2013). ("As an initial matter, an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment.").

B. Fifth Circuit precedent establishes employer liability when its own negligence facilitates sexual harassment by a supervisor.

In *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999), the defendant argued that the jury verdict in the plaintiff's favor should be overturned on appeal because the jury had been instructed that employer liability could be found under the negligence standard – and, meanwhile, the United States Supreme Court had decided *Faragher* and *Ellerth*, which applied the vicarious liability theory of employer liability in cases involving harassment by a supervisor.

In an opinion written by Judge Jerry Smith, the Court of Appeals for the Fifth Circuit rejected that argument. While the Supreme Court had indeed approved the application of the vicarious liability

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[23] The following may be considered an employer's proxy (or alter ego): "a president, owner, proprietor, partner, corporate officer or supervisor 'hold[ing] a sufficiently high position in the management hierarchy of the company for his actions to be imputed automatically to the employer.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 789-90 (1998).

theory in cases where the supervisor was a harasser, Judge Smith observed, those decisions did not disturb the law that then existed, and an employer's liability for supervisor harassment could still proceed on the "knew or should have known" theory. Judge Smith noted that, although the negligence standard was typically applied to coworker harassment, "[t]he concept of negligence ... imposes a 'minimum standard' for employer liability—direct liability—under title VII, a standard that is supplemented by the agency-based standards for vicarious liability as articulated in *Faragher* and [*Ellerth*]." *Id*. (citation omitted).

Nor was *Sharp* an outlier decision under Fifth Circuit precedent. In *Sharp*, Judge Smith applied in a straightforward manner the case law developed by the Fifth Circuit over many years – case law supporting the very simple proposition that, when an employer's own negligence results in sexual harassment, the employer is liable. *See, e.g., Williamson v. City of Houston*, 148 F.3d 462, 464 (5th Cir.1998); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action."); *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986) (requiring proof of *respondent superior, i.e.*, that the employer knew or should have known of the harassment in question and failed to take prompt remedial action); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (same).

See also Griffin v. Delchamps, Inc., 176 F.3d 480 (5th Cir. 1999) As an alternative to vicarious liability, an employer may be held responsible for a hostile work environment "if it knew or should have known of the harassment and failed to take prompt remedial action."

C. Secondary Sources – The Restatements of the Law

That employers are directly liable for their own negligence is not a new proposition. The RESTATEMENT (SECOND) OF EMPLOYMENT LAW, section 4.02, at 134, entitled "*Employer's Direct Liability to Employees for Its Own Conduct*," provides that "an employer is subject to liability in tort to an employee for harm caused in the course of employment by the tortious conduct of the employer or the controlling owner." (Emphasis added.)

Similarly, the RESTATEMENT (THIRD) OF AGENCY, section 7.03, at 151, provides that a principal is liable for its own negligence in "selecting, supervising, or otherwise controlling the agent" in addition to any vicarious liability that may be imposed via the agent's actions.

D. A few courts still get it right.

See, e.g., Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.2d 553, 575 (Iowa 2017) (plaintiffs under the Iowa Civil Rights Act may proceed against the employer on either a direct negligence or vicarious liability theory for supervisor harassment in a hostile-work-environment case. The *Faragher–Ellerth* affirmative defense, with the burden of proof on the employer, applies only to claims of vicarious liability.

See also Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642, 650–53 (10th Cir. 2013) (analyzing employer liability for supervisor harassment under both negligence and vicarious liability standards); *Dees v. Johnson Controls World Servs., Inc*., 168 F.3d 417, 421 (11th Cir.

1999) ("[A]n employer can be held directly liable for a supervisor's harassment when the employer either intended, or negligently permitted, the tortious conduct to occur."); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 540 n.4 (10th Cir. 1998) (recognizing the "continuing validity of negligence as a separate basis for employer liability" in action in which employee alleged supervisor harassment).

Cf. Smith v. Carter BloodCare, 2014 WL 1257273, at *4 (Tex. App. Fort Worth, Mar. 27, 2014) (when the harassment arises from a supervisor's conduct, the plaintiff does not have to prove the fifth element—that the employer was negligent; instead, "an employer may be vicariously liable for its employees' creation of a hostile work environment."

E. But rarely do any courts in the Fifth Circuit get it right.

After *Sharp*, it's almost as though the lawyers and judges in the Fifth Circuit and the district courts have wiped their memory banks clean of the notion that an employer's negligence that facilitates unlawful harassment by a supervisor can lead to its liability just as much as if the negligence facilitated unlawful harassment by a co-worker or customer.

1. Recent case law in the Fifth Circuit ignores the possibility of employer liability for its own negligence when the harasser is a supervisor.

Only two short years after *Sharp* was decided, negligence as a means of proving employer liability for supervisory harassment began disappearing from even general descriptions of the law. While the harasser in *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000), was the plaintiff's supervisor, the Fifth Circuit did not even acknowledge the possibility of finding the employer liable under the negligence theory. Its description of the law was that a hostile work environment claim is analyzed by asking, (1) "If proved, would the actions ascribed to the supervisor by the employee constitute severe or pervasive sexual harassment?" If so, then (2) then "the employer is vicariously liable—unless the employer can prove both prongs of the *Ellerth/Faragher* affirmative defense." *Id*. at 283-84. Appended to the decision was a flowchart entitled "Supervisory Sexual Harassment Roadmap," which omits any reference to negligence.

See also Gardner v. CLC of Pascagoula, L.L.C., 894 F.3d 654, 657 (5th Cir. 2018) (unless a supervisor is the harasser, a plaintiff needs to show that the employer knew or should have known about the hostile work environment yet allowed it to persist).

See also Moore v. Bolivar County, 2017 WL 5973039 (N.D. Ms. 12/01/2017) (The hostile work environment claim is analyzed by asking, (1) "If proved, would the actions ascribed to the supervisor by the employee constitute severe or pervasive sexual harassment?" If so, then (2) then "the employer is vicariously liable—unless the employer can prove both prongs of the *Ellerth/Faragher* affirmative defense.").

See also Equal Employment Opportunity Comm'n v. Dolgencorp, LLC, 2018 WL 2124098, at *3 (N.D. Miss. May 8, 2018) (an employer can avoid liability for severe or pervasive harassment by its supervisors only if it can show both that it acted reasonably in preventing and correcting harassment and that the employee acted unreasonably in failing to take advantage of

anti-harassment procedures which were available).

> Curiously, in this case, the defendant argued in its opening brief that it was not liable for the harassment by this supervisor because it took "prompt remedial action" upon learning of it. The evidence supplied by the plaintiff in her response rebutted that and, in its reply brief, the defendant instead argued that, because the question of liability was one of vicarious liability under *Faragher/Ellerth*, it did not need to prove that it engaged in "prompt remedial action" with regard to this plaintiff's particular complaint – only that, in general, it had a good anti-harassment policy – "as if this court should regard what it says as being more important than what it actually does." In addition to noting that the defendant had changed its legal theory, the district court rejected these ideas.
>
> > This line of argument turns the basic purpose of the *Faragher/Ellerth* standard on its head, by applying a more lenient standard to a claim of harassment by a supervisor than would be applicable to one involving alleged co-worker harassment.
> >
> > [I]t strikes this court that minimally competent corporate counsel is all that is required for a large corporation such as defendant to draft anti-harassment policies and procedures which "look good on paper."
>
> *Id*. at *6.

See also Johnson v. LaShip, LLC, 2018 WL 2735486, at *4 (E.D. La. June 7, 2018). The harasser was the shipyard manager, above the plaintiff's immediate supervisor. Against a hostile environment claim, an employer may use the *Ellerth/Faragher* affirmative defense to avoid vicarious liability for the conduct of its employees by showing that "(1) the employer exercised reasonable care to prevent and correct promptly any such sexual harassment, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."

2. The Fifth Circuit's Pattern Jury Charge suffers the same flaw.

The Fifth Circuit's 2014 Pattern Jury Charges, as revised in 2016, wrongly preclude a plaintiff from using the negligence theory of liability to hold an employer responsible for sexual harassment when the harasser is a supervisor. In the pattern jury instruction it offers for situations when the negligence theory of liability would be applicable in assessing an employer's liability for unlawful sexual harassment, the Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit states without caveat:

> When the alleged harasser is a supervisor, vicarious liability for allowing the harassment, not a negligence theory, is appropriate and Pattern Jury Instruction 11.2

or 11.3 should be used..[24]

The Committee does not try to square this pronouncement with the Supreme Court decisions listed above – *Ellerth, Faragher*, and *Vance*, with the decades of Fifth Circuit precedent, with Judge Smith's analysis in *Sharp*, with the Restatements, or with conflicting opinions from other Courts of Appeals. While the Committee acknowledges the existence of the *Sharp* opinion, but merely states that the case went to the jury before the Supreme Court's decisions in *Faragher* and *Ellerth*.[25].

[24] 2014 Pattern Jury Instructions (Civil) (as revised through October 2016) at 145-46 (Instruction 11.4, Title VII (42 U.S.C. § 2000E-2) Coworker or Third-Party Harassment Without Tangible Employment Action (Hostile Work Environment—Negligence)).

[25] *Id*. at 146 n.4.

UNLAWFUL HARASSMENT: LIABILITY UNDER RESTATEMENT OF AGENCY 2D § 219(2)

Does the evidence show ____?	**Yes/No**	**Legal Theory, Employer Liability**
Did the harassment result in a tangible employment action?	Yes ⇛ No ⇛	Automatic liability = Quid Pro Quo Check hostile work environment under negligence, vicarious liability, or alter ego theories
The harassment was sufficiently severe or pervasive to alter the terms and conditions of employment?	No ⇛ Yes ⇛	No liability under any theory (continue)
The harasser was a supervisor at a level where he or she was empowered by the employer to take tangible employment actions against the victim.	Yes ⇛ No ⇛	Can invoke *either* vicarious liability or negligence theory of liability. Cannot use vicarious liability theory, but negligence theory available
Negligence Theory: (1) The employer knew or should have known of the harassment	Yes ⇛ No ⇛	Can use either negligence or vicarious liability theory No liability for negligence; check other theories – vicarious liability or alter ego
(2) Employer nonetheless failed to take action to either prevent it or stop harassment once it obtained that knowledge?	Yes ⇛ No ⇛	Employer liable for its own negligence No liability for negligence; check other theories – vicarious liability or alter ego
Vicarious Liability (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior?	 No ⇛ Yes ⇛	 Employer is liable under vicarious liability theory. Analyze second factor of affirmative defense.
(2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise.	No ⇛ Yes ⇛	Employer liability under vicarious liability theory. No employer liability
Alter Ego – The harasser was "within that class of an employer organization's officials who may be treated as the organization's proxy"?	Yes ⇛ No ⇛	Liability under alter ego doctrine, § 219(2)(a) Check negligence or vicarious liability theories

GENDER DISCRIMINATION AT WORK:

Panelists' Perspectives on
Problems & Possibilities in 2018

Chapter Two

TOPIC ONE:
SEXUAL HARASSMENT
(Continued)

Navigating Workplace Harassment Issues in the #MeToo Era

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Morgan Lewis

NAVIGATING WORKPLACE HARASSMENT ISSUES IN THE #METOO ERA

August 25, 2018

Morgan Lewis

SEXUAL HARASSMENT CLAIMS PRE–#METOO

The situation facing companies in the post–#MeToo era differs from the pre–#MeToo era.

Sexual Harassment Claims Pre–#MeToo

Legal and/or technical ways to fend off claims of sexual harassment included:

1	2	3
Failure by victims to complain about conduct, thus preventing companies from investigating and remedying situations	Complained-about conduct was not "severe and pervasive"	Claims were asserted too late and barred by the statute of limitations

Sexual Harassment Claims Pre–#MeToo

- In cases where harassment was reported, investigated, and substantiated, settlement agreements typically were reached with claimants. Agreements generally included nondisclosure and confidentiality provisions to ensure secrecy.
- Complainants would be moved to other parts of companies and away from alleged harassers.
- Alternatively, complainants would be paid to leave companies.
- In cases where harassment was found, high-level offenders typically received warnings and trainings.

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THE #METOO AFTERMATH

The #MeToo Aftermath

- In summer/fall 2017, claims and prior settlements involving high-profile individuals such as Bill O'Reilly, Roger Ailes, and Harvey Weinstein were revealed.
- The immediate aftermath: a near-daily stream of claims against high-profile individuals.
- The trend shows some signs of slowing, but claims are still being made.

In the Post–#MeToo Era We See:

- Many claimants coming forward.
- Claims lodged against high-profile individuals in the entertainment and media industries.
- Claims against executives and high-producing individuals in many other industries.
- Claims made against members of Congress, and criticism of the procedure and process for handling such claims.

The #MeToo Aftermath

- Social media quickly spreads information and opinions about conduct claims.
- Companies may be quicker to “pull the trigger” and terminate the alleged harasser based on the allegations.
- Claims frequently involve conduct that allegedly occurred many years ago.
- Claimants often do not want their identities disclosed; some claims are made anonymously.

The #MeToo Aftermath

- Failure to complain and the statute of limitations are still technical or legal defenses, but they are not defenses from a public relations standpoint.
- Boards of directors are consequently concerned about the #MeToo crisis and the potential resulting damage to company brands.
- While the legal standard for what constitutes sexual harassment and the defenses to such claims have not changed, the enforcement standard has changed.

Federal, State, and Local Efforts to Remove Sexual Harassment from a “Cloak of Secrecy”

New US Tax Code precludes companies from deducting settlement amounts for sexual harassment claims if the settlement agreement has a nondisclosure provision.

Bills are pending in the US House and Senate to exclude sexual harassment claims from mandatory arbitration.

Legislation pending in several states and municipalities would prohibit the use of nondisclosure provisions in sexual harassment settlement agreements.

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#METOO – WHAT TO EXPECT

Hot Topics and New Issues Related to the #MeToo Movement

1

Shareholder Lawsuits

- The #MeToo movement could trigger a wave of investor actions.
- Wynn Resorts' board and former CEO were hit with a shareholder derivative suit after the stock fell 20% when allegations against Wynn went public in January 2018.
- The suit claims that the company and its board of directors should be held accountable for breaching their fiduciary duties and exposing shareholders to damages by sweeping accounts of Wynn's conduct under the rug for decades.
- 21st Century Fox settled a derivative lawsuit for $90 million in February 2018.
- More recently, investors sued Wynn Resorts GC and execs over insider trading.
- [Note: There is intensified focus on SEC disclosures of harassment allegations and investigation against high-level executives.]

2

Insurance Changes

- Carriers offering EPL insurance are now demanding that companies institute or update anti-harassment policies and procedures, and are also making sure that anti-harassment training actually takes place.
- Carriers are not yet increasing EPL rates and deductibles across the board (only selectively); however, “[i]t’s a surge we are waiting to happen.”
- Recently, insurers filed suit asking the court to find that they do not have to defend or indemnify Weinstein for nearly a dozen sexual assault and harassment suits.
- “Every policy . . . includes an ‘intentional acts’ exclusion.”

3

Gender Pay Inequity Claims

- #MeToo has pushed forward the focus on the gender pay gap.
- In a recent survey, 48% of companies say that they are reviewing their pay policies with an eye toward closing the gender pay gap.
- Some companies have recently announced that they are providing raises to even out salaries among men, women, and minority employees.
- Other companies have implemented salary transparency policies that eliminate the secrecy surrounding pay.

4

EEOC's New Harassment Guidance

- Currently awaiting approval from the Office of Management and Budget. The draft was a 75-page document.
- Will supersede several previously issued EEOC documents on harassment from the 1990s.
- The final part of the EEOC guidance includes four core principles of "Promising Practices": leadership and accountability, comprehensive and effective harassment policy, an effective and accessible harassment complaint system, and effective harassment training.
- Will include specific recommendations: live training, regular anonymous employee surveys, and other specifics.

5

Inclusion Riders and the Like

- Frances McDormand closed her acceptance speech at the Academy Awards: “I have two words to leave you with tonight—inclusion rider.”
- It is a stipulation that actors and actresses can demand to have inserted into their contracts, which would require a certain level of diversity among a film’s cast and crew.
- How could this impact corporate America? A leader can say, “I will not accept this role if the team isn’t diverse”; powerful allies can do the same; boards can demand more diversity, equity, and inclusion of their CEOs and executive teams; executive teams can create ways to hold people accountable.

In Light of the #MeToo Movement, Companies Must:

Take a comprehensive approach to making "zero tolerance" for sexual harassment a permanent reality.

React more quickly and decisively to harassment claims.

Engage in greater attempts to investigate anonymous claims.

Provide more transparency regarding investigations and their outcomes.

Provide employees with improved and updated training.

Proactively evaluate workplace culture issues.

How to Begin . . .

- Leaders play vital roles in ensuring safe, inclusive workplaces
- The #MeToo movement establishes a new paradigm for employers and provides opportunities for learning how to create safe, inclusive workplaces
- Companies and their leaders should use this moment to break down internal barriers and create cultures of inclusiveness and transparency

Proactive Steps Taken by Some Employers in Response to #MeToo

Evaluation of potential changes in management structure (e.g., HR head to report directly to CEO).

Institution of board review of all material HR matters.

Creation of a diversity and inclusion committee.

Institution of regular pay audits to assess gender parity and fairness.

Creation of anti-harassment support groups.

Conducting of annual workplace culture assessments and mandatory sexual harassment training.

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WORKPLACE CULTURE ASSESSMENTS

Workplace Culture Assessments—Becoming a Best Practice

- Since the start of the #MeToo movement, we have conducted more workplace culture assessments than ever before.
- Workplace culture assessments provide interesting information and observations, and allow employers to get ahead of issues in the workplace that may be percolating.
- These assessments are tailored and customized for companies.
- Our recent assessments have involved talking with thousands of employees in individual interviews or focus groups.

Overview of Workplace Assessments

- Analysis of workplace culture, specific issues, or complaints
- Four key steps:
  - Identification of issues:
    - We work with management and HR to identify the scope of assessment and whether to use focus groups, individual interviews, or a combination of both, etc.
    - We then develop a “bull’s-eye” question map
    - From there we identify specific questions to be asked in focus groups and/or individual interviews
  - Analysis: we identify key themes, trends, and/or areas for follow-up or escalation based on what we heard in focus groups or interview sessions
  - Results and recommendations: we provide concrete recommendations based on the themes that we heard
  - Implementation: we work with management and HR to implement recommendations

Common Themes Across Companies and Sectors

- The power phenomenon in the workplace is real; relationships in the workplace involving the power dynamic (superiors/subordinates) cannot be truly consensual.
- Men question whether companies are “pulling the trigger too quickly.”
- Most employees lack knowledge regarding procedures for complaining.
- Employees are reluctant to complain for fear of retaliation and retribution.
- There is considerable concern over unintended consequences such as undermining the mentoring and development of women by senior male leaders for fear of sexual harassment claims.

Assessments have found a need for increased:

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HOW LEADERS CAN ENSURE SAFE & INCLUSIVE WORKPLACES

SBOT L&E / GENDER DISCRIMINATION 051

1

Lead by example

Leaders set the tone for the organization. Poor and inappropriate behavior by leaders will lead to the same kind of conduct by others.

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2

Do not tolerate bad behavior and be sure to report it

Bad behavior has to be addressed and corrected promptly. It also needs to be reported to HR.

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3

Foster an inclusive environment

All employees, regardless of gender, need to feel valued and included in the activities and work of the organization.

4

Be aware of and try to curb unconscious biases

Unconscious biases are learned stereotypes that operate automatically and unconsciously when we interact with others. They impact our conscious decisions and behaviors. Everyone has them, based on our individual backgrounds and experiences.

5

Address unconscious bias

- Applying a “wiper effect” to your brain
- Developing relationships beyond first impressions
- Moving past the discomfort of differences
- Avoiding only commonality when developing relationships

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6

Be mindful of the concept of privilege

- Privilege is something that is given, not earned
- Those with privilege can have an advantage over those who do not have it
- We need not be ashamed of privileges, but we should be aware that others may not have the same advantages

7

Be conscious of the impact that perceived power can have on subordinates

- One question to ask:
  Are there ways to break down barriers?

8

Be open and transparent about performance

- Subordinates should not have to speculate regarding where they stand relative to their performance

9

Do not engage in discussions about your personal life

- Especially concerning situations with spouses, partners, or significant others

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10

Do not engage in discussions with subordinates about the subordinates' personal lives

- Especially concerning situations with their spouses, partners, or significant others

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Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

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Almaty	Chicago	Houston	Orange County	Shanghai*
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Brussels	Hartford	Moscow	Princeton	Washington, DC
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GENDER DISCRIMINATION AT WORK:

Panelists' Perspectives on
Problems & Possibilities in 2018

Chapter Three

TOPIC TWO:
LGBTQ ISSUES

Evolving Protections for Those Who Are LGBTQ

by
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I. Overview

The law on sexual orientation discrimination in employment "has recently evolved," as district courts within this Circuit have emphasized. The Equal Employment Opportunity Commission has joined the "evolution" as reflected in *Baldwin v. Foxx*, 2015 WL 4397641 at *5 (EEOC Doc., July 15, 2015) ("Title VII's prohibition of sex discrimination means that employers may not rely upon sex-based considerations or take gender into account when making employment decisions"). The Second and Seventh Circuits have issued *en banc* decisions agreeing with the EEOC. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107-08 (2d Cir. 2018) (*en banc*); *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (*en banc*). Numerous district courts also share this view. *See, e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839-40 (W.D. Pa. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (Title IX); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222-25 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002).

Courts and the Commission have relied on three rationales for recognizing that Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination. First, discrimination based on sexual orientation necessarily requires impermissible consideration of a plaintiff's sex, which Title VII prohibits. *Zarda*, 883 F.3d at 113; *id.* at 135; *id.* at 136; *Hively*, 853 F.3d at 358-59; *Baldwin*, 2015 WL 4397641, at *5. Where an employer treats a female employee married to a woman differently from a male employee married to a woman, that is "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345; *see also Zarda*, 883 F.3d at 116. Second, sexual orientation discrimination involves gender-based associational discrimination. Courts have routinely found that race-based associational discrimination violates Title VII; relying on that

principle, courts have recently concluded that associational discrimination claims are equally valid in the sex discrimination context. *Zarda*, 883 F.3d at 124-25; *id.* at 136; *Hively*, 853 F.3d at 349; *id.* at 359 ; *see also Baldwin*, 2015 WL 4397641, at *6-7. Third, sexual orientation discrimination may involve sex stereotyping, which would constitute sex discrimination under Title VII according to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Zarda*, 883 F.3d at 119-23; *Baldwin*, 2015 WL 4397641, at *7-8.

II. *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018)(plurality opinion)

Zarda v. Altitude Express is a Title VII sexual orientation case that took nearly eight years to secure an *en banc* victory for the Plaintiff at the Second Circuit Court of Appeals and, tragically, outlived the Plaintiff Donald "Don" Zarda.

Although it hardly requires an introduction, Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination by covered employers (generally, fifteen or more employees) on the basis of race, color, religion, sex, or national origin. 42 U.S.C.A. 2000e, *et seq*. In the 1986 case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court expanded the scope of Title VII's prohibition against sex discrimination in the workplace by finding that sexual harassment that creates a "hostile environment" is a form of sex discrimination. The legal contours of "sex" discrimination evolved once more in 1998, when Justice Antonin Scalia penned the unanimous opinion of the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), a case that originated in the Fifth Circuit, finding that same-sex sexual harassment, too, was a form of sex discrimination prohibited under Title VII.

In 2010, Don Zarda was a world-class skydiving instructor obsessed with professionalism and safety.[1] While working for Altitude Express, Inc., a skydiving company in New York, Don told a female student that he was gay, which Don often did with female clients in order to mitigate any awkwardness that might arise from their bodies being strapped tightly together in sensitive locations during tandem jumps.[2] Sometime after the jump, however, the female client informed her boyfriend, who in turn complained to Altitude Express, which swiftly terminated Don's employment. *Zarda*, 883 F.3d at 108-09.

In September 2010, Don filed a lawsuit in the United States District Court for Eastern District of New York against Altitude Express, alleging violations of Title VII. *Id.* at 109. The catch in Don's case, however, was that he alleged discriminatory termination of his employment because of sex stereotyping and his *sexual orientation*, which was not a recognized basis for discrimination under federal law at the time. *Id*. Predictably, upon motion for summary judgment by Altitude Express, the District Court tossed Don's sexual orientation discrimination claim on the basis that sexual orientation discrimination was not covered under Title VII. *Id*.

Tragedy struck in October 2014, however, when Don was killed in a base jumping accident in Switzerland. Don's case was distinctly important to him as a gay man, and he strongly believed in the merits of his claims. An immense and statuesque figure, *"Don was very proud of who he was and wanted to make sure that no one in our [LGBT] 'family' was mistreated or disrespected,"* Bill Moore, Don's former partner and a Dallas business owner, explained for this paper. Thus, not wanting to see his legacy extinguished, Don's sister and Mr. Moore decided to carry the suit forward to the Second Circuit Court of Appeals.

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[1] Vanessa Chesnut, *Plaintiff at center of landmark gay-rights case never got to witness his victory*, NBC NEWS (March 3, 2018), https://www.nbcnews.com/feature/nbc-out/donald-zarda-man-center-major-gay-rights-case-never-got-n852846.
[2] *Id.*

In January 2017, oral argument was held before a three judge panel at the Second Circuit, with the Estate of Donald Zarda asking the panel to revisit its precedent and find that sexual orientation discrimination is a form of "sex" discrimination under Title VII. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017). However, the panel declined the Estate's invitation to revisit its controlling precedent in *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000), reasoning that only the Second Circuit sitting *en banc* could do so. 855 F.3d at 82.

Thus, the Estate appealed to the *en banc* Second Circuit, which took up the case during its August 2017 term. In the time between the panel decision and the *en banc* decision on February 26, 2018, however, the landscape on the issue became muddied by conflicting opinions from a panel of the Eleventh Circuit Court of Appeals, which declined to recognize a Title VII sexual orientation claim without *en banc* review or a contrary Supreme Court opinion,[3] and the Seventh Circuit Court of Appeals, sitting *en banc*, finding that "discrimination on the basis of sexual orientation is a form of sex discrimination."[4]

The Second Circuit's *en banc* opinion began by addressing the white elephant in the struggle with interpretation of Title VII; that is, the inseverable connection between *sex* and *sexual orientation*. 883 F.3d at 113. Citing *Hively*, the *Zarda* Court reasoned: to "identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted." *Id*. Thus, according to the *Zarda* Court, it must then follow:

> Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.
> *Id.*

[3] *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017).
[4] *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc).

Next, the *Zarda* Court turned its attention to the classic "but for" comparative test in sex discrimination cases, holding: "To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently 'but for' his or her sex." 883 F.3d at 119. However, as the Court noted in distinguishing prior challenges over sex-specific employment practices, it is not enough for a Title VII plaintiff to show differential treatment because of sex—the first prong of Title VII's analysis requires a plaintiff to evidence discrimination "with respect to his compensation, terms, conditions, or privileges of employment." *Id*. The *Zarda* Court, therefore, viewed sexual orientation as a function of sex where, for example, "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." *Id*.

Moreover, the *Zarda* Court found it impossible to separate sexual orientation discrimination from "gender stereotyping" in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Supreme Court held that "employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination," and prior conclusions regarding "associational discrimination" in Title VII race cases.[5] For the Second Circuit, it was hardly a stretch to see that "[t]he gender stereotype at work here is that 'real' men should date women, and not other men."[6] Thus, on February 26, 2018, nearly eight years since the filing of suit and four years after his untimely death, Don's enduring love for his community played out in a 10-3 victory for LGBT rights.

[5] *Zarda*, 883 F.3d at 119-120 (citing *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986)).
[6] *Id*. (quoting Centola v. Potter, 183 F.Supp.2d 403, 410 (D. Mass. 2002)).

III. *Wittmer v. Phillips 66 Co*., 304 F.Supp.3d 627 (S.D. Tex. 2018)

Contradicting the notion that bad facts make bad law, the *Wittmer* case addresses a claim of transgender discrimination and, while granting summary judgment for the Defendant, nevertheless acknowledges that Title VII recognizes a claim for transgender discrimination.

Nicole Wittmer, a transgender woman, sued Phillips 66 Company for unlawful discrimination based on her sex after Phillips rescinded a job offer it had made after interviewing her. 304 F. Supp.3d at 629. Phillips presented evidence that: it did not know of her transgender status when it rescinded the job; and the rescission was based upon information that Ms. Wittmer had misrepresented her employment status during the job interview—both of which were uncontroverted at the summary judgment stage. Based upon such evidence, the court granted summary judgment for the Defendant. *Id*. at 636. However, in its analysis, the court recognized the newly protected nature of transgender status:

> Although the Fifth Circuit has not yet addressed the issue, [very recent] circuit court cases are persuasive. They consistently recognize transgender status and orientation as protected classes under Title VII, applying the long-recognized protections against gender—or sex based stereotyping. Applying these recent cases, the court assumes that Wittman's status as a transgender woman places her under the protections of Title VII.
> *Id.* at 634.

While the *Wittmer* facts did not lend themselves to establishing a *prima facie* case under the *McDonnell Douglas* framework, it did provide clarity with respect to the *Price Waterhouse* "failure to conform" standard under Title VII. Quoting the Sixth Circuit, the *Wittmer* Court verified that "'Title VII protect transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.'" Id. at 633—34, citing *Equal Emp't Opportunity Comm'n v. R.G.&G.R. Harris Funeral Homes, Inc*. 884 F.3d 560, 577 (6th Cir. 2018).

GENDER DISCRIMINATION AT WORK:

Panelists' Perspectives on
Problems & Possibilities in 2018

Chapter Four

TOPIC THREE:
GENDER DISCRIMINATION IN FEDERAL CONTRACTS

Pattern & Practice Cases by U.S. Dept. of Labor, Office of Federal Contract Compliance Programs (OFCCP)

by
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***U.S. Dept. of Labor - Office of the Solicitor,* Dallas**
edwards.karla.j@dol.gov

Gender Discrimination and Federal Contractors: U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)[1]

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246 (E.O.), as amended, among other laws. *See* 41 CFR § 60.1.1 *et al.* The E.O. seeks to hold federal government contractors and subcontractors responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of sex, gender identity and sexual orientation (as well as prevents discrimination based on race, color, religion, national origin, disability, or status as a protected veteran).

If a contractor has a contract or multiple contracts that are greater than $10,000, the contractor is subject to Executive Order 11246 if:

- It contracts directly with the federal government;
- One of its divisions, branches, sections or departments contracts directly with the federal government;
- It is a sub-contractor of a federal contractor;
- It is so closely related to a separate contractor with a covered contract that both entities are considered operating as a single entity.

Some contractors are covered regardless of the amount of contract, including companies with government bills of lading; depositories of federal funds in any amount; and financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes *See* 41 CFR § 60-1.5.

OFCCP conducts compliance evaluations of federal contractors to determine whether they maintain nondiscriminatory hiring and employment practices. This may include reviewing the contractor's affirmative action program (AAP); interviewing witnesses; touring the facility to understand the jobs; and analyzing data and other documents. Each non-construction (supply and service) contractor must develop and maintain a written AAP for each of its establishments if it has 50 or more employees and:

- Has a contract of $50,000 or more; or
- Has government bills of lading that total or can be expected to total $50,000 or more in a year; or
- Serves as a depository of government funds; or
- Is a financial institution that issues and pays savings bonds and notes.

OFCCP litigation involves claims of systemic pattern or practice discrimination and similarly to , the EEOC's Title VII litigation there are two theories of discrimination to consider: disparate impact and disparate treatment. Disparate impact cases involve a facially neutral policy or

[1] It is important to note that Karla Jackson Edwards has provided information in her personal capacity. Her statements do not represent any official position of the U.S. Secretary of Labor and/or the Department.

practice that is uniformly applied, but that produces a significant adverse impact on a protected group. *See Griggs v. Duke Power*, 401 U.S. 424 (1971). The discriminatory intent of the employer is not at issue and instead the discriminatory effects of the policy or practice is the focus. Examples of policies that may produce an illegal disparate impact include requiring applicants to pass a written test or submit to package lifting tests – but these tests are unrelated to the job and/or unneeded to perform the job at issue. Unlike disparate impact cases, disparate treatment cases require proof of intent and discriminatory motives. Intent can be proven by direct evidence, inferred from circumstances, or shown through statistics.

Statistics play a key factor with OFCCP's compliance evaluations and litigation. Statistics can show significant differences in the treatment of employees or candidates for hire. Two or more standard deviations is statistically significant. This means that it is unlikely that the results occurred by chance and there is an inference of discrimination. However, another factor may explain the disparity, including legitimate, nondiscriminatory factors.

Standard Deviation	Chance
1 SD	3.2 in 10
2 SD	5 in 100
3 SD	3 in 1,000
4 SD	6 in 100,000
5 SD	6 in 10 million
6 SD	2 in 1 billion

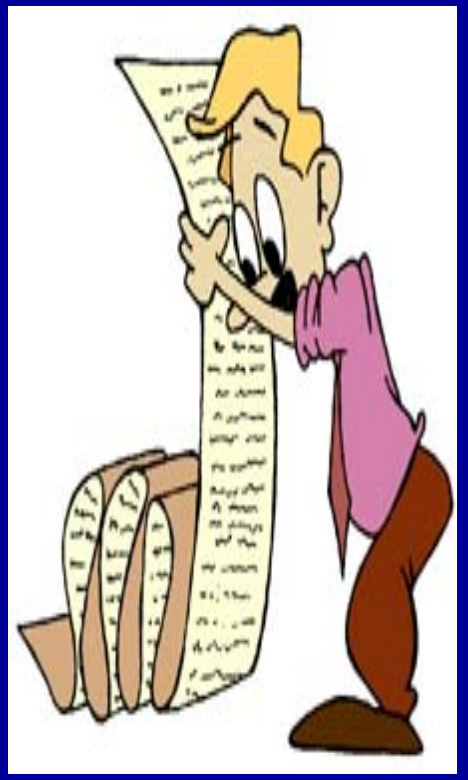
OFCCP may also use multiple regression analysis to determine the impact of multiple factors (independent variables) on an individual factor (dependent variable). Multiple regression analyses can isolate the effect of one of the independent variables while controlling, or holding constant, all of the other variables to explain whether or not the effect of each variable is statistically significant. This will provide the exact average effect of group membership (i.e. being female) on the dependent variable (i.e. salary or likelihood of being hired).

OFCCP seeks back pay, salary adjustments, job offers and/or injunctive relief as a result of discriminatory practices, among other remedies. Notably, expert witnesses are usually required in OFCCP litigation. This includes statistical experts or labor economists; testing experts like industrial organizational psychologists; local labor market and demographics experts; and/or industry experts regarding specific jobs.

Compliance assistance for contractors is available, including contacts and information available at www.dol.gov/ofccp/. The Southwest and Rocky Mountain Region (SWARM) of OFCCP includes Texas, as well as Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. Key SWARM personnel include Melissa Speer, Regional Director; Aida Collins, Deputy Regional Director; and Ronald Sullivan, Director of Regional Operations.

Gender Discrimination and Federal Contractors:

U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)



Laws Enforced by OFCCP

- Executive Order 11246 (E.O.)
  - Includes legal requirements for federal contractors to take affirmative action
  - Cannot discriminate on the basis of sex, gender identity and sexual orientation (as well as prevents discrimination based on race, color, religion, national origin, disability, or status as a protected veteran).
  - No private right of action.

Contract Coverage

- Contract(s) greater than $10,000 are subject to the EO if:
  - It contracts directly with the federal government
  - One of its divisions, branches, sections or departments contracts directly with the federal government
  - It is a sub-contractor of a federal contractor
  - It is so closely related to a separate contractor with a covered contract that both entities are considered operating as a single entity

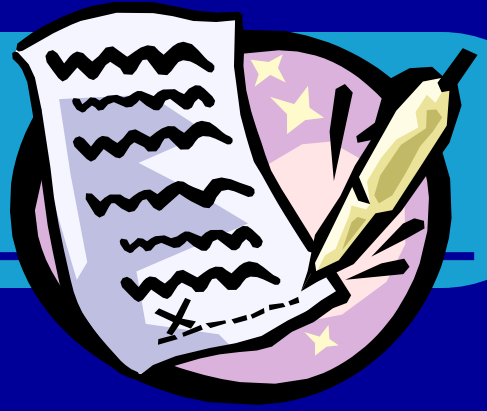
Contract Coverage (cont.)

- The following contractors are covered regardless of amount of contract
  - Companies with government bills of lading
  - Depositories of federal funds in any amount
  - Financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes
- 41 CFR 60-1.5

Compliance Evaluations

- OFCCP conducts compliance evaluations of federal contractors to determine whether they maintain nondiscriminatory hiring and employment practices.
- May include reviewing the contractor's affirmative action program (AAP); interviewing witnesses; touring the facility to understand the jobs; and analyzing data and other documents.

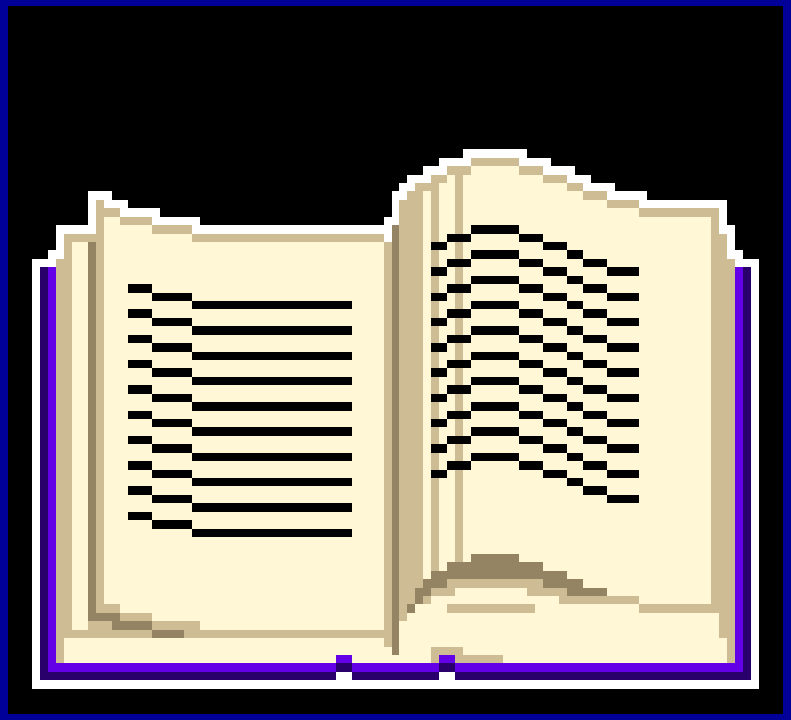
Written AAPs



- Each non-construction (supply and service) contractor must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:
  - Has a contract of $50,000 or more, or
  - Has government bills of lading that total or can be expected to total $50,000 or more in a year, or
  - Serves as a depository of government funds, or
  - Is a financial institution that issues and pays savings bonds and notes

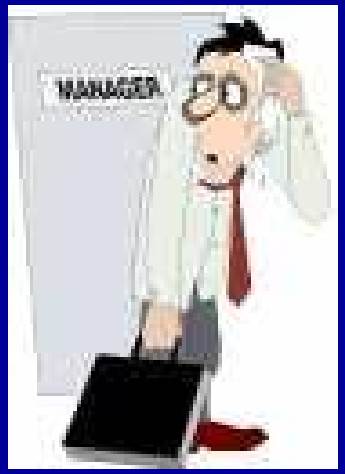
Two Main Theories

- Disparate Treatment
- Disparate Impact



Pattern or Practice

- Pattern or Practice
  - Where discriminatory conduct is the employer's standard or usual procedure, not merely an isolated incident
  - Example: Looking at the process an employer follows when it hires employees (applicant pools can be thousands or tens of thousands)



Prima Facie Case – Pattern or Practice

- In a systemic pattern or practice case, a prima facie case of discrimination can be proven by statistical evidence
- The plaintiff must demonstrate through statistics a pattern of underrepresentation or a difference in treatment of a protected class that is not explained by chance
  - 2 or 3 standard deviations can be sufficient to infer discrimination
  - *Hazelwood School District v. United States*

Statistically Significant Disparities

- Statistically significant differences in the treatment of similarly situated persons
  - Two or more standard deviations
- Unlikely that results occurred by chance
  - Another factor usually explains the disparity
  - Inference of discrimination
  - However, disparity may be explained by legitimate, nondiscriminatory factors

Probability or Chance

Standard Deviation	Chance
1 SD	3.2 in 10
2 SD	5 in 100
3 SD	3 in 1,000
4 SD	6 in 100,000
5 SD	6 in 10 million
6 SD	2 in 1 billion

Multiple Regression Analysis

- Used to determine the impact of multiple factors (*independent variables*) on an individual factor (*dependent variable*).
- Can isolate the effect of *one* of the independent variables while controlling, or holding constant, all the others.

Multiple Regression Analysis

- Explains whether or not the effect of each variable is *statistically significant.*
- Can provide the exact average effect of group membership *(i.e., being female)* on the dependent variable *(i.e., salary or likelihood of being hired).*

Expert Witnesses

- Statistical Experts
  - Labor Economists, often professors
- Testing Experts
  - Industrial Organizational Psychologists
- Other Experts
  - Experts on local labor market factors such as demographics
  - Experts on a certain industry, such as jobs in the banking industry

OFCCP Regulations

41 C.F.R. Part 60

https://www.ecfr.gov/cgi-bin/text-idx?SID=bffbd2b245f571d8dd17a584ce220266&mc=true&tpl=/ecfrbrowse/Title41/41cfr60-1_main_02.tpl

Remedies

- Hiring/job offers or reinstatement,
- Back pay with interest,
- Salary Adjustments,
- Retirement contributions,
- Leave and other benefits.

Key OFCCP Regional Personnel SWARM

- Melissa Speer, Regional Director
- Aida Collins, Deputy Regional Director
- Ronald Sullivan, Director of Regional Operations

District Offices & Key Personnel

- Dallas District Office
  - Vacant, Dallas DD
- Denver District Office
  - Nicole Huggins, Denver DD

District Offices & Key Personnel

- Houston District Office
  - Karen Hyman, Houston DD
  - LaToya Smith, ADD
- San Antonio District Office
  - Dinorah Boykin, DD
- New Orleans District Office
  - Rachel Woods, New Orleans DD

National Office Key Personnel

- Craig E. Leen, Acting OFCCP Director (Ondray Harris resigned on July 27, 2018).
- Craig E. Leen, Deputy Director
- Dr. Marika Litras, Acting Deputy Director,

  Director of Enforcement
- Deborah A. Carr, Director of Policy, Planning and Program Development