HARASSMENT IN THE WORKPLACE

I. INTRODUCTION/BACKGROUND

Liability for workplace harassment, including racial, religious, disability, and sexual harassment, is increasingly a concern for private and public employers. This workshop focuses on sexual harassment, but the suggested investigation and response techniques are applicable to all harassment claims.

A. Purpose of Workshop

1. How to react to allegations of workplace harassment is one of the trickiest questions facing human resources and other corporate managers today.

2. This workshop is intended to assist you in understanding the law surrounding workplace harassment and to challenge you to consider your reactions to various situations that you may encounter.

3. You want to avoid under reacting to claims of workplace harassment, by denying, deferring or ignoring serious charges.

4. On the other hand, you want to avoid overreacting, by firing or severely punishing employees for false or less serious allegations.

B. Recent Statistics and Anecdotes

1. In 1998 for instance, there were nearly 16,000 sexual harassment complaints made to the U.S. Equal Opportunity Commission and state human rights organizations, up from approximately 6,100 in 1990.

2. Monetary settlements reached through the EEOC for sexual harassment claims have risen from $7.7 million in 1990 to many tens of millions today. Compensatory damages in sexual harassment cases average more than $120,000, and punitive damages may be many times that amount.

3. In The News Recently

   a. March 31, 2000: Stanford Loses Gender Bias Suit

   In the first gender-discrimination case against Stanford University ever to reach trial, an eight-person jury unanimously found that the university had retaliated against former researcher Colleen Crangle and awarded her $541,000 in damages to “send a message to Stanford.”
b. March 30, 2000: Female General Accuses Peer of Harassment

The Army's most senior female officer has filed a sexual harassment complaint against a fellow general, accusing him of groping her in her Pentagon office in 1996. *(The Washington Times).*

c. March 23 - U.S. Settles Job Bias Case

The federal government agreed yesterday to pay $508 million--the largest award ever in an employment discrimination case--to end a lawsuit filed 23 years ago by hundreds of women who said they were denied jobs and promotions at the U.S. Information Agency and Voice of America. The agreement ends a tortured legal battle that began after Carolee Brady applied for a job as a USIA magazine editor, only to be told that managers were seeking a man. *(The Washington Post).*

d. March 10, 2000 - Accused Harasser Awarded Damages by Employer

A Circuit Court jury in Hawaii has voted a $2.1 million award to Eddie Gonsalves, who was fired from an auto service manager job at Infiniti-Nissan after a female service clerk filed a sexual harassment complaint against him. "It felt like I was being dragged through the mud and no matter how hard you rinsed off, it was going to follow you for the rest of your life," Gonsalves said. "The jury found that Infiniti-Nissan unlawfully discriminated against Gonsalves, breached a promise to him that his job would not be affected by the investigation, and violated its own personnel policies and procedures involving his termination." *(The Washington Post).*

e. Feb. 11 - Grocer Sued over Sexual Taunting

A Teller County woman has filed a lawsuit against City Market Corp., saying the company did nothing to protect her from relentless harassment by fellow employees who tormented her for being a lesbian. Debbie Aukema, 31, filed suit Feb. 2 in Teller County District Court against Tami Sluder, the manager of the floral department at the grocery store, and City Market Corp., the Grand Junction-based grocer with 38 stores in Colorado. *(Denver Post Southern Colorado Bureau).*

f. Feb. 8 - E-mails Sink 20 Times Employees

E-mails that ended 20 Times careers. MSNBC has posted this *Wall Street Journal* account of the New York Times’ mass firing of 23 employees, all but one of them in the company's Norfolk, Va. outpost, found to have forwarded offensive e-mails, including sexually oriented images, blonde jokes and Ebonics jokes.

g. Nov. 29, 1999 - JUNO Sued for Sexual Harassment - Again
For the second time in four months, Juno Online Services faces a sexual harassment lawsuit brought by a former employee. In a suit filed Friday in New York state court in Manhattan, Lori Park, a former Juno software engineer, claims she was pressured to date a company executive and was paid less than her male colleagues. In the court filing, Park describes a company where sexism and locker-room behavior were rampant. Friday night “happy hours,” for example, were “more reminiscent of a Roman orgy than a happy hour,” she says. *(The Standard - Internet News Service).*

h. Sept. 10, 1999 - When Others Harass, Managers Now Lose Pay

Supervisors across America take note: How well you promote and enforce your company's sexual-harassment policy could soon impact whether you get that next raise or promotion. This tough new standard of evaluating supervisors' rigor on harassment is something Ford Motor Co. agreed to as part of its $7.5 million sexual-harassment settlement with federal regulators in Chicago this week. And experts say it will soon become standard practice at most U.S. firms. *(Christian Science Monitor).*

i. Sept. 7, 1999 - Ford Pays Millions in Harassment Settlement

In an out-of-court deal with the U.S. Equal Employment Opportunity Commission, Ford Motor Co. on Tuesday agreed to pay more than $7.5 million to female workers who have faced sexual and racial harassment at its two Chicago-area plants. Ford agreed to adopt new personnel policies and training for workers to deal with sexual harassment on the job at all of its U.S. facilities. The cost for the training alone was estimated by the EEOC at $10 million. Indeed, EEOC officials singled out Ford's acceptance of a strict discipline policy, which they described as unique within the ranks of Corporate America, as a way of making sure that supervisors toe the company line on policies on curtailing sexual and racial harassment. Under the policy, a key measure for supervisors' promotion will be their "commitment to equal employment opportunity." Likewise, Ford supervisors who sexually harass employees or who ignore such on-the-job abuses will forfeit their bonuses and promotions and face the loss of their jobs. *(Various news services).*

II. SUMMARY OF SEXUAL HARASSMENT LAW

A. Scope

Although this workshop addresses federal law, please note that sexual harassment claims based on state law are increasingly common.

B. Legal Basis for Sexual Harassment Claims

1. Statutory Basis
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits sex discrimination and sexual harassment in the workplace:

It shall be an unlawful employment practice for an employer

(1) ... to discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's ... sex.

2. Administrative Guidelines

The Equal Employment opportunity Commission (EEOC), which is charged with enforcing Title VII, issued its Guidelines on Discrimination Because of Sex in 1980. Under those guidelines, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

a. submission to such conduct is a term or condition of employment; or

b. submission to or rejection of such conduct is made the basis for an employment decision; or

c. such conduct interferes with work performance or creates an offensive working environment.

29 C.F.R. § 1604.11

An employer is responsible for:

a. the conduct of supervisors, whether or not the employer knows about it;

b. the conduct of fellow employees, when the employer knows about it;

c. the conduct of third parties (e.g., customers, vendors), when the employer knows about it.

3. Judicial Rulings - Supreme Court

The United States Supreme Court issued its first ruling on sexual harassment in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The Court ruled unanimously that sexual harassment in the workplace violates Title VII.

In the Meritor case, a female bank teller alleged that her male supervisor subjected her to sexual demands and that she submitted out of fear of losing her job. Supreme Court Justice Rehnquist described the facts as follows:

[The supervisor, Taylor] invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job, she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Id. at 60.

Vinson never reported the harassment to any of Taylor's supervisors and never attempted to use the bank's complaint procedure. In upholding Vinson's right to pursue her claims under Title VII, the Supreme Court ruled:

(1) Title VII encompasses discrimination in the form of a "hostile or abusive work environment," even though there was no economic effect on plaintiff's employment. The Court rejected the employer's argument that, in enacting Title VII, Congress was concerned only with tangible economic loss and not psychological aspects of the workplace. Id. at 66-67.

(2) Not all workplace misconduct rises to the level of a "term, condition, or privilege" of employment. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Id. at 67.

(3) "The fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title
The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome." Id. at 68.

The cases following reflected that courts still were struggling with unresolved questions about sexual harassment. First, what standard -- "reasonable person," "reasonable woman," "subjective reaction of the victim" - should be applied to determine when a hostile sexual environment exists? Second, must the alleged conduct seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury, or is less serious misconduct also actionable?


Harris again involved complaints that a female employee, Harris, was subjected to abusive behavior by her supervisor, the company's president, Hardy. Justice O'Connor related the relevant facts:

Hardy often insulted [Harris] because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "we need a man as the rental manager"; at least once, he told her she was "a dumb ass woman" . . . . In front of others he suggested that the two of them "go to the Holiday Inn to negotiate Harris' raise" . . . . Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket....

114 S. Ct. at 369. At one point, Harris complained to Hardy, who said he was only joking and apologized. A month later, however, Hardy started anew. While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy ... some [sex] Saturday night?" Id. Shortly thereafter, Harris quit her job and filed a Title VII lawsuit against Forklift.

The Supreme Court decided that the appropriate standard to apply to determine whether conduct creates an offensive work environment is an objective standard -- whether the work environment would be hostile or abusive to a "reasonable person." Although the employee must also subjectively perceive the environment to be so abusive as to have actually altered the conditions of her employment, a jury must ultimately decide whether her perception or reaction was reasonable.

How should a "reasonable person" react? When is enough, enough? The Supreme Court reasoned that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." Id. at 370. A discriminatorily abusive work environment "can and often will
detract from employees' ob performance, discourage employees from remaining on the job, or keep them from advancing in their careers." Id. at 371.

Whether an environment is "hostile" or "abusive" requires looking at all the circumstances, including:

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

C. Types of Harassment

1. Quid Pro Quo Cases

Quid pro quo harassment involves an exchange, e.g., a promise of promotion in exchange for sexual favors, or a threat of discharge for rejection. It is discriminatory because the demand is based on gender. For instance in Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), a case in which a woman's job status was allegedly dependent upon submission to sexual advances, the court found a violation of Title VII because such "an extraction would not have been sought from any male." Id. at 989.

Quid pro quo harassment requires an unequal power relation and an abuse of that power for personal purposes. It is the most blatant type of harassment and is less common than hostile environment sexual harassment.

In Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit held that to succeed on a quid pro quo claim, plaintiff must prove by a preponderance of the evidence that:

a. He or she was subject to unwelcome sexual harassment;

b. The harassment is based on sex;

c. His or her reaction to the harassment affected tangible aspects of his or her compensation, terms, conditions or privileges of employment (although the plaintiff need not show economic harm). The acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit or cause of a tangible job detriment.
d. The employer knew or should have known of the harassment and took no effective remedial action. This element is automatically satisfied when a supervisor engages in quid pro quo harassment.

In Reinhold v. Commonwealth of Virginia, 947 F. Supp. 919, (E.D. Va. 1996), the evidence at trial showed that the harasser used his supervisory authority to punish the plaintiff, a school psychologist, after she spurned his sexual advances. The supervisor then dramatically increased her workload; required her to train, discipline and lead therapy sessions for teachers and staff members; refused to hire a temporary psychologist, as he had done in the past, to help the plaintiff complete psychological evaluations required by the State; threatened to “make her life hell;” and refused to allow her to take part in professional training. The court held that the jury reached a reasonable decision in finding for plaintiff on her quid pro quo claim.

2. Hostile Environment Cases

The Amended 1980 EEOC Guidelines cover "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." 29 CFR § 1604.11 (a)(3).

This concept of "hostile environment" sexual harassment was borrowed from a line of racially hostile work environment cases in which, for example, blacks were hired but subjected to racial epithets or jokes as a condition of employment. See, e.g., Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) ("one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers").

Following the issuance of these guidelines, the courts began to consider a number of cases involving both supervisory and co-worker harassment. These cases do not involve direct requests for sexual favors tied to an employment benefit. They arise when a claimant finds the atmosphere in the workplace offensive due to the sexual nature of conduct by supervisors and/or co-workers.

The United States Court of Appeals for the Fourth Circuit recently restated the elements of a hostile environment claim in Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 142 (4th Cir. 1996):

! Plaintiff must prove that he or she was harassed "because of" his or her "sex";

! The harassment was unwelcome;

! The harassment was sufficiently severe or pervasive to create an abusive working environment; and

! The conduct is imputable, on some factual basis, to the employer.
3. Same Sex Sexual Harassment

In Oncale v. Sundowner Offshore Servs., Inc., the Supreme Court held that same sex sexual harassment is cognizable under Title VII.

D. Key Factors

1. Pervasive, Persistent and Severe

As to the degree of offensive conduct constituting actionable sexual harassment, the United States Supreme Court in Meritor stated: “[N]ot all workplace conduct that may be described as 'harassment', constitutes sex discrimination. The harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'” Meritor Sav. Bank v. Vinson, supra, 477 U.S. at 67 (quoting Rogers V. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 967 (1972)).

The standard was refined in Harris. There, the Supreme Court stated that the appropriate standard was to take "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." 114 S. Ct. at 370. The Court held that the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment- an environment that a reasonable person would find hostile or abusive," and further, the victim must also "subjectively perceive the environment to be abusive." Id.

a. Examples of What Has Been Held to Be Not Sufficiently Severe or Pervasive

Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745 (4th Cir. 1996). The male plaintiff alleged a variety of harassing conduct by his male supervisor, including attempting to kiss the plaintiff at the plaintiff's wedding; pivoting an illuminating magnifying lens over the plaintiff's crotch and looking through it while asking "Where is it?"; asking the plaintiff personal questions about his sex life; making sexual innuendoes; regularly commenting on the plaintiff's physical appearance; and other similar bizarre or annoying conduct.

The district court decided the case on the basis that same-sex harassment is not actionable under Title VII. The Court of Appeals declined to address that issue, and concluded that the plaintiff had failed to prove that the alleged harassment was sufficiently severe or pervasive to create an objectively hostile work environment, or that the conduct was directed to him because of his sex. The court concluded that the alleged harasser's behavior was “temporally diffuse, ambiguous, and often not directed specifically at” the plaintiff. The behavior occurred intermittently over a seven-year period. The alleged harasser never made an overt sexual comment or touched the plaintiff in a sexual manner. Although the alleged harasser's behavior was "tasteless and inappropriately forward," it did not rise to the level that would interfere with
a reasonable person's work performance to the extent required by Title VII. In addition, some of
the conduct occurred in a group setting where it was unclear that it was directed towards the
plaintiff at all. The court therefore affirmed summary judgment for the employer.

Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir. 1997). The United States Court of
Appeals for the Sixth Circuit reversed a jury verdict in favor of the plaintiff for $50,000 in
compensatory and $200,000 in punitive damages. The female plaintiff alleged that male
supervisors and co-workers made inappropriate comments at meetings. For example, while
discussing the acquisition of a parcel of land next to a Hooters Restaurant, it was suggested that
the area be named "Titsville" or "Twin Peaks." While discussing a piece of property near a
"biker bar," one man asked the plaintiff "weren't you there Saturday night dancing on the
tables?" Other similar comments were made, including a reference to the plaintiff as "the
broad." A little over four months after she started working for the employer, the plaintiff was
terminated for performance deficiencies.

A jury found against the plaintiff on her sex discrimination claim but found in her favor
on her claim of hostile environment sexual harassment. Relying on Meritor and Harris, the
Court of Appeals agreed with the defendant that the verbal conduct alleged did not rise to the
level of being objectively hostile or abusive. The court concluded that even when viewed in the
light most favorable to the plaintiff and taking into account the totality of the circumstances, the
comments did not appear to have been more than "merely offensive." The court emphasized
that although the comments were unprofessional, offensive, and inappropriate, they were not
directed at plaintiff and, citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir.
1995), Title VII was "not designed to purge the workplace of vulgarity." Id. at 430.

Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995). The United States Court of
Appeals for the Seventh Circuit overturned a $25,000 jury verdict for a sexual harassment
plaintiff, telling her that being called a "pretty girl" and hearing provocative grunts from her
supervisor when she wore a leather skirt were not enough to sustain a claim of sexual
harassment. The Court said that drawing the line between vulgarity and sexual harassment is
not always easy, but that the concept of sexual harassment was not designed to purge the
workplace of vulgarity. The Court recognized that the supervisor was "not a man of refinement;
but neither is he a sexual harasser." Indeed, the Court reasoned that the alleged harasser "never
said anything to [the plaintiff] that could not be repeated on prime-time television." The Court
determined that even if his comments rose to the level of actionable harassment, the company
took prompt and effective steps to protect the plaintiff.

b. Examples of What Has Been Held to Be Sufficiently Severe or Pervasive

Shope v. Board of Supervisors 14 F.3d 596 (4th Cir. 1993). The United States Court of
Appeals for the Fourth Circuit held that there was sufficient evidence that plaintiff, a female
employee, had resigned her municipal employee position as a result of her supervisor's gender-
motivated harassment. This harassment included comments to the plaintiff that she "looked
ridiculous" in the dress she was wearing; that she "shouldn't be such a soft woman;" that she was "too aggressive a woman" for the job; and that she was a "weak woman." The court, citing to Harris v. Forklift Systems, Inc., noted that this evidence was "the sort the Supreme Court . . . indicated would suffice to make out a hostile working environment claim based on sex discrimination."

Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994). The United States Court of Appeals for the Third Circuit held that a sexual harassment claims based upon a hostile work environment theory may be asserted without proof of blatant sexual misconduct. The plaintiff presented evidence that she was subjected to a sexually hostile working environment in the form of false rumors among her colleagues that she was having a sexual relationship with her male supervisor, and thereby had gained influence over him. These rumors allegedly led plaintiffs fellow employees to shun her and her supervisors to evaluate her poorly for advancement purposes.

2. "Welcome" vs. "Unwelcome"

In addition to being sufficiently and objectively severe, actionable conduct must be "unwelcome." "The correct inquiry is whether the [complainant] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." Meritor Sav. Bank v. Vinson, 477 U.S. at 68. Very often, credibility is at issue: the complainant alleges the action was unwelcome and the harasser claims it was invited.

The Meritor case opened the door to very broad inquiry into the plaintiffs background. Reversing the appellate court ruling that testimony about the victim's provocative dress and personal sexual fantasies "had no place in this litigation," the United States Supreme Court ruled that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant." Id. at 69.

The Supreme Court noted that the EEOC's guidelines require the court to determine whether there was harassment in light of "the record as a whole" and the "totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 20 C.F.R. § 1604.11(b). Thus, a trial court "must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind [although] there is no per se rule against admissibility." Id.

Carr v. Allison Gas Turbine, 32 F.3d 1007 (7th Cir. 1994). The plaintiff was the first woman to work in the employer's tinsmith shop. Over a period of four years, she was subjected to a barrage of sexually explicit comments such as "whore;" was subjected to various sex or gender-related pranks and was exposed to nude pin-ups that were hung around the shop; and twice had a male co-worker expose himself to her. Although the lower court held that the plaintiff did not find the conduct "unwelcome" because she had also engaged in sexually
explicit and vulgar language, the United States Court of Appeals for the Seventh Circuit contrarily found that the several-year-long period of harassment was not welcome, and that the employer was entirely ineffective in eliminating the hostile environment.

E. Employer Liability

1. Supervisor Liability

In Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious or automatic liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

2. Conduct of Co-Workers

In Faragher, the Court cited with approval existing case law adopting the “negligence” standard for co-worker harassment. See Faragher, at 4649-50. In addition, the Court stated in Burlington Industries that “[n]egligence sets a minimum standard for employer liability under Title VII.” Burlington Industries, at 4638.

The Fourth Circuit has held that where the hostile environment is created by co-workers and supervisors or management do not participate, the plaintiff must demonstrate that the employer had "actual or constructive knowledge" of the events and failed to take prompt remedial action. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). Once the employer does have knowledge, it must take action. See Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (the court found the employer liable for co-worker harassment since the harassment was brought to the employer's attention and it failed to take adequate corrective steps.)

For instance, in Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987), a flight attendant filed a "hostile environment" suit against the airline because of a pilot's misbehavior. The court found that the pilot was a co-worker, rather than a supervisor. Under the circumstances, the airline would only be liable if it had actual or constructive knowledge and failed to take any
remedial action. The stewardess had complained and the airline hid confronted the pilot with the allegations. The pilot admitted some, but not all, of the alleged unprofessional conduct and the airline issued a written disciplinary warning. Given these circumstances, the Court of Appeals found that the airline had met its obligations. It was only required, to investigate and present a reasonable basis for its subsequent action. It did not have to believe only one side or the other, nor was termination the automatic remedy.

3. Constructive Discharge


To make out a claim for constructive discharge, a plaintiff must prove, in addition to a hostile work environment, (1) the "deliberateness of the employer's action" and (2) the "intolerability of the working conditions." Andrade v. Mayfair Management, Inc., 88 F.3d 258, 262 (4th Cir. 1996). "Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the employee to quit." Id.

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995). The United States Court of Appeals for the Fourth Circuit upheld a jury's findings that Cavalier Hotel Corporation was liable for constructive discharge of an employee who was subjected to sexual assaults and threats by the general manager of the hotel, even though Cavalier maintained an explicit policy forbidding such conduct. The Fourth Circuit applies the minority rule that "a plaintiff must ... prove that the actions complained of were intended by the employer as an effort to force the employee to quit." Id. at 1354. However, the court emphasized that it does not require "'smoking gun' evidence of employer intent." Id. Instead, as the Martin court explained, "in assessing the deliberateness of an employer's conduct, an employer must necessarily be held to intend the reasonably foreseeable consequences of its actions." Id. If an employee's decision to quit is a reasonably foreseeable consequence of her supervisor's abuse, this shows the requisite intent on the part of the employer to force the employee to quit, even if the employer denies having any conscious intent to do so. Id. at 1354-55.

4. Conduct of Third Parties

An employer may be held liable for the sexually harassing conduct of third parties under some circumstances.

In EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981), the employer was held liable where a female lobby attendant was made to wear a sexually provocative costume which engendered verbal abuse from male visitors. The court stated that the employer knew or should have known of the conduct.
In EEOC Decision 84-3, CCH Emp. Prac. Guide ¶ 6841 (2/16/84), the EEOC found an employer to be responsible for sexual harassment where the employee was a restaurant waitress who was harassed by a frequent customer of the restaurant, who was also a friend of the restaurant owner. See also Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986); Marentette v. Michinn, Host, Inc., 506 F. Supp. 909 (E.D. Mich. 1980).

F. Co-worker/Supervisor Liability

Of particular note in the Swentek case, supra, is that the stewardess sued both the airline and the pilot. The relief granted to the airline in court did not preclude the stewardess from suing the individual pilot for tort actions such as intentional infliction of emotional distress. In Kyriazi v. Western Elec. Co., 647 F.2d 388 (3d Cir. 1981), the court also found the co-workers liable for their actions. This liability could be either under Title VII (if the harasser is in a management or "employer" position) or under state tort law.

G. Remedies, Damages

1. Title VII

The complainant, if successful, is entitled to be put in the position he or she would have been in but for the discriminating conduct. This usually means back pay, reinstatement, injunction against further activity, and attorney's fees. As of 1991, Title VII also provides for compensatory and punitive damages up to $300,000.

2. Related Causes of Action

Employees may also file state claims with unlimited damages, including for example, (1) intentional infliction of emotional distress, (2) defamation, (3) invasion of privacy, (4) intentional interference with an employment contract, (5) assault and battery, or (6) possible criminal charges.

H. What About the Accused?

Very often, proof in sexual harassment cases is the same as in rape cases. The issue is one of credibility and the charge is easily made and easily denied. Tempers flare, reputations are ruined, and the workplace may be disrupted beyond repair.

Employees who feel falsely accused, or improperly discharged, may file breach of contract, emotional distress or defamation suits against their employers or accusers. See Thomas v. Petrus, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984). These employees may also file claims that they were actually discharged for their race or age. See Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986); Johnson v. Perkins Restaurants, Inc., 815 F.2d 1220 (8th
The sensitive and confidential handling of charges is crucial under these circumstances, as is the need to provide objective reasons for any actions taken.

I. What Employer Response is Sufficient?

Since *Meritor*, courts have straggled to define the circumstances under which an employer's response to a sexual harassment complaint is sufficient and, conversely, when the employer's response is so inadequate that the employee's decision to quit her/his employment may be considered constructive discharge by the employer.

1. Example of a Sufficient Response

In *Spicer v. Commonwealth of Virginia, Dep't of Corrections*, 66 F.3d 705 (4th Cir. 1995), the plaintiff was an employee in a correctional facility in which a majority of the felons had been convicted for violent crimes. Her provocative manner of dress prompted a memorandum from the captain of the security force to the warden, in which he referred to plaintiff's nipples showing through her clothing. When the warden forwarded the memorandum to plaintiff's supervisors, he failed to mark it confidential and the memorandum was read at a meeting attended by plaintiff and several co-employees. Plaintiff's fellow employees then began to tease her and make sexually offensive comments.

The plaintiff complained to her immediate supervisor who arranged a meeting with the warden. However, the plaintiff chose instead to visit the equal employment officer who contacted the warden. Immediate action was taken to ensure that the memorandum was not publicly posted. Moreover, management counseled those involved (in writing) and distributed a memorandum about treating such matters more sensitively. The correctional facility also admonished those making inappropriate sexual remarks. Finally, the correctional facilities conducted two training sessions to educate employees and to prevent the recurrence of such remarks.

The United States Court of Appeals for the Fourth Circuit concluded that no evidence existed to suggest that the "incident was other than the brief, isolated result of an inartfully drafted memorandum addressing a legitimate and important concern." *Id.* at 710. The plaintiff failed to make out a hostile environment claim, because she did not establish that the events were somehow imputable to the employer. The court emphasized that it has "repeatedly held that an employer cannot be held liable for isolated remarks of its employees unless the employer 'knew or should have known of the harassment, and took no effectual action to correct the situation.'" *Id.*

In sum, the court held that to hold the employer liable under the circumstances would be tantamount to imposing strict liability on the employer for all inappropriate workplace behavior, regardless of the employer's knowledge of the behavior or its response. The court noted that "when an employer's remedial response results in the cessation of the complained of conduct, liability must cease as well." *Id.* at 711. Because the employer had responded "both promptly
and effectively, eliminating completely the offensive conduct of the kind directed" at the plaintiff, there could be no Title VII liability. Id.

In Kadiki v. Virginia Commonwealth University, 892 F. Supp. 746 (E.D. Va. 1995), the United States District Court for the Eastern District of Virginia held that the plaintiff, a VCU student who alleged that her professor spanked her and touched a portion of her body generally regarded a private and erogenous, failed as a matter of law to establish a claim of hostile environment harassment. The Court granted the University summary judgment because it immediately investigated the conduct, placed the professor on probation, directed the professor to perform community service and recommended that he seek counseling.

In Waymere v. Harris County., 86 F.3d 424 (5th Cir. 1996), the United States Court of Appeals for the Fifth Circuit held that an employer's investigation, which took three months to complete and which resulted only in a reprimand and not the alleged harasser's termination, was nevertheless prompt and sufficient.

In Baskerville v. Culligan Int'l Co., 50 F.3d 420 (7th Cir. 1995); the United States Court of Appeals for the Seventh Circuit held that plaintiff failed to prove a hostile environment claim where the company counseled the harasser upon learning of his conduct and where plaintiff admitted knowing, but failed to follow, the company's sexual harassment complaint procedures.

In Johnson v. Baxter Healthcare Corp., No. 94-C4808, 1996 WL 435141 (N.D. M. July 31, 1996), the United States District Court for the Northern District of Illinois held that the plaintiff, an African American woman, failed to establish a claim of racial harassment. Plaintiff alleged that throughout the course of her employment, she was continually subjected to racial slurs and epithets from her coworkers and that, despite repeated notification of these incidents, the company failed to take effective corrective measures. The court noted that most of the alleged incidents took place, by plaintiff's own admission, more than 300 days before she filed her EEOC charge and therefore were time barred. The only remaining incidents were two alleged remarks by a coworker and one remark by a supervisor. Plaintiff alleged that the coworker twice said "yessir mas'r" to the supervisor in plaintiff's presence. However, the court noted that the supervisor immediately reprimanded the coworker for the remark, as required by company policy. Plaintiff could not remember the exact date of the second comment by the same coworker. However, evidence in the record showed that the remark was investigated and the company determined that there was no evidence to support plaintiff's allegation. Finally, plaintiff alleged that the supervisor once stated that she did not care what was said to plaintiff, as long as plaintiff was not called "nigger." The supervisor denied making the comment. However, the company investigated the issue. The supervisor's supervisor spoke with her and emphasized the serious nature of plaintiff's allegations.

The plaintiff contended that the company's response to her complaints of racial harassment was inadequate. Specifically, she pointed to the fact that there was no documentation in her coworker's file about the alleged remarks. The court noted that the company is required only to take action as appropriate under the circumstances. The court concluded that the
company's failure to take any additional steps was irrelevant absent evidence that its chosen approach was not reasonably likely to prevent the harassment from recurring. Because the plaintiff did not allege any incidents of harassment after the incidents that were investigated, the court determined that she could not assert that the company's response was inappropriate under the circumstances.

2. Examples of Insufficient Responses

In Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), vacated in part reh'g, 900 F.2d 27 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit reversed an award of summary judgment in favor of the employer to permit the employee an opportunity to prove that she quit her job because of an intolerable workplace environment. The employer promised that the harassment would not happen again and asked her not to quit. The harasser was disciplined by a written warning stating that any recurrences or retaliation would lead to termination and was instructed to seek counseling. The Fourth Circuit found that the supervisor's request that the employee not resign was not conclusive given that the employee might reasonably have interpreted the discipline against the harasser as insufficient in light of similar warnings to him in the past and evidence that the manager who issued warnings against such conduct joked with male colleagues about sexual harassment complaints, by women at the company.

In Reinhold v. Commonwealth of Virginia, 947 F. Supp. 919 (E.D. Va. 1996), upon learning of alleged harassment that had occurred over a period of eight months, the employer investigated and concluded that harassment had indeed occurred. The harasser was given a disciplinary notice, stripped of his supervisory authority, and referred to mandatory counseling. However, while the plaintiff took several days off from work to recover from the trauma, the employer permitted the harasser to write a memorandum on the employer's stationery. In the letter, the harasser apologized for the disruption caused by his suspension but insinuated that he was the real "victim." He also repeatedly denied that any of the incidents had taken place and he began to vilify the plaintiff to other employees. Five days after returning to work, the plaintiff resigned. The court concluded, based on these facts, that the jury could reasonably reach the conclusion that the employer was liable for hostile environment harassment. The court added that the employer's investigation was superficial and inadequately designed, and that under the employer's own policies, the harasser should have been fired.

In Waltman v. Int'l Paper Co., 875 F.2d 468 (5th Cir. 1989), the United States Court of Appeals for the Fifth Circuit reversed an award of summary judgment to the employer in a hostile environment case. The court found that shortly after the plaintiff began work, a coworker broadcast obscenities about her over the plant's public address system. The co-worker was told to stop but was not formally reprimanded. Other incidents of harassment occurred, and the court found that management received actual notice of the harassment on three occasions and constructive notice because of the pervasive sexual graffiti in the plant. The court found, that the company failed to reprimand the plaintiffs co-workers but merely required that the plant's sexual
harassment policy be read aloud. Under these circumstances the plaintiff's failure to invoke the company's formal grievance procedure did not defeat her claim.

In *Washington v. City of Cleveland*, 948 F. Supp. 1301 (N.D. Ohio 1996), an African American female security officer hired by the Cleveland Public Utilities Police, Division of Water, alleged that her supervisor, a white male, had a longstanding and ongoing pattern of sexual discrimination against her and made various racial comments regarding black women and interracial relations in general. After granting summary judgment for the city on plaintiff's quid pro quo sexual harassment claim, the court held that the plaintiff presented evidence that she was continuously propositioned and exposed to various unwelcome comments and touching in regard to both her sex and race. The court stated that the evidence presented showed that the incidents were not random or isolated but continued over an extended period of time, and that the alleged initiator of these incidents was plaintiff's supervisor. The court determined that plaintiff's workplace was so permeated with discriminatory intimidation, ridicule and insult so as to alter the conditions of plaintiff's employment and create an abusive working environment. Therefore, because genuine issues of material fact existed as to whether the actions complained of amounted to plaintiff being subjected to a hostile work environment on the basis of race and sex, the court denied the city's motion for summary judgment.

These cases illustrate that if the investigation reveals that the misconduct occurred, appropriate corrective action should be taken immediately. This may take the form of warnings, transfers, demotions or discharges, but the corrective action should be in compliance with any written policy and strong enough to have a deterrent effect.

Even if the misconduct cannot be confirmed, it still may be appropriate to reassign or transfer the complaining employee or the accused, or both. However, any transfer of the complaining employee should be reviewed carefully to avoid any possibility of retaliation claims under Title VII.