SUBJECT: PROPOSED Enforcement Guidance on Unlawful Harassment

PURPOSE: This transmittal issues for public input the Commission's proposed guidance on unlawful harassment under EEOC-enforced laws.

When it is issued in final, this PROPOSED sub-regulatory document will supersede Section 615: *Harassment*, EEOC Compliance Manual, Volume II; Policy Guidance on *Current Issues of Sexual Harassment* (1990); Policy Guidance on *Employer Liability for Sexual Favoritism* (1990); Enforcement Guidance on Harris v. Forklift Sys., Inc. (1994); and Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999). It is intended to communicate the Commission's position on important legal issues.

EFFECTIVE DATE: N/A – Proposal for public input

EXPIRATION DATE: This transmittal will remain available for public input for a period of 30 days after its publication.

ORIGINATOR: Office of Legal Counsel

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I. Introduction

A. Background

Thirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson*[1] that workplace harassment can be an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, harassment remains a serious problem.[2] As highlighted by the June 2016 Report of the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace (Task Force Report or Report), almost one third of the approximately 90,000 charges received by the Equal Employment Opportunity Commission (Commission or EEOC) in fiscal year 2015 included an allegation of workplace harassment.[3] The actual cases behind these numbers reveal that many people, including teenagers, people with intellectual disabilities, and others, still experience the hostile working conditions that the *Meritor* Court held to be actionable.

This enforcement guidance is a companion piece to the Task Force Report. The Task Force Report focuses on identifying ways to renew efforts to prevent harassment, and this enforcement guidance explains the legal standards for unlawful harassment and employer liability. This guidance presents a single legal analysis for harassment that applies the same legal principles under all equal employment opportunity (EEO) statutes enforced by the Commission. This guidance also replaces, updates, and consolidates several earlier EEOC guidance documents: *Compliance Manual Section 615: Harassment*; *Policy Guidance on Current Issues of Sexual Harassment* (1990); *Policy Guidance on Employer Liability for Sexual Favoritism* (1990); *Enforcement Guidance on* Harris v. Forklift Sys., Inc. (1994); and *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999).

In this guidance, the Commission sets forth its interpretation of the federal EEO laws the agency is charged with enforcing with respect to harassment.[4] In crafting this guidance,

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[1] 477 U.S. 57 (1986).

[2] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 5-15 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [hereinafter *Select Task Force Co-Chairs' Report*] (discussing prevalence of workplace harassment).

[3] *See* EEOC, *All Charges Alleging Harassment: FY 2010-FY 2015*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm (last visited Dec. 6, 2016).

[4] 42 U.S.C. § 2000e-5 (Title VII); 29 U.S.C. § 626 (ADEA); 42 U.S.C. § 12117(a) (ADA); 42 U.S.C. § 2000ff-6(a) (GINA). This guidance addresses claims of harassment under provisions of the federal EEO laws that prohibit discrimination by employers, including section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), and does not address claims of harassment under provisions that prohibit discrimination by employment agencies and labor organizations, including sections 703(b) and 703(c) of Title VII, 42 U.S.C. §§ 2000e-2(b) and 2000e-2(c). *See generally Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84-85 (1st Cir. 2007) (upholding jury verdict finding union liable for sexual harassment that occurred during union-sponsored bus trip); Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Phillips v. UAW Int'l*, No. 16-1832 (6th Cir. Oct. 5, 2016) (discussing union liability for harassment under 42 U.S.C. § 2000e-2(c)(1)).

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the Commission analyzed how courts have interpreted and applied the law to specific facts. Regarding many harassment issues, the lower courts are uniform in their interpretations of the relevant statutes. This guidance explains the law on such issues with concrete examples, where the Commission agrees with those interpretations. Where the lower courts have not consistently applied the law or the EEOC's interpretation of the law differs in some respect, this guidance sets forth the Commission's considered position and explains its analysis.

This document serves as a reference for staff of the Commission and of other federal agencies that investigate, adjudicate, or litigate harassment claims, or conduct outreach; for employers, employees, and practitioners seeking detailed information about the Commission's position on harassment; and for employers seeking promising practices.

B. Structure of this Guidance

In explaining how to evaluate whether harassment violates federal EEO law, this enforcement guidance focuses on the three components of a hostile work environment claim:

- Covered bases and causation: Was the conduct based on the complainant's legally protected status?
- Hostile work environment threshold: Was the conduct sufficiently severe or pervasive to create a hostile work environment?
- Liability: Is there a basis for holding the employer liable for the hostile work environment?

II. Covered Bases and Causation

Harassment is covered by the EEO laws only if it is based on an employee's legally protected personal characteristics. This section identifies the legally protected characteristics and explains how to determine whether harassing conduct is *because of* them. It also analyzes special causation issues for sex-based harassment.

The EEO laws prohibit harassment that creates a hostile work environment if it is based on one or more of the characteristics protected by these laws.

A. Covered Bases

- Race and color: Race-based harassment includes harassment based on a complainant's race, e.g., harassment because the complainant is African American or Asian American. It also can include harassment based on specific race-linked traits,

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such as facial features or hair.[5] Color-based harassment includes harassment based on skin tone.[6]

- National origin: National origin harassment includes harassment based on a complainant's, or his or her ancestors', place of origin. It also can include harassment based on an individual's ethnic or cultural characteristics, such as attire or diet, or linguistic characteristics, such as foreign accent or limited English proficiency.[7]

- Religion: Religious harassment includes harassment based on a complainant's particular religion (including atheism or lack of religious belief),[8] religious practices, or dress.[9] It also includes harassment because of a request for a religious accommodation or receipt of a religious accommodation.[10]

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[5] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 314, 320-21 (8th Cir. 2014) (concluding that plaintiffs established broad pattern of harassment, which included offensive comments about black hair and black hairstyles).

[6] *See, e.g.*, *EEOC v. Pioneer Hotel, Inc.*, No. 2:11-CV-01588-LRH, 2013 WL 3716447, at*3 (D. Nev. July 15, 2013) (denying motion to dismiss claim of harassment against class of Latino and/or dark-skinned employees based on national origin and/or skin color).

[7] *See, e.g.*, *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-801 (8th Cir. 2003) (holding that evidence of frequent harassment, including taunts about Hispanic employee's accent and statements that "Hispanics should be cleaning" and that "Hispanics are stupid," was sufficient to show that employee was subjected to pervasive harassment that created hostile work environment); *Gonzales v. Eagle Leasing Co.*, No. 3:13-CV-1565(JCH), 2015 WL 4886489, at *5 (D. Conn. Aug. 14, 2015) (holding that reasonable jury could find that plaintiff was subjected to hostile work environment based on race, national origin, and ethnicity where harassment included derogatory comments about traditionally Cuban food); *Syed v. YWCA of Hanover*, 906 F. Supp. 2d 345, 355-56 (M.D. Pa. 2012) (holding that fact finder could infer that harassment was motivated by animus based on race or national origin where plaintiff's supervisor criticized her "awful" Pakistani-styled dress, called her a "brown b___h," suggested she did not know how to open a door due to her national origin, and told her she needed to learn to drive because "we don't ride camel[s] here").

[8] *See Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 143-44 (5th Cir. 1975) (concluding that plaintiff, an atheist, was unlawfully required to attend staff meetings that commenced with religious talk and prayer).

[9] *See, e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443-44 (5th Cir. 2011) (holding that fact finder could conclude that plaintiff was subjected to unlawful religious harassment, which included disparaging comments about his religious beliefs); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008) (reversing summary judgment for employer on religious harassment claim that included evidence that employee was harassed, in part, because of his religious headwear).

[10] *See, e.g.*, *Abramson v. William Paterson Coll.*, 260 F.3d 265, 279 (3d Cir. 2001) (holding that reasonable jury could find that hostility directed toward Orthodox Jewish college professor regarding her insistence that she not work during the Sabbath constituted harassment based on religion); *Ibraheem v. Wackenhut Servs., Inc.*, 29 F. Supp. 3d 196, 214 (E.D.N.Y. 2014) (holding that reasonable jury could conclude that plaintiff was subjected to unlawful religious harassment after he was granted exception to employer's no-beard policy).

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- Sex: Sex-based harassment includes harassment based on the complainant's sex or gender. This behavior may consist of unwanted sexual attention or sexual coercion, such as pressure for sexual favors, touching or caressing, or sexually teasing remarks. Harassment based on sex also includes non-sexual conduct based on sex. Often termed "gender harassment," this is hostile behavior devoid of sexual interest. Gender harassment can include gender-based epithets, sexist comments (such as telling anti-female jokes), and remarks that are unrelated to sex but still motivated by the targeted employee's gender. It aims to insult and reject women or men because of their sex, rather than to pull them into a sexual relationship.[11]

    - Sex Stereotyping: Sex-based harassment includes harassment based on an individual's non-conformance with social or cultural expectations of how men and women usually act.[12] This includes harassment based on gender-stereotyped assumptions about family responsibilities.[13]

    - Pregnancy, Childbirth, or Related Medical Conditions: Sex-based harassment includes harassment based on pregnancy, childbirth, or related medical conditions,[14] including lactation.[15]

    - Gender identity: Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual's transgender status or

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[11] Louise F. Fitzgerald et al., *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, 17 Basic & Applied Soc. Psychol. 425, 431-32 (1995) (stating that, depending on context, sexualized conversation can constitute either a "come on" or a "put down," which is the "essential distinction between unwanted sexual attention and gender harassment"); *see also Select Task Force Co-Chairs' Report*, *supra* note 2, at 8-10.

[12] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459 (5th Cir. 2013) (en banc) (upholding jury verdict on grounds that claim that male employee was harassed because of sex could be established by evidence showing that male harasser targeted employee for not conforming to harasser's "manly-man stereotype"); *cf. Burns v. Johnson*, 829 F.3d 1, 13-14, 17 (1st Cir. 2016) (holding that reasonable jury could conclude that male supervisor's harassment of female subordinate was based, in part, on gender stereotype that women do not belong in positions of leadership).

[13] *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 (D. Minn. Aug. 13, 2004) (concluding that plaintiff alleged actionable harassment based on at least nine months of comments and other conduct implying or stating that she was unqualified and could be fired at any time because she was a woman and because she spent too much time caring for her children).

[14] *See, e.g.*, *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict in pregnancy-based hostile work environment claim where evidence showed that plaintiff was harassed because she had been pregnant and taken maternity leave, and might become pregnant again).

[15] *Cf. EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating or expressing breast milk).

the individual's intent to transition. It also includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner.[16]

- Sexual orientation: Sex-based harassment includes harassment because an individual is lesbian, gay, bisexual, or heterosexual.[17]

- Age: Age-based harassment includes harassment of employees because they are 40 or older. This includes harassment based on negative perceptions about older workers.[18] It does not include harassment based on perceptions about relative youth, such as harassment based on the perception that someone is too young for a certain position, even if the targeted individual is 40 or over.[19]

- Disability: Disability-based harassment includes harassment based on the complainant's physical or mental disability.[20] This includes harassment based on

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[16] *See, e.g.*, *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee's new name or pronoun may constitute sex-based harassment).

[17] *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (Oct. 27, 2015) (concluding that claim of sexual orientation discrimination "necessarily state[s] a claim of discrimination on the basis of sex [because] it involve[s] treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex"). Prior to the EEOC's decision in *Baldwin*, a number of courts had already concluded that claims of sexual orientation discrimination are cognizable as sex discrimination claims. *See Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *4 (W.D. Wash. Sept. 22, 2014). Additionally, at the time of the issuance of this proposed guidance, a number of courts have adopted the EEOC's legal analysis in *Baldwin*. *See Boutillier v. Hartford Pub. Sch.*, No. 3:13-cv-01303-WWE, 2016 WL 6818348, at *7-11 (D. Conn. Nov. 17, 2016); *EEOC v. Scott Med. Health Ctr.*, No. 16-225, 2016 WL 6569233, at *5-7 (W.D. Pa. Nov. 4, 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-61 (C.D. Cal. 2015); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). *But see Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) (holding that Title VII does not prohibit sexual orientation discrimination), *aff'd*, 830 F.3d 698 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted and opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

[18] *See, e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 442-43 (5th Cir. 2011) (holding that fact finder could conclude that plaintiff, a used car salesperson, was subjected to hostile work environment based on his age where plaintiff's supervisor had made profane, age-based references to the plaintiff up to half a dozen times a day, supervisor had engaged in physically threatening behavior toward plaintiff, and supervisor had "steered" sales away from plaintiff and toward younger salespersons).

[19] *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that ADEA does not prohibit favoring older workers over younger workers, even within the protected class).

[20] *See, e.g.*, *Quiles-Quiles v. Henderson*, 439 F.3d 1, 7-8 (1st Cir. 2006) (affirming jury verdict finding that Postal Service employee was subjected to hostile work environment based on his

how an individual walks or talks. It also includes harassment because of an individual's request for, or receipt of, reasonable accommodation.[21] Finally, it includes harassment because an individual is perceived as having a physical or mental impairment that is not transitory and minor, even if he or she does not have such an impairment.[22]

- Genetic information: Harassment on the basis of genetic information includes harassment based on a complainant's, or a complainant's family member's, genetic test or based on a complainant's family medical history. For example, harassment based on genetic information includes harassing an employee because her mother carries the BRCA gene, which is linked to an increased risk of breast and ovarian cancer.

For a discussion of harassment motivated by retaliation, see EEOC, *Enforcement Guidance on Retaliation and Related Issues* § III.B.3 (2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#3._Harassing.[23]

Harassment based on the perception that an individual has a particular protected characteristic, such as the belief that a person is a particular race, national origin, or religion, or has a particular sexual orientation, is covered by federal EEO law even if the perception is incorrect. For example, unlawful harassment of a Hispanic person because the harasser believes the individual is Pakistani is national origin discrimination, and unlawful harassment

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mental disability (depression) when supervisors mocked him on daily basis about his mental impairment and commented to other employees that he was a "great risk" because he was receiving psychiatric treatment and when one of the supervisors drove at the employee in her truck while he was crossing the street outside the post office); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 178-79 (4th Cir. 2001) (upholding jury finding that plaintiff, who suffered from chronic back issues, was subjected to hostile work environment based on disability where two supervisors constantly berated him and other workers with disabilities and encouraged other employees to ostracize workers with disabilities and refuse to give them materials they needed to do their jobs).

[21] *See, e.g.*, *Fox*, 247 F.3d at 174 (upholding jury verdict on disability harassment claim where supervisor made disparaging comments about employees with disabilities assigned light duty, including calling them "hospital people," supervised their work more closely, and segregated them from other employees); *Pantazes v. Jackson*, 366 F. Supp. 2d 57, 71 (D.D.C. 2005) (holding that jury could find that unreasonably lengthy delays in responding to plaintiff's accommodation requests, combined with other harassing acts, were sufficient to establish hostile work environment).

[22] 42 U.S.C. §§ 12102(1), (3) (defining disability discrimination as including discrimination because an individual is regarded as having a physical or mental impairment); 29 C.F.R. § 1630.2(g)(iii) ("This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'").

[23] *See generally Gowski v. Peake*, 682 F.3d 1299, 1311-12 (11th Cir. 2012) (per curiam) (joining all other circuits in recognizing retaliatory harassment claims, and explaining that such recognition is "consistent with the statutory text, congressional intent, and the EEOC's own interpretation of [Title VII]").

of a Sikh man wearing a turban because the harasser thinks he is Muslim is religious harassment, even though the perception in both instances was incorrect.[24]

All bases include harassment against a complainant because he or she associates with individuals outside the complainant's protected class (commonly called "associational discrimination"). Such association may include marriage or close friendship with another individual or advocacy on behalf of an individual or individuals.[25]

Harassment that is based on the complainant's protected characteristic is covered even if the harasser is a member of the same protected class.[26]

Harassment based on the intersection of two or more protected classes is prohibited.[27] For example, if African American women are harassed because of their sex and race, such

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[24] *See EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers repeatedly referred to employee of Indian descent as "Taliban" or "Arab" and stated that "[t]his is America . . . not the Islamic country where you came from," even though the harassing comments did not accurately describe his actual country of origin); *Kallabat v. Mich. Bell Tel. Co.*, 12-CV-15470, 2015 WL 5358093, at *3-4 (E.D. Mich. June 18, 2015) (denying summary judgment to employer on plaintiff's claim that he was harassed based on mistaken perception that he was Muslim); *Arsham v. Mayor & City Council of Baltimore*, 85 F. Supp. 3d 841, 844, 849 (D. Md. 2015) (holding that employee of Persian descent stated a valid claim of national origin discrimination and harassment even though her employer mistakenly believed her to be a member of the Parsee ethnic group, which plaintiff researched and believed originated in India and was a lower caste); *cf. Fogelman v. Mercy Hosp.*, 283 F.3d 561, 571-72 (3d Cir. 2002) (holding that ADA prohibits retaliation against an individual based on misperception that he had engaged in protected activity, reasoning that "what is relevant is that the [individual] . . . was treated worse than he otherwise would have been for reasons prohibited by the statute"). *But see, e.g.*, *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788-CM, 2013 WL 5819703, at *3-4 (D. Kan. Oct. 29, 2013) (stating that "perceived" discrimination claims are not cognizable under Title VII); *El v. Max Daetwyler Corp.*, No. 3:09:CV-415, 2011 WL 1769805, at *5-6 (W.D.N.C. May, 9, 2011) (rejecting proposition that Title VII provides claim for discrimination based on misperception), *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

[25] *See, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513-14 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (holding that Title VII encompasses claim of harassment against non-Hispanic woman based on her marriage to a Hispanic man); *Colon v. San Juan Marriott Resort & Stellaris Casino*, 600 F. Supp. 2d 295, 311 (D.P.R. 2008) (alleging hostile work environment based on association with individual with disability).

[26] *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (involving male employees sexually harassing male coworker); *Ross v. Douglas Cty.*, 234 F.3d 391 (5th Cir. 2000) (involving racial harassment by supervisor of same race as complainant).

[27] *See, e.g.*, *Masud v. Rohr-Grove Motors, Inc.*, No. 13 C 6419, 2015 WL 5950712, at *3-5 (N.D. Ill. Oct 13, 2015) (denying summary judgment for the employer on the plaintiff's harassment claim based on "evidence, viewed in the light most favorable to the plaintiff, support[ing] a pervasive pattern of discriminatory harassment based on not one but various protected characteristics all at once"); *see also Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (recognizing a claim of

harassment violates the law (assuming all other necessary elements are met), even if neither white women nor African American men are harassed in that workplace.

B. Establishing Causation

Federal EEO law is violated if the evidence establishes that the complainant was subjected to harassment creating a hostile work environment *because of* his or her protected characteristic. Although an employee's protected status need not be the only basis for the harassment,[28] the EEO statutes do not prohibit harassment unless it is based, at least in part, on a protected characteristic.[29]

> **Example 1: Harassment Is Covered Because Conduct Was Motivated by a Protected Characteristic.** Hayato, who is assigned by a temporary agency to work in a bank, alleges that his coworkers have subjected him to derogatory comments about his Japanese ethnicity, including epithets and teasing about his accent. Under these circumstances, Hayato has alleged that this harassment was based on his national origin.
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> **Example 2: Harassment Is Not Covered Because Conduct Was Not Motivated by a Protected Characteristic.** Devon, a receptionist at a financial services firm, alleges he was subjected to harassment based on his race, African American, by his coworker Zach. Devon alleges that Zach throws paper at him, shoves him when they pass in the hall, and threatens to beat him up. The investigation reveals that Zach's conduct started shortly after Zach's girlfriend broke up with him and started dating Devon. There is no evidence that Zach used racial epithets or any other evidence suggesting a prohibited motive. These facts are insufficient to establish that Devon was subjected to racial harassment by Zach.

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intersectional discrimination); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032-34 (5th Cir. 1980) (same).

[28] *See, e.g.*, *Hall v. City of Chicago*, 713 F.3d 325, 334 (7th Cir. 2013) (stating that issue is whether gender "played a part" in harassment); *Kissell v. Am. Fed'n of State, Cty. & Mun. Emps., Dist. Council 84*, 90 F. App'x 620, 622 (3d Cir. 2004) (stating that Title VII coverage does not require that a plaintiff's sex be the "sole motivation or even the primary motivation for the harassment").

[29] *See, e.g.*, *Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011) (determining that plaintiff did not present facts to show that aggressive conduct toward her "was motivated by, or had anything to do with, race"), *aff'd on other grounds*, 133 S. Ct. 2434 (2013); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 991 (8th Cir. 2003) (holding that employer was entitled to summary judgment where evidence showed that harassment was based on inter-personal politics and personality conflicts).

The determination of whether harassment is based on a protected characteristic will vary from case to case and will depend on the totality of the circumstances. As a general matter, however, the following principles will apply in determining causation in fact-specific cases:

- Facially discriminatory conduct: Conduct that blatantly insults or threatens an individual based on a protected characteristic – such as racial epithets or graffiti, gender-based epithets, or offensive comments about individuals with intellectual disabilities – inherently discriminates on that basis. Such conduct does not have to be directed at a particular worker based on that worker's protected characteristic, nor do all workers with the protected characteristic have to be exposed to the comments. Such conduct may be found to be discriminatory, regardless of the harasser's motivation.[30]

  > **Example 3: Causation Established Where Harassment Is Facially Discriminatory.** Keith and his colleagues work in an open-cubicle style office environment, and they frequently make derogatory comments about gay men and lesbians. John, who is openly gay, overhears the comments on a regular basis, even though they are not directed at him. Under such circumstances, the conduct is facially discriminatory and subjects John to discrimination based on sexual orientation (which is a form of sex discrimination), even though he was not specifically targeted by the comments.

- Context: Conduct must be evaluated within the context in which it arises. In some cases, the discriminatory character of conduct that is not facially discriminatory becomes clear when examined within the specific context in which the conduct takes place or within a larger social context. For example, use of the term "boy" to refer to an African American man may reflect racial animus given the context of its use.[31]

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[30] *See Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 271 (6th Cir. 2009) (concluding that women were subjected to sex discrimination by conduct that was patently degrading to women, even though members of both sexes were exposed to the conduct, and concluding that such conduct discriminates against women, irrespective of the harasser's motive); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1001 (10th Cir. 1996) (concluding that sex-based epithets discriminated against plaintiff based on her sex even if they were motivated by gender-neutral reasons); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (concluding that use of terms "n____r-rigged" and "black ass" supported race-based hostile work environment claim even though, the employer asserted, they were not "intended to carry racial overtones"); *cf. Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1228-31 (10th Cir. 2015) (concluding that district court erred in discounting environmental effect of offensive race-based conduct when court focused on "ostensibly benign motivation or intent" of alleged harassers).

[31] *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (holding that use of "boy" standing alone is not "always benign" and explaining that "speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage"); *Paasewe v. Action Group, Inc.*, 530 F. App'x 412, 416 (6th Cir. 2013) (holding that reasonable jury could find that

Context may also establish that certain terms, such as "you people," operate as "code words" revealing an intent to discriminate against a protected group.[32]

> **Example 4: Causation Established by Social Context.**
> Ron, an African American truck driver, found banana peels on his truck on multiple occasions. After the third of these occasions, Ron saw two white coworkers watching his reaction to the banana peels. The investigation reveals no evidence that bananas were found on any other truck or that Ron found any trash on his truck besides the banana peels. An investigator concludes that the appearance of banana peels on Ron's truck was not coincidental. In addition, the investigator finds that the use of banana peels invokes "monkey imagery" that, given the history of racial stereotypes against African Americans, was intended as a racial insult.[33]

- Link between facially discriminatory conduct and harassment that is not explicitly connected to a protected basis: Harassment that is not explicitly connected to a protected basis may constitute discriminatory conduct when linked to other conduct that is facially discriminatory, such as race-based epithets or derogatory comments about individuals with disabilities. A hostile work environment claim should not be divided up by separating facially discriminatory conduct from related instances of facially neutral harassment, and then discounting the latter as not discriminatory.[34] In some instances, however, facially discriminatory conduct may not be sufficiently related to facially neutral conduct in order to establish that the latter was also

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plaintiff was subjected to race-based harassment where plaintiff's coworker called him "boy," threatened his life, and told him he should "take Obama back to Africa to vote for him").

[32] *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (stating that racial harassment could be based on "code words," which referred to African American employees as "another one," "one of them," "that one in there," and "all of you").

[33] This example is based on the facts in *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012).

[34] *See, e.g.*, *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547-48 (2d Cir. 2010) (stating that circumstantial evidence that facially sex-neutral acts were part of pattern of sex discrimination may include evidence that same individual engaged in multiple acts of harassment, some facially sex-based and some not); *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) (stating that conduct that appears gender-neutral in isolation may appear gender-based when viewed in context of broader work environment); *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (stating that "[c]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category"); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 705 (7th Cir. 2001) (stating that reasonable person could conclude that comments that were not facially discriminatory were "sufficiently intertwined" with facially discriminatory remarks to establish that former were motivated by hostility to plaintiff's race and religion).

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discriminatory, such as where the conduct involved different actors and/or different time frames.[35]

> **Example 5: Facially Neutral Conduct Sufficiently Related to Religious Bias.** Holly, a devout Christian employed as a customer service representative, alleged that coworkers made offensive comments or engaged in other hostile conduct related to her religious beliefs and practices, including suggesting that Holly belonged to a cult or worshipped the devil; calling her religious beliefs "crazy"; drawing devil horns, a devil tail, and a pitchfork on her Christmas photo; and cursing the Bible and teasing her about Bible reading. In addition, the same coworkers excluded Holly from office parties and subjected her to curse words and sexually explicit conversations that the coworkers knew Holly regarded as offensive. Although some of the coworkers' conduct was facially neutral with respect to religion, the investigator concludes that such conduct was closely related to the religious harassment and thus that the entire pattern of harassment was based in part on Holly's religion.[36]

- Timing: If harassment began or escalated shortly after the harasser learned of the complainant's protected status, e.g., pregnancy, religion, or disability, the timing may suggest that the harassment was discriminatory.[37]

- Comparative evidence: Conduct that inherently denigrates employees based on a protected status is discriminatory even if employees in another protected class are also harassed.[38] On the other hand, if many employees in different protected classes are harassed, that may be evidence that the harassment was not based on a protected characteristic but was instead offensive or bullying conduct not motivated by a protected characteristic. Even if offensive or bullying conduct is widespread, however, evidence showing qualitative and/or quantitative differences in the conduct

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[35] *See, e.g.*, *Gibson v. Verizon Servs. Org., Inc.*, 498 F. App'x 391, 394 (5th Cir. 2012) (concluding that, although incidents contributing to a hostile work environment claim should not be disaggregated, single racial comment was not sufficient to impute racial intent to conduct by different employee during different time frame); *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010) (concluding that facially neutral harassment was not connected to overtly racial conduct as they "lack[ed] any congruency of person or incident").

[36] This example is based on the facts in *EEOC v. T-N-T Carports, Inc.*, No. 1:09-CV-27, 2011 WL 1769352 (M.D.N.C. May 9, 2011).

[37] *See, e.g.*, *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 236-37 (5th Cir. 2001) (holding that jury could find that harassment, which began after plaintiff revealed she was HIV-positive, was based on disability).

[38] *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (stating that referring to Asian American employees as "UFO's – ugly f___king orientals" is race-based, regardless of how members of other races are treated).

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directed against individuals in different protected groups can support an inference that the harassment of workers subjected to more, or more severe, harassment was based on their protected status.[39]

Example 6: Comparative Evidence Gives Rise to Inference That Harassing Conduct Is Not Based on a Protected Status. Gordy is a shift supervisor for a large construction firm. He is the only African American on a shift composed mostly of white, Hispanic, and Asian American employees. Theo is a white employee on Gordy's shift. One day, Gordy kicks gravel into Theo's eyes during a lunch break and calls him a "total dumbass" for improperly securing construction materials. Theo files an EEOC charge claiming racial harassment. The investigation reveals that numerous employees have complained about Gordy's conduct, such as leering at subordinates, purposefully bumping into them, invading their personal space, and calling them names, such as "idiot" or "moron." On other occasions, for instance, Gordy pushed a Hispanic worker out of his way and smacked an Asian American worker on his construction helmet with a hammer. Based on this evidence, the investigator concludes that Gordy's conduct toward Theo was not based on Theo's race.

Example 7: Comparative Evidence Gives Rise to Inference that Harassing Conduct Is Based on a Protected Characteristic. Tyler is a manager for a large banking firm. Tyler directly supervises two women, Kailey and Brooke, and two men, Chance and Levi. Tyler grants Kailey's request for time off to visit her dying sister. When Kailey returns, Tyler confronts her and yells at her for not reading her "damn email" while she was away. From then on, Tyler regularly hovers over Kailey and Brooke as they work to make sure they don't "mess up." Tyler also yells and shakes his fist at Kailey and Brooke when he is angry at them. This conduct continues, and Kailey and Brooke file EEOC charges alleging harassment based on sex. During the investigation, the investigator finds that Tyler regularly allows Chance and Levi to relax in his office for hours on end, doing little or no work. Tyler also permits Chance and Levi to leave the office early and does not monitor their work performance. Tyler's different treatment of women and men who are similarly

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[39] *See EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 842 (9th Cir. 2005) (holding that "offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees").

situated would support an investigator's conclusion that Tyler's treatment of Kailey and Brooke was based on their sex.[40]

C. Specific Causation Issues Related to Sex-Based Harassment

1. Generally

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court noted three evidentiary routes for establishing causation in a sexual harassment claim: proposals of sexual activity; general hostility toward members of the complainant's sex; and comparative evidence showing how the harasser treated members of both sexes.[41] These three routes are not exclusive; they are examples of ways in which harassment based on sex may be established.[42] For example, harassment is also sex-based if the harassment occurs because of sex stereotyping.[43] The same legal principles apply regardless of whether the harasser and complainant are of the same sex. As the Supreme Court has explained, "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[44]

Sexual conduct, including proposals for sexual activity, is often sex-based harassment because it is motivated by sexual desire that is directed towards members of only one sex.[45] This conduct may consist of unwanted sexual attention or sexual coercion, such as pressure for sexual favors, touching or caressing, or sexually teasing remarks.[46]

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[40] Facts adapted from *EEOC v. National Education Ass'n, Alaska*, 422 F.3d 840 (9th Cir. 2005).

[41] 523 U.S. 75, 80-81 (1998).

[42] *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455-56 (5th Cir. 2013) (en banc) (agreeing with sister circuits that the three evidentiary paths in *Oncale* are not exclusive); *see also, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("These routes, however, are not exhaustive."); *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale*'s list as "non-exhaustive").

[43] *Boh Bros.*, 731 F.3d at 456.

[44] *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

[45] *Id.* (stating that inference of discrimination is easy to draw in male-female sexual harassment involving proposals of sexual activity, as it is reasonable to assume that the proposals would not have been made to someone of the same sex).

[46] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (stating that sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (quoting 29 C.F.R. § 1604.11(a))); *see also, e.g.*, *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475 (5th Cir. 2002) (holding that district court erred in granting judgment as a matter of law for the employer where sexual harassment consisted of repeated touching, vulgar comments, propositions, and physical aggression).

Harassment based on sex also includes non-sexual conduct based on sex. Often termed "gender harassment," this is hostile behavior devoid of sexual interest. Gender harassment can include gender-based epithets (for example, calling a female colleague a ''c__t''), sexist comments (such as making comments that women do not belong in management or that men do not belong in nursing),[47] or even facially gender-neutral conduct motivated by sex (such as bullying directed toward female employees but not male employees).[48] This behavior differs from unwanted sexual attention in that it aims to insult and reject women or men because of their sex, rather than pull them into a sexual relationship. Such behavior may constitute sex-based harassment even if both men and women are subjected to the offensive behavior. For example, derogatory comments about women are sex-based even if both men and women are exposed to the comments.

> **Example 8: Sexual Conduct Based on Sex.** Lindsey, an employee in a supermarket bakery department, alleges that a coworker, John, rubs up against her in a sexual manner, tells sexual jokes, and displays dolls made out of dough in sexual positions. Lindsey has been subjected to harassment based on her sex.
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> **Example 9: Gender-based Epithets That Reflect Hostility Against Members of One Sex.** Tina, a construction worker on a road crew, alleges that she was subjected to unlawful sex-based harassment by her supervisor when he used gender-based epithets and disparaged women's participation in the construction industry. Under these circumstances, Tina has alleged harassment based on sex.

2. Sexual Favoritism

Courts have held that isolated instances of preferential treatment based on consensual sexual relationships do not discriminate against disfavored employees based on their sex, reasoning that such preferences disadvantage other men and women alike.[49] By contrast, if sexual favoritism toward members of only one sex is more commonplace, that practice can violate Title VII if it creates a hostile work environment for members of that sex. For

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[47] *See, e.g.*, *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013) (explaining that non-sexual conduct can be based on sex and therefore contribute to sexually hostile work environment); *Rosario v. Dep't of Army*, 607 F.3d 241, 248 (1st Cir. 2010) (stating that conduct that does not have sex-based connotations can contribute to sexually hostile work environment).

[48] *See EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005) (stating that "pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate Title VII"); *see also supra* Example 7: Comparative Evidence Gives Rise to Inference that Harassing Conduct Is Based on a Protected Status.

[49] *See, e.g.*, *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (concluding that discrimination in favor of a sexual partner is not sex-based discrimination as the favoritism disadvantages both sexes alike for reasons other than gender); *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (same).

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example, widespread favoritism toward female employees who grant sexual favors can create a work environment that demeans women and creates the perception that women will not be promoted unless they submit to sexual advances.[50]

> **Example 10: Sexual Favoritism Creating Hostile Work Environment.** A warden in a county prison engages in sexual affairs with several female correctional officers over a few years. These women were granted prized assignments and promotions. Amber, a correctional officer, is denied a promotion in favor of one of the warden's sexual partners, even though Amber is better qualified. Although the warden never directed sexual conduct at Amber, an investigator concludes that Amber was subjected to a hostile work environment based on her sex because she felt pressured to engage in sexual conduct with the warden to obtain desirable assignments and promotions.[51]

> **Example 11: Sexual Favoritism Not Creating Hostile Work Environment.** Delilah hires Boris to be her personal assistant, and they become romantically involved. Delilah promotes Boris three times in the next 18 months, upsetting Boris's more senior coworkers, both male and female. One of these coworkers, Tammy, files an EEOC charge alleging that she was denied the most recent of these promotions because of her sex. The investigator concludes, however, that Boris was promoted because of his romantic relationship with Delilah, and therefore, Tammy was not denied the promotion because of her sex.

III. Harassment Resulting in Discrimination with Respect to a Term, Condition, or Privilege of Employment

Was the conduct sufficiently severe or pervasive to create a hostile work environment? Was it both subjectively and objectively hostile? What conduct is part of the hostile work environment claim? What if some of the conduct was not directed at the complainant or occurred outside the workplace?

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[50] *See, e.g.*, *Miller v. Dep't of Corr.*, 115 P.3d 77, 90 (Cal. 2005) (relying on EEOC Title VII guidance in concluding that employee can establish violation of state antidiscrimination law by demonstrating widespread sexual favoritism severe or pervasive enough to create a hostile work environment); *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1998) (holding that plaintiff stated prima facie case of sexual harassment based on evidence that managers harassed female employees by bestowing preferential treatment on those who submitted to sexual advances).

[51] This example is based on the facts in *Miller v. Department of Corrections*, 115 P.3d 77 (Cal. 2005).

A. In General

For an employer to be liable under an EEO statute for workplace harassment based on a protected trait, the harassment must be sufficiently severe or pervasive to affect a "term, condition, or privilege" of employment.[52] In *Meritor Savings Bank v. Vinson*, the Supreme Court provided two examples of unlawful harassment: (1) an explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic, e.g., firing an employee because she rejected sexual advances,[53] and (2) conduct that constructively changes the terms or conditions of employment through creation of a hostile work environment.[54]

Where the harassment results in an explicit change to the terms or conditions of employment, the discrimination is clear. For example, refusing to allow a woman to use earned vacation time because she did not submit to sexual advances would be an explicit change to her terms and conditions of employment. Absent an explicit change, however, the harassment is actionable only if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[55]

As the Supreme Court explained in *Harris v. Forklift Systems, Inc.*:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[56]

Thus, harassment based on a protected characteristic is actionable when the employee is subjected to "discriminatory intimidation, ridicule, and insult"[57] that is severe or pervasive enough to create an objectively and subjectively hostile work environment.

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[52] *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination based on race, color, religion, sex, or national origin with respect to "terms, conditions, or privileges of employment").

[53] Historically, such conduct was described as "quid pro quo" harassment. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court questioned the utility of the "quid pro quo" vs. hostile work environment distinction and instead held that employers are vicariously liable for a hostile work environment created by supervisor harassment culminating in a tangible employment action. *See infra* note 140.

[54] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *see also Ellerth*, 524 U.S. at 752 (stating that "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment").

[55] *Meritor Sav. Bank*, 477 U.S. at 67 (alteration in original) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

[56] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

[57] *Meritor Sav. Bank*, 477 U.S. at 65.

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The EEO statutes are not limited to discriminatory conduct that has tangible or economic effects and instead "strike at the entire spectrum of disparate treatment."[58] At the same time, however, they do not impose a general civility code that covers "run-of the mill boorish, juvenile, or annoying behavior."[59] The severe-or-pervasive standard takes a "middle path" that distinguishes between covering conduct that is merely offensive and requiring that the conduct cause psychological harm.[60]

Whether conduct creates a hostile work environment depends on all of the circumstances, and no single factor is determinative. Circumstances may include the frequency and severity of the conduct; whether it was physically threatening or humiliating; whether it unreasonably interfered with an employee's work performance; and whether it caused psychological harm.[61] If related harassing acts are based on multiple protected characteristics, then all of the acts should be considered together in determining whether the conduct created a hostile work environment.[62]

B. Severe or Pervasive

Even if a complainant finds conduct based on a protected characteristic to be offensive, such conduct does not constitute a violation of EEO law unless it is sufficiently severe *or* pervasive to create a hostile work environment.[63] As discussed below, this test requires the complainant to demonstrate that she reasonably perceived the conduct as hostile.[64] The more severe the harassment, the less pervasive it must be to establish a hostile

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[58] *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank*, 477 U.S. at 64).

[59] *Morris v. City of Colorado Springs*, 666 F.3d 654, 664 (10th Cir. 2012) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (stating that requirement of severity or pervasiveness "prevents Title VII from expanding into a general civility code"); *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2008) (stating that employee must "accommodate the normal run of aggravations that are part of holding a job").

[60] *Harris*, 510 U.S. at 21.

[61] *Id.* at 23.

[62] *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400-01 (5th Cir. 2007) (concluding that evidence was sufficient to show that harassment based on employee's Muslim faith and national origin (Indian) resulted in hostile work environment); *see also Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 335-36 (4th Cir. 2010) (concluding that race-based conduct could be considered cumulatively with sexist conduct, which would allow reasonable jury to find that Mosby-Grant was subjected to hostile work environment); *Hafford v. Seidner*, 183 F.3d 506, 515-16 (6th Cir. 1999) ("It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to 'pervasive' harassment.").

[63] *Harris*, 510 U.S. at 21; *Hall v. City of Chicago*, 713 F.3d 325, 330 (7th Cir. 2013) (stating that harassment is actionable if it is severe *or* pervasive and that, thus, "one extremely serious act of harassment could rise to an actionable level as could a series of less severe acts" (quoting *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001))).

[64] *Hall*, 713 F.3d at 330.

work environment.[65] There is neither a "magic number" of harassing incidents that automatically establishes a hostile work environment nor a minimum threshold for severity that must be satisfied in every case.[66] Whether a series of events are sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case.

A hostile work environment may include a variety of offensive acts and conduct, including physical or sexual assaults or threats; offensive jokes, slurs, epithets, or name calling; intimidation, bullying, ridicule, or mockery; insults or put-downs; ostracism; offensive objects or pictures; and interference with work performance.

The harassing conduct need not harm the complainant's work performance, so long as the evidence establishes that the harassment was sufficiently severe or pervasive to "constructive[ly] alter[] the terms or conditions" of the complainant's employment.[67] Similarly, actionable harassment can be established in the absence of psychological injury, though evidence of psychological harm from the harassment may be relevant to demonstrating a hostile work environment.[68]

> **Example 12: Hostile Work Environment Created Even Though Complainant Continued to Perform Well.** Irina works as a sales representative for a freight transportation company. She and her coworkers sit in adjacent cubicles. Her coworkers, both men and women, often discuss their sexual liaisons in graphic detail; use sex-based epithets when describing women; look at pornographic materials; and, on

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[65] *See, e.g.*, *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 1000 (9th Cir. 2010) (stating that "required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct" (quoting *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001))).

[66] *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) ("Within the totality of circumstances, there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."); *see also Harris*, 510 U.S. at 22 (explaining that determination of whether harassment creates hostile work environment "is not, and by its very nature cannot be, a mathematically precise test").

[67] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *see also Harris*, 510 U.S. at 22 (explaining that harassing conduct resulting in hostile work environment violates Title VII even if it has no tangible effect on the complainant); *EEOC v. Fairbrook Med. Clinic P.A.*, 609 F.3d 320, 330 (4th Cir. 2010) (stating that issue is not whether work has been impaired but whether work environment has been discriminatorily altered and that "fact that a plaintiff continued to work under difficult conditions is to her credit, not the harasser's"); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 274 (6th Cir. 2009) (concluding that district court erred in requiring evidence that complainant's work performance suffered measurably as result of harassment rather than merely evidence that harassment made it more difficult to do the job); *Dawson v. Cty. of Westchester*, 373 F.3d 265, 274 (2d Cir. 2004) (stating that crucial question is "whether the workplace atmosphere, considered as a whole, undermined plaintiffs' ability to perform their jobs, compromising their status as equals to men in the workplace").

[68] *Harris*, 510 U.S. at 22-23.

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weekend shifts, occasionally come to the office only partly clothed (e.g., a man not wearing a shirt, another man wearing only a towel after leaving the gym, etc.). Irina was horrified by the loudness and vulgarity of the conduct, and she frequently left the office crying. Despite this conduct, however, Irina was able to meet her daily and weekly quotas, and her work continued to be rated in her performance review as above average. Irina filed an EEOC charge alleging a hostile work environment based on sex.

An EEOC investigator concludes that Irina was subjected to a hostile work environment. Although the harassment did not result in a decline in her work performance or in any apparent psychological injury, the nature of the conduct and Irina's reactions to it are sufficient to establish that the ongoing sexual conduct was sufficient to create a hostile work environment because the conduct made it more difficult for a reasonable person in Irina's situation to do her job.[69]

1. Severity

Even a single serious incident of harassment can result in a hostile work environment. The following are examples of conduct that the Commission typically finds sufficiently severe to establish a hostile work environment:

- Sexual assault,[70]
- Sexual touching of an intimate body part,[71]
- Physical violence or the threat of physical violence,[72]

[69] This example is based on the facts in *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263 (6th Cir. 2009).

[70] *E.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 983-84 (7th Cir. 2008).

[71] *See, e.g.*, *Turner v. Saloon, Ltd.*, 595 F.3d 679, 686 (7th Cir. 2010) (concluding that Turner's claim that his female supervisor grabbed his penis through his pockets was probably severe enough on its own to create a genuine issue of material fact as to Turner's sexual harassment claim).

[72] *See Patterson v. Cty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004) (concluding that hostile work environment based on race could be established by single incident in which plaintiff was allegedly punched in the ribs and temporarily blinded by having mace sprayed in his eyes because of his race); *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999) (concluding that damaging wrist of employee to the point that surgery was required "easily qualifies as a severe enough isolated occurrence to alter the conditions of her employment"); *cf. Pryor v. United Airlines, Inc.*, 791 F.3d 488, 497 (4th Cir. 2015) (concluding that reasonable jury could find that two anonymous notes placed in the plaintiff's mailbox, although not pervasive, were sufficiently severe to create hostile work environment where notes referred to lynching and were in form of mock hunting license for African Americans).

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- The use of symbols of violence or hatred toward individuals sharing the same protected characteristic, such as a swastika, an image of a Klansman's hood, or a noose,[73]

- The use of the "n-word" by a supervisor,[74]

- The use of animal imagery, such as comparing the complainant to a monkey, an ape, or other animal,[75] and

- Threats to deny job benefits for rejecting sexual advances.[76]

As noted above, even a single use of the "n-word" can result in a hostile work environment. More generally, however, racial, ethnic, religious, gender, or other epithets are among the most serious forms of harassment. As stated by one court, epithets are "intensely

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[73] *E.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1145 (10th Cir. 2008) (concluding that "jury could easily find that the noose was an egregious act of discrimination calculated to intimidate African-Americans"); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 213 (D. Mass. 2006) (holding that reasonable jury could conclude that display of a noose in African American employee's work area was sufficient to create hostile work environment); *Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001) (stating that a "noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence" and that "effect of such violence on the psyche of African-Americans cannot be exaggerated").

[74] *See Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) ("'[P]erhaps no single act can more quickly alter the conditions of employment' than 'the use of an unambiguously racial epithet such as 'n____r' by a supervisor.'" (quoting *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993))).

[75] *See, e.g.*, *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (stating that calling African American employee "porch monkey" was "about as odious as the use of the word 'n____r'"); *Henry v. CorpCar Servs. Houston, Ltd.*, 625 F. App'x 607, 613 (5th Cir.) (concluding that although alleged harassment was brief as it had occurred over only two days, jury could find that it was sufficiently severe to create hostile work environment where African American employees were compared to gorillas), *cert. denied*, 136 S. Ct. 104 (2015); *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (agreeing with plaintiff that using term "monkey" to refer to African Americans was "roughly equivalent" to using the term "n____r"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (stating that use of "monkey" to describe African Americans was "degrading and humiliating in the extreme").

[76] In *Burlington Industries, Inc. v. Ellerth*, the Court explained that unfulfilled threats are actionable if they create a hostile work environment. 524 U.S. 742, 754 (1998). A sufficiently serious threat, even if unfulfilled, could meet the necessary level of severity. *See Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 607 (2d Cir. 2006) ("Threats or insinuations that employment benefits will be denied based on sexual favors are, in most circumstances, quintessential grounds for sexual harassment claims, and their characterization as 'occasional' will not necessarily exempt them from the scope of Title VII."); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 500 (7th Cir. 1997) (en banc) (Flaum, J., concurring) (stating that supervisor's unambiguous communication that adverse job action will follow if sexual favors are denied may cause "real emotional strife," including "anxiety, distress, and loss of productivity regardless of whether the threat is carried out").

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degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'"[77]

Because a "supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[78] harassment by a supervisor or other individual with authority over the complainant is inherently more severe than similar misconduct by a nonsupervisor.[79] Moreover, the severity of the harassment may be heightened if the complainant reasonably believes that the harasser has authority over her, even if that belief is mistaken.[80]

The more directly harassment affects the complainant, the more likely it is to contribute to a hostile work environment. For example, harassment is generally more probative of a hostile work environment if it occurs in the complainant's presence than if she learns about it second-hand. Nevertheless, a complainant's knowledge of harassing conduct that other employees have experienced may be relevant to determining the severity of the harassment in the complainant's work environment.[81]

Some conduct may be more severe if it occurs in the presence of others, such as the complainant's coequals, subordinates, or clients. For example, a worker's sexually degrading

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[77] *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) (quoting *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983)); *see also, e.g.*, *Passananti v. Cook Cty.*, 689 F.3d 655, 665 (7th Cir. 2013) ("A raft of case law . . . establishes that the use of sexually degrading, gender-specific epithets, such as 'sl_t,' 'c__t,' 'wh__e,' and 'b__h,' . . . has been consistently held to constitute harassment based on sex." (quoting *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229-30 (1st Cir. 2007))); *Johnson v. Angels*, 125 F. Supp. 3d 562, 569 (M.D.N.C. 2015) (stating that racial epithets used by supervisors went "far beyond the merely unflattering" and were "degrading and humiliating in the extreme" (quoting *Boyer-Liberto*, 786 F.3d at 280)).

[78] *Ellerth*, 524 U.S. at 763; *Boyer-Liberto*, 786 F.3d at 278 (quoting *Ellerth*, 524 U.S. at 763).

[79] *See Zetwick v. Cty. of Yolo*, No. 14-17341, 2016 WL 6610225, at *2 (9th Cir. Nov. 9, 2016) (unpublished) (concluding that reasonable jury could find that alleged sexual harassment was actionable, in part, because of harasser's status as a supervisor); *Steck v. Francis*, 365 F. Supp. 2d 951, 971-72 (N.D. Iowa 2005) (stating that supervisor's agency relation increases impact of harassment by supervisor); *see also Dandy v. United Parcel Serv.*, 388 F.3d 263, 271 (7th Cir. 2004) (stating that supervisor's use of the n-word has more severe impact on work environment than use by coworkers); *Williams v. Silver Spring Volunteer Fire Dep't*, 86 F. Supp. 3d 398, 413 (D. Md. 2015) (stating that severity of harasser's conduct was exacerbated by his official authority over complainant).

[80] *See Boyer-Liberto*, 786 F.3d at 279-80 (explaining that, regardless of whether harasser was complainant's supervisor for purposes of employer vicarious liability, determination of objective severity required court to consider how harasser portrayed her authority and what complainant reasonably believed harasser's actual power to be).

[81] *See, e.g.*, *Ziskie v. Mineta*, 547 F.3d 220, 224-225 (4th Cir. 2008) (stating that conduct personally experienced by plaintiff may be more probative of hostile work environment than conduct she did not witness, but all the evidence should be considered: "[h]ostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look different in light of evidence that a number of women experienced similar treatment"); *see also infra* notes 123-126 and accompanying text.

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comments may be more severe if made in the presence of the complainant and her subordinates rather than solely in the complainant's presence.[82]

2. Pervasiveness

A number of more frequent but less serious incidents also can create a hostile work environment.[83] The focus is on the cumulative effect of these acts, rather than on the individual acts themselves; most hostile work environment claims involve a series of related acts. As noted above, there is not a "magic number" of harassing incidents that automatically establishes a hostile work environment. Whether a series of events are sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case.[84] Relevant considerations may include the frequency of the conduct[85] and whether the actions occurred close together in time.[86]

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[82] *See Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (concluding that fire lieutenant could establish hostile work environment based on single incident in which coworker loudly made obscene and sexist comments at meeting where lieutenant was the only woman and many of the men were her subordinates); *Delozier v. Bradley Cty. Bd. of Educ.*, 44 F. Supp. 3d 748, 759 (E.D. Tenn. 2014) (concluding that male band leader's sexual comments about female assistant band leader were sufficient to create hostile work environment where they were made in front of assistant band leader's students, thereby undermining her authority and stature in her students' eyes); *Hanna v. Boys & Girls Home & Family Servs., Inc.*, 212 F. Supp. 2d 1049, 1061 (N.D. Iowa 2002) (noting significance of fact that sexually harassing conduct was directed at female complainant in presence of male clients).

[83] *See, e.g.*, *Zetwick v. Cty. of Yolo*, No. 14-17341, 2016 WL 6610225, at *1-2 (9th Cir. Nov. 9, 2016) (unpublished) (concluding that reasonable jury could find that plaintiff was subjected to hostile work environment where her supervisor greeted her with unwelcome hugs and/or kisses on at least 100 occasions over a 12-year period); *Hall v. City of Chicago*, 713 F.3d 325, 332 (7th Cir. 2013) ("[I]ncidents, which viewed in isolation seem relatively minor, that consistently or systematically burden women throughout their employment are sufficiently pervasive to make out a hostile work environment claim."); *Lauderdale v. Tex. Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157, 163 (5th Cir. 2007) (stating that frequent harassment, though not severe, can reach level of being "pervasive," thereby creating a hostile work environment).

[84] *See, e.g.*, *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (stating that liability is evaluated "on a case-by-case basis after considering the totality of the circumstances" (quoting *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380-81 (7th Cir. 1986))); *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (stating that "flexibility is useful in a context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment").

[85] *E.g.*, *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1073-74 (9th Cir. 2005) (upholding jury verdict for plaintiff, court noted that CEO's repeated use of a "Westernized" version of plaintiff's name, despite his objections, may not have been severe but was frequent and pervasive).

[86] *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010) (concluding that, given short time frame and number of incidents involved, plaintiff established genuine issue as to whether she was subjected to hostile work environment); *see also Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 789 (7th Cir. 2007) (citing cases in which 15 to 20 gender-based comments over one-year period were held sufficient to be actionable while eight comments over several years were insufficient); *Davis-Bell v. Columbia Univ.*, 851 F. Supp. 2d 650, 673 (S.D.N.Y. 2012) (concluding that because the nine incidents that made up the plaintiff's hostile work environment claim were

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Example 13: Hostile Work Environment Created by Pervasive Sexual Harassment. Connor, who works as a passenger service assistant for an airline, alleges that he has been sexually harassed by a female coworker, Lydia. The evidence shows that Lydia directed sexual overtures and other sex-based conduct at Connor on a regular basis, despite his repeated insistence that he was not interested. For example, Lydia gave Connor revealing photographs of herself, sent him notes asking for a date, described fantasies about him, and persistently told him how attractive he was and how much she loved him. Based on these facts, an investigator concludes that, regardless of whether the conduct was severe, it was sufficiently pervasive to create a hostile work environment.[87]

Example 14: Hostile Work Environment Not Created Where Harassment Was Not Pervasive or Severe. After Amanda, an Asian American woman, resigns from her paralegal position at a law firm where she worked for five years, she files an EEOC charge alleging that she was subjected to harassment based on race and sex. Amanda alleges that on one occasion she overheard some coworkers make jokes that she thought were derogatory toward Asian Americans. She also alleges that she overheard a coworker use the term "b___h" on a few occasions to refer to his girlfriend. Amanda does not identify any further incidents, and the investigator does not find any other evidence that Amanda was subjected to harassment based on race or sex. Based on this evidence, the investigator concludes that Amanda was not subjected to unlawful harassment because the conduct was neither pervasive nor severe.

C. Subjectively and Objectively Hostile Work Environment

To establish a hostile work environment, the offensive conduct must be both subjectively hostile (i.e., the complainant perceived the conduct to be severe or pervasive) and objectively hostile (i.e., a reasonable person in the complainant's position would have perceived the conduct to be severe or pervasive).

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isolated and spread out over four years, they were not sufficiently continuous to be considered pervasive by a rational jury).

[87] This example is based on the facts in *EEOC v. Prospect Airport Services, Inc.*, 621 F.3d 991 (9th Cir. 2010).

1. Unwelcomeness Is Part of the Analysis of Whether Conduct Is Subjectively and Objectively Hostile

In the Commission's view, conduct that is subjectively and objectively hostile is also necessarily unwelcome.[88] Therefore, the Commission disagrees with courts that have analyzed "unwelcomeness" as an element in a plaintiff's prima facie harassment case, separate from the "subjectively and objectively hostile work environment" analysis.[89]

The unwelcomeness test derives from the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*, where the Court stated that the "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome,"[90] and from the 1980 EEOC Guidelines upon which the Court relied.[91] In *Meritor*, however, the Court focused on the concept of unwelcomeness in order to distinguish it from the concept of voluntariness, noting that the complainant's participation in the challenged conduct did not necessarily mean that she found it welcome.

In 1993, in *Harris v. Forklift Systems, Inc.*, the Supreme Court refined the hostile work environment analysis to require a showing that the conduct was both subjectively and objectively hostile.[92] Since *Harris*, a number of courts have addressed unwelcomeness as part of determining subjective hostility, because conduct that is subjectively hostile will also, necessarily, be unwelcome.[93] For example, if a complainant establishes that a series of lewd,

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[88] The unwelcomeness inquiry has been the subject of much criticism. *See, e.g.*, Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 Yale L.J. & Feminism 131, 133 (2008) ("[T]he unwelcomeness requirement enshrines into law a troubling form of reasoning: Since women generally welcome sexual behavior, it is most efficient to require the exceptional woman who does not welcome such behavior to make her difference known."); Henry L. Chambers, *(Un)welcome Conduct and the Sexually Hostile Environment*, 53 Ala. L. Rev. 733, 733-34 (2002) ("Because the application of the unwelcomeness requirement to all potentially harassing, gender-based conduct can lead to results inconsistent with the broadened vision of Title VII, the requirement should be jettisoned."); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 Notre Dame L. Rev. 621, 621 (1997) ("Though common sense would seem to say that welcome harassment is a contradiction in terms, policy makers, rule makers, and courts have nevertheless engaged in extensive discussion and analysis of ways to determine whether a harassment victim has somehow invited the behavior that is hurting him or her.").

[89] *See, e.g.*, *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (stating that unwelcomeness is one of the requirements in establishing hostile work environment based on sex); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016) (same); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (stating that unwelcomeness is one of the requirements in establishing hostile work environment based on race); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1248 (11th Cir. 2015) (same).

[90] 477 U.S. 57, 68 (1986).

[91] 29 C.F.R. 1604.11(a) (defining sexual harassment as including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature").

[92] 510 U.S. 17, 21-22 (1993).

sexist, and derogatory comments were subjectively hostile, those comments also would be, by definition, unwelcome.

In some circumstances, as discussed below, evidence that the complainant communicated unwelcomeness to the harasser may also be relevant to assessing whether harassment was objectively hostile.

2. Subjectively Hostile Work Environment

In general, the complainant's own statement that he perceived conduct as offensive is sufficient to establish subjective hostility.[94] For example, if an individual makes a formal complaint about the conduct, it follows logically that the individual found it hostile. Similarly, if there is evidence that the individual complained to family, friends, or coworkers about the conduct, it is likely that he found it subjectively hostile.[95]

The complainant's subjective perception may be at issue, however, if there is evidence that the complainant did not find the harassment to be hostile, such as the complainant's statement that she did not feel harassed by the challenged conduct.[96]

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[93] *See, e.g.*, *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004) (holding that because reasonable jury could find that conduct was unwelcome, there was issue of material fact regarding subjective hostility); *Horney v. Westfield Gage Co.*, 77 F. App'x 24, 29 (1st Cir. 2003) (treating unwelcomeness and subjective hostility as same issue); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001) (explaining that issue of subjective hostility turns on whether conduct was unwelcome to plaintiff).

[94] *See, e.g.*, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) (concluding that subjective hostility was established through unrebutted testimony to supervisors and EEOC); *Horney v. Westfield Gage Co.*, 77 F. App'x 24, 29 (1st Cir. 2003) (concluding that subjective hostility/unwelcomeness was established by plaintiff's testimony that the conduct she complained about made her feel offended and humiliated); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001) (concluding that subjective hostility/unwelcomeness was established by plaintiff's complaints and his unrebutted testimony that conduct was unwelcome); *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341-42 (10th Cir. 1998) (concluding that evidence established jury issue as to subjective hostility where plaintiff testified that harassment made her "more and more stressed out and pretty cracked," that she "hated" the conduct, that she was "pretty shocked," and that she "just wanted to avoid the whole situation").

[95] *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454 (7th Cir. 1994) (concluding that plaintiff established harassment was subjectively hostile where, among other things, she told a friend about the conduct and then complained to her supervisor after learning from the friend that she had some legal recourse).

[96] *E.g.*, *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1047 (8th Cir. 2005) (concluding that complainant failed to establish prima facie case of sexual harassment where she stated that she did not feel harassed by the conduct); *Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir. 2001) (concluding that plaintiff did not subjectively perceive conduct as hostile where he testified during deposition that he did not consider racially charged hate letter a "big deal," that he was not surprised, shocked, or disturbed by it, and that he would lose no sleep over it).

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Whether conduct is subjectively hostile depends on the perspective of the complainant. Thus, if a male complainant does not welcome sexual advances from a female supervisor, it is irrelevant whether other men in the workplace would have welcomed these advances.[97] Moreover, the fact that an individual participated in the conduct is not dispositive; an individual might have experienced the conduct as hostile but felt that she had no other choice but to "go along to get along."[98]

A complainant's subjective perception can change over time. Conduct that had been welcomed in the past might subsequently be perceived as hostile, such as after the end of a romantic relationship.[99] Moreover, although the complainant may welcome certain conduct, such as sexually tinged conduct, from a particular employee, that does not mean that she also would welcome it from other employees.[100] Nor does acceptance of one form of sexually tinged conduct mean that the complainant would welcome all sexually tinged conduct.[101]

Delay in complaining about harassment does not mean that the conduct was not subjectively perceived as hostile, particularly if there is an explanation for the delay.[102] Thus, although a complainant's failure to complain in a timely fashion may be relevant to whether an employer is liable for the harassment, it does not necessarily mean that the conduct was not subjectively perceived as hostile.[103]

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[97] *See EEOC v. Prospect Airport Servs.*, 621 F.3d 991, 997-98 (9th Cir. 2011) (explaining that whether male complainant welcomed female coworker's sexual propositions depended on his "individual circumstances and feelings" and that it did not matter whether other men would have welcomed the propositions).

[98] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (explaining that correct inquiry is whether the complainant experienced the conduct as unwelcome, not whether she voluntarily participated in it); *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 754 (10th Cir. 2014) (concluding that issue of whether sexual conduct was unwelcome was a matter for the jury to decide, regardless of whether plaintiff's participation in it was voluntary).

[99] *See, e.g., Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (concluding that complainant adequately communicated to harasser, with whom she had been having consensual sexual relationship, that his conduct was no longer welcome).

[100] *Cf. Kramer*, 743 F.3d at 749 n.16 (stating that complainant's private consensual sexual relationship with other county employee was unrelated to her claim of sexual harassment by sergeant).

[101] *See Gerald v. Univ. of P.R.*, 707 F.3d 7, 17 (1st Cir. 2012) (stating that telling risqué jokes did not signal that employee was amenable to being groped at work); *Pérez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 28 (1st Cir. 2011) (stating that acquiescence to customary greeting among employees – a kiss on the cheek – was not probative of the complainant's receptiveness to his supervisor's sucking on his neck).

[102] *See Williams v. Gen. Motors Corp.*, 187 F.3d 553, 566-67 (6th Cir. 1999) (concluding that subjective component of hostile work environment claim did not require that plaintiff have reported the harassment where her failure to do so was "entirely understandable considering that one of the alleged aggressors was her supervisor and she wanted to get along at work").

[103] *Id.*; *see also infra* section IV.B.2.b.iii (discussing liability).

3. Objectively Hostile Work Environment

In addition to being subjectively hostile, the conduct in question must create an objectively hostile work environment: an environment that a reasonable person in the plaintiff's position would find hostile.[104] The impact of conduct must be evaluated in the context of "surrounding circumstances, expectations, and relationships."[105]

The objective hostility of the harassment requires "an appropriate sensitivity to social context"[106] and should be evaluated from the perspective of a reasonable person of the complainant's protected class.[107] Thus, if an African American individual alleges racial harassment, the harassment should be evaluated from the perspective of a reasonable African American in the same circumstances as the complainant. Conduct can establish a hostile work environment even if some members of the complainant's protected class did not find it to be offensive.[108]

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[104] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

[105] *Id.* at 82; *see also Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 811 (11th Cir. 2010) (en banc) (stating that analysis requires proceeding with "'[c]ommon sense, and an appropriate sensitivity to social context,' to distinguish between general office vulgarity and the 'conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive'" (quoting *Oncale*, 523 U.S. at 82)); *Hood v. Nat'l R.R. Passenger Corp.*, 72 F. Supp. 3d 888, 893 (N.D. Ill. 2014) (stating that joking manner in which challenged comments were made was relevant consideration in evaluating severity of Hispanic employees' use of "gringo" to refer to white complainant).

[106] *Oncale*, 523 U.S. at 82.

[107] *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) ("Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. . . . By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff."); *see also Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005) (stating that hostile work environment requires evidence establishing that harassment would have adversely affected a reasonable person of the same protected class in the plaintiff's position); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., dissenting in part and concurring in part) (noting that failure to adopt perspective of the complainant's protected class might result in applying the stereotypical views that Title VII was designed to outlaw); *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (evaluating sexual harassment claim of female plaintiff from viewpoint of "reasonable woman").

[108] *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 85 (2d Cir. 2010) (Calabresi, J., concurring) (stating that female complainant could base her hostile work environment claim on sexually derogatory conduct that was the product of locker room culture that some other women participated in); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 272 n.2 (6th Cir. 2009) (concluding that plaintiff established that she experienced sex-based harassment, even though some women participated in the conduct); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 886 (D. Minn. 1993) (concluding that expert testimony and testimony of female mine workers established that work environment affected psychological well-being of reasonable woman working there, and this conclusion was not affected by fact that some women did not find work environment objectionable); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1525 (M.D. Fla. 1991) (stating that fact

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In addition to protected status, other personal characteristics of a particular complainant may affect whether he or she reasonably perceives certain conduct as creating a hostile work environment. For example, if a teenager was harassed by a substantially older individual, then the age difference may intensify the perceived hostility of the behavior, which would be relevant to both subjective and objective hostility.[109] Similarly, if an undocumented worker is targeted for harassment, then the heightened risk of deportation may contribute to both subjective and objective hostility.[110]

Prevailing workplace culture does not excuse discriminatory conduct.[111] For example, public displays of pornography or sexually suggestive imagery demeaning women can contribute to an objectively hostile work environment for female employees, regardless of the long-standing nature of the practice. There is no "crude environment" exception to Title VII, if the harassment otherwise meets the standard of severe or pervasive harassing conduct.[112]

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that some women did not find conduct offensive did not mean that conduct was not objectively hostile).

[109] *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (stating that ten-year age disparity between teenage complainant and older harasser, coupled with his authority over her, could have led rational jury to conclude that harassment resulted in hostile work environment).

[110] *Cf. Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-65 (9th Cir. 2004) ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution. . . . As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices.").

[111] *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999); *see also Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 812-13 (11th Cir. 2010) (en banc) (holding that plaintiff, the only woman working on the sales floor, could establish sexually hostile work environment based on vulgar, sex-based conduct, even though the conduct had begun before she entered the workplace); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) ("We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment . . . ."); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part) (stating that female employee should not have to assume the risk of hostile work environment by voluntarily entering workplace in which sexual conduct abounds); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (rejecting contention that racial epithets that were common in defendant's industry could not establish hostile work environment based on race).

[112] *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (rejecting district court's suggestion that harassment might be discounted in environment that was "inherently coarse"; "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most"); *see also Reeves*, 594 F.3d at 810 (stating that "member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct"); *Vollmar v. SPS Techs., LLC*, No. 15-2087, 2016 WL 7034696, at *6 (E.D. Pa. Dec. 2, 2016) (concluding that even in work environment in which foul language and joking are commonplace, employer can be liable for fostering hostile work environment for female employees).

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In some circumstances, evidence of unwelcomeness may be relevant to the showing of objective hostility.[113] When analyzing whether conduct is unwelcome, some courts have focused on whether the harasser had notice that the conduct was unwelcome – in other words, whether the complainant had communicated that she did not welcome it.[114] Such notice may be relevant in determining whether it is objectively reasonable for a person in the complainant's position to have perceived ongoing conduct as hostile, because the harasser continued despite notice that his conduct was unwelcome. For example, flirtatious behavior or asking an individual out on a date may, or may not be, facially offensive, depending on the circumstances. If the actor is on notice, however, that the conduct is unwelcome, then a reasonable person in the complainant's position may perceive the actor's persistence in flirting or asking for a date to be hostile.[115]

The same may be true in the context of religious expression. If a religious employee attempts to persuade a nonreligious employee of the correctness of his beliefs, or vice versa, the conduct is not necessarily unwelcome. If, however, the nonreligious employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile.[116]

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[113] Although evidence of unwelcomeness may be relevant, the Commission does not believe that a plaintiff needs to prove "unwelcomeness" as a separate element of the prima facie case. *See* section III.C.1, *supra*.

[114] *See, e.g.*, *Souther v. Posen Constr., Inc.*, 523 F. App'x 352, 355 (6th Cir. 2013) (concluding that jury could not find that alleged harasser's sexual advances were unwelcome where, among other things, plaintiff and alleged harasser were engaged in an on-and-off sexual relationship for five years, she never complained to the alleged harasser or anyone else that his conduct was unwelcome, and plaintiff and the alleged harasser remained friends during period when affair was dormant); *Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (concluding that correctional officer presented sufficient evidence to show that she adequately communicated to the chief deputy that his conduct was unwelcome where she told him that she was uncomfortable continuing their relationship and that she was concerned that she would lose her job if she ended their relationship, given that she knew that other female employees were fired after ending their relationships with him); *Perez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 28 (1st Cir. 2011) (concluding that plaintiff established that supervisor's conduct was unwelcome where, among other things, plaintiff twice unequivocally rejected his supervisor's sexual propositions); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998 (9th Cir. 2010) (concluding that plaintiff established fact issue regarding whether conduct was unwelcome where he repeatedly told coworker, "I'm not interested," yet she continued to make sexual overtures).

[115] *See Webb-Edwards v. Orange Cty. Sheriff's Office*, 525 F.3d 1013, 1027 (11th Cir. 2008) (concluding that conduct was less likely to be actionable because it ended after plaintiff told harasser that it made her uncomfortable); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 704 (7th Cir. 2001) (stating that repeated harassment that continues despite an employee's objections is indicative of a hostile work environment).

[116] *See* EEOC, *Religious Discrimination*, *Compliance Manual* § 12-III.A.2.b (2008), http://www.eeoc.gov/policy/docs/religion.html#_Toc203359509); *Venters v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (concluding that reasonable person in the plaintiff's position could have found work environment hostile where supervisor's remarks were uninvited, intrusive, and continued even after the employee informed her supervisor that his comments were inappropriate).

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D. The Scope of Hostile Work Environment Claims

1. Conduct Must Be Sufficiently Related

Because the incidents that make up a hostile work environment claim constitute a single unlawful employment practice, the complainant can challenge an entire pattern of conduct, as long as it continues into the limitations period.[117] The earlier offensive and unwelcome conduct, however, must be sufficiently related to the later conduct to be part of the same hostile work environment claim.[118] Relevant considerations depend on the specific facts but may include the similarity of the actions involved, the frequency of the conduct, and whether the same perpetrators engaged in the conduct.[119]

A hostile work environment claim may include any hostile conduct that affects the complainant's work environment, even conduct that may be independently actionable. For example, a discriminatory transfer to a less desirable position that is separately actionable may also contribute to a racially hostile work environment if the action was taken by a supervisor who frequently used racial slurs.[120]

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[117] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (explaining that because hostile work environment is single unlawful employment action, Title VII does not separate individual acts that are part of the broader claim, for purposes of timeliness or liability).

[118] *Compare Maliniak v. City of Tucson*, 607 F. App'x 626, 628 (9th Cir. 2015) (concluding that timely and untimely incidents involving signs denigrating women were sufficiently related to be considered part of same hostile work environment claim), *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013) (concluding that plaintiff could proceed under continuing violation theory where at least one incident – being called a "b___h" during a meeting – occurred within the filing period and many of the acts outside the filing period involved similar conduct by the same individuals), *and EEOC v. Fred Meyers Stores, Inc.*, 954 F. Supp. 2d 1104, 1123 (D. Or. 2013) (concluding that sexual harassment of retail store employee by customer that occurred before the employee's six-month absence could be considered along with harassment that occurred after she returned in determining whether she was subjected to a hostile work environment, where conduct involved same customer engaging in similar physical harassment before and after employee's absence from the workplace, and despite the employee's complaint, harasser was allowed to continue frequenting store before he sexually harassed her again), *with Martinez v. Sw. Cheese Co., LLC*, 618 F. App'x 349, 354 (10th Cir. 2015) (holding that pre-filing period conduct was not sufficiently related to filing period conduct so as to be part of same hostile work environment where it did not involve same type of conduct, it occurred infrequently, and it involved different harassers), *and Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 727 (7th Cir. 2004) (holding that timely and untimely incidents were not part of same hostile work environment where there was three-year gap and last incident involved chance encounter on commuter train).

[119] *See Morgan*, 536 U.S. at 120; *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (stating that "flexibility is useful in a context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment").

[120] *See Baird v. Gotbaum*, 662 F.3d 1246, 1251-52 (D.C. Cir. 2011) (holding that district court erred in concluding that plaintiff's hostile work environment claim could not include discrete acts that were also actionable on their own); *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007) (concluding that although timely discrete act can provide basis for considering untimely, non-discrete acts as part of same hostile work environment claim, timely failure to promote and

Example 15: Earlier Harassment Sufficiently Related to Later Harassment. Noreen alleged that she was subjected to harassment based on her religion (Islam) and national origin (Pakistani). Noreen said that her team leader in the packaging department, Joe, made offensive comments about her accent, religion, and ethnicity. Noreen complained to the plant manager, who did not take any action, and Joe's harassment continued. At her own request, Noreen was transferred to the stretch wrap department. Soon after, she saw Joe speaking with Frank, a stretch wrap employee, while pointing at Noreen and laughing. Starting the next day, Frank regularly referred to Noreen using religious and ethnic slurs, including "muzzie," "terrorist," and "paki." Frank also refused to fill in for her when she needed to take a break. Noreen complained to the plant manager about Frank's conduct, but again the plant manager did not take any action. Here, Noreen experienced harassment in two different departments by different harassers, but the conduct was similar in nature. The harassment in the second department occurred shortly after the harassment in the first department; the harassment in the second department started after the two harassers met; and the plant manager was responsible for addressing harassment in both departments. Under these circumstances, the investigator concludes that the harassment experienced by Noreen in the two departments constitutes part of the same hostile work environment claim.[121]

Example 16: Earlier Harassment Insufficiently Related to Later Harassment. Cassandra, who worked for a printing company, alleged that she was subjected to sexual harassment when she was in the production department and also after she was transferred to the estimating department. While in the production department, Cassandra said that she was exposed to sexually explicit discussions, sexual jokes, and vulgar language. Although she was no longer exposed to most of the harassment after her transfer to the estimating department,

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retaliation were not sufficiently similar to untimely allegations so as to be part of same hostile work environment claim); *Royal v. Potter*, 416 F. Supp. 2d 442, 453-54 (S.D. W. Va. 2006) (concluding that plaintiff's actionable hostile work environment claim included termination of temporary position and failure to promote). *But see Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 892-93 (9th Cir. 2005) (stating that timely acts offered in support of hostile work environment claim must be non-discrete acts because basing hostile work environment claim on timely discrete and untimely non-discrete acts would "blur to the point of oblivion the dichotomy between discrete acts and a hostile environment").

[121] This example is based on the facts in *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383 (7th Cir. 2007).

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> Cassandra overheard a male worker on the other side of her cubicle wall tell someone that if a weekend trip with one of his female friends "was not a sleepover, then she wasn't worth the trip." The sleepover comment was made nearly a year after Cassandra's transfer and was not directed at Cassandra or made for her to hear. Other than that comment, Cassandra did not experience any alleged harassment after her transfer to the estimating department, which did not interact with the production department. In these circumstances, the investigator concludes that the alleged harassment experienced by Cassandra in the production department was not part of the same hostile work environment claim as the alleged harassment in the estimating department.[122]

2. Types of Conduct

a. Conduct That Is Not Directed at the Complainant

Harassing conduct can affect an employee's work environment even if it is not directed at that employee. For instance, open workplace displays of pornography may contribute to a hostile work environment for women even if the pornography is not directed at them.[123] Similarly, anonymous harassment, such as racist or antisemitic graffiti or the display of a noose, may contribute to a hostile work environment, even if it is not directed at any particular employees.[124] Offensive conduct that is directed at other individuals of the complainant's protected class also may contribute to a hostile work environment for the complainant. Such conduct may even occur outside of the complainant's presence as long as the complainant becomes aware of the conduct during his or her employment and it is sufficiently related to the complainant's work environment.[125]

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[122] This example is based on the facts in *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70 (2d Cir. 2010).

[123] *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (stating that pornography "sexualizes the work environment to the detriment of all female employees"); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010) (en banc) (concluding that jury could find that conduct of male sales floor employees that was gender-specific, derogatory, and humiliating – including vulgar sexual comments, pornographic images of women, and gender epithets – created hostile work environment for complainant, who was the only woman on the sales floor, even though the conduct was not specifically directed at her).

[124] *See, e.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1144-46 (10th Cir. 2008) (holding that reasonable jury could conclude that plaintiff was subjected to racially hostile work environment, which included anonymous bathroom graffiti and the display of a noose).

[125] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that district court erred in evaluating plaintiffs' section 1981 and section 1983 racial harassment claims by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark but each plaintiff became aware of all of the conduct); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1257 (11th Cir. 2014) (stating that employees could base their racial harassment claims on conduct that they were aware of); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335-36 (6th Cir. 2008) (concluding

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Example 17: Conduct Not Directed Against Complainant that Contributes to a Hostile Work Environment. Lilliana is the District Manager for an insurance company. Peter reports to Lilliana and is an Assistant District Manager; he oversees four sales representatives. Lilliana is white, and Peter and the four sales representatives are African American. Over the two years that Peter has worked for the insurance company, Lilliana has used the term "n____r" several times when talking to Peter's subordinates; she told Peter that his "black sales representatives are too dumb to be insurance agents"; and she called the corporate office to ask them to stop hiring black sales representatives. Some of the comments were made in Peter's presence, and Peter learned about other comments secondhand, when sales representatives complained to him about them. An investigator finds that Lilliana's conduct toward Peter's subordinates contributed to a hostile work environment for Peter because the comments either occurred in Peter's presence or he learned about them from others.[126]

b. Conduct That Occurs in Work-Related Context Outside of Regular Place of Work

A hostile work environment claim may include conduct that occurs in a work-related context outside an employee's regular workplace.[127] For instance, harassment directed at an employee during the course of employer-required training occurs within the "work environment," even if the training is not conducted at the employer's facility.[128]

Example 18: Harassment During Off-Site Training Was Within Work Environment. Susan was assigned, along

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that evidence of hostile work environment may include acts of harassment that plaintiff becomes aware of during her employment that were directed at others and occurred outside her presence).

[126] Facts adapted from *Rodgers v. Western-Southern Life Insurance Co.*, 12 F.3d 668 (7th Cir. 1993).

[127] *See, e.g.*, *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 985-86 (8th Cir. 2016) (holding that district court erred in analyzing hostile work environment claim by plaintiff, a truck driver, by excluding alleged sexual harassment of plaintiff by her driving partner during mandatory rest period); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (concluding that potential client's rape of female manager at business meeting outside her workplace was sufficient to establish hostile work environment since having out-of-office meetings with potential clients was job requirement); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (concluding that "work environment" included short layover for flight attendants in foreign country where employer provided block of hotel rooms and ground transportation).

[128] *See Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment during course of employer-mandated training).

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with three of her coworkers, including Tony, to take a week-long training course at a training center operated by a private training provider. On the last day of the training, Susan was sexually assaulted by Tony in a stairwell of the training facility. Although the assault occurred outside Susan's regular workplace and at a training center operated by a third-party vendor, it occurred in a work-related context. Therefore, the assault occurred in Susan's work environment for purposes of a Title VII sexual harassment claim.

Conduct also occurs within the work environment if it is conveyed using work-related communications systems, such as an employer's email system or electronic bulletin board.[129]

Example 19: Conduct on Employer's Email System Contributing to a Hostile Work Environment. Ted and Perry are coworkers in an accounting firm. Ted is white, and Perry is African American. Ted sends weekly jokes every Monday morning from his work computer and work email account to colleagues, including Perry. Many of the jokes are off-color and involve racial stereotypes, including stereotypes about African Americans. Perry complains to Ted and their mutual supervisor after several weeks of Ted's emails, but Ted is not instructed to stop. After several more weekly emails, Perry files a charge of discrimination with the EEOC. An investigator finds that the racial jokes sent by Ted contributed to a hostile work environment for Perry because, among other reasons, they were sent using Ted's work computer and work email account and were sent to colleagues in the workplace.

c. Conduct That Occurs in a Non-Work-Related Context, But with Impact on the Workplace

Conduct that does not occur in a work-related context can have consequences in the workplace and therefore contribute to a hostile work environment. For instance, if an African American employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the mere presence of those same coworkers in the African American employee's workplace can result in a hostile work environment.[130] Conduct that

[129] *See Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000) (concluding that, although electronic bulletin board did not have physical location at employee's worksite, evidence might show it was so closely related to the workplace environment and beneficial to the employer that continuation of harassment on it should be regarded as occurring in workplace).

[130] *See, e.g.*, *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that harasser's intimidating conduct outside workplace helped show why complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v.*

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can affect the workplace, even though it does not occur in a work-related context, includes electronic communications using private social media accounts. For example, if an Asian American employee is the subject of a racist comment that a coworker posts on social media, and other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment.[131]

> **Example 20: Conduct on Social Media Platform Outside Workplace.** Brad and Al work on an all-male construction crew. Al is the crew superintendent, and he regularly brings pornographic magazines to the construction site to share with the other crew members during lunch breaks. After Brad repeatedly refuses to look at the magazines, Al and the other crew members begin taunting Brad. Al uses his smartphone to post comments on his personal Facebook page calling Brad a "princess" and "f____t." Brad and the other crew members see Al's posts about Brad, and they talk about the posts at work and begin directing epithets at Brad, simulating sex acts around him, and exposing themselves to him. An investigator finds that the Facebook posts contributed to a hostile work environment even though they were written on a personal smartphone and some were written after-hours.

Finally, supervisor harassment that occurs outside the workplace is more likely to contribute to a hostile work environment than similar conduct by coworkers, given a supervisor's ability to affect a subordinate's employment status.

IV. Liability

An employer is liable for the actions of its agents under the federal EEO laws.[132] The actions of a harasser, however, are rarely authorized by the employer and are generally outside the scope of employment. Agency principles, therefore, are often insufficient guides

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Steak 'N Shake, Inc., 3 F. App'x 302, 311 (6th Cir. 2001) (stating that employee may reasonably perceive her work environment as hostile if forced to work for someone who harassed her outside the workplace); *cf. Andersen v. Rochester City Sch. Dist.*, 481 F. App'x 628, 630 (2d Cir. 2012) (concluding that alleged harassment of teacher by student outside of school did not create hostile work environment where student was not in teacher's class and they did not interact at school).

[131] *See, e.g.*, *Tammy S. v. Dep't of Def.*, EEOC Appeal No. 0120084008, 2014 WL 2647178, at *12 (June 6, 2014) (concluding that complainant was subjected to sex-based harassment creating a hostile work environment, including harasser's personal website, which was announced during a training class at work and was viewed and discussed by many employees in the workplace); *Knowlton v. Dep't of Transp.*, EEOC Appeal No. 0120121642, 2012 WL 2356829, at *1-3 (June 15, 2012) (reversing dismissal of harassment claim that included race-related comment posted by coworker on Facebook).

[132] *E.g.*, 42 U.S.C. § 2000e(b) (defining "employer" under Title VII as including "any agent").

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for determining employer liability for a hostile work environment.[133] Recognizing this, the Commission and the courts have developed a sliding scale for determining employer liability for hostile work environment claims.

The Commission and the courts have applied one of four standards for liability, based on the relationship of the harasser to the employer, and the nature of the hostile work environment:

- If the harasser is a proxy or alter ego of the employer, the employer is strictly liable for the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no defense to liability.

- If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer is vicariously liable for the harasser's conduct. There is no defense to liability.

- If the harasser is a supervisor, and the hostile work environment does *not* result in a tangible employment action, the employer is vicariously liable for the actions of the harasser. The employer, however, may limit its liability if it can prove a two-part affirmative defense.

- If the harasser is not a proxy or alter ego of the employer and is not a supervisor, the employer is liable for the hostile work environment created by the harasser's conduct if the employer failed to act reasonably to prevent the harassment or to take corrective action in response to the harassment when it was aware or should have been aware of it.

If the complainant challenges harassment by one or more supervisors and one or more coworkers or non-employees that is part of the same hostile work environment claim,[134] the liability standard for supervisor harassment will usually apply to the entire claim.[135]

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[133] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998) (stating that it is the Court's obligation to "adapt agency concepts to the practical objectives of Title VII"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755 (1998) (stating that case law on agency principles provides "useful instruction," though common law principles may not necessarily transfer in all respects to Title VII); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (stating that agency principles "may not be transferable in all their particulars to Title VII").

[134] For a discussion of how to determine whether conduct is part of the same hostile work environment claims, refer to section III.D.1, *supra*.

[135] *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001) (upholding jury verdict for plaintiff where ample evidence supported imposition of vicarious liability for hostile work environment created by coworkers and supervisors); *Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1045 (7th Cir. 2000) (stating that plaintiff pursuing hostile work environment claim based on supervisor's conduct may introduce evidence of coworker harassment that is logically tied to the supervisor).

A. Liability Standard Depends on the Role of the Harasser in the Organization

The liability standard depends on whether the harasser is the employer's:

- **Proxy or alter ego;**
- **Supervisor; or**
- **Non-supervisory employee, coworker, or non-employee.**

The applicable standard of liability depends on the level and kind of authority that the employer gave the harasser to act on its behalf.

1. Alter Ego or Proxy of the Employer

An individual is considered an alter ego or a proxy of the employer if he or she is of a sufficiently high rank that his or her actions "speak" for the employer.[136] Individuals who might be considered proxies include sole proprietors and other owners; partners; corporate officers; and high-level supervisors.[137] By contrast, a supervisor does not qualify as the employer's alter ego merely because he or she exercises significant control over the complaining employee.[138]

2. Supervisor

In the context of employer liability for a hostile work environment, an employee is considered a "supervisor" if he or she is "empowered by the employer to take tangible employment actions against the victim."[139] A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer.[140]

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[136] *See, e.g., Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 54 (2d Cir. 2012); *Helm v. Kansas*, 656 F.3d 1277, 1286 (10th Cir. 2011); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 384 (5th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000).

[137] *See Faragher*, 524 U.S. at 789-90 (citing cases discussing alter-ego liability).

[138] *See Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) (stating that *Faragher* and *Ellerth* do not suggest that supervisor can be considered employer's alter ego merely because he possesses high degree of control over subordinate); *see also Townsend*, 679 F.3d at 55-56 (concluding that jury instruction was erroneous because it gave misleading impression that mere status as supervisor with power to hire and fire is sufficient to render individual employer's alter ego); *Johnson*, 218 F.3d at 730 (concluding that alter-ego liability did not apply where supervisor was not high-level manager whose actions spoke for the defendant).

[139] *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). The Court rejected the EEOC's position that someone also qualifies as a "supervisor" if he or she has the authority to direct another individual's daily work activities. *Id.* at 2447-48.

[140] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998). For purposes of assessing liability, the term "tangible employment action" has replaced the concept of "quid pro quo harassment."

Ellerth discusses the concept of a "tangible employment action" "only to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S.

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Examples of tangible employment actions include hiring and firing, failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits.[141] In some cases, a decision may constitute a tangible employment action even though it does not have direct economic consequences, such as a change in job duties that limits the affected individual's eligibility for promotion[142] or a demotion with a substantial reduction in job responsibilities but without a loss in pay.[143]

Even if an individual is not the final decision maker as to tangible employment actions affecting the complainant, he or she would still be considered a supervisor if he or she has the "power to *recommend* or otherwise substantially influence tangible employment actions."[144] Similarly, an employee who does not have actual authority over the harassed employee can still be considered a supervisor if the harassed employee reasonably believes, based on the employer's actions, that the harasser has such power.[145] The complainant might

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53, 64 (2006) (quoting *Ellerth*, 524 U.S. at 760) (alteration in original); *see also Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (describing *Ellerth* and *Faragher* as delineating two categories of hostile work environment claims distinguished by the presence or absence of a tangible employment action). *Ellerth* does not address the scope of either Title VII's general antidiscrimination provision or Title VII's antiretaliation provision. *Burlington N.*, 548 U.S. at 65.

[141] *E.g.*, *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 790.

[142] *See Vance*, 133 S. Ct. at 2447 n.9.

[143] *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 654-55 (5th Cir. 2002).

[144] *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 738 (10th Cir. 2014) (emphasis in original); *see also id.* at 741 ("Even if the [formal decision maker] undertook *some* independent analysis when considering employment decisions recommended by [the alleged harasser], [the alleged harasser] would qualify as a supervisor so long as his recommendations were among the proximate causes of the [formal decision maker's] decision-making." (emphasis in original)); *Vance*, 133 S. Ct. at 2446 n.8 (indicating that ability to make recommendations regarding hiring and promotion is evidence of supervisory status).

[145] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Kramer*, 743 F.3d at 742 ("Apparent authority exists where an entity 'has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first [party].'" (quoting *Bridgeport Firemen's Sick & Death Benefits Ass'n v. Deseret Fed. Sav. & Loan Ass'n*, 735 F.2d 383, 388 (10th Cir. 1984))); *Wilson v. Muckala*, 303 F.3d 1207, 1220-21 (10th Cir. 2002) (finding insufficient support for apparent authority theory as to chief of staff's conduct where complainant received assurances from immediate supervisors that chief of staff exercised no authority over complainant's position and complainant did not indicate that chief of staff was in her chain of command); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").

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have such a reasonable belief where, for example, the chain of command is unclear or the harasser has broad delegated powers.[146]

3. Nonsupervisory Employees/Coworkers and Non-employees

Federal EEO laws protect employees against unlawful harassment by other employees who do not qualify as a proxy/alter ego or a "supervisor," i.e., other employees without the authority to take tangible employment actions. Employees are also protected against unlawful harassment by non-employees, such as independent contractors,[147] customers,[148] hospital patients and nursing home residents,[149] and client employees.[150]

B. Applying the Appropriate Standard of Liability

Once the status of the harasser is determined, the appropriate standard of liability can be applied.

1. Alter Ego or Proxy

As noted above, if the harasser is an alter ego or proxy of the employer, the employer is automatically liable for unlawful harassment and has no defense – a finding that the harasser is an alter ego or proxy is, therefore, the end of the liability analysis.

> **Example 21: Harasser Was Employer's Alter Ego.**
> Tammy alleged that she was sexually harassed by the company Vice President, John. The investigation reveals that John was the only corporate Vice President in the organization, answering only to the company's President, and he exercised managerial responsibility over the Respondent's operations. Given John's high rank within the company and his significant control over the company's operations, the investigator concludes that John was the Respondent's alter ego, subjecting it to automatic liability for a hostile work environment resulting from his harassment.[151]

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[146] In *Kramer*, the Tenth Circuit concluded that apparent-authority principles also might apply where an employer has vested an employee with some limited authority over the complainant and the complainant reasonably but mistakenly believes that the employee also has related powers, which, in some circumstances, might include the power to undertake or substantially influence tangible employment actions. 743 F.3d at 742-43.

[147] *Dunn v. Washington Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

[148] *EEOC v. Fred Meyers Stores, Inc.*, 954 F. Supp. 2d 1104, 1116 (D. Or. 2013).

[149] *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 915 (7th Cir. 2010).

[150] *EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 606-07 (4th Cir. 2011).

[151] This example is based on the facts in *Townsend v. Benjamin Enterprises*, 679 F.3d 41 (2d Cir. 2012).

2. Supervisor

An employer is vicariously liable for a hostile work environment created by a supervisor. Under this standard, liability for the supervisor's harassment is imputed, i.e., attributed, to the employer.[152]

If the supervisor took a *tangible employment action* as part of the hostile work environment, then the employer is automatically liable and does not have a defense.

If the supervisor *did not take a tangible employment action*, then the employer can raise an affirmative defense to vicarious liability or damages. The employer must prove both elements of the defense:

- **The employer acted reasonably to prevent and promptly correct harassment; and**
- **The complaining employee unreasonably failed to use the employer's complaint procedure or to take other steps to avoid or minimize harm from the harassment.**

a. Hostile Work Environment Including a Tangible Employment Action: No Employer Defense

An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.[153] As noted in the section above, agency principles generally govern employer liability for a hostile work environment. The Supreme Court stated in *Ellerth* that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."[154] Therefore, when a hostile work environment includes a tangible employment action, the "action taken by the supervisor becomes for Title VII purposes the act of the employer," and the employer is liable.[155]

The tangible employment action may occur at any time during the course of the hostile work environment, and need not occur at the end of employment or serve as the culmination of the harassing conduct.[156] For example, if a supervisor subjects an employee

[152] *See, e.g.*, *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005) (stating that harasser must exercise sufficient authority over complainant to justify imputing liability to employer for his misconduct); Restatement (Third) of Agency § 7.03 cmt. b (2006) (stating that vicarious liability of principal turns on liability of agent).

[153] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-63 (1998).

[154] *Id.* at 761-62.

[155] *Id.* at 762.

[156] *Id.* at 762-63 (explaining that requirements of the "aided in the agency" relation standard "will always be met when a supervisor takes a tangible employment action against a subordinate"); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (stating that affirmative defense is not available where "discrimination the employee has suffered included a

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to a hostile work environment by making frequent sexual comments and denying her pay increases because she rejects his sexual advances, then the employer is liable for the supervisor's harassment and there is no defense.[157]

An unfulfilled threat to take a tangible employment action does not itself constitute a tangible employment action, but it may contribute to a hostile work environment.[158] By contrast, fulfilling a threat of a tangible employment action because a complainant rejects sexual demands (e.g., denying a promotion) or fulfilling a promise of such an action because the complainant submits (e.g., granting a promotion) constitutes a tangible employment action.[159]

b. Hostile Work Environment Without a Tangible Employment Action: Two-Pronged Affirmative Defense

i. Both Prongs of the Defense Must Be Established

If harassment by a supervisor creates a hostile work environment that has not resulted in a tangible employment action, the employer can raise an affirmative defense to liability or damages. That defense requires the employer to prove that:

- the employer exercised reasonable care to prevent and correct promptly any harassment; and

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tangible employment action"); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 101-02 (2d Cir. 2006) (stating that affirmative defense is not available if tangible employment action was taken against employee as part of supervisor's discriminatory harassment and that harassment culminates in tangible employment action if action is "linked" to the harassment). *But see Hall v. City of Chicago*, 713 F.3d 325, 335 (7th Cir. 2013) (concluding that work reassignment could not preclude affirmative defense because it occurred at beginning of complainant's tenure in the division and therefore "could not have been the culmination of anything").

[157] Under such circumstances, the employee also would have a claim that she was denied a raise because of her sex. *See supra* section III.D.1 (noting that conduct that is separately actionable also may be part of a hostile work environment claim).

[158] *Ellerth*, 524 U.S. at 754 (analyzing Ellerth's claim, which involved only unfulfilled threats, as a hostile work environment claim); *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1027 (8th Cir. 2004) (analyzing unfulfilled implied threat as a factor in determining whether plaintiff was subjected to a hostile work environment).

[159] *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003) (concluding that "determining not to fire an employee who has been threatened with discharge constitutes a 'tangible employment action,' at least where the reason for the change in the employment decision is that the employee has submitted to coercive sexual demands"); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 98 (2d Cir. 2002) (finding prejudicial error where lower court failed to instruct jury to consider supervisor's conditioning of plaintiff's continued employment on her submission to his sexual demands as possible tangible employment action). *Contra Santiero v. Denny's Rest. Store*, 786 F. Supp. 2d 1228, 1235 (S.D. Tex. 2011) (concluding that employee was not subjected to tangible employment action where she acceded to sexual demands and thereby *avoided* tangible employment action); *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1224-26 (M.D. Fla. 2004) (rejecting *Jin* analysis as inconsistent with Supreme Court and Eleventh Circuit precedent).

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- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment.[160]

The employer is required to prove both elements of the defense. For example, if the employer is able to show that it exercised reasonable care, but cannot show that the employee unreasonably failed to take advantage of preventive or corrective opportunities, the employer will not be able to establish the defense.

Some courts have held that an employer may avoid liability by proving only the first element of the defense when a hostile work environment claim is based on a single incident of harassment.[161] It is the Commission's position that when the harasser is a supervisor, the exercise of reasonable care by the employer is not sufficient by itself to spare an employer from liability in these instances.[162]

In creating this affirmative defense to liability in *Faragher* and *Ellerth*, the Supreme Court sought "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees."[163] The Court held that this carefully balanced defense contains "two *necessary* elements:"[164] (1) the employer's exercise of reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee's unreasonable failure to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[165] There is nothing in the opinion that creates an exception to this requirement in cases involving a single incident of harassment, and the Commission does not believe that one can be created without jeopardizing the careful balance in the *Faragher-Ellerth* affirmative defense, even though this can lead to harsh outcomes for otherwise law-abiding employers.

Thus, in circumstances in which an employer is unable to establish both prongs of the affirmative defense, the employer will be liable for the harassment. If the employer, however, can show that the employee reasonably could have avoided some but not all of the

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[160] *Id.* at 765; *Faragher*, 524 U.S. at 807.

[161] *See, e.g., McCurdy v. Ark. State Police*, 375 F.3d 762, 771-72 (8th Cir. 2004) (concluding that employer is not required to establish second prong where single incident of harassment results in hostile work environment).

[162] *See, e.g., Greene v. Dalton*, 164 F.3d 671, 674-75 (D.C. Cir. 1999) (concluding that employer could not avoid liability because even if it could establish first prong of defense, it could not establish the second prong).

[163] *Ellerth*, 524 U.S. at 764.

[164] *Id*. at 765 (emphasis added).

[165] *Id*.

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harm from the harassment, the employer may be able to limit the damages resulting from the harassment.[166]

Example 22: Employer Limits Damages by Establishing Affirmative Defense. Nick files a charge alleging that he was subjected to racial harassment by his supervisor, Sam. The evidence shows that the harassment began when Sam used an egregious racial epithet to refer to Nick's race during an informal meeting with Nick's coworkers, conduct that was sufficient standing alone to create a hostile work environment. Although Sam's harassment continues, Nick does not complain until four months later, when he accepts a position with another employer. The investigator concludes that the employer has established both elements of the affirmative defense with respect to the continuing harassment after the meeting because Nick could have avoided this harm by complaining promptly. However, the employer is liable for the hostile work environment created by Sam's initial use of the egregious epithet since Nick could not have avoided this harm if he had complained earlier.

Example 23: Employer Avoids Liability by Establishing Affirmative Defense. Jamie files a charge alleging that she was subjected to a hostile work environment by her supervisor. The supervisor's harassment was relatively mild at first but grew progressively more severe over a period of several months. The employer had an effective anti-harassment policy and procedure, and there were no circumstances that made failure to use the process reasonable. Jamie never complained about the harassment using this process. The employer learned of the supervisor's conduct from Jamie's coworker. After learning about the harassment, the employer took immediate corrective action that stopped the harassment. Under these circumstances, the employer is not liable for the supervisor's harassment of Jamie, because the employer had an effective policy and procedure and took prompt corrective action upon receiving notice of the harassment and because Jamie could have avoided all actionable harassment if she had used the effective procedure offered by the employer.

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[166] *See Greene*, 164 F.3d at 675 (explaining that in order for defendant to avoid all liability for sexual harassment leading to rape of plaintiff, "it must show not merely that [the plaintiff] inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in [her] place would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive'"); *cf. Savino v. C.P. Hall Co.*, 199 F.3d 925, 935 (7th Cir. 1999) (stating that plaintiff's "unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability").

ii. First Prong of the Affirmative Defense: Employer's Duty of Reasonable Care

The first prong of the affirmative defense requires the employer to show that it exercised reasonable care to prevent and correct harassment. In assessing whether the employer has taken adequate steps, the inquiry begins by identifying the policies and practices an employer has instituted to prevent harassment and to respond to complaints of harassment. These steps usually consist of promulgating a policy against harassment, establishing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities pursuant to the policy, and monitoring the workplace to ensure adherence to the employer's policy.[167]

Even the best policy and complaint procedure, however, will not alone establish that the employer has exercised reasonable care – the employer must also implement them effectively. Thus, evidence that an employer has a comprehensive anti-harassment policy and complaint procedure will be insufficient to establish the first prong if employees are nonetheless reasonably skeptical of the fairness and effectiveness of the process. Such evidence regarding the employer's enforcement practices will also be relevant to whether an employee unreasonably failed to use the employer's complaint process.

To be effective, an anti-harassment policy should include the following components:

- the policy defines what conduct is prohibited, and is widely disseminated;[168]
- the policy is accessible to workers,[169] including those with limited proficiency in English;
- the policy requires that supervisors report or address harassment involving their subordinates when they are aware of it;[170] and

[167] For further guidance on what constitutes reasonable care to prevent harassment, refer to section IV.B.3.a, *infra*.

[168] *E.g.*, *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010) (holding that reasonable jury could conclude that failure to disseminate harassment policy and complaint procedure precluded employer from establishing first prong of defense).

[169] *See EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007) (explaining that, although an employer need not tailor its complaint procedure to the competence of each employee, "the known vulnerability of a protected class has legal significance").

[170] *See Duch v. Jakubek*, 588 F.3d 757, 764-65 (2d Cir. 2009) (stating that supervisor has duty to act on and stop harassment by a subordinate); *Williamson v. City of Houston, Tex*, 148 F.3d 462, 466-67 (5th Cir. 1998) (stating that supervisor's knowledge that his subordinate had harassed the plaintiff could be imputed to the employer); *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 801 (8th Cir. 2003) (concluding that jury could find that employer had notice of harassment when employee complained to her supervisor, who had authority to discipline employees, and complainant reasonably believed that supervisor had duty to report the harassment to others in the company); *Schmidt v. Medicalodges, Inc.*, 492 F. Supp. 2d 1302, 1311 (D. Kan. 2007) (asserting Tenth Circuit's position that low-level supervisor with authority over complaining employee may be considered management-

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- the policy offers various ways to report harassment, allowing employees to contact someone other than their direct supervisor.[171]

To be effective, a complaint process should include the following components:

- the process provides for effective investigations and prompt corrective action;[172]
- the process provides adequate confidentiality protections; and
- the process provides adequate anti-retaliation protections.[173]

A conflict between an employee's desire for confidentiality and the employer's duty to investigate arises when employees inform managers about alleged harassment but ask them to keep the matter confidential and take no action. Although it may be reasonable in some circumstances to honor the employee's request, it may not be reasonable to do so if it appears likely that the harassment was severe[174] or if employees other than the complainant

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level employee for purposes of imputing knowledge to employer and triggering employer's duty to respond).

[171] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding as matter of law that city did not exercise reasonable care to prevent the supervisors' harassment while taking note of fact that city's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (stating that it was "not altogether surprising" that complainant did not follow grievance procedure that apparently required her to complain first to her supervisor, who was the alleged harasser); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) (stating that reasonable sexual harassment procedure should provide a mechanism for bypassing a harassing supervisor when making a complaint); *Green MOBIS Ala., LLC*, 995 F. Supp. 2d 1285, 1300 (M.D. Ala. 2014) (concluding that employer acted reasonably to prevent sexual harassment where, among other things, its complaint procedures provided alternative avenues to report harassment in case the harasser was an employee's supervisor).

[172] *See, e.g.*, *Cerros. v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005) (describing prompt investigation as a "hallmark of reasonable corrective action").

[173] *See, e.g.*, *Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) (upholding sexual harassment jury verdict for plaintiff where she resigned instead of cooperating with employer's investigation because, among other things, the Human Resources Director did nothing to assure her that she would not be subjected to retaliation); *cf. Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (concluding that defendant demonstrated that it exercised reasonable care to prevent sexual harassment where, among other things, it had facially valid anti-harassment policy with a non-retaliation provision and a flexible reporting procedure); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 102-03 (2d Cir. 2006) (concluding that employer satisfied first element of affirmative defense to disability-based harassment where, among other things, it had anti-harassment policy that prohibited harassment on account of disability or medical condition, promised that complaints would be handled promptly and confidentially, and contained an anti-retaliation provision).

[174] Some courts have suggested that it may be permissible to honor such a request in some circumstances, but that it may be necessary to take corrective action, despite a complainant's wishes,

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are vulnerable.[175] One mechanism to help minimize such conflicts would be for the employer to set up an informational phone line or website that allows employees to ask questions or share concerns about harassment anonymously.

An employer's responsibility to exercise reasonable care to prevent and correct harassment by supervisors, however, is not limited to implementing an anti-harassment policy and complaint procedure. To establish that it exercised reasonable care, an employer must show both that it took reasonable steps to prevent harassment in general and that it took reasonable steps to remedy the specific harassment at issue in a particular complaint.

An employer's response to a report of harassment must show that the employer took reasonable steps to investigate any allegation of harassment and, if it determines harassment has occurred or is occurring, to stop it. The reasonableness of the employer's action is fact-specific, and will vary from case to case. Nevertheless, there are general principles which will guide any response. These principles are discussed in detail in section IV.B.3.b.ii.

> **Example 24: Employer Liable Because It Failed to Exercise Reasonable Care in Responding to Harassment.** Paige, who works as a cashier in a fast-food restaurant, files a charge alleging that she was sexually harassed by one of her supervisors, Mitch, an assistant manager. The investigation reveals that Paige initially responded to Mitch's sexual advances and other sexual conduct by telling him that she was not interested and that his inappropriate conduct made her uncomfortable. Mitch's conduct persisted, however, so Paige spoke to the restaurant's other assistant manager, Mallory, who, like Mitch, was designated as Paige's direct supervisor. Mallory, however, did not report Mitch's conduct or take any action because she felt Paige was being overly sensitive. Mitch continued to sexually harass Paige, and a few weeks after speaking with Mallory, Paige contacted the Human Resources Director. The following day, Respondent placed Mitch on paid administrative leave, and a week later, after concluding its investigation, Respondent terminated Mitch. Respondent contends that it took reasonable corrective action

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if harassment is severe. *See Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1186 (9th Cir. 2005) (concluding that employer acted reasonably in not investigating complaint where complainant said he wanted to handle situation himself and failed to indicate the severity of the harassment, though employer might have duty to take corrective action in other circumstances, despite complainant's wishes), *amended by* 433 F.3d 672 (9th Cir. 2006), *amended by* 436 F.3d 1050 (9th Cir. 2006); *Torres v. Pisano*, 116 F.3d 625, 639 (2d Cir. 1997) (concluding that, although there is a point at which "harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee," employer acted reasonably here in honoring employee request to keep matter confidential and not take action until later date, where employee had recounted only a few relatively minor incidents of harassment).

[175] *See Torres*, 116 F.3d at 639 (stating that employer most likely could not honor single employee's request not to take action if other workers were also being harassed).

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by promptly responding to Paige's complaint to Human Resources. Because Mallory was one of Paige's supervisors, however, and was therefore responsible for addressing potential harassment, Respondent could not establish the affirmative defense, having failed to act reasonably to address the alleged harassment after Paige spoke with Mallory.

iii. Second Prong of the Affirmative Defense: Employee's Failure to Take Advantage of Preventive or Corrective Opportunities

The second prong of the affirmative defense requires the employer to show that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[176] An employer that has exercised reasonable care will not be liable if the complainant reasonably could have avoided all harm from unlawful harassment but failed to do so.[177] If there is some harm resulting from unlawful harassment, however, that the complainant could not reasonably avoid, the employer is liable for that harm even when it exercised reasonable care.[178]

Proof that the employee unreasonably failed to use the employer's complaint procedure will normally establish the second prong of the affirmative defense.[179] In some circumstances, however, there may be a reasonable explanation for an employee's delay in complaining or failure to utilize the employer's complaint process. In addition, there may be instances when an employee's use of mechanisms other than the employer's official complaint process will be sufficient to demonstrate that the employee took reasonable steps to avoid harm from the harassment.

The reasonableness of an employee's failure to take steps to avoid harm from harassment, or delay in doing so, depends on the particular circumstances and information

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[176] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

[177] *Faragher*, 524 U.S. at 807 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.").

[178] *See, e.g.*, *Greene v. Dalton*, 164 F.3d 671, 674-75 (D.C. Cir. 1999) (concluding that employer could not avoid liability because even if it could establish first prong of defense, it could not establish the second prong).

[179] *Ellerth*, 524 at 765; *Faragher*, 524 at 807-08; *see also Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (concluding that no jury could find that plaintiff acted reasonably where she was aware that anti-harassment policy required immediate reporting of sexual harassment, yet she failed to say anything for at least five months); *Taylor v. Solis*, 571 F.3d 1313, 1318-19 (D.C. Cir. 2009) (concluding that reasonable employee in plaintiff's position would have used employer's complaint procedure yet plaintiff instead posted sexual harassment policy on her office door and told her friend that she was being harassed).

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available to the employee *at that time*.[180] An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. An employee might reasonably ignore a small number of minor incidents, hoping that the harassment will stop without resorting to the complaint process.[181] The employee also may choose to tell the harasser directly to stop the harassment and then wait to see if he stops before complaining to management.

Even if the employee uses the employer's official complaint process, simply filing the complaint does not necessarily show that the employee acted reasonably in using the process. If, for example, the complainant failed to cooperate in the investigation, the complaint would not qualify as a reasonable effort to avoid harm.[182]

Finally, if the employee unreasonably delayed complaining and an earlier complaint could have reduced the harm, then the employer might be able to use the affirmative defense to reduce damages, even if it could not eliminate liability altogether.

a) Reasonable Delay in Complaining or in Failing to Use the Employer's Complaint Procedure

There may be reasonable explanations for an employee's delay in complaining or failure to utilize the employer's complaint process.[183] For example:

- Obstacles to filing complaints: An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary

[180] The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c.; *see also Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 754 (10th Cir. 2014) (noting that employee's response to harassment was not necessarily unreasonable even if "20/20 hindsight" suggests that other steps would have been more effective).

[181] *See, e.g., Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) (stating that employee should not necessarily be expected to complain after the first or second incident of relatively minor harassment and that employee is not required to report "individual incidents that are revealed to be harassment only in the context of additional, later incidents and that only in the aggregate come to constitute a pervasively hostile work environment"); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 36 (1st Cir. 2003) (noting that "sometimes inaction is reasonable" and concluding that failure to report low-level incidents of harassment was not unreasonable).

[182] *See, e.g., Crockett v. Mission Hosp., Inc.*, 717 F.3d 348, 357-58 (4th Cir. 2013) (concluding that second prong of the defense was established by uncontradicted evidence that the employer counseled complainant on how to file a formal complaint, provided her with a copy of the sexual harassment policy, and repeatedly met with her in an effort to learn what had happened so it could correct the situation, but complainant refused, for a month, to provide any details or information about the conduct that had prompted her complaint).

[183] *Cf. Faragher*, 524 U.S. at 806 (stating that employers can establish a defense only if plaintiff *unreasonably* failed to avail herself of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense").

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obstacles to filing complaints. For example, if the process entailed undue expense by the employee,[184] inaccessible points of contact for making complaints,[185] or unnecessarily intimidating or burdensome requirements, failure to use the process could be reasonable.

- Ineffective complaint mechanism: An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on a reasonable belief that the complaint process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process would be ineffective if the persons designated to receive complaints were all close friends of the harasser.[186] A failure to complain also might be reasonable if the complainant was aware of instances in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or by coworkers.[187]

- Risk of retaliation: An employee's failure to use the employer's complaint procedure would be reasonable if the employee reasonably feared retaliation based on the filing of the complaint. An employer's complaint procedure should provide assurances that complainants will not be subjected to retaliation. Even in the face of such assurances, however, an employee might reasonably fear retaliation in some instances. For example, if the harasser threatened to discharge the employee if she complained, then

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[184] *See id.* (referencing a proven, effective complaint process that was available "without undue risk or expense").

[185] *See Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998) (concluding that complaint process was deficient where official who could take complaint was inaccessible due to hours of duty and location in separate facility); *Derry v. EDM Enters., Inc.*, No. 09-CV-6187-TC, 2010 WL 3586739, at *3 (D. Or. Sept. 13, 2010) (concluding that plaintiff's failure to take advantage of employer's corrective opportunities was not unreasonable where the only contact persons for reporting harassment were her supervisor, who was the alleged harasser, and the CEO, whose phone number was not readily available and whom plaintiff was discouraged from contacting without going through her supervisor).

[186] *See Monteagudo v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 171-72 (1st Cir. 2009) (concluding that jury could have determined that the plaintiff's failure to report sexual harassment by her supervisor was not unreasonable, in part, because of close relationship between harasser and officials designated to accept complaints); *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x. 473, 482-83 (6th Cir. 2012) (concluding that reasonable jury could find that the plaintiffs did not act unreasonably in failing to report operations manager's sexual harassment to other managers where harasser repeatedly told them that other managers were his friends and would not believe the plaintiffs if they complained).

[187] *See Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789, 806 (D.N.J. 2002) (concluding that employee of 23 years could be excused for failing to report alleged incidences of sexual harassment because she had witnessed her employer's failure to respond to coworkers' and her own complaints); *cf. Aponte-Rivera v. DHL Sols., Inc.*, 650 F.3d 803, 810 (1st Cir. 2011) (concluding that reasonable jury could have found that the plaintiff took advantage of corrective measures provided by the employer when she filed two written complaints of harassment, despite her failure to file another formal complaint before resigning, as her prior written complaints had been ineffective in ending the harassment).

the employee's decision to delay reporting the harasser is likely reasonable.[188] Similarly, an employee's failure to complain could be reasonable if she or another employee had previously been subjected to retaliation for complaining about harassment.[189] By contrast, because it may not be possible for an employer to completely eliminate all unpleasantness that an employee may experience in reporting harassment, a delay in reporting will not be considered reasonable if based merely on concerns about ordinary discomfort or embarrassment.[190]

b) Reasonable Efforts to Avoid Harm Other than by Using the Employer's Complaint Process

Even if an employee failed to use the employer's complaint process, the employer will not be able to establish the affirmative defense if the employee took other reasonable steps to avoid harm from the harassment. A promptly filed union grievance or EEOC charge while the harassment is ongoing, for example, could qualify as an effort to avoid harm.[191] Similarly, a temporary employee who is harassed at the client's workplace generally would be free to report the harassment to either the employment agency or the client, reasonably expecting that the entity she notified would act to correct the problem.[192]

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[188] *See Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 37 (1st Cir. 2003) (concluding that jury could find that 17-year-old complainant did not act unreasonably in failing to report sexual assault where supervisor threatened to have her fired if she complained and he boasted that his father was "really good friends" with the owner); *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 525-26 (5th Cir. 2001) (concluding that, in light of supervisor's repeated threats of retaliation, a jury could infer that employee's nine-month delay in filing a complaint was not unreasonable).

[189] *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 437 (7th Cir. 2012) (stating that employee may have been justified in not reporting assistant manager's harassment to district manager because she had previously been treated harshly by a different harasser after reporting his conduct to the district manager); *Still v. Cummins Power Sys.*, No. 07–5235, 2009 WL 57021, at *13 (E.D. Pa. Jan. 8, 2009) (concluding that a trier of fact could find plaintiff's failure to report supervisor's racial harassment reasonable, given plaintiff's testimony that two other employees suffered retaliation after complaining about harassment by the same supervisor).

[190] *E.g.*, *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (explaining that imposing vicarious liability on employer is compromise requiring more than "ordinary fear or embarrassment" to justify delay in complaining (quoting *Reed v. MBNA Mktg. Sys. Inc.*, 333 F.3d 27, 35 (1st Cir. 2003))).

[191] *E.g.*, *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 56 (1st Cir. 2010) (stating jury could find that employee exercised reasonable care to avoid harm by filing union complaints, at least one of which was copied to the employer); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (concluding that plaintiff made effort "to avoid harm otherwise" where she filed a union grievance and did not utilize the employer's harassment complaint process since both the employer and union procedures were corrective mechanisms designed to avoid harm).

[192] Depending upon the facts and specific nature of the employment relationship, the staffing firm, the client, or both may be legally responsible under the federal EEO laws for undertaking corrective action. *See* EEOC, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997), 1997 WL 33159161, at *10-*11, http://www.eeoc.gov/policy/docs/conting.html.

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3. Non-supervisory Employees/Coworkers or Non-employees

An employer is liable for a hostile work environment created by harassment by non-supervisory employees or by non-employees if:

- **it failed to act reasonably to prevent the harassment;**

  OR

- **it failed to take reasonable corrective action in response to harassment about which it knew or should have known.**

a. Unreasonable Failure to Prevent Harassment

An employer is liable for a hostile work environment where it was negligent by failing to act reasonably to prevent harassment from occurring.[193] Although the relevant considerations will vary from case to case, some of the considerations include:

1) Adequacy of the employer's anti-harassment policy and complaint procedures: As with the first prong of the affirmative defense with regard to harassment by a supervisor, assessing negligence on the part of an employer starts with whether the employer had an adequate anti-harassment policy and complaint procedure.[194] The elements described above with regard to an effective policy and complaint procedure apply here as well.

[193] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). The Court in *Vance* stressed that a complainant could "prevail simply by showing that the employer was negligent in permitting . . . harassment to occur." *Id.* at 2451. It explained that it was therefore wrong to assume, as the dissent had, *see id.* at 2463 (Ginsburg, J., dissenting), that the Court's holding precluded employer liability unless the employer had notice of the harassment and failed to take appropriate corrective action. *Id.* at 2453 (majority opinion). As the Court explained, a complainant can also establish employer liability for nonsupervisory harassment "by showing that his or her employer was negligent in failing to prevent harassment from taking place." *Id.*

[194] *See id.* at 2453 (stating that evidence relevant in determining whether employer unreasonably failed to prevent harassment would include evidence that employer did not monitor the workplace, that it failed to respond to complaints, that it failed to provide a system for registering complaints, or that it effectively discouraged complaints from being filed); *Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006) (stating that employer is liable for coworker harassment if "it failed to have and enforce a reasonable policy for preventing harassment, or in short only if it was negligent in failing to protect the plaintiff from predatory coworkers"); *cf. Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 335 (4th Cir. 2003) (concluding that jury could find that employer had constructive knowledge of harassment where employer failed to provide adequate avenues to complain about harassment); *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (stating that employer's adoption of harassment policy that encouraged employees to report harassment to supervisor or EEO Director was relevant in evaluating employer liability for coworker harassment); *Miller v. Kenworth of Dothan, Inc.*, 277 F. 3d 1269, 1279 (11th Cir. 2002) (concluding that anti-harassment policy was not effective where it was not aggressively or thoroughly disseminated, it was not posted in the workplace, managers were not familiar with it, and it was not in the complainant's personnel file); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (stating that implementation of training session was relevant to whether employer exercised reasonable care to prevent harassment).

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2) Nature and degree of authority, if any, that the alleged harasser exercised over the complainant.[195] Employers have a heightened responsibility to protect employees against harassment by other employees whom it has "armed with authority."[196]

3) Adequacy of the employer's efforts to monitor the workplace,[197] such as by training supervisors and other appropriate officials on how to recognize potential harassment and by requiring them to report or address harassment that they are aware of.

4) Adequacy of the employer's steps to minimize known or obvious risks of harassment, such as harassment by inmates incarcerated in a maximum security prison.[198]

b. Unreasonable Failure to Correct Harassment of Which the Employer Had Notice

Even if an employer acted reasonably to prevent harassment by coworkers or non-employees, it is still liable for a hostile work environment if it did not act reasonably to correct harassment about which it knew or should have known.[199] As explained by the Supreme Court, "[i]n such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."[200]

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[195] *Vance*, 133 S. Ct. at 2451 (stating that "nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent").

[196] *Oberweis Dairy*, 456 F.3d at 717.

[197] *Vance*, 133 S. Ct. at 2453.

[198] *See, e.g.*, *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).

[199] 29 C.F.R. §§ 1604.11(d), (e); *see also, e.g.*, *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010); *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1257 (11th Cir. 2003).

[200] *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998).

Notice

- **An employer has notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it *or* if the employer reasonably should know about the harassment.**

Corrective Action

- **Once an employer has notice of potential harassment, it is required to take reasonable corrective action to prevent the conduct from continuing.**

i. Notice

The first element that triggers an employer's duty to take reasonable corrective action against harassment is the employer's notice of the harassment.[201]

An employer has actual notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it.[202] Thus, if an individual with supervisory authority over the harasser or over the target of the harassment is aware of the misconduct, then the employer has actual notice of the harassment.[203]

An employer also has notice of harassment if an employee with a general duty to respond to harassment, such as the EEO Director, has knowledge of the harassment.[204] In

[201] *See, e.g.*, *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1186 (9th Cir. 2005); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 812 (7th Cir. 2001).

[202] *See Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (stating that employer has "actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it"); *see also* Restatement (Third) of Agency § 5.03 (2006) ("For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal . . . .").

[203] *See Swinton v. Potomac Corp.*, 270 F.3d 794, 804-05 (9th Cir. 2001) (stating that individual's knowledge of harassment is imputed to employer if individual has "substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment" or if individual has "official or strong de facto duty to act as a conduit to management for complaints about work conditions" (quoting *Lamb v. Household Servs.*, 956 F. Supp. 1511, 1517 (N.D. Cal. 1997))); *Torres v. Pisano*, 116 F.3d 625, 637 (2d Cir. 1997) (stating that where supervisor of harasser has notice of the harassment, notice will be imputed to employer because the "employer vested in the supervisor the authority and the duty to terminate the harassment").

[204] *See Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 107-08 (3d Cir. 2009) (stating that employee's knowledge of harassment is imputed to employer if employee is specifically charged with addressing harassment, such as human resources manager designated to receive

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addition, an employer has notice if someone qualifying as the employer's proxy or alter ego, such as an owner or high-ranking officer, has knowledge of the harassment.[205]

> **Example 25: Employer Had Notice of Harassment.**
> Lawrence, an African American man in his 60s, was employed as a laborer in a distribution yard for Respondent. Lawrence alleged that he was subjected to race- and age-based harassment by coworkers and that Respondent failed to take appropriate corrective action after he complained. Respondent contends that it was never notified of the alleged harassment until after Lawrence had been fired for misconduct and he filed an EEOC charge. The investigation reveals that Lawrence complained to the "yard lead," who was responsible for instructing and organizing teams of yard workers. According to the yard lead, he was expected to report problems to the yard manager, who had authority to take disciplinary action against employees. Based on this evidence, the investigator concludes that Lawrence reasonably expected that the yard lead had the responsibility to, and would, refer his complaints to an appropriate official authorized to take corrective action. Therefore, Respondent had actual notice of the alleged harassment.[206]

A complaint can be made by a third party, such as a friend, relative, or coworker, and need not be made by the target of the harassment herself. For example, if an employee witnesses her coworker being subjected to racial epithets by their supervisor, and the employee reports the supervisor's behavior to the appropriate personnel in Human Resources, the employer is on notice of potentially harassing behavior. Similarly, even if no one complains, the employer still has notice if someone responsible for correcting or reporting harassment becomes aware of the harassment, such as by personally witnessing it.[207]

Notice to the employer triggers the employer's duty to take corrective action if the notice has provided the employer with enough information to make a "reasonable employer think there is some probability" that an employee is being subjected to harassment on a protected basis. Complaints that a coworker's conduct was "rude" and "aggravating," without further information indicating that the conduct was based on a protected

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complaints); *Crowley v. L.L Bean, Inc.*, 303 F.3d 387, 403 (1st Cir. 2002) (concluding that team leader's knowledge was imputed to employer where it had policy allowing employees to report sexual harassment to team leaders).

[205] *See Torres*, 116 F.3d at 636.

[206] This example is based on the facts in *Lambert v. Peri Formworks Systems, Inc.*, 723 F.3d 863 (7th Cir. 2013).

[207] *See Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005) (concluding that employer had notice of harassment that was witnessed by supervisors with a duty to report it to management).

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characteristic, would not provide sufficient notice that the conduct was based on the complainant's protected status. Conversely, evidence indicating that an employee had engaged in "unwanted touching" of another employee would be sufficient to alert the employer of a reasonable probability that the second employee was being sexually harassed and that it should investigate the conduct and take corrective action.[208]

> **Example 26: Employer Had Notice of Harassment.**
> Respondent contended that it did not have notice of Jim's alleged sexual harassment of Susan, one of his coworkers. The investigation reveals, however, that Susan requested a schedule change when she was scheduled to work alone with Jim, and that Susan's coworkers told her supervisor, Stacey, that Susan wanted to avoid working with Jim. Also, Jim told Stacey that he may have "done something or said something that [he] should not have to Susan." When Stacey asked Susan about working with Jim, she became "teary and red" and said "I can't talk about it." Stacey responded by saying, "That's good because I don't want to know what happened." Under the circumstances, Stacey had enough information to suspect that Jim was sexually harassing Susan. As Susan's supervisor, she had the responsibility to initiate a formal inquiry, if she had the authority, or to notify another official who did have the authority.[209]

The duty to take corrective action may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.[210] Employers obviously cannot be found liable under Title VII for conduct that does not violate Title VII. It is possible, however, for an employer to be put on notice by a complaint that alleges something short of unlawful harassment where the conduct might reasonably be expected to continue and result in unlawful harassment if the employer does not take corrective action.[211]

Notice of harassing conduct directed at one employee might serve as notice not only of the harasser's potential for further harassment of the same employee but also of his potential to harass others. Factors in assessing the relevance of the employer's knowledge of

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[208] *Valentine v. City of Chicago*, 452 F.3d 670, 680 (7th Cir. 2006).

[209] This example is based on the facts in *Duch v. Jakubek*, 588 F.3d 757 (2d Cir. 2009).

[210] *See Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605-06 (7th Cir. 2006) (stating that duty to prevent unlawful harassment may require employer to take reasonable steps to prevent harassment once informed of a reasonable probability that it will occur).

[211] *Id.* at 606; *see also Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2453 (2013) (stating that employer is liable for harassment if it failed to act reasonably to prevent the harassment).

prior harassment can include the "extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment."[212]

An employer has constructive notice of harassing conduct if, under the circumstances presented, a reasonable employer should know about the conduct.[213] Most commonly, an employer is deemed to have constructive notice if harassing conduct is so widespread or pervasive that individuals responsible for taking action with respect to the harassment reasonably should know about it.[214]

ii. Reasonable Corrective Action

Once an employer has notice of potentially harassing conduct, it is responsible for taking reasonable corrective action to prevent the conduct from continuing. This includes conducting a prompt and effective investigation and taking appropriate action based on the findings of that investigation.

a) Prompt and Adequate Investigation

An investigation is prompt if it is conducted reasonably soon after the complaint is filed.[215] For instance, an employer who opens an investigation into a complaint one day after it is filed clearly has acted promptly.[216] An employer that waits two months, on the other hand, clearly has not acted promptly.[217] In other instances, what is "reasonably soon" is fact-

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[212] *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 756 (10th Cir. 2014) (quoting *Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 783-84 (10th Cir. 1995)).

[213] *E.g.*, *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008).

[214] *See, e.g.*, *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009); *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 n.4 (3d Cir. 2009); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003); *see also Ocheltree v. Scollon Prods, Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (stating that employer cannot adopt "see no evil, hear no evil" strategy and that notice of harassment is imputed to employer if a "'reasonable [person], intent on complying with Title VII,' would have known about the harassment" (quoting *Spicer v. Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995))).

[215] *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013) (stating that base level of reasonable corrective action may include, among other things, prompt initiation of investigation); *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011) (stating that adequate remedy requires employer to intervene promptly).

[216] *See Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 985 (8th Cir. 2012) (concluding that defendant exercised reasonable care to prevent and correct harassment when it initiated an investigation upon receiving a harassment complaint, placed the alleged perpetrator on administrative leave within two days, and terminated him within two weeks); *Pantoja v. Dep't of Air Force*, EEOC Appeal No. 01995176, 2001 WL 1526459, at *1 (Nov. 21, 2001) (affirming administrative judge's decision that agency was not liable for alleged sexual harassment where agency immediately investigated allegations and within one day moved alleged harasser to another building).

[217] *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (stating that two-month delay in initiating investigation was not type of response "reasonably likely to prevent

sensitive and depends on such considerations as the nature and severity of the alleged harassment and the reasons for delay. For example, when faced with allegations of physical touching, an employer that, without explanation, does nothing for two weeks has not acted promptly.[218]

An investigation is effective if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."[219] The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred.[220]

> **Example 27: Employer Failed to Conduct Adequate Investigation.** Brandon, a construction worker, repeatedly complains to the superintendent that he is being sexually harassed by Phil, the foreman in charge of Brandon's crew. After about two weeks, the superintendent asks a friend of his to conduct an investigation, even though this individual is not familiar with EEO law or the harassment policy and has no experience conducting harassment investigations. Another week later, the investigator contacts Brandon and Phil and meets with them individually for about 10 minutes each.

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the harassment from recurring" (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005))).

[218] *See Rockymore v. U.S. Postal Serv.*, EEOC Appeal No. 012010311, 2012 WL 424237, at *5 (Jan. 31, 2012) (finding that agency failed to take prompt corrective action where it did not provide any justification for its two-week delay in responding to the complainant's sexual harassment complaint, particularly in light of the complainant's indication that the alleged harasser had touched her).

[219] *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007); *see also EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 465-66 (5th Cir. 2013) (en banc) (holding that reasonable jury could conclude that employer failed to take reasonable measures to prevent and correct harassment where, among other things, harassment complaint resulted in belated and cursory 20-minute investigation in which investigator did not take any notes or ask any questions during his meeting with the complainant and he never contacted the employer's EEO Officer or sought advice about how to handle the matter); *Lightbody v. Wal-Mart Stores E., L.P.*, No. 13–cv–10984–DJC, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014) (concluding that reasonable jury could find that employer was liable for sexual harassment of plaintiff because, in investigating the plaintiff's complaint, it failed to follow leads that bore on the alleged harasser's credibility); *Grimmett v. Ala. Dep't of Corr.*, No. CV-11-BE-3594-S, 2013 WL 3242751, at *13 (N.D. Ala. June 25, 2013) (concluding that employer failed to show that it exercised reasonable care where it presented general evidence that it had initiated an investigation but no specific evidence that would enable the court to evaluate the adequacy of the investigation and the employer's conclusory finding that the harassment complaint was unfounded).

[220] *See Hathaway v. Runyon*, 132 F.3d 1214, 1224 (8th Cir. 1997) ("It is not a remedy for the employer to do nothing simply because the coworker denies that the harassment occurred, and an employer may take remedial action even where a complaint is uncorroborated." (citations omitted)).

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> During the meeting with Brandon, the investigator never asks him any questions and does not take any notes. Without first consulting with the EEO office, the investigator issues a single-page memorandum concluding that there is no basis for finding that Brandon was sexually harassed, but does not provide any explanation. Under these circumstances, Respondent has not conducted an adequate investigation.[221]

The employer should keep the complainant and the alleged harasser apprised of the status of the investigation, as appropriate, while it is still in progress.[222] Upon completing its investigation, the employer should inform the parties of its determination and the corrective action that it will be taking.

Employers should retain records of all harassment complaints and investigations.[223] These records can help employers identify patterns of harassment, which can be useful for improving preventive measures, including training. These records also can be relevant to credibility assessments and disciplinary measures.

In some cases, it may be necessary, given the seriousness of the alleged harassment, for the employer to take intermediate steps to address the situation while it determines whether a complaint is justified.[224] Examples of such measures include making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. As a rule, an employer should make every reasonable effort to minimize the burden or negative consequences to an employee who complains of harassment, pending the employer's investigation.[225]

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[221] This example is based on the facts in *EEOC v. Boh Bros. Construction Co.*, 731 F.3d 444 (5th Cir. 2013).

[222] *See Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 930-31 (8th Cir. 2010) (concluding that jury could reasonably find that employer did not take plaintiff's complaints seriously because it repeatedly failed to keep her apprised of its response to the alleged harassment and to follow through on its stated intentions).

[223] Employers are required to keep records for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. If an EEOC charge is filed, the employer is required to preserve all records relevant to the charge until its final disposition. 29 C.F.R. § 1602.14.

[224] *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001).

[225] *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (agreeing that a "remedial measure that makes the victim of sexual harassment worse off is ineffective per se" and that, thus, a transfer that reduces a complainant's wages or impairs her prospects for promotion is not adequate corrective action); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (concluding that remedial action was not adequate where employer twice changed complainant's schedule to separate her from harasser, rather than changing harasser's shift or work area or firing the harasser); *see also EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 608 (4th Cir. 2011); *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1307-08 (M.D. Ala. 2006).

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b) Appropriate Corrective Action

To avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment" under the particular circumstances at that time.[226] Corrective action should be designed to stop the harassment and prevent it from continuing.[227] The reasonableness of the employer's corrective action depends on the particular facts and circumstances at the time when the action is taken.[228]

Considerations that will be relevant in evaluating the reasonableness of an employer's corrective action include the following:

1) Proportionality of the corrective action: Corrective action should be proportionate to the seriousness of the offense.[229] If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent despite prior corrective action, then suspension or discharge may be appropriate.[230]

2) Authority granted harasser: Employers have a heightened responsibility to protect employees against abuse of official power. To that end, employers must take steps to prevent employees who have been granted authority over others from using it to further harassment, even if that authority is insufficient to establish vicarious liability.[231] Thus, the nature and degree of the harasser's authority

[226] *E.g.*, *Jackson v. Cty. of Racine*, 474 F.3d 493, 502 (7th Cir. 2007); *see also Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013); *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669 (4th Cir. 2011); *Dawson v. Entek Int'l*, 630 F.3d 928, 938 (9th Cir. 2011); *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 421 (8th Cir. 2010).

[227] *E.g.*, *Waldo*, 726 F.3d at 814; *Helm v. Kansas*, 656 F.3d 1277, 1290 (10th Cir. 2011); *Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011), *aff'd*, 133 S. Ct. 2434 (2013); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335 (4th Cir. 2011); *Dawson*, 630 F.3d at 940.

[228] *See Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005).

[229] *E.g.*, *Scarberry v. Exxonmobil Oil Corp.*, 328 F.3d 1255, 1259-60 (10th Cir. 2003) (stating that "test is whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior").

[230] *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 343-44 (6th Cir. 2008) (concluding that, although separating the harasser and complainant may be adequate in some cases, it was not sufficient in this case where the wrongdoer was a serial harasser and management repeatedly transferred the harasser's victims instead of taking other corrective action aimed at stopping the harasser's misconduct, such as training, warning, or monitoring the harasser, and that employer was required to take increasingly effective steps to end the harassment).

[231] *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2451 (2013); *Doe v. Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006). For a discussion of when vicarious liability applies, refer to section IV.A.2, *supra*.

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should be considered in evaluating the adequacy of corrective action.[232]

3) Whether harassment stops: Whether the harassment stopped as a result of the corrective action is a key factor in determining whether the corrective action was appropriate. The continuation of harassment despite an employer's appropriate corrective action does not necessarily mean, however, that the corrective action was inadequate.[233] For example, if an employer takes appropriate proportionate corrective action against a first-time offender who engaged in mildly offensive sexual conduct, yet the same employee subsequently engaged in further harassment, then the employer would not be liable if it also responded appropriately to the subsequent misconduct by escalating its corrective action. Conversely, where an employer undertakes no action in response to a complaint of harassment, the fact that the harassment "fortuitously stops" does not shield it from liability.[234]

4) Effect on complainant: An employee who complains of harassment in good faith should ideally face no adverse consequences as a result of corrective action imposed on the harasser. As noted above, however, the employer may place some burdens on the complaining employee as part of the corrective action it imposes on the harasser as

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[232] *See Vance*, 133 S. Ct. at 2451.

[233] *See, e.g.*, *May v. Chrysler Group, LLC*, 716 F.3d 963, 971 (7th Cir. 2012) (stating that success or failure of corrective action in stopping harassment is not determinative as to employer liability but is nevertheless material in determining whether corrective action was reasonably likely to prevent harassment from recurring); *Wilson v. Moulison N. Corp.*, 639 F.3d 1, 8 (1st Cir. 2011) (rejecting argument that corrective action must have been inadequate because it failed to stop the harassment as "nothing more than a post hoc rationalization"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998) ("Because there is no strict liability and an employer must only respond reasonably, a response may be so calculated even though the perpetrator might persist.").

[234] *See Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) ("Just as an employer may escape liability even if harassment recurs despite its best efforts, so it can also be liable if the harassment fortuitously stops, but a jury deems its response to have fallen below the level of due care."); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (stating that employer that fails to take any corrective action is liable for ratifying unlawful harassment even if harasser voluntarily stops); *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123-24 (8th Cir. 2007) (stating that employer that fails to take proper remedial action in response to harassment is liable because the "combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy" (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998))); *cf. Knabe v. Boury Corp.*, 114 F.3d 407, 414 (3d Cir. 1997) (stating that employee must show that remedial action was not reasonably calculated to prevent further acts of harassment, and even complainant who is dissatisfied with employer's remedial action and does not return to work can make this showing).

long as it makes every reasonable effort to minimize those burdens or adverse consequences.[235]

5) Options available to the employer:[236] Although employers are responsible for addressing harassment by anyone in the workplace, employers may have fewer options for influencing the conduct of some non-employees, thereby limiting the remedial options available,[237] or may have limited control over the work environment, such as a joint employer that assigns employees to work at client sites. Employers also have less ability to control conduct arising outside the workplace that can contribute to a hostile work environment. In almost all cases, however, even where an employer faces some limitations, it will have an "arsenal of incentives and sanctions" that it can use to address harassment.[238]

6) The extent to which the harassment was substantiated: Where an employer conducts a thorough investigation[239] but is unable to determine with sufficient confidence that the alleged harassment occurred, its response may be more limited. An employer is not required to impose discipline if, despite a thorough investigation, it has inconclusive findings.[240] Nonetheless, the employer should

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[235] *See Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 812 (7th Cir. 2000) (concluding that, where employer transferred a harassed employee in response to harassment complaint to position that left her materially worse off, employer could be held liable for transfer because it "breache[d] the duty of care it owe[d] to the harassed employee").

Corrective action that leaves the complainant worse off also could constitute unlawful retaliation if motivated by retaliatory bias. *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues* § III.B.3 (2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#3._Harassing.

[236] *See Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (stating that factors in evaluating corrective action include options available to employer).

[237] *See, e.g.*, *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (stating that determination of whether employer is liable for harassment by non-employees requires consideration of extent of employer's control and any legal responsibility with respect to those non-employees (citing 29 C.F.R. § 1604.11(e))).

[238] *Dunn v. Washington Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

[239] *See, e.g.*, *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x 473, 480 (6th Cir. 2012) (concluding that jury could find that employer might have uncovered evidence of harassment if it had conducted a thorough investigation); *see also supra* notes 219-220 and accompanying text (discussing requirement to conduct a thorough investigation, including making credibility determinations when there are conflicting versions of relevant events).

[240] *See Swenson v. Potter*, 271 F.3d 1184, 1196 (9th Cir. 2001) ("As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment. . . . Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred.").

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undertake preventive measures, such as counseling, training, or monitoring.[241]

7) Special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression:[242] Because Title VII requires that employers accommodate employees' sincerely held religious practices and beliefs in the absence of undue hardship, employers may violate Title VII if they try to avoid potential coworker objections to religious expression by preemptively banning all religious communications in the workplace. Employers, however, also have a duty to protect workers against religious harassment. Employers would not be required to accommodate religious expression that creates, or threatens to create, a hostile work environment.[243]

Corrective action in response to a harassment complaint must be taken without regard to the complainant's protected characteristics. Thus, employers should follow the same investigative process, regardless of the protected characteristics of the complainant or of the alleged harasser, to determine what corrective action, if any, is appropriate. For example, it would violate Title VII if an employer assumed that a male employee accused of sexual harassment by a female coworker had engaged in the alleged conduct, based on stereotypes about the "propensity of men to harass sexually their female colleagues."[244]

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[241] *Shields*, 499 F. App'x at 479-80 (explaining that, even if employer's investigation did not substantiate sexual harassment claim, employer still had responsibility to ensure that accused harasser did not engage in harassment in the future, such as monitoring the accused harasser's conduct); *cf. Christian v. AHS Tulsa Reg'l Med. Ctr., LLC*, 430 F. App'x 694, 698-99 (10th Cir. 2011) (affirming lower court conclusion that employer took reasonable corrective action where, despite a "reasonably thorough investigation," its findings were inconclusive but it nevertheless counseled the alleged harasser in light of its anti-discrimination policy and he remained subject to more serious sanctions if he was again accused of misconduct).

[242] For more information on balancing religious expression with anti-harassment measures, refer to EEOC, *Compliance Manual Section 12: Religious Discrimination* § 12-III C (2008), http://www.eeoc.gov/policy/docs/religion.html#_Toc203359515.

[243] *See, e.g.*, *Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 618 (7th Cir. 2014) (concluding that employer was not required to accommodate employee by allowing her to distribute pamphlets that were offensive to coworkers, including material that negatively depicted Muslims and Catholics and stated that they would go to hell); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006) (concluding that employer was not liable for religious harassment of plaintiff because it took prompt and appropriate remedial action after learning of the plaintiff's objections to her coworker's proselytizing).

[244] *Sassaman v. Gamache*, 566 F.3d 307, 311-12 (2d Cir. 2009) (concluding that male supervisor established inference of sex discrimination when he was terminated after being accused of sexual harassment by a female employee and was told by commissioner, "you probably did what she said you did because you're male and nobody would believe you anyway").

V. Systemic Harassment

A. Harassment Affecting Multiple Complainants

Like other forms of discrimination, harassment can be systemic, subjecting multiple individuals to a similar form of discrimination. If harassment is systemic, then the harassing conduct could subject all of the employees of a protected group to the same circumstances. For example, evidence might show that all of the African American employees working on a particular shift were subjected to, or otherwise knew about, the same racial epithets, racial imagery, and other offensive race-based conduct.[245] In such a situation, evidence of widespread race-based harassment could establish that each of the African Americans working on that shift was individually subjected to an objectively hostile work environment.

> **Example 28: Same Evidence of Racial Harassment Establishes Objectively Hostile Work Environment for Multiple Employees.** CPs (charging parties), five black correctional officers, alleged that they were subjected to racial harassment. CPs, who were the only black officers on their shift, alleged that they experienced demoralizing racial treatment and jokes, including aggressive treatment by dog handlers stationed at the entrance and racial references and epithets, such as the n-word, "back of the bus," and "the hood." Much of the conduct occurred in a communal setting, such as the cafeteria, in which supervisors participated or laughed at the conduct without objecting. The evidence shows that this conduct occurred regularly, up to several times a week during the approximately one-year period before CPs filed EEOC charges, despite CPs' repeated objections. Although none of the CPs were personally subjected to all of the harassment, the harassers treated them as a cohesive group, and each became aware of harassment experienced by the others. Based on this evidence, the investigator concludes that each of the CPs was subjected to an objectively hostile work environment based on race.[246]

B. Pattern-or-Practice Claims

In some situations involving systemic harassment, the evidence may establish that the employer engaged in a "pattern or practice" of discrimination, meaning that the employer's "standard operating procedure" was to tolerate harassment creating a hostile work

[245] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 318 (8th Cir. 2014) (observing that harassment of black correctional officers working on the same shift was directed at them as a group and that officers became aware of any harassment experienced by others).

[246] This example is based on the facts in *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014).

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environment.[247] This inquiry focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"[248] – in other words, whether the work environment, as a whole, was hostile.[249] For instance, in one case, the court concluded that evidence of widespread abuse, including physical assault, threats of deportation, denial of medical care, and limiting contact with the "outside world," was sufficient to establish that Thai nationals employed on the defendant's farms were subjected to a hostile work environment.[250] To avoid liability in a pattern-or-practice case, the employer must adopt a systemic remedy, rather than only address harassment of particular individuals. Moreover, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive company-wide procedures.[251]

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[247] *See, e.g.*, *EEOC v. Pitre Inc.*, 908 F. Supp. 2d 1165, 1178 (D.N.M. 2012) (holding that fact finder must determine whether defendant "maintained a pattern or practice of condoning a sexually hostile work environment"); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1069-70 (C.D. Ill. 1998) (concluding that pattern or practice of sexual harassment could be established by evidence that employer tolerated unlawful sexual harassment at its auto assembly plant in Normal, Illinois); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (concluding that employer's tolerance of sexually hostile environment in mine and processing plant made sexual harassment of women the "standard operating procedure"); *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (stating that pattern-or-practice claim required government to establish that "racial discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice").

[248] *Mitsubishi*, 990 F. Supp. at 1074; *see also EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 946 (N.D. Ill. 2001) (stating that pattern-or-practice liability turns not on particularized experiences of individual claimants but on landscape of total work environment).

[249] *EEOC v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 3120069, at *17 (N.D. Ill. Oct. 23, 2007) (holding that EEOC was required to establish that sexual harassment that occurred at the worksite during the relevant time period, taken as a whole, was sufficiently severe or pervasive that a reasonable woman would have found the work environment hostile or abusive).

[250] *EEOC v. Global Horizons, Inc.*, 7 F. Supp. 3d 1053, 1060-61 (D. Haw. 2014).

[251] *See Mitsubishi*, 990 F. Supp. at 1075.

Evidence establishing a pattern-or-practice violation does not necessarily establish that any particular employee in that workplace was subjected to a hostile work environment. Courts have taken different approaches in assessing violations as to individual claimants in pattern-or-practice cases. For example, in *Mitsubishi*, the court concluded that establishing a pattern-or-practice violation shifts the burden of production to the employer to show that individual claimants did not find the conduct unwelcome or hostile and that it took appropriate corrective action, though the claimants retained the ultimate burden of proof on those issues. *Id.* at 1079, 1080-81. By contrast, in *International Profits Associates*, the court concluded that a pattern-or-practice violation does not give rise to a presumption that any individual claimants were subjected to unlawful harassment. Thus, for each individual claimant seeking monetary damages, the EEOC was required to prove that that particular claimant experienced sex-based harassment that a reasonable woman would find sufficiently severe or pervasive to create a hostile work environment and that the claimant subjectively perceived the harassment she experienced to be hostile. The employer, however, bore the burden of production to come forward with evidence showing that it was not negligent with respect to a particular claimant, and if the employer produced such evidence, then the burden shifted back to the EEOC to show that the employer's steps were inadequate. 2007 WL 3120069, at *17.

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Example 29: Evidence of Sexual Harassment Establishes Pattern-or-Practice Violation. Zoe alleges that she has been subjected to ongoing sexual harassment at Respondent's agricultural processing plant in City. The investigation reveals that female employees throughout the City plant are frequently groped by male coworkers and supervisors, propositioned for sex, and subjected to lewd comments about their bodies. Several of Zoe's female coworkers have submitted to male supervisors' sexual demands and threats that they would reduce the hours or terminate the employment of noncompliant female employees. The investigation further reveals that this conduct has continued for several years and that although management has taken some corrective action in isolated cases, it has failed to adopt any systemic responses to address the plant-wide sexual harassment. Based on this evidence of widespread sexual harassment throughout the City plant and management's failure to take appropriate plant-wide corrective action, the investigator determines that Respondent has subjected female employees at City plant to a pattern-or-practice of sexual harassment.

VI. Promising Practices

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment.[252]

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace identified five core principles that have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.[253]

The Report includes checklists based on these principles to assist employers and other covered entities in preventing and responding to workplace harassment.[254] The promising practices identified in this section are based on these checklists.

[252] *See, e.g.,* EEOC, *Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment,* https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/index.cfm. Promising practices may vary based on the characteristics of the workplace and/or workforce.

[253] *See Select Task Force Co-Chairs' Report, supra* note 2.

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A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture of respect in which harassment is not tolerated. This commitment may be demonstrated by:

- Clearly, frequently, and unequivocally stating that harassment is prohibited and will not be tolerated;
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts; and
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks.[255]

In particular, leaders should ensure that their organizations:

- Have a harassment policy that is comprehensive, easy-to-understand, and regularly communicated to all employees;[256]
- Have a harassment complaint system that is fully resourced, is accessible to employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;[257]
- Regularly and effectively train all employees about the harassment policy and complaint system;[258]

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[254] *Id.* at 79-82 (noting that the checklists are intended as a resource for employers, rather than as a measurement of legal compliance).

[255] *See id.* at 25-30, 83-88 (identifying select risk factors for harassment and proposing strategies to reduce the risk of harassment).

[256] *See infra* section VI.B for additional information about promising practices related to harassment policies.

[257] *See infra* section VI.C for additional information about promising practices related to complaint procedures.

[258] *See infra* section VI.D for additional information about promising practices related to training.

- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of unlawful harassment;[259]

- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining respectful workplaces and promptly reporting, investigating, and resolving harassment claims; and

- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment, when harassment is determined to have occurred.

To maximize effectiveness, senior leaders may seek feedback about their anti-harassment efforts. For example, senior leaders may consider:

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated;[260] and

- Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes:

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

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

- A description of the organization's harassment complaint system, including multiple (if possible), easily-accessible reporting avenues;[261]

- A statement that employees are encouraged to report conduct that they believe constitutes unlawful harassment (or that, if left unchecked, may rise to the level of unlawful harassment), even if they are not sure that the conduct violates the policy;

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[259] *See infra* section VI.D for additional information about promising practices related to training.

[260] *See, e.g.*, *Select Task Force Co-Chairs' Report*, *supra* note 2, at 33 (addressing the development and use of climate surveys to assess perceptions of harassment among employees and members of the military).

[261] *See infra* note 263.

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

- A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;

- A statement that employees are encouraged to respond to questions or to otherwise participate in investigations into alleged harassment;

- A statement that information obtained during an investigation will be kept confidential to the extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;

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

- An unequivocal statement that retaliation is prohibited and will not be tolerated, and an assurance that alleged victims, individuals who in good faith report harassment or participate in investigations, and other relevant individuals will be protected from retaliation.

In addition, effective written harassment policies[262] are:

- Written and communicated in a clear, easy-to-understand style and format;

- Translated into all languages commonly used by employees;

- Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations; and

- Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

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[262] Small businesses may be able to prevent and correct harassment without the use of formal, written harassment policies, though they may develop and use such policies at their discretion. *See* EEOC, *Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, https://www.eeoc.gov/policy/docs/harassment-facts.html (last modified 2010) (indicating that small business owners may verbally inform employees that harassment is prohibited; encourage employees to report harassment promptly and advise employees that harassment may be reported directly to the owner; conduct a prompt, thorough, impartial investigation; and take swift and appropriate corrective action).

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;
- Provides multiple avenues of complaint, if possible;[263]
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and also, where appropriate, the preventative and corrective action taken as a result.

Employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system:

- Are well-trained, objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;

[263] Smaller organizations may have fewer avenues of complaint available, due to their size, but may still consider designating multiple individuals to receive harassment complaints, if possible.

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- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;

- Create and maintain an environment in which employees feel comfortable reporting harassment to management;

- Understand and maintain the confidentiality associated with the complaint process; and

- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees will ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training should be:

- Championed by senior leaders;

- Repeated and reinforced regularly;

- Provided to employees at every level and location of the organization;

- Provided in all languages commonly used by employees;

- Tailored to the specific workplace and workforce;

- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and

- Routinely evaluated by participants and revised as necessary.

Harassment training is most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes:

- Descriptions of unlawful harassment and conduct that, if left unchecked, might rise to the level of unlawful harassment;

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- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or otherwise become aware of conduct that they believe may be prohibited;
- Explanations of the complaint process; and
- Explanations of the range of possible consequences for engaging in prohibited conduct.

Because supervisors and managers have additional responsibilities with respect to harassment, they may benefit from additional training. Effective harassment training for supervisors and managers includes:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
    - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;
    - Easy-to-understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
    - Clear instructions about how to report harassment up the chain of command; and
    - Explanations of the confidentiality rules associated with harassment complaints;
- An unequivocal statement that retaliation is prohibited and will not be tolerated, including:
    - An explanation of prohibited conduct, including taking or allowing others to take action against employees for:
        - Reporting in good faith conduct that they believe may constitute unlawful harassment (or that, if left unchecked, may rise to the level of unlawful harassment), regardless of whether the alleged conduct is found to violate the harassment policy; or
        - Participating in good faith in an investigation into alleged harassment, regardless of whether the alleged conduct is found to violate the harassment policy; and
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

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Employers also may find it helpful to consider and implement new forms of training, such as workplace civility training and/or bystander intervention training, to prevent workplace harassment.[264]

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[264] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 54-58 (describing workplace civility and bystander intervention training, and noting that such trainings "show[] significant promise for preventing harassment in the workplace"); Lilia Cortina, *Written Testimony for the June 20, 2016 Commission Meeting*, https://www.eeoc.gov/eeoc/meetings/6-20-16/cortina.cfm (describing and providing examples of workplace civility training); Dorothy J. Edwards, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm (describing bystander intervention training Green Dot); Melissa Emmal, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/emmal.cfm (describing the successful implementation of Green Dot training in Anchorage).