

“LET’S TALK ABOUT SEX”

*How Understanding The Law Can Help Employers Avoid And Defend Sex Discrimination
And Sexual Harassment Claims*

PAIGE A. LUEKING
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
214/712-9500
214/712-9540 (fax)

©2006

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

 A. Federal Law 1

 1. Civil Rights Act of 1964 1

 2. Civil Rights Act of 1991 1

 B. Texas State Law 2

 1. Employment "At-Will" 2

 2. Texas Commission on Human Rights Act 2

 3. Texas Labor Code 2

 4. Damages 2

II. SEX DISCRIMINATION 2

 A. Disparate Treatment 2

 1. Establishing a *prima facie* Discrimination Case 2

 2. Employer Rebuttal to a *prima facie* Case 3

 3. Equal Pay Act 3

 B. Disparate Impact 3

 C. Emerging Issues 3

 1. Sexual Orientation 3

 2. Women & Pregnancy - "The Maternal Wall" 4

III. SEXUAL HARASSMENT 4

 A. *Quid Pro Quo* 4

 1. Tangible Job Effect 5

 2. Unwelcome Conduct 5

 B. Hostile Environment 5

 1. "Severe or Pervasive" 6

 2. Non-Sexual Conduct 7

 C. Employer Liability 7

 1. Supervisor-to-Subordinate Harassment 7

 2. Co-worker Harassment 9

 D. Emerging Issues 9

 1. "E-Harassment" 9

 2. E-mail 10

 3. Internet Pornography 10

 4. Blogs and Personal Pages 10

 5. Avoiding Liability 11

 6. Same-Sex Harassment 11

IV. RESOURCES 11

V. CONCLUSION 11

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<i>Borg-Warner Protective Services Corp. v. Flores</i> , 955 S.W.2d 860 (Tex. App. Corpus Christi 1997)	7
<i>Burlington Indus. v. Ellerth</i> , 524 U.S. 762 (1998).....	5, 7-8
<i>Casiano v. AT&T Corp.</i> , 213 F.3d (5 th Cir. 2000).....	6-7
<i>Diaz v. Pan American Airways, Inc.</i> , 442 F.2d 385, cert. denied, 404 U.S. 950 (1971)	3
<i>Eckerdt v. Frostex Foods, Inc.</i> , 802 S.W.2d 70, 72 (Tex. App.-Austin 1990, no writ)	2
<i>Ellison v. Brady</i> , 924 F.2d 872 (9 th Cir. 1991).....	6, 9
<i>Ewald v. Wornick Family Foods, Corp.</i> , 878 S.W.2d 653, 658 (Tex. App.-Corpus Christi 1994, writ denied)	4-5
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998).....	8
<i>Farpella-Crosby v. Horizon Health Care</i> , 97 F.3d 803 (5 th Cir. 1996).....	6-7
<i>Gan v. Kepro Circuit Systems</i> , 27 EPD 32, 379 (E.D. Miss. 1982)	5
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971).....	3
<i>Harley v. McCoach</i> , 928 F. Supp. 533 (E.D. Pa. 1996)	9
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17 (1993).....	5-6
<i>Harvill v. Westward Communications</i> , 433 F.3d 428 (5 th Cir. 2005).....	9
<i>Hicks v. Gates Rubber, Co.</i> , 833 F.2d 1406 (10 th Cir. 1987).....	5
<i>Highlander v. K.F.C. Management, Co.</i> ,	

805 F.2d 644 (6 th Cir. 1986).....	6
<i>Hockman v. Westward Comm., LLC.</i> , 407 F.3d 317 (5 th Cir. 2004).....	7
<i>Jespersen v. Harrah’s Operating Co.</i> , 280 F. Supp. 2d 1189 (D. Nev., 2002).....	3
<i>Katz v. Dole</i> , 709 F.2d 251(4 th Cir. 1983).....	5
<i>Kocak v. Community Health Partners of Ohio, Inc.</i> , 400 F.3d 466 (6 th Cir. 2005).....	4
<i>Meritor Sav. Bank v. Vinson</i> , 477 U.S. 57 (1986).....	4-7
<i>McDonnell Douglas v. Green</i> , 411 U.S. 792 (1973).....	2
<i>McKinney v. Dole</i> , 765 F.2d 1129 (D.C. Cir. 1985).....	7
<i>Miller v. Woodharbor Molding & Millworks, Inc.</i> , 80 F. Supp.2d 1026, 1029 (N.D. Iowa 2000).....	8
<i>Nash v. Electrospace Systems, Inc.</i> , 9 F.3d 401 (5 th Cir. 1993).....	8
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , 523 U.S. 75 (1998).....	7, 11
<i>Pedrozo v. Cintas Corp.</i> , 297 F.3d 1063 (8 th Cir. 2005).....	11
<i>Pollard v. E.I. Dupont</i> , 532 U.S. 843 (2001).....	1
<i>Rabidue v. Osceola Refining Co.</i> , 805 F.2d 611 (6 th Cir. 1986).....	6
<i>Robinson v. Jacksonville Shipyards, Inc.</i> , 760 F. Supp. 1486, 1542 (M.D. Fla. 1991).....	10
<i>Scrivner v. SISD</i> , 169 F.3d 969 (5 th Cir. 1999).....	8
<i>Schroeder v. Texas Iron Works, Inc.</i> , 813 S.W.2d 483 (Tex. 1991).....	2
<i>Soto v. El Paso Nat. Gas Co.</i> ,	

942 S.W.2d 671, 678-80 (Tex. App.—El Paso 1997, writ denied)	6
<i>Strauss v. Microsoft, Inc.</i> , 814 F. Supp. 1186, 1194 (S.D.N.Y. 1993).....	9
<i>Swentek v. USAir</i> , 830 F.2d 552, 557 (4 th Cir. 1987).....	5
<i>Trout v. City of Akron</i> , No. CV-97-115879	10
<i>Union Pacific R.R. v. Loa</i> , 153 S.W.3d (Tex. App. El Paso 2004).....	8
<i>Walsh v. Nat’l Computer Systems, Inc.</i> , 332 F.3d 1150 (8 th Cir. 2003).....	4
<i>Watson v. Ft. Worth Bank and Trust</i> , 487 U.S. 977 (1988).....	3
<i>Wernsing v. Illinois Department of Human Services</i> , 118 S.W.3d 491 (Tex. App.-Dallas 2003, no pet.)	3
<i>Wyerick v. Bayou Steel Corp.</i> , 887 F.2d 1271 (5 th Cir. 1989).....	5
<i>Yates v. Avco Corp.</i> , 819 F.2d at 637 (6 th Cir. 1987).....	6
 <u>Statutes</u>	
TEX. LAB. CODE ANN. § 21.001 et seq. (Vernon Supp. 2005).....	2
§ 21.0015.....	2
§ 21.2585.....	2
TITLE VII § 703 (42 U.S.C. § 2000E ET SEQ.)	1
42 U.S.C.S. § 1981a	1
§ 1981a(b)(3).....	1

“LET’S TALK ABOUT SEX:” HOW UNDERSTANDING THE LAW CAN HELP EMPLOYERS AVOID AND DEFEND SEX DISCRIMINATION AND SEXUAL HARASSMENT CLAIMS

I. INTRODUCTION

The mass entry of women into the workforce after World War II, a time at which the workplace was still a man’s domain, prompted the passage of the Civil Rights Act of 1964, which broadly prohibited workplace discrimination based on gender. Even after the passage of this Act, women were still the subjects of continual sexual harassment and discrimination at the hands of their male colleagues and supervisors, yet many victims of such harassment and discrimination did not come forward and accuse their harassers out of fear for their jobs or out of lack of knowledge about the available legal recourse. This pattern of behavior allowed employers to largely ignore the issue for over two decades after the Civil Rights Act was passed, without fear of experiencing a lawsuit.

The passage of two amendments to the Act in the early Nineties, one which allowed plaintiffs to recover punitive damages from employers, and another that made it easier for victims to prove injury, has dramatically increased the probability that an employer will face sexual harassment or discrimination allegations at some point in time. The rise in the number of sexual harassment claims filed with the Equal Employment Opportunity Commission (EEOC)—from 6,883 in 1991 to 12,679 in 2005—evinces this growing threat, which can be particularly costly to employers in terms of both time and money. The average verdict in a sexual harassment/discrimination case has risen to approximately \$250,000¹, with total claimant compensation in some cases exceeding \$50 million². Thus, the stakes in such cases are extremely high, which is why it is imperative that employers know the pertinent law so that they can prevent becoming victims of sexual harassment and discrimination lawsuits. After reviewing the federal and state statutes and case law on the subject, this article will address practical concerns that employers have regarding sex discrimination and sexual harassment in the

workplace, including how to implement effective anti-discrimination policies, how to limit company liability in harassment claims, and how to prepare for the increasingly litigious area of “e-harassment.” In addition, the article will offer tips for defending a sexual harassment or sex discrimination lawsuit should it arise.

A. Federal Law

1. Civil Rights Act of 1964

All sexual harassment and sex discrimination claims are actionable under Title VII § 703 (henceforth “Title VII”) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., a broadly applicable statute that forbids “discriminat[ion] against any individual with respect to his...compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

2. Civil Rights Act of 1991

The Civil Rights Act was amended by Congress on November 21, 1991 to allow jury trials in Title VII claims and to allow claimants to recover punitive as well as compensatory damages from an employer if it was shown that the employer intentionally discriminated or acted “with malice or reckless indifference” to the rights of the employee. 42 U.S.C.S. § 1981a. While this represented a victory for present and future victims of workplace discrimination, the amendment also capped the amount of damages that these claimants could recover. The cap, which applies to “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses,” is based on a graduated scale, with damages for the smallest employers (15-101 employees) capped at \$50,000, and damages for the largest employers (500+ employees) capped at \$300,000 per claim. *Id.* § 1981a(b)3.

This does not mean that employers are completely insulated from large claims. The Supreme Court added a wrinkle to the 1991 amendment in *Pollard v. E.I. Dupont*, 532 U.S. 843 (2001) by saying that front pay, or money awarded for lost compensation during the period between judgment and the victim’s reinstatement at work (or for compensation awarded in lieu of reinstatement), was not subject to the damage cap and could therefore exceed \$300,000. In addition, large businesses that engage in discriminatory practices risk being the subject of class-action lawsuits brought by hundreds or thousands of employees, each of whom can claim up to the \$300,000 maximum compensation. For example, popular teen clothier Abercrombie & Fitch was recently forced to pay out over \$40 million to

¹ Lou Gonzales, *Court Rulings Make Training Employers About How to Avoid Sexual Harassment a Lucrative Business*, COLORADO SPRINGS GAZETTE, Aug. 10, 1998.

² Ronette King, *Women Taking Action Against Many Companies*, NEW ORLEANS TIMES-PICAYUNE, April 27, 1997.

plaintiffs in a race discrimination lawsuit³, while nationwide low-cost vendor Wal-mart currently faces a sex-discrimination class-action involving 1.6 million current and former employees⁴.

B. Texas State Law

1. Employment “At-Will”

Texas has long been an “at-will” employment state, meaning that any party of an employment relationship can terminate the agreement “at-will,” at any time, and for any reason, with no liability. Despite this fact, the “at-will” doctrine is subject to several statutory exceptions that include all federal and state anti-discrimination laws. Title VII, as well as Texas’ counterpart to the federal legislation are two of these exceptions, meaning that employers cannot terminate employment relationships because of gender.

2. Texas Commission on Human Rights Act

The Texas counterpart to Title VII is the Texas Commission on Human Rights Act (TCHRA), TEX. LAB. CODE ANN. § 21.001 et seq., which “provides for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.” The TCHRA is administered and enforced by the Civil Rights Division of the Texas Workforce Commission, which functions as the state parallel to the EEOC. *See* TEX. LAB. CODE ANN. § 21.0015 (Vernon Supp. 2005). Currently, the amount of Texas case law interpreting the TCHRA is limited; as a result, the courts are obligated to look to the analogous federal case law for interpretation of the provisions of Title VII. *See Eckerdt v. Frostex Foods, Inc.*, 802 S.W.2d 70, 72 (Tex. App.-Austin 1990, no writ). Texas courts embrace and consistently rule with the federal holdings interpreting Title VII, but evaluate claims under the TCHRA. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991).

Some possible Texas state law claims include assault and battery, contractual claims, defamation, false imprisonment, invasion of privacy, intentional infliction of emotional distress, violation of the Texas Commission on Human Rights provisions and violation of certain Workers Compensation laws. This listing is not exclusive as the area of employment law is a dynamic one, fueled by emerging technology, creativity of the claimant’s attorney and the facts of each specific scenario.

While procedural concerns may exist that make one court more appealing than the other, a federal court may be more receptive to a motion to dismiss a

case for failure to state a cause of action and more likely to grant a summary judgment.

3. Texas Labor Code

This state statute prohibits an employer from discriminating or discharging an employee who is, in good faith, instituting a proceeding under the Act, hiring a lawyer to investigate a claim or filing a claim for benefits. TEX. LAB. CODE ANN. § 21.000 et seq..

4. Damages

Under Texas law, the amount of damages that a plaintiff can recover for a claim pursuant to the TCHRA are capped according to the scale set forth in the Civil Rights Act of 1991. TEX. LAB. CODE ANN. § 21.2585. The scale is as follows:

<i>Employees</i>	<i>Damage Cap</i>
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
500+	\$300,000

II. SEX DISCRIMINATION

A. Disparate Treatment

The most common type of employer discrimination is disparate treatment, in which employees in similar situations are treated differently based on their gender. A simple example would be: Jane and John both miss ten days of work during the year. Jane, a female, is terminated for violating the company absenteeism policy. John, a male, is given a verbal warning to not continue missing work. Assuming that Jane and John’s work performance are more or less equal on all other levels, the employer has committed gender discrimination of the disparate treatment type.

1. Establishing a *prima facie* Discrimination Case

In order to establish a *prima facie* case of gender discrimination, a plaintiff must prove that he/she 1) was a member of a protected class, 2) applied for the job and the job was open, 3) had the minimum qualifications for the job or was meeting the employer’s expectations, 4) was not hired or was discharged, demoted, etc, and 5) a person of a different gender was hired or treated differently. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

To prove the fifth prong of a *prima facie* case, an employee can use one of three avenues. He can either 1) cite a facial policy of unlawful discrimination (*e.g.* the employer only hires male servers, 2) offer examples of direct hires discrimination (*e.g.* hiring personnel says “I’m not going to hire you because you’re a woman”), or 3) produce circumstantial evidence that suggests discrimination. In the example given above, John’s light treatment compared to

³ J. Browne, *Abercrombie & Fitch Settles Discrimination Lawsuit*, NEW YORK AMSTERDAM NEWS, Dec. 2, 2004.

⁴ *Wal-Mart and Sex Discrimination by the Numbers*, FORBES.COM, June 23, 2004.

Jane's termination would serve as circumstantial evidence that infers a discriminatory reason behind Jane's firing.

2. Employer Rebuttal to prima facie Case

If a complainant satisfactorily proves a *prima facie* case by means of citing direct or circumstantial evidence of discrimination, then an employer can defend itself by providing evidence a different, non-discriminatory reason for its actions.

An employer accused of having a facially discriminatory policy has fewer options. According to Title VII, an employer may only discriminate based on sex "in those certain instances where...sex...is a bona fide occupational job qualification." Title VII § 703(e)(1). Title VII defines a bona fide occupational job qualification ("BFOQ") as a minimum qualification necessary to perform the duties of a certain job. If a prospective employee's membership in a certain gender precludes him from being able to perform a BFOQ, then an employer may discriminate based on gender without liability. However, the BFOQ defense is only applicable when a BFOQ is "reasonably necessary to the normal operation or essence of defendant's business." See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, cert. denied, 404 U.S. 950 (1971); as a result, its scope is rather limited.

1. Equal Pay Act

Despite fact that women now constitute almost 50% of the current workforce, working women earn approximately \$0.80 for each dollar that a male makes in the same job position, while older working women earn barely half of what their male counterparts earn. Paying women less than men to perform the same job functions is an example of illegal disparate treatment in violation of Title VII and the Equal Pay Act of 1963, which prohibits sex discrimination evidenced by unequal pay.

Potential damages available to a prevailing plaintiff include:

- a. back pay;
- b. attorneys fees;
- c. court costs.

In hiring new employees one consideration is the employee's prior salary and how the employer treats other employees similarly situated. *Wernsing v. Illinois Department of Human Services* 427 F.3d 466 (7th Cir. 2005) A key to avoiding these types of claims is to update and monitor the company's compensation scale—especially prior to raising salaries, prior to

annual performance evaluations or reviews, and prior to hiring new employees.

B. Disparate Impact

According to the Supreme Court, employment practices that produce a disparate impact are "facially neutral employment practices, adopted without a deliberately discriminatory motive, [that] may in operation be functionally equivalent to illegal intentional discrimination." *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977 (1988). The Court first recognized the illegal nature of disparate impact discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which a power plant's requirement that employees have a high-school diploma was found to be unrelated to job performance and found to "disqualify negroes at a substantially higher rate than white applicants." While the fact issues considered in *Griggs* revolved around race, the Court's ruling applies equally to all classes protected by Title VII, meaning that employer policies must affect employees of both genders equally. A policy that requires all employees to be 6 foot 2 inches tall is a good example of a policy that produces a gender-based disparate impact. Although the policy does not explicitly discriminate against women, the fact that the average woman is only 5'4" and that few women reach 6'2" implicitly prevents women from getting a job.

How can employers ensure that policies do not produce a gender-based disparate impact? First, all hiring policies, tests, and/or requirements should be explicitly related to job performance. As long as a test or requirement serves to identify an employee or prospective employee's competence in performing a BFOQ, it will not violate disparate impact provisions. See *Griggs*. It should be kept in mind, though, that if a disparate impact claim arises, the defendant employer shoulders the burden of proof that the policy is a BFOQ; as a result, employer should be prepared to provide such proof. In the example given above, height would have to be considered a BFOQ (and it rarely is) in order for the height requirement to be a legal policy, and the employer would have to show why persons under 6'2" could not perform the essential job functions. Secondly, employers should ensure that all other employment policies place "equal burdens" on all employees. If female are required to wear makeup or style their hair, for example, men must also be subject to similar gender-appropriate grooming standards like trimmed nails and hair. See *e.g. Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev., 2002).

C. Emerging Issues

1. Sexual Orientation

Although Title VII does prohibit discrimination based on sex, the word "sex" is generally interpreted

to mean gender. Thus, the sexual orientation (*e.g.* homosexual, heterosexual, bisexual) of a person does not place them in a protected class under federal law. While fourteen states have added special provisions that do prohibit discrimination in employment based on a person's sexual preferences, Texas is not one of these states. However, while there is no state-wide ban on sexual orientation discrimination, several Texas cities, including Dallas, Houston, Austin, El Paso, and Lubbock have city ordinances that prohibit the practice⁵.

2. Women & Pregnancy – “The Maternal Wall”⁶

Since females—not males—are able to give birth only by virtue of their gender, discrimination against pregnant women in employment practices is typically considered to be discrimination “because of sex,” in violation of Title VII and in violation of the Pregnancy Discrimination Act (PDA), a 1978 amendment to the federal anti-discrimination laws.

Recently, the Federal Appeals Courts have handed down several decisions that have significantly broadened the scope of the protection offered by the PDA; as a result, employers must be very cognizant of how they treat female employees and prospective employees who are pregnant or thinking about becoming pregnant. Among the most notable of these decisions is *Kocak v. Community Health Partners of Ohio, Inc.*, 400 F.3d 466 (6th Cir. 2005), in which the court interpreted the protection offered under the PDA to extend to women who are not currently pregnant, but have the capacity to become pregnant in the future. In *Kocak*, the plaintiff took a leave of absence from her employer due to pregnancy-related complications. When she re-applied to work there again, she testified that the hiring manager asked in her interview if she planned on getting pregnant again, and then subsequently told her that the company would not hire her based on the scheduling complications with her past pregnancy and based on the probability for future pregnancies. When she sued under the auspices of the PDA, the employer claimed that she was not protected because she was not actually pregnant; however, the court disagreed. *See also Walsh v. Nat'l Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).

The *Kocak* case illustrates employers' need to be careful, especially in the hiring process. Years ago, employers were able to ask many questions of a female job candidate which now are illegal.

⁵ *Summary of States, Cities, and Counties that Prohibit Discrimination based on Sexual Orientation*, LAMBDLEGAL.COM

⁶ Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating The Civil Rights of “Carers” in the Workplace*, 13 Duke J. of Gender L. & Pol'y 31, 31 (2006).

Questions pertaining to marital status, sexual preferences, pregnancy, future childbearing plans, unwed motherhood, child care, number and ages of children are not permissible under current law. A prospective employer who asks “Do you have a boyfriend?”, “If you marry, how soon will you have children?”, “Doesn't your husband want you home caring for your children?” may be on thin grounds from a Title VII standpoint. Employers are permitted to ask questions to understand a candidate's motivation and personality. Focusing on prior education and employment experience and outside interests are permissible and may allow the employer to gain insight into the candidate without violating federal law.

Although an employer cannot discriminate against women based on their past, current, or future pregnancies, the language of that Act does allow an employer to take action when pregnancy interferes with a female's ability to perform a bona fide occupational qualification. That is, the Act does not require employers to provide preferential treatment for pregnant women, it only requires that “women affected by pregnancy, childbirth, or related medical conditions...be treated *the same* for all employment purposes (emphasis added).” The emphasis on equal treatment gives employers license to discharge pregnant employees if they cannot perform required duties, without fear of being slapped with a sexual discrimination lawsuit. For example, if a female employee violates her employer's absenteeism or tardiness policy due to the accumulation of excessive absences caused by morning sickness, the employer can discharge her without liability unless the woman can present comparative evidence that men who violated the policy in a similar fashion were not punished in the same way. Similarly, if a woman's job requires her to regularly lift heavy objects and her pregnancy renders her incapable to do so, an employer may take appropriate action without liability.

III. SEXUAL HARASSMENT

All sexual harassment claims are also actionable under Title VII of the Civil Rights Act. Though the term “sexual harassment” is noticeably missing from the Act itself, the courts have traditionally interpreted sexual harassment in the workplace as being a form of discrimination “because of sex.” In 1986, Chief Supreme Court Justice William Rehnquist distinguished between two types of harassment in his seminal opinion in *Meritor Sav. Bank v. Vinson* 477 U.S. 57 (1986), saying that both *quid pro quo* harassment and “hostile environment” harassment violated Title VII.

A. Quid Pro Quo

Quid pro quo, literally meaning “this for that” in Latin, is the more easily identifiable type of harassment, and occurs when the conditions of an employee’s job change based on the acceptance or denial of unwelcome sexual conduct from a supervisor. *Quid pro quo* harassment normally takes the form of explicit threats—“If you don’t sleep with me, I’ll fire you,” or “If you sleep with me, I’ll give you a raise”—though harassment can be implicit as well. Viable *quid pro quo* claims must satisfy five requirements: 1) the employee was a member of a protected class, 2) the harassment was based on sex, 3) the perpetrator was a supervisor, 4) the victim experienced some kind of tangible employment action that was predicated on the refusal or acceptance of the sexual conduct, and 5) the conduct in question must be unwelcome. See *Ewald v. Wornick Family Foods, Corp.*, 878 S.W.2d 653 (Tex. App.-Corpus Christi 1994, writ denied). While the first three requirements are usually obvious, the final two are often less clearly defined and warrant some explanation.

1. Tangible job effect

In order to have an actionable *quid pro quo* claim, the claimant must prove that a concrete job effect (e.g. discharge, demotion, promotion, raise, pay cut) resulted from his or her acceptance or refusal of sexual conduct. Simple incidence of harassing conduct on the part of a supervisor, while deplorable, is not *quid pro quo* harassment unless “submission to [the supervisor’s] attentions [is] a condition of favorable supervisory treatment or continuation of...employment.” *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). In most cases, a tangible employment action will “inflict direct economic harm” on the victim; however, this is not necessarily a prerequisite, and the lines between what constitutes a tangible employment action and what does not do become blurred when the action taken is not a discharge or obvious demotion or pay cut. See *Burlington Indus. v. Ellerth*, 524 U.S. 762 (1998). Also, the plaintiff must show some causal link between the rejection of the harassment and the adverse employment action. *Ewald v. Wornick Family Foods, Corp.*, 878 S.W.2d 653, 658 (Tex. App.-Corpus Christi 1994, writ denied).

2. Unwelcome conduct

In addition to proving that the harassment resulted in concrete job effects, the claimant must also prove that it was clear that the conduct in question was unwelcome. Behavior qualifies as unwelcome if “it is unsolicited or unincited and is undesirable or offensive to the employee.” *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271 (5th Cir. 1989). Although an explicit complaint or protest to the conduct can strengthen a claimant’s case that the conduct in

question was unwelcome, it is by no means necessary. Rather, the EEOC and the courts have chosen to examine each case individually when attempting to judge the credibility of the witness. In addition, because an employee consents to or voluntarily engages in sexual conduct with a supervisor does not necessarily mean that the conduct is not unwelcome, as found in *Meritor, supra*. In that case, the female plaintiff, a teller-trainee at the defendant bank was propositioned by her supervisor, a branch manager. After initially refusing his sexual advances, the plaintiff testified that she eventually acquiesced to his request to have intercourse out of fear of losing her job. She further stated that she voluntarily engaged in intercourse with her supervisor over forty times, never reporting any of the harassment because she was “afraid.” Despite the voluntary nature of the intercourse, the Court held for the plaintiff, saying that her initial refusal to her supervisor’s propositions was enough evidence to support the fact that the conduct was unwelcome, and that this, not the voluntary or involuntary nature of the conduct, was the critical issue *Id.* On an interesting related note, courts have been split over whether or not evidence of a claimant’s provocative speech or dress can be relevant to whether or not sexual advances in question were unwelcome. While some lower courts have embraced the idea that women can “ask for it [harassment]” by dressing or acting in a sexually provocative way *Gan v. Kepro Circuit Systems*, 27 EPD 32, 379 (E.D. Miss. 1982), others have taken the position that women do not waive their right to be treated like a lady by failing to behave like one. See *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) and *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987). The Supreme Court has yet to face the issue, though it did say that evidence of a plaintiff’s dress and comportment can be introduced into evidence.

B. Hostile Environment

The second and more litigious type of sexual harassment is known as hostile environment harassment. With approximately 70% of all sexual harassment cases being filed under the auspices of hostile environment, this is the kind of case that employers are most likely to see. Claims can be based on many actions, physical and non-physical, sexual and non-sexual, to the extent that those actions create a work environment “abusive to employees on basis of their...gender.” *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

Actions that may contribute to a hostile working environment include:

- a. use of pet names (e.g. “babe” or “honey”)
- b. sexual jokes

- c. display of sexual pictures in the office
- d. repeated solicitation of dates
- e. comments on a co-worker's dress
- f. comments about a co-workers bodily features or sex life
- g. physical touching, including attempted kissing, pinching, fondling
- h. sexually suggestive body language

It is important to realize that when examining a hostile environment claim, the occurrence of any one of the above listed acts is not viewed in isolation. Rather, the critical inquiry is the cumulative effect created by all instances of discriminatory or abusive behavior; after all, an "environment" cannot be created by a single event, unless that event is so severe. *Soto v. El Paso Nat. Gas Co.*, 942 S.W.2d 671, 678-80 (Tex. App.—El Paso 1997, writ denied). But what combination and/or frequency of the listed actions constitute an "abusive" environment? The answer to this question was originally the subject of much judicial variance in the federal appeals courts, with some stating that the environment was not considered hostile unless the employee's psychological well-being had been negatively impacted, *see Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), while others rejected this requirement entirely, finding for the plaintiff on the basis of a single or few offensive comments *See Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

1. "Severe or pervasive"

In order to find a middle ground between the courts that required evidence of psychological harm and those that required only the presence of possibly offensive speech, the Supreme Court in *Harris* stated that the conduct in question must be either "severe or pervasive"⁷ to constitute an actionable hostile environment. On one hand, this standard protects the occasional vulgar or discriminatory epithet from harassment charges, but on the other, it relaxes the burden of proof by removing the need to prove psychological distress. In order to determine whether or not the conduct in question was severe or pervasive

⁷ Since the severity of harassing conduct often varies inversely with its pervasiveness and vice versa, a victim need only prove that the conduct in question was either "severe" or "pervasive," not both. For example, a violent and serious event like a rape need occur only once in order to create the feeling of a hostile environment. On the other hand, more trivial incidents like a come-on or vulgar joke must occur repeatedly and frequently in order to create a hostile environment.

enough to constitute harassment, the courts consider the totality of circumstances, including the following criteria *Id.*:

- a. the frequency of the conduct in question;
- b. whether the conduct was physically threatening or humiliating;
- c. whether the alleged harasser was a co-worker or supervisor;
- d. whether others joined in the perpetrating;
- e. whether the conduct was directed at more than one individual; and
- f. whether the conduct interfered with the plaintiff's work environment.

This final criterion tends to be the central question when determining severity or pervasiveness, which is why an isolated innuendo or vulgar comment is generally not enough to establish a hostile environment claim. *See Meritor, supra*. This criterion is especially useful in preserving the ultimate goal of Title VII, which is to create a workplace free of discrimination, not free of vulgarity. The Court also adopted a "reasonable person" standard in the *Harris* case, saying that the conduct must be perceived to be abusive by "the reasonable person *Harris*, 510 U.S. 17⁸." Although the Court did not elaborate further, the perspective of this reasonable person was implied to be that of the person bringing the claim, or a person in "a similar environment under similar or like circumstance." *Highlander v. K.F.C. Management Co.*, 805 F.2d 644 (6th Cir. 1986). The Ninth Circuit Court of Appeals took the "reasonable person" standard even further in *Ellison* 924 F.2d 972, saying that sexual harassment directed toward females should be viewed from the standpoint of a "reasonable woman," citing the fact that women and men are vulnerable in different ways and therefore find different conduct objectionable. *Yates v. Avco Corp.*, 819 F.2d at 637 (6th Cir. 1987). Despite this ruling, most courts have chosen not to use the "reasonable woman" and commonly use the "reasonable person" standard instead, which results in a large amount of judicial variance in determining what type of conduct qualifies as severe or pervasive. To form an idea of what kind of conduct qualifies, consider the following

⁸ Actions in *Harris* deemed to be pervasive by the reasonable person standard included comments like "you're a woman, what do you know," "we need a man as the rental manager," "we should go to the Holiday Inn to discuss your raise."

case examples in which the conduct in question was determined to be severe or pervasive.

In *Casiano v. AT&T Corporation*, 213 F.3d (5th Cir. 2000) the court denied summary judgment to defendant where male victim was repeatedly subject to the following conduct from his female supervisor:

- a. called “honey”
- b. subjected to demands to retrieve coffee, snacks and personal items
- c. approached to discuss his sexual preferences and performance and
- d. propositioned fifteen (15) times in four (4) months to engage in an extramarital affair.

In *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996) harassment was found to be severe enough to defeat defendant’s summary judgment motion where male co-worker made comments/overtures that plaintiff found offensive, such as:

- a. due to her proclivity for sex she had a large number of children
- b. he (supervisor) knew what she liked to do
- c. because she had seven (7) children, she must not have a television
- d. unbuttoning her blouse and fondling her

On the other hand, similar conduct has also been found to be insufficient to support a claim. Consider *Hockman v. Westward Comm, LLC*, 407 F.3d 317 (5th Cir. 2004), in which the following conduct failed to satisfy the severe or pervasive requirement:

- a. comments to an employee about another employee’s body parts
- b. grabbing and brushing against complainant’s breasts and buttocks
- c. holding complainants cheeks and attempting to kiss (occurred once)
- d. asking complainant to come to a co-worker’s office so that they could be alone

Although the conduct in *Hockman* was arguably as offensive as that in *Casiano* and *Farpella*, the court denied summary judgment for the plaintiff because it

found that the fondling did not qualify as severe, and since the complainant could not remember how often it occurred, it did not satisfy the pervasiveness standard either.

2. Non-sexual conduct

Although the courts have traditionally focused on the “sexual” nature of harassment, and in particular advances made by men toward women, sexual harassment actually encompasses any harassment that occurs simply due to a victim’s gender, including non-sexual conduct. Examples of such non-sexual behavior that could still be construed as harassment based on sex include:

- a. inadequate training;
- b. less favorable work assignments;
- c. name calling; and
- d. physical abuse.

This notion was reaffirmed in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), with the court finding that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” In *Oncale, supra* heterosexual male oil rig workers physically harassed the plaintiff, a male co-worker, by exposing their genitals and performing other inappropriate actions toward him that made him fearful that he might be raped. Though sexual in nature, this harassment was considered fundamentally different because sexual desire was not the motivating factor. See also *McKinney v. Dole*, 765 F.2d 1129 (D.C Cir. 1985).

C. **Employer Liability**

Employer liability has been an important feature of sexual harassment litigation since *Meritor, supra* was brought to the Supreme Court two decades ago, and the plaintiff’s failure to prove employer liability is one of the courts’ three most cited reasons for denying harassment claims (the other two are lack of proof that the conduct was “severe or pervasive” and a lack of proof that the allegations were true).

Even though the courts had long pondered the issue of employer liability, rules determining liability were not firmly established until 1998 in *Burlington Indus. v. Ellerth*, 524 U.S. 742.

1. Supervisor-to-Subordinate Harassment

Applying §219(2)d of the Restatement of Agency, which provides that an employer is vicariously liable when an employee “uses apparent authority” or is “aided in accomplishing the tort by the

existence of the agency relation,” the Court of Appeals in *Ellerth, supra*. held that employers are strictly (automatically) liable in *quid pro quo* cases, meaning that claimants can recover without regard to whether or not the employer knew about the harassment, and without regard to whether or not the company had an anti-harassment policy in place. *See also Borg-Warner Protective Services, Corp. v. Flores*, 955 S.W.2d 860 Tex. App. Corpus Christi 1997. While the agency relationship aids *quid pro quo* harassment—supervisors would not be able to control tangible job benefits without the power granted to them by the employer—it is not always clear if the agency relationship aids in commission of hostile environment harassment, in which the victim does not suffer the loss of any tangible job benefits. Accordingly, the Court in *Ellerth, supra*. chose to apply a different standard in cases in which no tangible employment action is taken, saying that an employer could be held vicariously liable for such harassment only if the harassing conduct was perpetrated by a supervisor with immediate authority over the claimant. In addition, the court held that employers could absolve themselves of such liability, subject to proof by a preponderance of evidence, by showing that both:

- a. the employer made a reasonable attempt to prevent and correct harassment; and
- b. the plaintiff employee failed to take advantage of any preventative measures offered by the employer

The success or failure of most sexual harassment litigation depends on the application of this standard, thenceforth known as the “*Ellerth/Faragher* affirmative defense.”⁹ Thus, knowing how to satisfy this standard is of primary importance to employers looking to insulate themselves from liability.

Satisfying the first prong of the defense begins with the promulgation of a company anti-harassment policy to all employees¹⁰. *See Nash v. Electrospace Systems, Inc.*, 9 F.3d 401(5th Cir. 1993). Simply having a policy in place, however, has proven to be an insufficient defense at times, as the courts have repeatedly focused on the reasonability and effectiveness of a policy instead of its mere existence. *See Miller v. Woodharbor Molding & Millworks, Inc.* 80 F.Supp.2d 1026, 1029 (N.D. Iowa 2000). In order to be viewed by the courts as being reasonable and

effective at preventing harassment, an employer’s sexual harassment policy must include:

- a. A clear explanation of prohibited conduct;
- b. A short list of managers to whom sexual harassment complaints should be reported;
- c. Multiple complaint avenues that avoid the supervisory chain of command;
- d. A detailed and clearly described complaint process that involves prompt, thorough, and impartial investigation;
- e. Language that ensures that complainants cannot be victims of retaliation;
- f. A promise of complete confidentiality; and
- g. Assurance that the employer will take corrective action if and when it is determined that harassment has occurred

In addition to disseminating a reasonable policy, an employer must also undertake an expedient, thorough, and unbiased investigation when a complaint is made. *See Union Pacific R.R., Co. v. Loa*, 153 S.W.3d (Tex. App. El-Paso 2004, no pet.)(summary judgment granted to employee because employer failed to react to complaint in a timely matter or investigate thoroughly) Adequate and prompt remedial action that stops the harassment and prevents future harassment must also take place in order for the first prong of the defense to be satisfied, with the adequacy of the employer’s response depending on the facts gleaned from the investigation, as well as the severity and frequency of the conduct in question. Though the courts have not established a uniform timeline prescribing how long an investigation should take, or how soon after an investigation that punishment must be levied, thirty days from complaint to remedial action is a good rule of thumb to use when taking action on a sexual harassment complaint.

Secondly, in order to avoid liability an employer must also demonstrate that the complainant did not exhaust the company’s available anti-harassment remedies. Showing that the complainant failed to complain or complain in a timely manner usually satisfies this prong of the defense. *See Scrivner v. SISD*, 169 F.3d 969 (5th Cir. 1999). Employers may still be able to satisfy this defense if it can prove that the claimant acted unreasonably in their complaint, by either complaining to the wrong authority, or misleading the company during the internal

⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), involved the same issue of employer liability for sexual harassment, and the decision in *Burlington Indus.* was a companion decision to that case.

¹⁰ Although an anti-harassment policy is the easiest method to show reasonable care, it “is not necessary in every instance as a matter of law.” *See Ellerth* at 20.

investigation. See *Harvill v. Westward Communications* 433 F.3d 428 (5th Cir. 2005).

2. Co-worker Harassment

Unlike harassment that occurs between a supervisor and subordinate, an employer is not strictly liable for harassment that occurs between employees who reside on an even plane in the organizational hierarchy, and the *Ellerth/Faragher* defense does not apply to these cases. Rather, the courts have held employers to a negligence liability standard in cases involving a hostile environment that is created by a co-worker. In other words, the burden of proof lies squarely upon the shoulders of the claimant, and to impute employer liability a claimant must not only prove that the employer knew or should have known about the harassing conduct, but also prove that it failed to take prompt and appropriate action to stop it. The standards for prompt and appropriate action are the same as those noted in the previous section; as a result, an employer can avoid liability in *any* case by adhering to the following guidelines:

Do:

- ✓ Develop, disseminate, and enforce an anti-harassment policy that includes the elements listed above;
- ✓ Engage in a *prompt*, thorough, and impartial investigation when a claim arises. This includes interviewing all parties AND all potential witnesses, evaluating each witness's credibility should discrepancies exist among stories, and reaching a determination based on the results of the investigation;
- ✓ Take prompt and appropriate corrective action. This does not necessitate separating the complainant and the alleged harasser during the investigation, nor does it mandate the firing of the harasser if the harassment is found to be true. In distributing punishment to the harasser, an employer should evaluate the severity of the harassment, and punish accordingly. A written warning may be sufficient for a minor offense, whereas major or repeated offenses may be grounds for termination of the harasser. It should be noted that if a harassment claim is validated; moving the victim to a less desirable location is not an acceptable remedy. Rather, if a separation of victim and harasser is deemed necessary, the harasser must be forced to move, not the victim See *Ellison*, 924 F.2d 872.
- ✓ Document everything.

Do Not:

- ✗ Disregard or dismiss complaints without investigating;
- ✗ Retaliate or give the impression of retaliation against the claimant;
- ✗ Allow an employee under the supervision of the harasser to undertake the investigation;
- ✗ Take too long to address complaints;
- ✗ Conduct an investigation in "bad faith," trying to find a predetermined result.

D. Emerging Issues

1. "E-Harassment"

With the proliferation of the internet and electronic mail as the primary means of intra-office communication, sexual harassment is no longer simply a physical or verbal phenomenon. Rather, employers are beginning to face a new type of dispute that centers on "e-harassment," or harassment that takes place on the computer, in e-mail messages, and on the World Wide Web. For example:

- a. In a 1993 case involving Microsoft, a supervisor sent vulgar emails to his staff members (both male and female), including one containing a parody video entitled "A Girl's Guide to Condoms," and another containing a news report about Finland's proposal to institute a sex holiday. When the plaintiff sued for retaliatory discharge, these emails were enough evidence to suggest that she had been fired for reasons other than the nondiscriminatory one cited by Microsoft, and court to denied summary judgment to the defendant. *Strauss v. Microsoft*, 814 F. Supp. 1186, 1194 (S.D.N.Y. 1993)
- b. A 2002 case centered on the showing of internet images of nude women resembling female employees around the office. Plaintiff alleged that the showing of these images was part of the conduct that contributed to her hostile work environment.
- c. In 1996, a female warehouse worker complained that she was the object of a tremendous amount of vulgar sexual conduct, including an email sent to her from a co-worker that referred to her as "brown

sugar.” Though the employer investigated and withdrew email privileges from the warehouse, the court found a genuine issue of fact as to whether or not the employer took prompt action upon learning of the harassment. *Harley v. McCoach*, 928 F. Supp. 533 (E.D. Pa. 1996).

- d. Employees at a Chevron Corporation subsidiary distributed a list of “why beer is better than women” via email. The list contained diminutive comments like “beer does not demand equality” and “if you had a beer the bottle is still worth \$0.10”. The hostile work environment claim was settled for \$2.2 million.

These cases raise a litany of questions for employers, including: can employers be held liable for its employees’ misuse of technology? Can employers legally discipline employees for online conduct? Is it the employer’s fault if employees harass co-workers by sending sexually explicit e-mail? Downloading pornography at work? Writing sexual comments about co-workers in a personal web log (“blog” for short)? What if an employer fails to curtail third-party pornographic spam e-mail?

2. E-Mail

Although the law pertaining to electronic sexual harassment is evolving, an analysis of the judicial precedence for brick-and-mortar harassment can help answer some of the questions posed above.

First, it is agreeable that derogatory and joking e-mails can support a hostile environment claim, as jokes distributed electronically are no different than jokes that are told verbally. In order to be actionable, internet-based hostile environment claims must fit the same standards and normal harassment claims—the conduct must be unwelcome, and it must be severe or pervasive enough to lead to a change in the victims working environment. Although some dispute how some sexist humor distributed via e-mail can lead to a “hostile” or “abusive” environment based on the free will to push the “delete” key, the courts have had no problem making the connection. In 1997, for example, the EEOC filed suit against federal loan corporation, Freddie Mac, citing a racially hostile environment in which a string of e-mail messages mocking the black dialect proved to be the smoking gun in the EEOC’s case¹¹. In that same year, suits were brought also against finance giants Morgan Stanley, R.R. Donnelly, and Citibank due to those companies’ tolerance of racially and sexually charged

e-mails circulated on the office e-mail systems¹². The courts have consistently applied the same reasoning in these cases, saying that when male employees distribute e-mail jokes that degrade women, female employees might find it difficult to work with someone whom they know to be sexist.

3. Internet Pornography

According to an MSNBC poll, one in five men and one in eight women admitted to using their work computers to access sexually explicit material, while half of the respondents admitted to forwarding sexual content to co-workers¹³. The shocking prevalence of pornography in the workplace poses a serious threat to employers in terms of harassment liability. The courts have already ruled that the display of pornographic posters in the workplace is enough to constitute a hostile environment, and today’s internet images are no different than yesterday’s Playboy pinups. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1542 (M.D. Fla. 1991). Despite the fact that an employee may think that his workplace web usage is a private matter, this is usually not the case, as other employees may see explicit images when walking by the offender’s computer monitor, or the offender may print the images to a common computer, where other employees can easily and unknowingly view them.

It is obvious that some women find pornography offensive. Moreover, most pornography depicts women as sexual objects, and this in and of itself creates a discriminatory environment because it conveys the message that women are not professional equals and that “they are welcome in the workplace only if they subvert their identities to the sexual stereotypes prevalent in that environment.” *Id.* As a result, the consistent viewing of porn by one employee could lead to the creation of a discriminatory environment for another, even if the offending employee never intended for anyone else to see the images. *See Trout v. City of Akron*, No. CV-97-115879 (plaintiff awarded \$265,000 in damages after viewing pornographic computer images downloaded by co-workers). Since an employer is liable for harassment of which it has previous knowledge, a company that has an internet monitoring policy but fails to correct the offensive conduct or reprimand the harasser can be held liable.

4. Blogs and Personal Pages

Finally, the explosion in popularity of blogs and personal web pages hosted by social networking sites

¹¹ Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, LAW & CONTEMPORARY PROBLEMS, 63, 299 (2000).

¹² Matthew H. Meade, *Defusing the E-mail Time Bomb: Establish Firm Workplace Rules to Prevent Discrimination Suits*, PITTSBURGH POST-GAZETTE, April 25, 1997.

¹³ Bob Sullivan, *Porn Problem Persists: Study Says 50 percent Receive Unwanted Sex Messages*, MSNBC.COM, Sept. 6 2004.

like Friendster.com, Xanga.com, and MySpace represents the newest threat in employment discrimination liability. These sites, which are intensely popular¹⁴, allow users to post pictures, write journal entries covering every aspect of their lives (including work), and interact with other users in online forums and live chat rooms. Although no direct judicial precedence has been set to date, it is plausible to assume that employers may eventually become liable when employees post derogatory and/or sexual comments about co-workers on their personal web space. After all, the mechanism by which web page postings create a hostile environment is largely the same as that of verbal comments or e-mail messages. That is, messages of a sexual nature directed at a woman may make her uncomfortable working around the harasser, as well as around other employees whom she knows to have read the comments. Moreover, even seemingly innocent comments can serve to intimidate the person they describe, as that person might fear that those comments may eventually escalate to physical action by the harasser, and even rape.

As these websites become increasingly integrated into workplace life, employers should take steps to ensure that they are not accessible by employees at work, so that the employer cannot be held responsible for what employees post about work life and their co-workers.

5. Avoiding Liability for E-Harassment

The reason that many employees engage in risqué online behavior at work is largely due to the perception that online conduct is private and ephemeral, existing only on one computer screen until the “delete” button is pressed. Unfortunately, this is not true, as almost all workplace e-mail and some internet usage is saved indefinitely on a hard drive, waiting to be targeted by a plaintiff’s attorney as evidence in a harassment case. Accordingly, reminding employees of the fact that what they do on the computer at work is neither private nor instantaneously erasable is the first step that an employer can take to help prevent internet-based sexual harassment and discrimination. Creating a clear e-mail and internet policy is a perfect way to reduce the prevalence of these false assumptions. Policies should state that:

- a. the e-mail system is for business use only;
- b. all e-mail messages will be screened to ensure the appropriateness of content;
- c. all e-mail messages are stored permanently;

- d. all internet traffic is monitored; and
- e. the giving out of a work e-mail address on websites that may eventually lead to explicit solicitation is prohibited

“In short, the employee should understand that nothing should be e-mailed that the employee would not be willing to sign and place on the company bulletin board¹⁵.” The policy should be distributed to all employees and each should sign an acknowledgement form when the policy is received, updated or reviewed. Additionally, employers should block employees’ access to any questionable sites using a commercially available internet filter, much like the parental controls used to protect children from stumbling on explicit content. If monitoring detects the circulation of derogatory or joking e-mails among employees, an employer should, as with non-virtual cases, take prompt and remedial action to ensure that the e-mails stop and do not occur in the future. Failure to do so can still result in liability, even in the presence of a firm internet and e-mail policy.

Of course, the employer should use the least intrusive means to monitor employees’ communications. A lawsuit filed by a Seattle woman illustrates the importance of interoffice email communications. At first glance, the complaint seemed frivolous as the termination letter was in compliance with the human resource policy of the company. During discovery, a computer consultant hired by the plaintiff located an email which was believed to be deleted from the president to the personnel director. The president’s email to explicit, contained vulgarity and resulted in a settlement of \$250,000. Thus, it is important that management and human resources are aware and adhere to the company’s policy on email retention.

6. Same-Sex Harassment

While the majority of reported incidents of sexual harassment involve male-to-female sexual advances, incidents of same-sex harassment can and do occur. In *Oncale*, 523 U.S. 75 (1993), a seminal case in this regard, the Supreme Court held that this type of harassment is also a violation of Title VII.

Why? While approximately 86% of sexual harassment charges are asserted by females asserting improper conduct by male co-worker, the language of Title VII contains no distinction between men and women as complainant or harasser. In the traditional male versus female or female versus male case, the complaining party is required to demonstrate that the offensive conduct was directed to him/her on the basis

¹⁴ MySpace is the second most popular English-language website, with over 50 million hits in May of 2006.

¹⁵ Meade.

of sex and where harassment is alleged that it is severe and that the conditions and terms of employment were altered, creating an abusive environment. There is new law developing for same-sex claims and whether the courts will impose a different standard is unsettled. For a review of the decisions addressing this topic of claims see *Pedrozo v. Cintas Corp*, 297 F. 3d 1063 (8th Cir. 2005). (complaining employee asserted sexual harassment claim when female co-worker allegedly attempted to kiss, blow kisses and told her to “kiss my ----.” The suit was rejected by the Court because the record did not support the fact that the harasser was sexually interested in co-worker.

IV. RESOURCES

The internet provides a great wealth of information and easy access to the federal and state regulations in the sexual discrimination and harassment arena. The listing below is in no way exhaustive, however, it should assist in researching a specific provision whether one is defending a claim, investigating an employee's complaint, preparing to interview prospective employees or drafting corporate policies and procedures.

- <http://www.eeoc.gov>
- <http://www.eeoc.gov/employers/investigations.html>
- <http://www.eeoc.gov/policy/epa.html>

V. CONCLUSION

Practical considerations include abiding by “The Golden Rule” when interacting with co-workers, adhering to standards of professionalism and fostering an environment to allow candid assessment of the workplace conduct.