Challenging Harassment in the Workplace: A Key Priority at the EEOC

A Resource Guide for Employers

Includes a Review of the Recent EEOC Task Force Report on Harassment in the Workplace, the EEOC's Perspective on Actionable Harassment Claims and Employer Liability, New EEOC Litigation, and Noteworthy Settlements

Barry A. Hartstein,* Co-Chair, EEO & Diversity Practice

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INTRODUCTION

While EEO compliance remains an important objective for the employer community, minimizing the risk of facing a harassment claim has become a top priority. The weekly, and sometimes daily, headlines of new harassment allegations are ample proof of this.

Even prior to the recent headlines, attacking harassment in the workplace has been an important priority for the Equal Employment Opportunity Commission (EEOC), the country's chief federal enforcement agency responsible for receiving and investigating charges of discrimination, as demonstrated by EEOC litigation, settlements and agency initiatives. As an example, in Fiscal Year 2017, nearly 30% (*i.e.*, 54 of 184 lawsuits filed) involved alleged harassment in the workplace.

On August 15, 2017, in one of its largest settlements over the past fiscal year, the EEOC announced a $10.125 million settlement, following an EEOC investigation of racial and sexual harassment of African Americans and women at two Chicago-area facilities of a major automaker. The EEOC also announced that combatting harassment in the workplace was one of the EEOC's top national priorities in both its 2012-2016 and 2016-2020 Strategic Enforcement Plans.

In its most recent Strategic Enforcement Plan ("SEP") issued on October 16, 2016, the EEOC stated that "Preventing Systemic Harassment" is an important focus of the agency, explaining:[1]

> Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency. Forty-three percent of the complaints filed by federal employees in fiscal year 2015 raised harassment. The most frequent bases alleged in federal sector complaints are race, disability, age, national origin, sex and religion, in order of frequency. This priority typically involves systemic cases. However, a claim by an individual or small group may fall within this priority if it raises a policy, practice, or pattern of harassment. Strong enforcement with appropriate monetary relief and effective injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. In addition, the Commission believes a concerted effort to promote holistic prevention programs, including training and outreach, will greatly deter future violations.

The 2016 SEP, in which the agency announced its renewed commitment to address harassment concerns, was preceded by the EEOC establishing a task force to examine the ongoing challenge of

1 *See* Press Release, EEOC, *EEOC Updates Strategic Enforcement Plan*, (Oct. 27, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm and Strategic Enforcement Plan at 9, *citing* the EEOC's Select Task Force Report on the Study of Harassment in the Workplace (June 2016).

harassment in the workplace.[2] On June 20, 2016, following 18 months of study, EEOC Task Force Co-Chairs, Commissioners Chai R. Feldblum and Victoria A. Lipnic, issued their Report on the "Select Task Force on the Study of Harassment in the Workplace."[3] The goal of the Report was to "reboot workplace harassment prevention."[4]

The Task Force Report was followed in January 2017 by proposed "Enforcement Guidance on Unlawful Harassment," which was described as "a companion piece to the Task Force Report."[5] Unlike the Task Force Report, which is designed to assist employers in "identifying ways to renew efforts to prevent harassment," the purpose of the proposed Enforcement Guidance is to explain "the legal standards for unlawful harassment and employer liability" and provide "a single legal analysis for harassment that applies the same legal principles under all equal employment opportunity (EEO) statutes enforced by the Commission."[6] While the proposed Enforcement Guidance was subject to comments by the employer community and others over many months,[7] and was pending approval at the Office of Management and Budget ("OMB") as of the date this Littler Report went to press, the published draft provides an excellent framework about the EEOC's perspective on the legal standards applicable to harassment claims.[8] The proposed Enforcement Guidance reviews both Supreme Court and federal appellate court decisions, plus selected district court opinions, issued over the years and provides the EEOC's perspective, particularly where the courts differ on interpreting selected issues involving actionable claims and liability for harassment. The Enforcement Guidance highlights that "(t)hirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson*,[9] 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."

The EEOC has been at the forefront attacking harassment in the workplace for many years, as demonstrated by the $34 million settlement in June 1998, which remains as one of the largest EEOC settlements challenging harassment in the workplace.[10] Ironically, increased sensitivity to concerns of harassment in the workplace initially stemmed from the 1991 televised confirmation hearings of U.S. Supreme Court Justice Clarence Thomas, based on testimony by Anita Hill involving alleged sexual harassment by Thomas when she served as his assistant while he was Chairman of the EEOC.[11]

The objective of this Littler Report is to serve as a resource guide for employers that: (1) highlights key segments of the EEOC's Task Force Report on Harassment and assists employers in harassment prevention; (2) reviews the EEOC's perspective on actionable harassment claims and potential liability for harassment; (3) summarizes recent EEOC litigation and lessons learned; and (4) highlights key legal issues involving EEOC systemic harassment claims.

2 *See* Press Release, EEOC, *EEOC to Study Workplace Harassment* (Mar. 30, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/3-30-15.cfm.

3 *See* Press Release, EEOC, Task Force Co-Chairs Call On Employers and Others to "Reboot" Harassment Prevention (June 20, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-20-16.cfm.

4 *Id.*

5 *See* Press Release, EEOC, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment* (Jan. 10, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm and accompanying Proposed Enforcement Guidance on Unlawful Harassment *available at* https://www.regulations.gov/docket?D=EEOC-2016-0009.

6 *Id.*

7 *See* Press Release, EEOC, *EEOC Extends Public Input Period on Proposed Harassment Enforcement Guidance to March 21* (Feb. 3, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/2-3-17.cfm.

8 The purpose of the guidance is to replace, update, and consolidate 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). *See* Proposed Enforcement Guidance at 5.

9 477 U.S. 57 (1986).

10 *See* Press Release, EEOC, *Mitsubishi Motor Manufacturing And EEOC Reach Voluntary Agreement To Settle Harassment Suit* (June 11, 1998), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-11-98.cfm.

11 *See An Outline of the Anita Hill and Clarence Thomas Controversy*, http://chnm.gmu.edu/courses/122/hill/hillframe.htm. Clarence Thomas was Chair of the EEOC from May 6, 1982 until March 8, 1990. *See* https://www.eeoc.gov/eeoc/history/35th/bios/clarencethomas.html.

EEOC TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

Establishment of EEOC Task Force

In January 2015, former EEOC Chair Jenny Yang held a Commission meeting that focused on harassment in the workplace and reiterated that harassment remains a major priority of the Commission.[12] In March 2015, Chair Yang set up the "EEOC Select Task Force on the Study of Harassment in the Workplace,"[13] explaining the ongoing concern, "[c]omplaints of harassment span all industries, include many of our most vulnerable workers, and are included in 30% of the charges that we receive."

Between April 2015 and June 2016, the Task Force held a series of meetings, some of which were open to the public and others involving closed working sessions. The first public meeting of the Task Force was held in June 2015, in which the EEOC focused on "Workplace Harassment: Examining the Scope of the Problem and Potential Solutions."[14] A second public meeting, held in October 2015, dealt with "Promising Practices to Prevent Workplace Harassment."[15] Based on the October 2015 meeting, the EEOC announced the findings of a "panel of experts," and stated: "Placing pressure on companies by buyers, empowering bystanders to be part of the solution, multiple access points for reporting harassment, prompt investigations, and swift disciplinary action when warranted, along with strong support from top leadership, are some of the measures employers can take to prevent workplace harassment."[16] At a later public meeting, held on December 7, 2015, one panel of experts discussed the bases of workplace harassment extending beyond sex and race to include age, disability, religion, national origin, sexual orientation, and gender identity. A second panel focused on the "creative use of social media" to spread an anti-harassment message, particularly among millennials and/or to provide "a platform for workers to bring complaints to the public's attention."[17]

Results of EEOC Task Force Report on Harassment

On June 20, 2016, the EEOC announced the results of the Task Force in an 88-page report entitled, "Select Task Force on the Study of Harassment in the Workplace" (hereinafter "Task Force Report"

12 *See* EEOC, *Meeting of January 14, 2015 – Workplace Harassment, available at* http://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm. *See also* Press Release, EEOC, *Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting* (Jan. 14, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm.

13 *See* Press Release, EEOC, Press Release, *EEOC to Study Workplace Harassment* (Mar. 20, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-30-15.cfm.

14 *See* Press Release, EEOC, *EEOC Task Force to Probe Workplace Harassment at Public Meeting on June 15* (June 8, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-8-15.cfm.

15 *See* Press Release, EEOC, *U.S. EEOC Harassment Task Force to Host Public Meeting, First In Los Angeles* (Oct. 22, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-22-15.cfm.

16 *See* Press Release, EEOC, *Multi-Prong Strategy Essential to Preventing Workplace Harassment* (Oct. 23, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm.

17 *See* EEOC, Press Release, *Many Bases of Discrimination Can Lead to Harassment, Panel of Experts Tells EEOC Task Force* (Dec. 8, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/12-8-15.cfm.

or "TF Report").[18] Discussed below are various highlights of the Report.

Executive Summary

The focus of the TF Report is harassment prevention, and for that reason the Task Force reviewed "conduct and behaviors which might not be 'legally actionable,' but left unchecked, may set the stage for unlawful harassment."[19] The key findings of the TF Report are as follows:

- Workplace harassment remains a persistent problem, as illustrated by the fact that in the fiscal year prior to issuance of the TF Report, approximately one-third of all discrimination charges involve an allegation of workplace harassment.
- There is a "compelling business case" to stop and prevent harassment, based on both "direct costs," such as the millions paid in settlement of claims, and indirect costs, based on the negative impact on the workplace resulting in "decreased productivity, increased turnover, and reputational harm."
- Effective harassment prevention includes not only the importance of senior leadership taking the view that harassment will not be tolerated, but also "accountability," both in terms of ensuring that those who harass "are held responsible in a meaningful, appropriate and proportional manner," and those "whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so)," and anti-harassment efforts must be given "the necessary time and resources to be effective."
- Training programs need to go beyond merely "avoiding legal liability," and training should be "part of a holistic culture of non-harassment," recognizing that such training should be tailored to the specific workforce, and middle managers and supervisors "can be an employer's most valuable resource" in harassment prevention. The TF Report underscores that employers need to consider different approaches to training such as "bystander intervention training" so co-workers have the tools to intervene when witnessing harassing behavior, and "civility training" that promotes respect and civility in the workplace.
- The TF Report concludes that it is up to everyone – "it's on us" to "be part of the fight to stop workplace harassment," and employers "cannot be complacent bystanders and expect our workplace cultures to change themselves."[20]

What We Know About Harassment in the Workplace

In reviewing various studies on harassment in the workplace, the TF Report concluded that "sex-based harassment" has three subtypes: (1) unwanted sexual attention; (2) sexual coercion, and (3) gender harassment. According to the TF Report, research findings indicate that "gender harassment" is the most common form of harassment."[21] Gender harassment includes "sexually crude terminology" or displays (such as using the derogatory "c" word toward a female co-worker or posting pornography) or making sexist comments, including anti-female jokes.[22] The prevalence of other forms of harassment because of race, ethnicity, religion, age, disability, gender identify or sexual orientation, is less known, other than reported harassment charges based on such status.[23]

The TF Report states, "the extent of non-reporting is striking."[24] The TF Report cites certain studies, which attribute victims' non-reporting to fear

18 *See* Press Release, EEOC, *Task Force Co-Chairs Call On Employers and Others to "Reboot" Harassment Prevention* (June 20, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-20-16.cfm, and accompanying Task Force (TF) Report.

19 TF Report at iv.

20 *Id.* at iv-vi.

21 *Id.* at 9-10.

22 *Id.* at 9.

23 *Id.*

24 *Id.* at 15.

of several reactions: (1) disbelief of their claim; (2) inaction on their claim; (3) receipt of blame for causing the offending actions; (4) social retaliation; and (5) professional retaliation, such as damage to their career or reputation.[25] According to the TF Report, based on only 6% to 13% of individuals experiencing harassment filing a claim, "anywhere from 87% to 94% of individuals did not file a formal complaint."[26]

Notwithstanding, in fiscal year 2015, 31% of all discrimination charges (*i.e.*, 27,893 out of 89,385 charges) alleged some form of harassment.[27] Settlements through the administrative process resulted in payment of $125.5 million.[28] This amount was augmented by settlement of 42 harassment lawsuits filed by the EEOC, which resulted in an additional $39 million to resolve such complaints.[29] The TF Report points out that such settlement payments do not include private litigation, and even highlighted a 2012 California jury verdict that resulted in a $268 million jury award.[30]

The TF Report also reviews in some detail the "indirect costs" tied to harassment, particularly sexual harassment. In citing various studies and testimony before the Commission, the TF Report references the negative impact on employees, including employees suffering from depression and other psychological disorders and adverse physical effects, such as headaches, sleep problems and weight loss or gain, to name a few.[31] The TF Report also discusses the adverse effect on team and group relationships, employee turnover, and potential reputational damage to the employer.[32]

As a precursor to various news headlines, the TF Report also addresses the competing economic considerations when the alleged harasser is a workplace "superstar," and cautions that "superstar status can be a breeding ground for harassment."[33] The TF Report refers to various considerations, including special privileges accorded such workers based on "higher income, better accommodations and different expectations," which could "lead to a self-view that they are above the rules."[34] Reference was made to a recent Harvard Business School study, which suggested that avoiding such "toxic workers" actually "can save a company more than twice as much as the increased output by such workers," and "[n]o matter who the harasser is, the negative effects of harassment can cause serious damage to a business."[35]

This section of the TF Report concludes by focusing on certain workplace settings in which employees reportedly are more prone to harass, and includes specific strategies to reduce the risk of harassment.[36]

Preventing Harassment in the Workplace

In the crucial section of the TF Report, the Co-Chairs address preventive strategies to reduce the risks of harassment in the workplace. Discussed below are the key points.

Leadership and Accountability. A central theme of the TF Report is creating a workplace culture with the greatest impact in preventing harassment. The TF Report highlights the paramount importance of "leadership and commitment to a diverse, inclusive, and respectful workplace in

25 *Id.* at 16.

26 *Id.*

27 *Id.* at 18.

28 *Id.*

29 *Id.* at 19-20.

30 *Id.* at 19. The details of the April 2012 jury verdict against the defendant, a California medical center, are reviewed in detail at http://abcnews.go.com/US/LegalCenter/168-million-awarded-woman-harassed-raunchy-cardiac-surgery/story?id=15835342. The lawsuit was subsequently settled for an undisclosed amount in December 2012. *See Chopourian v. Catholic Healthcare West*, Case No. 2:09-CV-02972-KJM-KJN, *available at* https://www.leagle.com/decision/infdco20121206937.

31 TF Report at 20-21.

32 *Id.* at 22-23.

33 *Id.* at 24.

34 *Id.*

35 *Id.*

36 *Id.* at 25-30; *also see* Appendix C to TF Report at 83-88.

which harassment is simply not acceptable."[37] However, as important is "accountability" to ensure that those who harass are held responsible in a "meaningful, appropriate and proportional manner," and those who are tasked with preventing or responding to harassment, directly or indirectly, "are rewarded for doing that job well, or penalized for failing to do so."[38] Leadership and accountability are described as "two sides of the coin."[39] As significantly, the TF Report stresses that commitment to a harassment-free workplace "must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy." Critical to meeting this objective is creating an environment in which there is mutual respect, regardless of an employee's gender, race or any other protected status.

The TF Report emphasizes that effective leadership requires these actions:

- First, an employer must establish a "sense of urgency" about preventing harassment, which can be done by (i) evaluating whether the workplace setting is one in which workers are more prone to harass, and if so, take proactive steps to address the concerns;[40] and/or (ii) conducting climate surveys to determine whether employees feel that harassment exists in the workplace and is tolerated.[41]
- Second, an employer must have *effective* policies and procedures and *effective* training to ensure that employees understand the employer's policy and ways to report concerns, which may require periodic testing to ensure that the system is working.[42]
- Third, the employer needs to ensure that "money and time" are invested in this initiative, which includes having harassment prevention included as part of an employer's budget.[43]
- Fourth, those tasked with addressing harassment prevention need to be "vested with enough power and authority to make such change happen."[44]

The TF Report also addresses the importance of "accountability," as demonstrated to employees, so they have confidence that harassment complaints will be taken seriously and that "proportionate corrective actions" will be taken, which will cause employees reporting harassment they *experience or observe*, thus creating a "positive cycle" that reduces harassment in the workplace.

Critical to an effective harassment prevention program is accountability by those who harass, and sanctions that are appropriate for "bad behavior." In other words, the wrong message is sent if highly valued or senior employees engaging in bad behavior are not dealt with severely if they engage in harassment.[45] The TF Report also stresses the importance of mid-level or front-line managers being held responsible for promptly following up on a harassment complaint and/or protecting from retaliation those who report harassment.[46] The TF Report highlights that a "rewards system" that incentivizes and rewards responsiveness "speaks volumes."[47] The TF Report states that "counter-intuitively, rewards initially could be given to reward manager when there is an increase in complaints in their area of responsibility."[48] The TF Report stresses that a "holistic approach" is needed in which each aspect

37 *Id.* at 31.
38 *Id.*
39 *Id.*
40 *See* Appendix C to TF Report at 83-88.
41 *Id.* at 32-33.
42 *Id.* at 33.
43 *Id.* at 34.
44 *Id.*
45 *Id.*
46 *Id.* at 35.
47 *Id.*
48 *Id.* at 36.

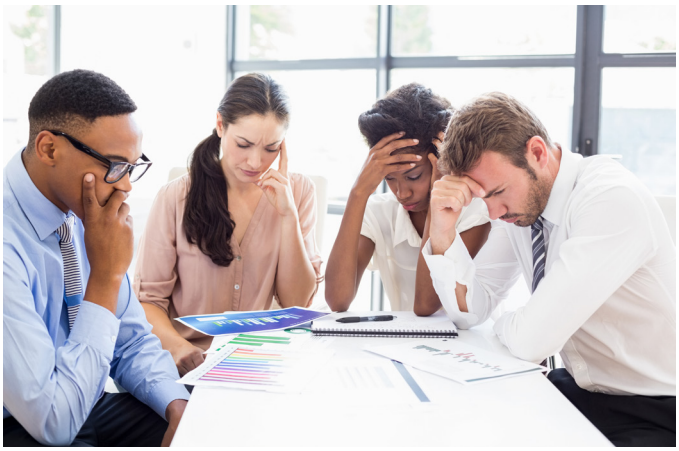
of an effective harassment is addressed, rather than merely focusing on a particular issue, such as having a metric for a manager's performance in responding to a harassment complaint or having a harassment policy mentioned consistently at employee meetings, but not protecting those who complain about harassment.[49]

The TF Report also includes an appendix with various checklists for compliance, including "Checklist One: Leadership and Accountability,"[50] which is attached to this Littler Report as "Appendix B." Since issuance of the TF Report, the EEOC has also developed "Promising Practices" on leadership and accountability, which are posted on its website and based primarily on this checklist.[51]

Policies and Procedures. The Task Force next addresses policies, reporting procedures, investigations and corrective actions as part of an employer's "holistic effort" to prevent harassment.

Anti-Harassment Policies. The TF Report recommends that employers adopt a "robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy."[52] The TF Report recommends that an anti-harassment policy should include the following:[53]

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;



- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

The TF Report emphasizes the importance of the policy being in easy-to-understand language, in all languages used in the workplace, be communicated regularly to employees, including information on how to file a complaint, and that employers take a "critical look" at the current policy and determine whether a "reboot" should be considered.

Here, too, the Appendix to the TF Report includes a checklist for compliance, called "Checklist Two: An Anti-Harassment Policy," which is attached to this Littler Report as "Appendix C."[54] The EEOC's website has also included "Promising Practices" with a policy review checklist that appears to be based primarily on this checklist from the TF Report.[55]

Social Media. Based on the extensive use of social media today, the TF Report also addresses the

49 *Id.* at 36-37.
50 *Id.*, Appendix B, at 79.
51 *See* EEOC, *Promising Practices for Preventing Harassment, available at* https://www.eeoc.gov/eeoc/publications/promising-practices.cfm.
52 TF Report at 38.
53 *Id.*
54 *Id.*, Appendix B, at 80.
55 *See Promising Practices for Preventing Harassment*, supra note 51.

positives and negatives of social media. From a positive perspective, social media provides the opportunity for "less formal and more frequent interactions." On the other hand, from a negative perspective, it can "foster toxic interactions." For that reason, the TF Report emphasizes that harassment "should be in employers' minds as they draft social media policies," and "social media issues should be in employers' minds as they draft anti-harassment policies."[56]

"Zero Tolerance" Policies. One of the most significant recommendations of the TF Report worth close review involves its "caution" against use of the phrase "zero tolerance" as part of an anti-harassment policy. In the view of Task Force Co-Chairs Lipnic and Feldblum, a zero tolerance policy may inappropriately convey the view that "one size fits all." This could cause under-reporting of harassment complaints, particularly involving minor harassing behavior, because a co-worker does not want the offending employee to lose his or her job over the conduct.[57]

Reporting Systems for Harassment. Based on the TF Report, an effective anti-harassment policy needs to serve the needs of those who have *experienced* or *observed* harassment to come forward and report harassment. For the system to have credibility, if an employee has a bad experience, this may negatively affect others relying on the system. As important are those accused of harassment being treated fairly under the system.[58] The TF Report highlights the importance in a unionized environment of the union taking the system seriously and supporting complainants and witnesses, but also considering that unions have obligations to all employees they represent, including union members who may be accused of harassment.[59]

Under any harassment program, however, the TF Report stresses the importance of the reporting system being multi-faceted and robust so employees have various options in reporting harassment concerns, which may include human resources personnel, company managers, complaint hotlines and web-based complaint procedures. The response may also need to vary depending on the nature of the conduct, and it may merely require a manager talking to an employee sometimes or a full-blown investigation in other situations.[60]

The EEOC also recognized that requirements to keep an investigation confidential under anti-discrimination laws might conflict with certain decisions under the National Labor Relations Act. The TF Report underscores the importance of the EEOC working with the National Labor Relations Board "to harmonize the interplay of federal EEO laws and the NLRA."[61]

Finally, the TF Report discusses key elements of a successful reporting system, including addressing how investigations should be conducted. The TF Report identifies the following as key elements in a successful reporting system:

- Employees who receive harassment complaints must take the complaints seriously.
- The reporting system must provide timely responses and investigations.
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution.
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with

56 TF Report at 39.
57 *Id.* at 40.
58 *Id.*
59 *Id.* at 40-41.
60 *Id.*
61 *Id.* at 42.

legal obligations and the need to conduct a thorough, effective investigation.

- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all parties.
- The Appendix to the TF Report also includes "Checklist Three: A Harassment Reporting System and Investigations,"[62] which is attached to this Littler Report as "Appendix D." The EEOC website also posts "Promising Practices for Preventing Harassment" that includes discussion of an "Effective and Accessible Harassment Complaint System," which is based primarily on this checklist.[63]

Anti-Harassment Compliance Training. The TF Report highlights several reasons employers have developed anti-harassment training programs: (1) early initiation of such training following the EEOC's 1980 guidelines that suggested training to prevent harassment; (2) the impact of the U.S. Supreme Court's 1998 decisions *in Ellerth* and *Faragher* in which anti-harassment training has been part of an employer's affirmative defense to harassment lawsuits involving supervisors; (3) EEOC conciliation agreements and consent decrees requiring such training; and (4)anti-harassment training mandated by state laws in California, Connecticut and Maine.[64]

The TF Report points to various studies regarding the effectiveness of anti-harassment training and provides certain takeaways: (1) training can increase the ability of employees to understand the nature of the conduct that constitutes "harassment," which is unacceptable in the workplace; (2) to be effective, training must be coupled with other efforts to prevent harassment; and (3) although there was no evidence that training reduced the frequency of harassment, complaints to HR increased based on such training.[65]

The TF Report next provides insights regarding the key contents of anti-harassment training for both non-management and management employees, particularly focusing on "compliance training."[66]

Training for All Employees. According to the TF Report, compliance training focuses on helping employers comply with legal requirements, but such training should not be limited to actionable harassment. Rather, training should include "conduct, if left unchecked, might rise to the level of illegal harassment."[67] The TF Report recommends that compliance training: (1) address the needs of the particular workplace, rather than using a "one size fits all" approach; (2) focus on "unacceptable behaviors," rather than trying to teach participants the legal standards that will make such conduct "illegal";[68] (3) educate employees regarding their rights and responsibilities, including having "multiple avenues" to report unwelcome conduct; (4) describe how employees who witness harassment report such conduct; and (5) explain how the complaint procedure will proceed.[69] As significant, the TF Report highlights the importance of clarifying what conduct is ***not*** harassment,[70] explaining:

> Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because

62 *Id.*, Appendix B, at 81.
63 *See Promising Practices for Preventing Harassment*, supra note 51.
64 TF Report at 44.
65 *Id.* at 47-48.
66 *Id.* at 49-51.
67 *Id.* at 50.
68 *Id.*
69 *Id.* at 50-51.
70 *Id.* at 50.

of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

Training for Middle Managers and First-Line Supervisors. As discussed earlier in the TF Report, management and supervisory personnel must receive "clear messages of accountability" regarding their responsibilities in dealing with harassment, including: (1) practical advice on how to respond to different levels and types of offensive behavior; (2) instructions on how to report such conduct "up the chain of command"; and (3) the responsibilities of supervisors to address harassing behavior, even absent a complaint.[71]

The TF Report also focuses on key principles regarding the "structure" of successful compliance training:

- Training should be supported at the highest levels;
- Training should be conducted and reinforced regularly for all employees;
- Training should be conducted by qualified, live, and interactive trainers; and
- Training should be routinely evaluated.[72]
- The Appendix to the TF Report also includes "Checklist Four: Compliance Training,"[73] which is included as "Appendix E" to this Littler Report. The EEOC has included in its "Promising Practices for Preventing Harassment," as posted on its website, discussion of "Effective Harassment Training," which is based primarily on this checklist.[74]

Workplace Civility and Bystander Intervention Training. In discussing training options, the TF Report addresses training that may help shape the "organizational structure" and help prevent harassment in the workplace. The TF Report specifically addresses two types of training programs "showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander training."[75]

Workplace Civility Training. Contrary to the typical compliance training that focuses on eliminating unwelcome behavior, the TF Report explains that workplace civility training involves "promoting respect and civility in the workplace generally."[76] Such training stresses the "positive" – "what employees and managers should do, rather than on what they should not do."[77] While the authors of the TF Report comment that the civility training "has not been rigorously evaluated," they submit that such training "could provide an important complement" to compliance training.[78] The authors acknowledge that "civility codes" have been challenged under the NLRA, and they recommend

71 *Id.* at 51.
72 *Id.* at 52-53.
73 *Id.*, Appendix B, at 82
74 *See Promising Practices for Preventing Harassment*, supra note 51.
75 TF Report at 54-60.
76 *Id.* at 54.
77 *Id.* at 55.
78 *Id.* at 56.

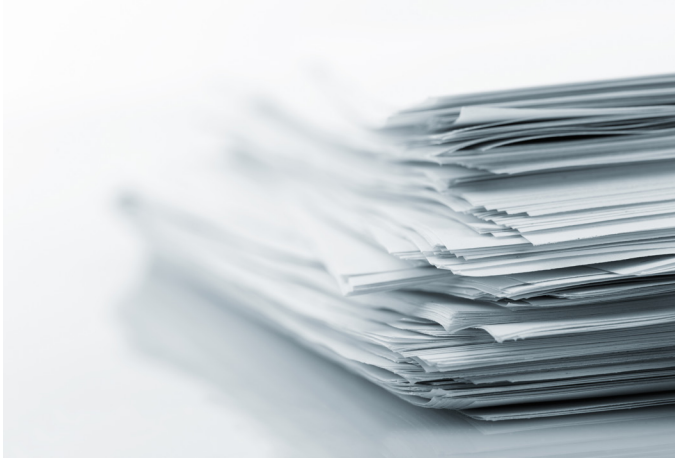
that the NLRB and EEOC confer "to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes."

Bystander Intervention Training. According to the TF Report, bystander training frequently has been utilized to prevent sexual assault at high schools and colleges, and such training is used to "empower students to intervene with peers to prevent such assaults from occurring."[79] In the view of the Co-Chairs of the TF Report, such training might be effective in the workplace, explaining:[80]

> Such training could help employees identify unwelcome and offensive behavior that is based on a co-workers' protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

Final Comments in Task Force Report

The TF Report concludes by discussing the importance of education and outreach. While explaining that employer on-the-job training is one option, there is significant available information. This includes successful outreach efforts by the EEOC, non-profit organizations providing information for workers, and other resources for employers, such as membership organizations like



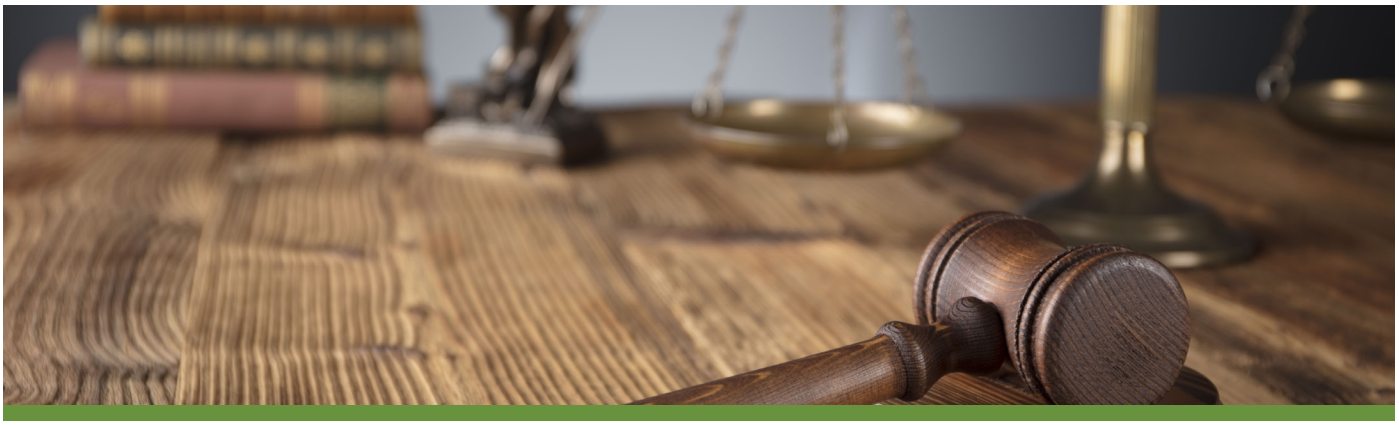
the Society for Human Resources Management. According to the TF Report, more focused outreach on youth is needed, but the Co-Chairs commended the EEOC for its Youth@Work outreach and education campaign.[81]

The TF Report also refers to the Commission's plan to update Enforcement Guidance on Harassment, to be used as a resource by employers and employees, and making its website "mobile friendly and accessible in a number of languages."[82]

The TF Report includes the observation that although the ideas provided in the TF Report may be helpful, sitting back as "complacent bystanders" will have no impact on workplace cultures needing change. The TF Report refers to the "audacious goal to launch an 'It's On Us' campaign to address anti-harassment efforts in the workplace."[83]

Recommendations also are included at the end of the TF Report, which reiterate the key points of the TF Report. Appendices provide "Checklists for Compliance" that focus on key preventive efforts, which also are attached to this Littler Report for ease of reference.

79 *Id.* at 57.
80 *Id.*
81 *Id.* at 62.
82 *Id.* at 61-62.
83 *Id.* at 64-65.



PROPOSED ENFORCEMENT GUIDANCE ON UNLAWFUL HARASSMENT

Purpose of Proposed Enforcement Guidance

While the focus of the EEOC's TF Report is harassment prevention, the EEOC has also developed some "rules of the road" in addressing the legal standards applicable to harassment claims, which are discussed in the EEOC's "*Proposed Enforcement Guidance on Unlawful Harassment*" (hereinafter "Enforcement Guidance"), issued on January 10, 2017.[84] In announcing the proposed Enforcement Guidance, the EEOC explained that it should be viewed as "a companion piece" to the TF Report. The three objectives of the Enforcement Guidance are to: (1) explain the legal standards for unlawful harassment and employer liability; (2) provide a "single legal analysis for harassment that applies the same legal principles for all statutes enforced by the EEOC;" and (3) replace the various previously issued EEOC updates and guidance on harassment. In announcing the proposed Enforcement Guidance, the EEOC invited public comment before finalizing the guidance, and the comment period was extended until March 21, 2017.[85] To date, the EEOC has not yet issued the final version of the guidance, which is reportedly pending review at the Federal Office of Management and Budget (OMB) as of the date of this Littler Report's publication. Even in draft form, the proposed Enforcement Guidance provides excellent insight regarding how the agency will evaluate harassment claims.

The proposed Enforcement Guidance includes three primary sections and addresses: (1) the scope of harassment claims, focusing on "legally protected personal characteristics"; (2) the applicable legal standard in determining whether the conduct was "severe or pervasive" to create a hostile work environment; and (3) the applicable standard of liability, which depends on who engaged in such unlawful conduct.

Individuals Protected from Harassment

The introductory section of the proposed Enforcement Guidance is very straightforward and primarily underscores that harassment based on any protected status is covered, including race, color, national origin, religion, sex (including gender identify and sexual orientation),[86] age, disability or genetic information. However, the Enforcement Guidance highlights certain types of conduct that is unlawful in which coverage is less obvious: (1) harassment based on the "perception" that an individual has a protected characteristic, even if mistaken, using the example of harassment of a Hispanic person based on the mistaken belief he/she is Pakistani; (2) harassment against an individual based on a close relationship

84 *See EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment*, supra note 5.

85 *Id. See also EEOC Extends Public Input Period on Proposed Harassment Enforcement Guidance to March 21*, supra note 7.

86 The U.S. Chamber of Commerce filed comments to the draft Enforcement Guidance on March 21, 2017, which include reference to the EEOC's omission of court decisions that have held that sexual orientation and gender identify are not covered under Title VII, aside from other exceptions to the guidance.

to someone in a protected status, called "associational discrimination"; (3) harassment by an individual who is a member of the same protected class; and (4) harassment based on two or more protected classes.[87]

The draft Enforcement Guidance states that the determination whether harassment is based on a protected characteristic will depend on the "totality of the circumstances" and could involve "facially discriminatory conduct" (*e.g.*, racial epithets) or the "context" of certain actions or conduct (*e.g.*, use of the term "boy" or "you people") referring to African Americans.[88]

In dealing with sex-based harassment, the draft Enforcement Guidance underscores that such conduct can involve: (1) sexual conduct, including proposals for sexual activity, or (2) non-sexual conduct, such as sexist comments (*e.g.*, using offensive terms directed at females) or bullying directed toward women but not men. The Enforcement Guidance distinguishes between isolated preferential treatment based on a consensual sexual relationship, which is not covered under Title VII because such preferences disadvantage men and women alike,[89] compared to widespread favoritism toward female employees who grant sexual favors, which creates the perception that women will be disadvantaged unless they submit to sexual advances.[90]

What Constitutes Actionable Harassment

While most employers today establish anti-harassment policies in which offensive behavior violating employer policy need not reach the level of being "actionable" harassment, knowing the applicable legal standards, as set forth in the draft Enforcement Guidance, obviously is important.

The Enforcement Guidance relies heavily on the leading U.S. Supreme Court decisions, but also highlights and relies on numerous federal appellate court decisions in reviewing the applicable legal standards for actionable harassment. *Meritor Savings Bank v. Vinson*[91] is a starting point because this landmark Supreme Court decision, handed down slightly over 30 years ago, determined that workplace harassment can be actionable discrimination prohibited by Title VII of the Civil Right Act of 1964.

In the *Meritor* decision, the Supreme Court highlighted that actionable harassment can arise in two circumstances: (1) a change or condition of employment is "linked" to harassment based on a protected status (*e.g.*, firing a female employee who rejected a superior's sexual advances);[92] or (2) the conduct impacts an employee's terms of conditions of employment based on creating a "hostile work environment."[93] As many employers are aware, harassment linked to sexual favors historically was referred to as "quid pro quo" harassment. As explained in the Enforcement Guidance, the U.S. Supreme Court's 1998 decision in *Burlington Industries, Inc. v. Ellerth*,[94] "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."

Severe or Pervasive Conduct. In dealing with hostile environment claims, the *Meritor* decision underscores that 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."[95] As significantly, such conduct has to be severe or

87 Enforcement Guidance at 9-11.

88 The draft Enforcement Guidance also underscores that the protected status does not need to be the only basis for the harassment, and it is sufficient if the conduct is based, at least in part, on a protected characteristic. *Id.* at 11.

89 *Id.* at 17

90 *Id.* at 18.

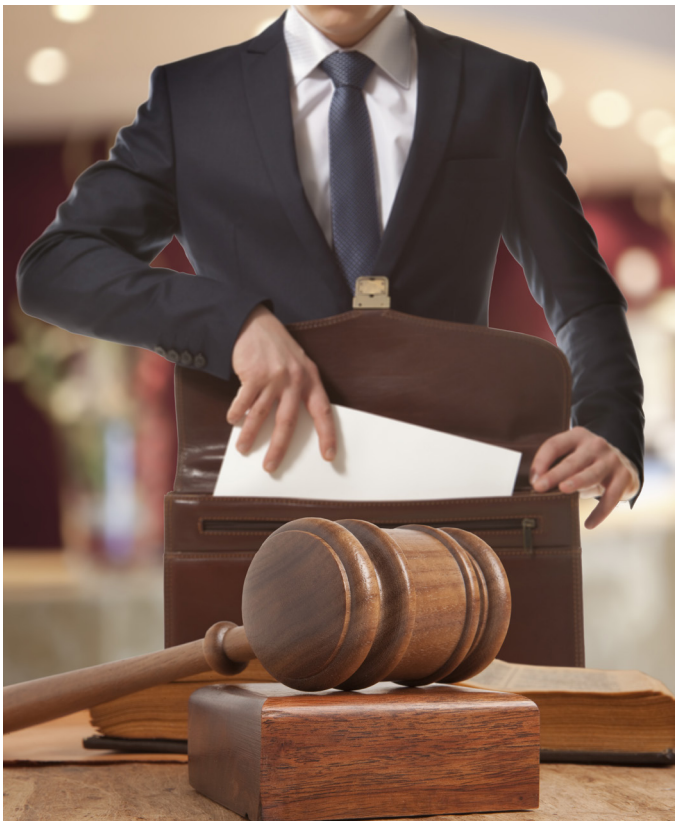
91 477 U.S. 57 (1986).

92 *Id.* at 66.

93 Enforcement Guidance at 19.

94 524 US 742 (1998).

95 *Meritor*, 477 U.S. at 67; Enforcement Guidance at 19.



Key U.S. Supreme Court Decisions Addressing Harassment in the Workplace: A "Must Read" for Employers in Understanding the "Rules of the Road" Dealing with Actionable Harassment:

- *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)
- *Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993)
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)
- *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)
- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- *National Railroad Passenger Association v. Morgan*, 536 U.S. 101 (2002)
- *Vance v. Ball State University*, 570 U.S. ___; 133 S. Ct. 2434 (2013)

pervasive enough "to create an objectively and subjectively hostile work environment."[96]

In reviewing actionable claims, the Enforcement Guidance cites the U.S. Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*,[97] explaining:

> 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. 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.[98]

On the other hand, as explained in the 1998 U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*[99] Title VII is not intended as a "general civility code." The Enforcement Guidance also cites other decisions reinforcing the view that "boorish, juvenile, or annoying behavior" simply is beyond the scope of actionable harassment.

The guidance further explains "severe or pervasive" conduct, suggesting "[t]he more severe the harassment, the less pervasive it must be to establish a hostile work environment," and there is no "magic number" of harassing incidents establishing a hostile work environment or minimum threshold of severity, underscoring that the "specific facts of each case" must be reviewed.[100] And yet, "a single serious incident of harassment" may be sufficient, using the examples of: (1) sexual assault, (2) sexual touching of an intimate body part, (3) physical violence or threat of violence, (4) use of symbols of violence or hate such as a noose or swastika, (5) use of the "n-word" by a supervisor, (5) using of animal

96 Enforcement Guidance at 19.
97 501 U.S. 17 (1993).
98 *Id.* at 20.
99 523 U.S. 75, 81(1998). *See also* Enforcement Guidance at 20.
100 Enforcement Guidance at 21.

imagery with racial overtones, and (6) threats to deny job benefits for rejecting sexual advances.[101]

Less-serious conduct also can create exposure, using the "pervasive" standard, which involves the "cumulative effects" of such acts, rather than on the individual acts themselves.[102]

Application of Subjective and Objective Standard. The proposed Enforcement Guidance explains that to be actionable, the harassment must be both "subjectively hostile" (*i.e.* the complainant perceived the conduct as severe or pervasive) and "objectively hostile" (*i.e.* reasonable person would view the conduct as severe or pervasive).[103] The U.S. Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*,[104] "refined" the hostile environment standard in requiring the conduct to both subjectively and objectively hostile.[105]

In the Supreme Court's decision in *Meritor*, the court also distinguished between "unwelcome" versus "voluntary" conduct, underscoring that voluntary participation in certain conduct does not necessarily mean it was welcome. The proposed Enforcement Guidance goes one step further. In the Commission's view, conduct that is subjectively and objectively hostile is also "necessarily unwelcome"; the Commission disagrees with courts that view "unwelcomeness" separately.

The proposed Enforcement Guidance further elaborates on the "subjective" and "objective" standards. First, in dealing with subjectivity, the Commission views a complainant's own statement that he/she perceived the conduct as offensive as sufficient to establish subjective hostility. As significantly, "subjective perception can change over time," and conduct welcomed in the past can become "unwelcome." Delay in complaining also does not undercut the subjective view that harassment occurred, assuming there is an explanation for the delay.[106]

In reviewing the requirement that conduct also must be objectively hostile, the proposed Enforcement Guidance explains that the conduct "should be evaluated from the perspective of a reasonable person of the complainant's protected class."[107] Other factors also may weigh in the mix, such as a conduct against a teenager by a substantially older person or an undocumented worker who is vulnerable to the risk of deportation.[108] As important, the Enforcement Guidance states that a prevailing workplace culture, such as a "crude environment," does not excuse the conduct.[109]

Scope of Hostile Environment Claims. The draft Enforcement Guidance also addresses significant issues that arise in determining whether a harassment claim is actionable: (1) the requirement that the conduct be "sufficiently related"; (2) conduct not directed at the complainant or outside the regular place of work; or (3) non-work related conduct that impacts the workplace.

Requirement to be Sufficiently Related. In reviewing whether a harassment claim is actionable, the draft Enforcement Guidance relies on the 2002 U.S Supreme Court decision in *National R.R. Passenger Corp v. Morgan*,[110] explaining that a complainant "can challenge an entire pattern of conduct, so long as it continues into the limitations period.[111] The touchstone in permitting earlier conduct to be considered is that the conduct must be "sufficiently related" in order

101 *Id.* at 22-23.
102 *Id.* at 25.
103 *Id.* at 26.
104 510 U.S. 17 (1993).
105 *Id.* at 27.
106 *Id.* at 28-29.
107 *Id.* at 30.
108 *Id.* at 31.
109 *Id.*
110 536 U.S. 101 (2002).
111 Enforcement Guidance at 33.

for the earlier conduct to be viewed as part of the hostile environment claim.[112]

Conduct Not Directed at the Complainant or Outside the Regular Place of Work. In dealing with conduct not specifically directed at an employee, the proposed Enforcement Guidance uses the example of open displays of pornography to illustrate that such conduct can contribute to a hostile work environment for female employees, even if not directed at the female employees.

Non-Work-Related Conduct. The proposed Enforcement Guidance further states that even offensive conduct outside the workplace may serve as the basis for a claim if the complainant becomes aware of the conduct during her employment, and it is sufficiently related to the employee's work environment.[113] Use of email systems used for non-work-related reasons, such as conveying inappropriate communications, was identified as an example in which exposure could arise. As significantly, non-work-related conduct, such as employees subjecting a co-worker to racially offensive conduct, such as racial slurs, outside the workplace may be a basis for a hostile work environment claim.[114]

Liability for Harassment

The proposed Enforcement Guidance outlines that the liability standard will depend on whether the harasser is the employer's "proxy or alter ego," supervisor or non-supervisory employee, or co-worker or non-employee, and discusses four standards of liability used by the courts:[115]

- 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 also vicariously liable for the actions of the harasser, but the employer 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 such conduct.

The Enforcement Guidance explains that an individual is considered an "alter ego or a proxy" of the employer if the individual has "sufficiently high rank that his or her actions 'speak' for the employer," using the example of a sole proprietor, owner, partner or corporate officer.[116]

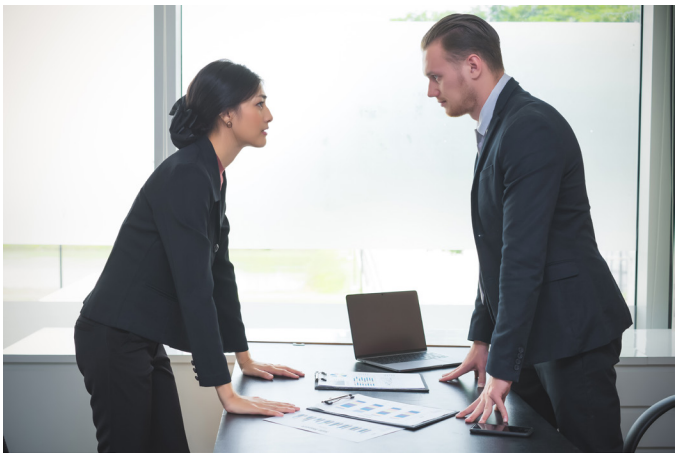
The Enforcement Guidance next explains that an individual is considered a "supervisor" if the person is "empowered by the employer to take tangible employment actions against the victim," citing the U.S. Supreme Court's 2013 decision in *Vance v. Ball State University*,[117] which rejected the EEOC's position that someone qualifies as a "supervisor" if he or she has the authority to direct another individual's daily work activities.[118] According to *Vance*, the ability to make recommendations regarding hiring and promotion is evidence of supervisory status.[119] The Guidance also reviews actions constituting "tangible employment actions."

112 *Id. See also Morgan*, 536 U.S. at 120.
113 Enforcement Guidance at 35.
114 *Id.* at 37-38.
115 *Id.* at 39.
116 *Id.* at 40.
117 133 S. Ct. 2434 (2013).
118 Enforcement Guidance at 40, n.139.
119 *Vance*, 133 S. Ct. at 2446, n. 8; *see also* Enforcement Guidance at 41, n.1.

Tangible Employment Actions by Supervisors. In dealing with supervisory conduct, an employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.[120] As the Supreme Court explained in *Ellerth*, if the hostile 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.[121] The Guidance identified employer actions constituting "tangible employment actions," which include "hiring and firing, the failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits." The Enforcement Guidance explains that an "unfulfilled threat" to take a tangible employment action does not create automatic liability for supervisory conduct,[122] and the discussion below applies.

Hostile Work Environment Without a Tangible Employment Action. The U.S. Supreme Court's 1998 decisions in *Burlington Industries, Inc. v. Ellerth*,[123] and *Faragher v. City of Boca Raton*,[124] discussed the applicable legal standard regarding liability for supervisory conduct absent a tangible employment action. In such circumstances, an employer can raise an affirmative defense to liability or damages, and the defense requires:[125]

- the employer exercised reasonable care to prevent and correct promptly any harassment; and
- 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.[126]



In the EEOC's view, the Enforcement Guidance clarifies that the inability to establish both prongs of the affirmative defense results in employer liability for harassment.[127] Further, if the employee reasonably could have avoided some of the harm from the harassment, the damages may be limited.[128] The Enforcement Guidance uses the example of avoiding the continuing harm by complaining, but the damages for the initial offensive conduct could not be avoided because the complaining employee could not have avoided the harm.[129]

In discussing the first prong of the affirmative defense—an employer exercising reasonable care to prevent and correct harassment—these steps usually consist of: (1) promulgating a policy against harassment; (2) establishing a process for addressing harassment complaints; (3) providing training to ensure employees understand their rights and responsibilities under the policy; and (4) monitoring the workplace to ensure adherence to the employer's policy.[130]

120 Enforcement Guidance at 43.
121 *Ellerth*, 524 U.S. at 762.
122 Enforcement Guidance at 44.
123 524 U.S. 742 (1998).
124 524 U.S. 775 (1998).
125 *Ellerth*, 524 U.S. at 765. *See also Faragher*, 524 U.S. at 807; Enforcement Guidance at 45.
126 *Id.* at 45.
127 *Id.*
128 *Id.* at 46.
129 *See* Example 22, Enforcement Guidance at 46.
130 Enforcement Guidance at 47.

Similar to the TF Report, the Enforcement Guidance outlines what is required for an effective anti-harassment policy and complaint procedure:

Key Components of Effective Anti-Harassment Policy:

- the policy defines what conduct is prohibited, and is widely disseminated;
- the policy is accessible to workers, 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; and
- the policy offers various ways to report harassment, allowing employees to contact someone other than their direct supervisor.

Key Components of Effective Complaint Procedure:

- the process provides for effective investigations and prompt corrective action;
- the process provides adequate confidentiality protections; and
- the process provides adequate anti-retaliation protections.[131]

The Enforcement Guidance expressly addresses confidentiality, explaining that it may not be reasonable to honor any such request, particularly if the harassment was severe or other employees are vulnerable.[132] The EEOC suggests that an informational phone line or website permitting questions or raising concerns anonymously could be considered.[133]

Based on the second affirmative defense, an employer must establish that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[134] According to the EEOC, an employee's failure to use the employer's complaint procedure normally will establish the second prong, but the EEOC pointed to circumstances where delay may be explained and/or where an employee complained through other than the official complaint procedure, which may nullify use of the defense.[135] Further, failing to complain over minor offenses may excuse delay.[136]

As significant, the EEOC highlights several circumstances in which failure to complain may be excused, thus barring reliance on the affirmative defense. The EEOC points to:

- Obstacles to filing complaints, such as undue expense, inaccessible points of contact, or intimidating or burdensome requirements;
- An ineffective complaint mechanism, such as the employee's "reasonable belief" that the complaint procedure was ineffective, or including close friends of the harasser as persons designated to receive complaints;
- Risk of retaliation, including an employee's reasonable fear of retaliation based on filing a complaint. Such retaliatory actions could include the harasser's threatening to discharge the employee if she complained.

The Enforcement Guidance further highlights that an employee does not have to complain if the employee took other reasonable steps to avoid harm from the harassment, such as filing a union grievance or a discrimination charge.[137]

Non-Supervisory Employees/Co-Workers or Non-Employees. The proposed Enforcement Guidance reviews the applicable law regarding employer liability for harassment by others, including co-workers and non-employees, which essentially is a negligence standard. The two key prongs under which employer conduct is evaluated involves: (1) unreasonable failure to prevent harassment; and (2) unreasonable

131 Enforcement Guidance at 47-48.
132 *Id.* at 48-49.
133 *Id.* at 49.
134 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. *See also* Enforcement Guidance at 50.
135 Enforcement Guidance at 50.
136 *Id.* at 51.
137 *Id.* at 53.

failure to correct harassment of which the employer had notice.[138]

Unreasonable Failure to Prevent Harassment. The Enforcement Guidance states that "the relevant considerations will vary from case to case," but factors that come into play include adequacy of the employer's anti-harassment policy and complaint procedure and adequacy of the employer's efforts to monitor the workplace, such as by training supervisors and related personnel on how to recognize potential harassment.[139]

Unreasonable Failure to Correct Harassment if the Employer Had Notice. The two key factors dealing with corrective action involve: (1) notice; and (2) a prompt and adequate investigation followed by appropriate corrective action.[140]

Impact of Employer Being on Notice. An employer with notice, which includes knowledge of offending conduct by a supervisor or human resources representative, triggers a duty to investigate and take corrective action, where appropriate. Notice also could arise based on a complaint from a third party, such as a friend, relative or co-worker, regarding concerns about an employee. Significantly, according to the proposed Enforcement Guidance, 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 be reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken."[141] The proposed Guidance also refers to "constructive notice" of harassing conduct if, "under the circumstances, a reasonable employer should know about the conduct."[142]

Prompt and Adequate Investigation. An employer with notice must conduct a prompt and adequate investigation and institute reasonable corrective action. Based on the

Enforcement Guidance, acting promptly "is fact-sensitive and depends on such considerations as the nature and severity and the reasons for delay."[143] The proposed Enforcement Guidance outlines the basic requirements for an effective investigation as follows:[144]

> An investigation is effective if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." 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.

The proposed Enforcement Guidance also states that employers should take additional actions as part of a prompt and adequate investigation, such as the following:[145]

- The employer should keep the complainant and the alleged harasser apprised of the status of the investigation;
- Employers should keep records of all harassment complaints and investigations to identify any patterns of harassment and to take appropriate preventive actions;

138 *Id.* at 54-55.
139 *Id.*
140 *Id.* at 56-65.
141 *Id.* at 58.
142 *Id.* at 58-59.
143 *Id.* at 60.
144 *Id.*
145 *Id.* at 61.

- Employers should consider intermediate steps during the investigation, which may include: (1) scheduling the complaining employee to avoid contact with the alleged harasser during the investigation; (2) temporarily transferring the alleged harasser, or (3) placing the alleged harasser on paid non-disciplinary leave with pay, pending the results of the investigation; and
- Employers should make reasonable efforts to minimize the burden of negative consequences on the complaining employee.

Appropriate Corrective Action. The proposed Enforcement Guidance underscores that to avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment based on review of the applicable circumstances,"[146] taking into account these considerations:

- Proportionality of the corrective action; the corrective action should be "proportionate to the seriuosness of the offense."[147] Minor infractions with no prior offenses may warrant counseling or a warning, as contrasted to severe or pervasive conduct that warrants suspension or termination.
- Authority granted the harasser, and the nature and degree of the harasser's authority "should be considered in evaluating the adequacy of the corrective action."[148]
- Whether harassment stops because of the corrective action, recognizing continuation of the harassment does not necessarily mean that the corrective action was inadequate, particularly for first-time offenders engaged in mildly offensive conduct.[149]
- Effect on complainant, based on the objective that complaints of harassment should not result in any adverse consequences on the complainant.[150]
- Options available to the employer, taking into account that an employer may have fewer options when the offending employee is a non-employee or where the alleged conduct occurred at a client site where the employer has limited control over the environment.[151]
- Extent to which the harassment was substantiated, recognizing that if, despite a thorough investigation, the findings are inconclusive, the employer is not required to impose discipline.[152]
- Special considerations to be considered when balancing anti-harassment and accommodation requests tied to religious expression. Employers may violate Title VII by preemptively banning all religious communications in the workplace, but could limit accommodations when religious expression creates or threatens to create a hostile work environment.[153]
- Employers need to follow the same investigative process, regardless of the protected status of the alleged harasser or harassee, explaining, "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 illegal conduct, based on stereotypes about the 'propensity of men to harass sexually their female colleagues.'"[154]

Systemic Harassment

In the last section of the proposed Enforcement Guidance discussing substantive topics, the EEOC briefly addresses systemic harassment involving an alleged "pattern or practice" of discrimination,

146 *Id.* at 62.
147 *Id.*
148 *Id.* at 63.
149 *Id.*
150 *Id.* at 64.
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*

"meaning that the employer's 'standard operating procedure' was to tolerate harassment creating a hostile work environment."[155] The Enforcement Guidance describes the applicable standard regarding systemic harassment claims as follows:

> This inquiry focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"—in other words, whether the work environment, as a whole, was hostile. 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. 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.[156]

According to the Enforcement Guidance, "[E]stablishing a pattern-or-practice violation does not necessarily establish that any particular employee was subjected to a hostile work environment."[157] However, the EEOC notes that the courts have taken different views evaluating potential violations as to individual claimants, explaining that, in one 1998 decision:

> 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.[158]
>
> By contrast, in *International Profit Association*, 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.[159]

Promising Practices

In the final section of the draft Enforcement Guidance, the EEOC essentially incorporates key recommendations of the EEOC's TF Report to prevent harassment in the workplace.

155 *Id.*
156 *Id.* at 67.
157 *Id.*, n. 251.
158 See *EEOC v. Mitsubishi Motor Mfg., of Am. Inc.*, 990 F. Supp. 1059 (C.D. IL 1998); *see also* Enforcement Guidance at 67, n. 251.
159 *EEOC v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 3120069 at *17 (N.D. Ill Oct. 23, 2007).

REVIEW OF EEOC HARASSMENT LITIGATION AND LESSONS LEARNED

Overview

As discussed at the outset of this Littler Report, during FY 2017, the EEOC filed 184 "merits" lawsuits,[160] and based on Littler monitoring these case filings, a total of 54 recently filed EEOC lawsuits involve harassment complaints. While a complete list and summary of these lawsuits is attached to this Littler Report as "Appendix A," it is noteworthy that over 50% of these lawsuits (29 of 54 lawsuits/54%) involve multiple victim claims. As significantly, while the EEOC has been attacking alleged harassment based on sex, race and other protected characteristics, it is noteworthy that in fiscal year 2017, a review of EEOC court filings indicates that 34 out of the 54 EEOC harassment lawsuits (63%) include sexual harassment claims. Further, among these lawsuits, over 50% (18 out of 34 lawsuits) involve multiple victim claims, many of which refer to a "class of similarly aggrieved individuals" and/or "pattern or practice" claims.

In recent years, aside from the recent $10.125 million settlement, announced on August 15, 2017, involving claims of racial and sexual harassment involving a major automaker, some of the most significant settlements and/or verdicts involving EEOC harassment litigation have included:

- A $17.4 million jury verdict in Florida federal court in favor of various female farm workers, which involved claims that female employees were subjected to repeated sexual harassment by male supervisors, including groping, propositions and rape, in which the jury issued a unanimous verdict for the EEOC with an award of $2.4 million in compensatory damages and $15 million in punitive damages.[161]
- A $14.5 million consent decree involving a multi-state oil drilling company, which included claims that the affected employees were subjected to pervasive racial and ethnic slurs, assigned to the lowest-level jobs, and were subjected to other alleged discriminatory conduct.[162]
- Settlements in 2012 and 2013 totaling $10 million and $11 million, respectively, involving alleged racial harassment, which involved alleged hostile displays such as nooses and racial graffiti, and affected employees being disciplined more severely.[163]
- A $3.8 million settlement involving a joint settlement agreement among the EEOC, the NY Attorney General and a utility company resolving allegations of ongoing sexual harassment and discrimination against women in field positions, which included claims that female workers faced widespread harassment by male co-workers and a hostile work environment based on gender, and that the company failed to address this discrimination.[164]

Based on the recent focus on sexual harassment, the discussion below focuses on selected EEOC settlements and/or litigation involving allegations of sexual harassment in the workplace. While such litigation can be costly and lengthy for employers, the EEOC also faced one of its more embarrassing losses in pursuing harassment litigation in *EEOC v.*

160 "Merit" lawsuits involve alleged violations based on a person's protected status, as contrasted to other legal actions initiated by the EEOC, such as a subpoena enforcement action.

161 *See* Press Release, EEOC, *EEOC Wins Jury Verdict of over $17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms* (Sept. 10, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm, although the jury award subsequently was substantially reduced in light of Title VII's statutory caps.

162 *See* Press Release, EEOC, *Patterson-UTI Drilling to Pay $14.5 Million to Settle Claims of Race / National Origin Discrimination* (Apr. 20, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/4-20-15.cfm.

163 *See* Press Release, EEOC, *EEOC's Systemic Program Shows Significant Success in Past 10 Years* (July 7, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/7-7-16.cfm, and "A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, page 23, *available at* https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf. https://www.eeoc.gov/eeoc/systemic/review/#IIIBhttps://www.eeoc.gov/eeoc/systemic/review/#IIIB.

164 *See* Press Release, EEOC, *Class of Female Blue-Collar Workers Charged Sexual Harassment, Unequal Treatment Because of Sex* (Sept. 9, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/9-9-15.cfm.

CRST.[165] The *CRST* case stemmed initially from an individual charge of discrimination and expanded into a systemic harassment lawsuit, spanning a period of over 10 years from its initial filing in 2005 and still remains in the courts.

After the district court dismissed the EEOC's pattern-or-practice claim, the EEOC continued to pursue a class-type claim on behalf of 270 claimants. Ultimately, and after many years of litigation and various judgments for the employer, the EEOC was left with only two claimants and then dropped the claim of one claimant, and was then left solely with the claim of the initial charging party, which was settled for $50,000. Following an award of over $4 million in attorneys' fees in favor of the employer, the case was appealed to the Eighth Circuit and remanded, and most recently was before the U.S. Supreme Court, which remanded the case for further proceedings regarding the attorneys' fee award. On September 22, 2017, the district court continued to affirm a fee award for the company, although the fees and costs for CRST were adjusted to $1,860,127.36, although the final amount to be awarded remains in dispute.[166]

Regardless of the less-than-ideal outcome for the EEOC in *CRST* , employers still need to properly evaluate the risks involved in EEOC harassment claims and litigation, as shown by the discussion below.

Lessons Learned from Recent Harassment Settlement with EEOC

At the outset, the recent $10.125 million EEOC settlement of a systemic claim with an automaker involving two Chicago-area facilities provides some lessons learned for employers.[167] This matter was resolved following a lengthy EEOC investigation, reasonable cause finding and settlement during conciliation prior to a lawsuit being filed by the EEOC. Most significantly, this was the second major settlement between the EEOC and the same Chicago area automaker facilities. In September 1999, the company agreed to pay nearly $8 million in damages to female employees "alleged to have been victimized by sexual harassment, racial harassment, harassment on the basis of sex, and retaliation for complaining about the harassment."[168]

The 1999 settlement was significant in its scope, as described by the EEOC:

- [The company] has also agreed to train all of its employees on prevention of job discrimination. [The company] expects to spend a projected $10 million to conduct the training. In addition, [the company] will take steps to increase representation of females entering supervisory positions to 30% over the next three years at its Chicago Stamping and Assembly Plants.

* * *

- According to the terms of the main agreement, which will remain in effect for three years, [the company] will pay $7.5 million, to be distributed among a class of eligible claimants as defined in the agreement. Under a related confidential agreement, [the company] will pay a total of $250,000 to two female employees to resolve their individual charges. In addition, [the company] agreed to undertake efforts to increase the level of female representation in the first line supervisory cadre over the term of the agreement. A goal has been set to place females in 30% of the entry supervisory openings at its Chicago Stamping and Assembly Plants.

  The agreement also calls for the company to provide training on the prevention of discrimination and the panel-approved policies and procedures. The company projects that it will spend $10 million to provide the training to all its employees. The agreement requires that the company provide such training, as well as the

165 *See CRST Van Expedited, Inc. v. EEOC*, No. 14-1375, 2016 U.S. LEXIS 3350, 578 U.S.__ (2016).

166 *See EEOC v. CRST* Van Expedited Inc., Case No. 1:07-cv-00095-LRR, Docket 462 and subsequent entries (N.D. Iowa).

167 *See* Press Release, EEOC, *Ford Motor Company to Pay up to $10.125 Million To Settle EEOC Harassment Investigation* (Aug. 15, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/8-15-17.cfm.

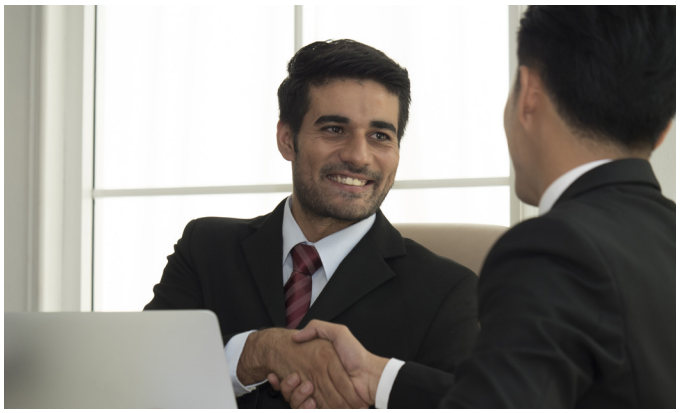
168 *See* Press Release, EEOC, *EEOC And Ford Sign Multi-Million Dollar Settlement Of Sexual Harassment Case* (Sept. 7, 1999), *available at* https://www.eeoc.gov/eeoc/newsroom/release/archive/9-7-99.html.

> implementation of the revised policies and procedures, not only at the Chicago-area plants, but at certain other Ford facilities.

The 2017 conciliation agreement with the EEOC resulted in revisiting some of the very same issues previously addressed in the earlier settlement, as described in the EEOC's recent description of the settlement:

> The conciliation agreement provides monetary relief of up to $10.125 million to those who are found eligible through a claims process established by the agreement. The agreement also ensures that during the next five years, [the company] will conduct regular training at two of its Chicago-area facilities; continue to disseminate its anti-harassment and anti-discrimination policies and procedures to employees and new hires; report to EEOC regarding complaints of harassment and/or related discrimination; and monitor its workforce regarding issues of alleged sexual or racial harassment and related discrimination.[169]

This recent settlement also demonstrates that risks of litigation are not necessarily eliminated based on settlement of a systemic claim with the EEOC. As an example, despite the automaker's 2017 settlement with the EEOC, the company has been confronted with an ongoing private class action lawsuit, initially filed in 2014 by 30 named plaintiffs, alleging harassment.[170] On October 14, 2017, the plaintiffs moved to stay distribution of the settlement notices based on the EEOC settlement to potential claimants, alleging that it was an attempt by the company "to undercut class certification in this matter."[171] While the court denied the motion on October 18, 2017,[172] it raised concerns of the company's engaging in "gamesmanship" to "limit their own liability and undercut certification of the class,"



but nevertheless determined that "plaintiffs' experienced counsel should have been on notice of the timing and procedures that follow a Conciliation Agreement" and determined that plaintiffs failed to meet the burden to justify injunctive relief.[173]

The dual-front attack faced by the automaker in defending itself against claims by both the EEOC and private counsel is a reminder that any settlement entered into with the EEOC does not have the binding effect of a Rule 23 class action, whether entered into during conciliation or based on a consent decree following a lawsuit initiated by the EEOC. In short, an employee or former employee is not bound by the terms of a conciliation agreement or consent decree entered into with the EEOC unless the individual specifically signs off on specific terms, such as executing the conciliation agreement or signing a release tied to the conciliation agreement or consent decree.

As significantly, a private settlement entered into with a charging party may have no effect on the EEOC if the EEOC elects to continue investigating a systemic charge that initially stemmed from the individual charge of discrimination.[174] Both the Seventh Circuit and Ninth Circuit have permitted the EEOC to continue investigating systemic

169 *Id.*

170 *See Christie Van et al. v. Ford Motor Company*, Case No. 1:14-CV-08708 (N.D. Ill., Filed Nov. 3, 2014).

171 *Id.*, Docket No. 157; *see also* Docket No. 166.

172 *Id.* Docket No. 169 (Oct. 18, 2017).

173 *Id.* The court noted, however, that the 2017 conciliation agreement was similar to the 1999 conciliation agreement entered into between the EEOC and the company at the same facilities involving virtually identical issues.

174 *See EEOC v. Watkins Motor Lines*, 553 F.3d 593, 597 (7th Cir. 2009).

claims stemming from an individual charge, even after a private lawsuit is filed.[175]

Lessons Learned From Recent Harassment Trial with EEOC

The risks in harassment litigation are evident because the perspectives of the reported victim and the employer frequently differ markedly. These lawsuits are fact-driven, and significant risks arise, even if an employer engages in good-faith efforts to maintain a harassment-free workplace.

A recent jury verdict for the EEOC is ample proof of this fact. On December 22, 2016, the jury in *EEOC v. Costco Wholesale Corp*. ruled for the EEOC, and awarded $250,000 in compensatory damages to a former Costco employee who alleged that she was harassed and stalked by a customer.[176] The *Costco* lawsuit is a reminder of the risks involving third-party harassment, particularly in the retail and hospitality sectors.

Based on the complaint against the employer, the EEOC alleged that it engaged in "unlawful employment practices" by "creating and tolerating a sexually hostile work environment of offensive comments of a sexual nature, unwelcome touching, unwelcome advances, and stalking by a customer and constructively discharging her."[177]

Following extensive discovery, the district court denied the employer's summary judgment motion.[178] It is noteworthy that the company maintained anti-harassment and reporting policies, which prohibited all forms of harassment, including conduct by both employees and customers, and required employees to report any conduct they considered to be harassing. The employer also had an "open door" policy permitting employees to contact any supervisor with any concerns and permitting employees to contact ascending levels of management until their issue was resolved. Further, the employer conducted annual training on equal employment and anti-harassment for all employees, which included videos, interactive discussions and instruction designed to assist employees in identifying and reporting harassment, and the employer conveyed a "zero-tolerance" stance regarding harassment.[179]

The former store employee, whose discrimination charge led to the EEOC's lawsuit, was employed as a part-time employee for approximately 15 months, and worked as a front-end assistant until she began a leave of absence from which she never returned. The employee initially complained about the customer to a loss-prevention representative several months after starting work at the store, and referred to the customer "constantly" trying to speak with her, and had commented that she "looked scared," which "unnerved her." Within a matter of days, the loss-prevention agent, her manager and assistant store manager approached the customer, took him to the office and explained that he was making the complainant uncomfortable, and he was told to "minimize" his contact with the complainant. Her manager and the store's assistant general manager followed up with the complainant, advising her to let them know if anything else happened, although the complainant alleged stated that following her complaint, she was told by a company manager to be "friendly" with the customer. The complainant also filed a police report, claiming that the customer was stalking her at work.[180]

The facts were disputed regarding what occurred over the next year. The complainant alleged there were periods of time in which the customer returned to the store, would stare at her, and continued to speak with her, repeatedly asking "intimate questions," such as whether she would

175 *See EEOC v. Union Pacific Railroad*, No. 15-3452 (7th Cir. Aug 15, 2017); *see also EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009); *but see EEOC v Hearst*, 103 F.3d 462 (5th Cir. 1997) (Fifth Circuit held that EEOC's authority to investigate a charge ends when it issues a right-to-sue letter).

176 Case No. 1:14-cv-06553 (N.D. Ill., Filed: Aug. 25, 2014); *see also* jury award at Docket No. 234 (Dec. 21, 2016); *see* Press Release, EEOC, *EEOC Wins Jury Verdict in Sexual Harassment Case against Costco* (Dec. 22, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm.

177 *EEOC v. Costco Wholesale, Inc.*, Case No. 14-CV-6553, Docket No. 1 (Aug. 24, 2014).

178 *Id.*, Court Order denying summary judgment motion, Docket No. 104 (Dec. 15, 2015).

179 *Id.* at 1-3.

180 *Id.* at 4-5.

go out with him and whether he had a boyfriend, asked about her age, touched her face once, and her wrist on another, and told her she looked "beautiful" and "exotic." The complainant alleged that she complained to her manager on multiple times and that her father even complained to company management. Company management disputed whether there were complaints during this period, and claimed that they had spoken to her, but she never identified any concerns.

Interactions came to a head shortly before the complainant went on medical leave when she allegedly caught the customer videotaping her with his cell phone while she was working, which led to her complaining about the incident. Company management immediately investigated, such as reviewing security video. The issue was "run up the ladder," and the customer was told to shop at a different store while the matter was being investigated. In response, the customer complained to store management about what he viewed as unfair treatment of him. Meanwhile, the complainant went to court and obtained an order of protection and subsequently requested and was placed on an extended medical leave under company policy, which permitted leaves of up to one year. The company's investigation of the matter was inconclusive, but the customer was advised that it was best that he shop at a different store location. The customer responded by threatening to sue the store for harassing him. Following a year of being on leave, the complainant subsequently requested an additional one-to-two years of leave, but this was denied based on the view that company did not provide indefinite leaves of absence.[181]

In ruling on the summary judgment motion, which most likely involved similar facts at the later trial, the district court judge viewed the record as "the 'proverbial swearing contest.'"

From the company's perspective, it was in a difficult situation in which the customer and employee provided vastly different accounts of incidents that occurred and there was an inability to confirm or refute the employee's allegations. However, the court determined that a "reasonable jury" could conclude that the actions, over an extended period, could rise to the level of a "hostile environment."[182]

Particularly noteworthy was the court's view of the company's knowledge of the incidents and its efforts to take remedial action. The court viewed as significant the complainant's claim that a manager told her to be friendly with the customer after she contacted the police, citing case law that "'a rational jury could have believed that [plaintiff] did not feel comfortable' reporting the harassment based on the employer's harsh reaction to an earlier complaint." The court also raised concerns regarding the company's response to the situation because it waited for more than a year before telling the customer not to return to the store, which the jury could conclude was "an unreasonable period of time," thus finding the court "cannot conclude as a matter of law that [the store] took reasonable steps to end the alleged harassment."[183]

The store filed an appeal following the adverse jury ruling, and the EEOC filed a cross-appeal based on various rulings, including post-trial rulings, in the case, which most likely included the district court's granting summary judgment for the store on the "constructive discharge" claim.[184] The matter remains pending on appeal.

Key Legal Issues Involving EEOC Systemic Harassment Claims

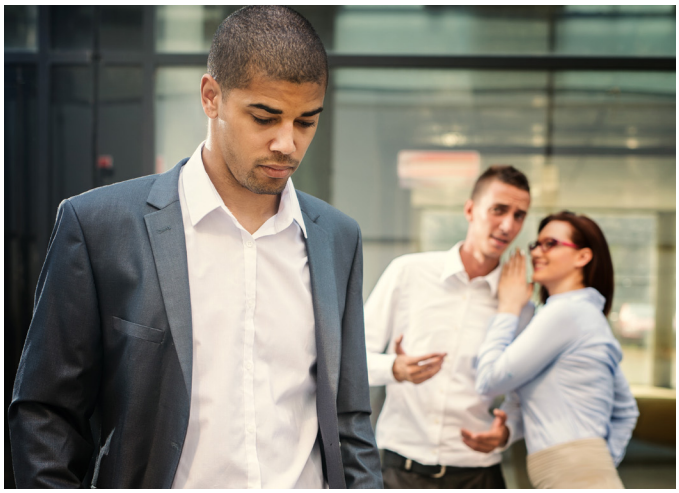
Although private plaintiffs may have challenges in bringing pattern-or-practice sexual harassment claims unless they can meet the strict requirements under Rule 23 to certify a class

181 *Id.* at 8-12.

182 *Id.* at 17.

183 *Id.* at 21.

184 See *EEOC v Costco Wholesale, Inc.*, Case No. 14-CV-6553, Docket Nos. 274 and 278.



action,[185] the U.S. Supreme Court long ago eased the EEOC's burden for bringing class-type claims. In 1980, the Court in *General Telephone Company v. EEOC*[186] held that the requirements under Rule 23 do not apply to the EEOC, thus making it easier to file class-type claims against employers.[187]

The debate over the years has been how class-type or "pattern-or-practice" lawsuits are initiated and pursued by the EEOC. Congress empowered the EEOC to challenge discriminatory practices based on two separate sections in Title VII—Sections 706 and 707.[188] The courts historically have applied a different standard of proof for claims under each section, depending on the nature of the claim. Notably, jury trials and compensatory damages are available under Section 706, but not under Section 707.

Only Section 707 makes express reference to pattern-or-practice claims, but the EEOC frequently has tried to blur the lines based on the goal to seek compensatory and punitive damages against an employer when asserting both individual and class-type claims, including sexual harassment claims. Section 707 authorizes the EEOC to sue when it "has reasonable cause to believe that [an employer] is engaged in a pattern or practice" of unlawful discrimination.[189]

The Supreme Court's decision in *International Brotherhood of Teamsters v. United States*[190] set forth the basic standard, consistently relied on over the years, that a pattern or practice of discrimination can be proven by "establish[ing] by a preponderance of the evidence that… discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[191] On the other hand, a pattern-or-practice claim fails by an employer's showing "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[192] These cases are typically proved based on statistical evidence, coupled with anecdotal evidence.

When the *Teamsters* framework is used, the courts typically have bifurcated the proceedings into a liability phase, followed by a damages phase, in which the scope of individual relief is determined and a presumption of liability applies.[193] From an employer's perspective, the EEOC has an advantage in proving pattern-or-practice claims because once the EEOC passes the threshold of demonstrating class-wide discrimination, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[194]

185 Although a district court permitted a private pattern-or-practice harassment claim in *Jenson v. Eveleth Taconite Co*, 824 F. Supp. 847 (D. Minn. 1993), the courts generally have refused to permit "pattern or practice" litigation unless the plaintiffs comply with Fed. R. Civ. P. 23. *See e.g., Davis v. Coca-Cola Bottling Co.*, 516 F. 3d 955, 968 (11th Cir. 2008); *Bacon v. Honda of America Mfg., Inc.*, 370 F. 3d 565, 575 (6th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F. 3d 742, 759-761 (4th Cir. 1998); *Brown v. Coach Stores, Inc.*, 163 F. 3d 706 (2d Cir. 1998).

186 446 U.S. 318 (1980).

187 Fed. R. Civ. P. 23(a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.

188 42 U.S.C. §§ 2000e-5, 2000e-6.

189 42 U.S.C. § 2000e-6(a). It is noteworthy that pattern-or-practice claims focus solely on "intentional discrimination" and do not apply to disparate impact claims. *See, e.g., Davis v. Coca Cola Bottling Co.*, 516 F. 3d 955, 964-65 (11th Cir. 2008) ("section 707(a) of the Civil Rights Act of 1964… entitles the Government to bring a pattern or practice claim on behalf of a class of similarly situated employees…against on ongoing act of intentional discrimination").

190 431 U.S. 324 (1977).

191 *Teamsters*, 431 U.S. at 336.

192 *Id.*

193 *Id.* at 361.

194 *Id.* at 362.

One of the landmark cases involving pattern-or-practice litigation involving sexual harassment, as relied on by the EEOC, is *EEOC v. Mitsubishi Motor Mfg. of America, Inc*.[195] Here, the district court relied on the Teamsters framework for pattern-or-practice cases for determining whether the employer's "standard operating procedure" was to ignore complaints of sexual harassment. The court also addressed how such a pattern-or-practice case can be proven. Specifically, the court looked at two primary Supreme Court decisions, *Meritor Savings Bank v. Vinson*[196] and *Harris v. Forklift Sys., Inc.*,[197] and determined that although a hostile and abusive work environment normally would include both an "objective and subjective component," the sole focus in determining pattern-or-practice liability in harassment claims is an objective standard. In another significant pattern-or-practice lawsuit filed years later, *EEOC v. Dial Corporation*,[198] the court relied on the same reasoning applied in *Mitsubishi*.

Despite the risks of EEOC-filed pattern-or-practice harassment lawsuits, the agency has not always succeeded in asserting such claims, as shown by the 2005 summary judgment ruling in *EEOC v. Carrols Corporation*,[199] in which the EEOC asserted pattern-or-practice harassment claims against the employer involving 350 restaurants in 16 states. *Carrols Corporation* demonstrates the challenges faced when asserting broad-based pattern-or-practice claims in which the EEOC relies on *Teamsters* and the assertion that sexual harassment was "the standard operating procedure." The court focused on the fact that during the relevant time period, the restaurants employed 172,649 employees, of which 90,835 were women. Among the 511 purported victims, the court found 333 statements alleged facts, which if proven, could constitute sexual harassment,[200] but determined this number also represented only .367% of the women the defendant employed during the relevant time period. The court thus concluded that it did "not find that even a substantial minority of Defendant's employees experienced harassment" or "that sexual harassment was Defendant's 'standard operating procedure'—the regular rather than the unusual practice."

Despite this favorable ruling for the employer in *Carrols Corporation*, this litigation by the EEOC demonstrates that even winning the pattern-or-practice argument may not eliminate continued litigation by the EEOC. There, the EEOC nevertheless continued to pursue the claims on behalf of the original 511 purported victims under Section 706 of Title VII, relying on the Supreme Court's 1980 *General Telephone* decision, which permits the agency to pursue claims on behalf of a group of individuals. While the court granted summary judgment for the employer regarding several claims, in a ruling dated March 2, 2011,[201] the court reviewed each claim individually and permitted the EEOC to continue to pursue claims on behalf of 89 purported victims. Two years later, on January 13, 2013, after 15 years of litigation, the parties signed a consent decree in which the employer agreed to pay $2.5 million in compensatory damages and lost wages to the remaining purported victims, aside from agreeing to certain injunctive relief.[202]

Further complicating the legal landscape is that two U.S. courts of appeal have permitted the EEOC to pursue pattern-or-practice suits under Section 706 of Title VII, thus permitting compensatory and punitive damages for pattern-or-practice claims.[203] From the EEOC's

195 990 F. Supp. 1059 (C.D. Ill. 1998).

196 477 U.S. 57 (1986).

197 510 U.S. 17 (1993).

198 156 F. Supp. 2d 926 (N.D. Ill. 2001).

199 2005 WL 928634 (N.D.N.Y. Apr. 20, 2005).

200 The EEOC asserted claims on behalf of 511 purported victims.

201 *EEOC v. Carrols Corp.*, 5:98-CV-1772 (N.D.N.Y. Mar. 2, 2011).

202 *See* Press Release, EEOC, *Carrols Corp. To Pay $2.5 Million to Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Jan. 11, 2013), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-9-13.cfm.

203 *See EEOC v. Bass Pro Outdoor World, L.L.C.*, 2016 WL 3397696 15-20078 (5th Cir. June 17, 2016) and *Serrano & EEOC v. Cintas Corp*, 699 F.3d 884 (6th Cir. 2013).

perspective, "The significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination."[204]

The one significant limitation regarding the EEOC pursuing pattern-or-practice harassment claims is that a majority of the courts have applied a 300-day statute of limitations, limiting claims on behalf of individuals whose harassment claims occurred more than 300 days before the underlying charge. One of the most recent decisions addressing this issue is *EEOC v. Discovering Hidden Hawaii Tours, Inc.*,[205] which included an alleged pattern or practice of sexual harassment, constructive discharge and retaliation claims against three purportedly related defendants, which initially stemmed from claims involving five former employees. The court noted that an aggrieved employee who fails to file a timely charge may be able to pursue a claim under the "piggyback or single-filing rule," in which the employee "piggyback[s] on the timely charge filed by another plaintiff for purposes of exhausting administrative remedies."[206] However, the central issues before the court, and disputed between the parties, was "whether, when the EEOC brings a Section 706 pattern-or-practice hostile environment claim on behalf of a class of aggrieved employees, it may extend liability to included employees who suffered the same type of harassment outside of the 300-day limitation period." The court concluded that the "weight of authority supports Defendants' position that the continuing violation doctrine properly applies to include only the additional, otherwise time-barred claims of aggrieved individuals, who suffered at least one unlawful employment action within 300 days of the filing of the charge, but does not permit the inclusion of employees who did not themselves suffer any unlawful employment practice within that 300-day period."[207]

CONCLUSION

We hope this Littler Report will serve as a useful resource to assist employers in understanding the complex legal landscape they face today when confronted with potential harassment claims in the workplace, including harassment prevention. The following "takeaways" should be considered:

- Harassment will remain an important priority at the EEOC over at least the next several years, and the EEOC has made it abundantly clear that it will not restrict its focus to sexual harassment. Rather, a charge involving alleged harassment on the basis for race, sex, religion, national origin, disability, age or any other protected status may lead to an expanded investigation by the EEOC beyond the individual who initially filed the charge.
- Employers should consider "rebooting" their anti-harassment programs and policies to ensure they have considered the recommendations proposed by the EEOC's Task Force Report, including sending the appropriate message from senior leadership, modifying the express terms of any anti-harassment policy, as needed, and ensuring there is accountability to ensure that those who harass are held responsible "in a meaningful, appropriate and proportional manner," and those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for a job well done, or penalized for failing to do to so."[208]
- In enforcing an anti-harassment policy, employers should be mindful of the recommendation of the Co-Chairs of the

204 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. Similar provisions exist under § 207(a) of the Genetic Information Nondiscrimination Act (GINA). The Commission also has had authority to pursue class cases under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.

205 See *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576 (D. Haw. Sept. 21, 2017).

206 The court cited *Arizona ex rel Horne v. Geo Grp., Inc*. 816 F. 3d 1189 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 623 (2017).

207 The court provided a detailed review of case law supporting this view, but also included reference to case cites supporting the minority view, as supported by the EEOC, that no limitation period applies to pattern-or-practice harassment claims in relying on a "continuing violation" theory.

208 TF Report at 31.

Harassment Task Force Report that "zero tolerance" policies actually may hinder, rather than improve, the work environment and "may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-workers to lose their job over relatively minor harassing behavior." Rather, "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct."[209]

- Based on the Task Force Report, the most effective approach to harassment prevention is to address actions in the work environment that have not yet risen to the level of a hostile work environment from a legal perspective (*i.e.*, "severe or pervasive" conduct to create an objectively and subjectively work environment), but may be reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.
- Employers must be mindful of the courts' view that harassment by supervisors or managers will cause strict liability if a supervisor's harassment creates a hostile work environment that includes a "tangible employment action" (*e.g.*, hiring, firing, failure to promote, demotion, etc.), and strict liability will arise for supervisory harassment even absent a tangible employment action, unless the employer can effectively raise an affirmative defense by demonstrating: (1) the employer exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities to prevent harm or take other steps to avoid harm from the harassment.
- Liability will also arise for actions by employees or non-employees based on actual or constructive notice of such harassment and the employer fails to promptly investigate and take appropriate corrective action or to correct the harassment of which the employer had notice.
- Employers need to remember that in resolving any discrimination charge with the EEOC, particularly involving systemic harassment claims, the only individuals bound by a conciliation agreement and/or consent decree are those who have signed such agreement and/or release of such claims. Conversely, the private settlement of a claim with a charging party may not be a bar to the EEOC continuing a systemic harassment investigation; even initiation of a private lawsuit may not bar the EEOC from continuing such an investigation.
- Employers need to closely monitor state and federal legislative developments in this evolving area, recognizing that the plaintiffs' bar, various organizations, and others may seek passage of legislation barring confidentiality of settlements involving harassment claims and/or required arbitration of such claims, which shield such claims from public disclosure.[210]

209 *Id.* at 40.

210 For example, the Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2017), Pub. Law No. 115-97, signed into law on December 22, 2017, prevents employers from deducting as a business expense sexual harassment settlement amounts if those settlements include nondisclosure agreements.

APPENDIX A - EEOC COURT FILINGS INVOLVING ALLEGED HARASSMENT FISCAL YEAR 2017 (OCT. 1, 2016 - SEPT. 30, 2017)

STATE	COURT NAME	SUMMARY	NATURE OF HARASSMENT	SINGLE OR MULTIPLE PLAINTIFFS
AZ	USDC Arizona filed 3/30/17 Case 2:17cv945 - Judge Boyle EEOC Press Release 3/30/17	EEOC alleges the employer engaged in sex discrimination against female employees by subjecting them to severe and pervasive sexual harassment and by creating and maintaining a hostile work environment because of their sex (female), in continuing violation of Title VII. The EEOC further alleges that the employer engaged in unlawful discrimination based on age by subjecting an employee to a hostile work environment because of her age in violation of the ADEA. Finally, the EEOC alleges that the employer engaged in unlawful discrimination by retaliating against a group of employees and similarly aggrieved female employees by firing them or forcing them to be constructively discharged because they opposed practices made unlawful by Title VII.	Sexual Harassment Age Discrimination Retaliation	Multiple
AZ	USDC Arizona filed 1/21/17 Case 2:17cv182 EEOC Press Release 1/23/17	Charging Parties are a gay male employee, and a straight male employee who was associated with the gay male employee and was perceived to be gay. Both individuals allegedly were subjected to harassment and physical attacks and intimidation, including very crude comments and jokes about sexual behavior.	Sexual Harassment Sexual Orientation Harassment Retaliation	Multiple
CA	USDC Eastern District of California Filed 9/22/17 Case 1:17cv1270 -Judge O'Neil	Charging Party alleges that she was subjected to a hostile work environment based on her sex and was sexually harassed by coworkers, managers, and supervisors. Charging Party alleges that she was subjected to sexually explicit comments, suggestions, and overtures, and sexual gestures, and exposure to male genitalia.	Sexual Harassment Retaliation	Multiple
CA	USDC Southern District of California Filed 4/4/17 Case 3:17cv678 - Judge Whelan	The EEOC asserts that Defendants subjected the Charging Parties and a class of similarly aggrieved individuals to sexual harassment and/or retaliation for opposing unlawful employment practices in violation of Title VII. Defendants also allegedly subjected a class of workers associated with sexual harassment victims to retaliation in violation of Title VII.	Sexual Harassment Retaliation	Multiple
CA	USDC Central District of California Filed 9/29/17 Case 2:17cv7221	The EEOC alleges that three unnamed Charging Parties and a class of affected female employees were subjected to harassment based on their sex.	Sexual Harassment	Multiple

CA	USDC Southern District of California Filed 9/27/17 - case 1:17cv00728 EEOC Press Release 9/28/17	The EEOC alleges that Charging Party and other employees were subjected to harassment based on their national origin (Hispanic or Mexican), including being called derogatory and offensive names. Defendant allegedly failed to take action despite complaints and comments being made in front of supervisors.	National Origin Harassment	Multiple
CA	USDC Northern District of California Filed 7/24/17 Case 4:17cv4188 EEOC Press Release 7/25/17	The EEOC alleges that several named parties (working as caregivers) were subjected to sexual harassment by the client to whom they were assigned by Defendant. The client also allegedly made harassing comments due to the caregiver's race (African American). The caregivers allegedly complained about the treatment and hostile work environment at the residence in which they were working. The EEOC alleges that the Defendant took no corrective action and refused to reassign those that complained in retaliation for their complaints of harassment and hostile work environment.	Sexual Harassment Race Harassment Retaliation	Multiple
CA	USDC Northern District of California Filed 12/13/16 Case 3:16cv709 EEOC Press Release 12/13/16	Supervisor allegedly made sexually offensive verbal statements and acts towards female janitors working the night shift. The supervisor allegedly stared at the female janitor's bodies, would adjust his genitals, would make inappropriate advances, and would hug and massage the Charging Parties. The agency also alleges that female employees who reported the behavior and/or participated in providing statements supporting the janitors were retaliated against. In addition, the agency brings claims under the ADA alleging that Defendant manipulated time studies to enable Defendant to pay disabled workers lower rates.	Sexual Harassment Retaliation	Multiple
DC	USDC District of Columbia Filed 12/20/16 Case 1:16cv2477 - Judge Howell EEOC Press Release 12/20/16	The agency alleges that Charging Party was subjected to a hostile work environment based on his sex. Charging Party was allegedly subjected to anti-gay epithets and mocking comments and questions from the Defendant's kitchen staff. Charging Party was allegedly told he was "too sensitive" when he reported the alleged harassment.	Sexual Harassment Sexual Orientation Harassment	Single

FL	USDC Middle District of Florida Filed 5/30/17 Case 8:17cv1292 - Judge Moody EEOC Press Release 5/31/17	The EEOC alleges Defendant, a farming business growing a variety of produce, violated federal law by subjecting a female farmworker to sexual harassment, including rape, and then suspending and firing her for complaining about it. According to the EEOC's suit, a male supervisor in charge of Defendant's agricultural operations and field labor engaged in egregious sexual harassment toward the woman, including unwelcome sexual comments, forcible physical contact and rape. Although the rape was immediately reported, Defendant allegedly undertook no investigation and took no action against the supervisor, forcing the employee to protect herself by obtaining a restraining order. Instead of addressing the problem, the EEOC said, Defendant allegedly retaliated against the victim, including suspending her and ultimately firing her.	Sexual Harassment Retaliation	Single
FL	USDC Southern District of Florida Filed 4/18/17 Case 1:17cv21446 - Judge Cooke EEOC Press Release 4/18/17	The EEOC filed suit to correct unlawful employment practices based on race (African American), national origin (Haitian), and/or color (Black) and to provide appropriate relief to Charging Parties and a class of other Black Haitian Steward/Dishwashers wrongfully terminated based on their race, national origin, and color.	Race Harassment	Multiple
GA	USDC Northern District of Georgia Filed 11/3/16 Case 1:16cv4118 - Judge Story EEOC Press Release 11/4/16	Co-owner and general manager of Defendant restaurant allegedly sexually harassed four female employees during several years and created a sexually hostile work environment. Alleged behavior includes comments about the claimants' bodies and sexual behavior, comments about the bodies and attractiveness of customers, and showing sexually explicit photos and videos.	Sex Harassment	Multiple
GA	USDC Northern District of Georgia Filed 9/14/17 Case 1:17cv3545 EEOC Press Release 9/14/17	The EEOC alleges that Charging Parties were called derogatory names based on their race (African-American), including the "n-word," by the owner. Posters and images of monkeys were also displayed in the Charging Parties' working area. The owner also allegedly pressured, and offered bribes, to Charging Parties to withdraw their Charges. The owner also allegedly slapped one of the Charging Parties in the face and reported to the police that tension had been building since he filed his EEOC Charge. All three Charging Parties were terminated.	Race Harassment Retaliation	Multiple

GA	USDC Southern District of Georgia Filed 9/15/17 Case 6:17cv122 - Judge Hall	The EEOC alleges that Charging Party was subjected to sexually harassing comments, sexual propositions, and unwanted touching by a fellow assistant manager. Charging Party allegedly reported the conduct and requested to be scheduled so she did not have to work with the alleged harasser, but Defendant allegedly took no action. Charging Party alleges that she was constructively discharged.	Sexual Harassment	Single
HI	USDC Hawaii Filed 2/15/17 Case 1:17cv67 - Judge Watson EEOC Press Release 2/15/17	The agency alleges that the owner of Defendant company sexually harassed multiple male employees and job applicants. Alleged harassment included unwanted touching, explicit sexual suggestions, sexual activity, showing explicit pictures and pornography, and suggestions that performance reviews were affected by engaging in sexual conduct with the owner.	Sexual Harassment Sexual Orientation Harassment Retaliation	Multiple
HI	USDC Hawaii Filed 9/26/17 Case 1:17cv482 - Judge Kay	The EEOC alleges that the owner of Defendant company subjected Charging Party and a class of female employees to sexual harassment. The owner allegedly made sexual comments, called employees "bitch" and slut," engaged in unwanted touching, and made sexual overtures.	Sexual Harassment Retaliation	Multiple
IL	USDC Northern District of Illinois Filed 9/21/17 Case 1:17cv6817 - Judge Shah EEOC Press Release 9/21/17	The EEOC alleges that Defendant engaged in race discrimination by subjecting Charging Party to a hostile work environment based on his race. Charging Party was allegedly subject to racial epithets, slurs, and comments by his coworkers and supervisors, and a noose was hung in the warehouse where he worked. Charging Party alleges that he was constructively discharged because he was afraid to go to work.	Race Harassment	Single
IL	USDC Southern District of Illinois Filed 9/19/17 Case 3:17cv01002 EEOC Press Release 9/19/17	The EEOC alleges that a class of female employees, including several named individuals, were subjected to sexual harassment, including sexual comments, gestures, touching, propositions, and threats. The alleged sexual harassment was perpetrated by the general manager and several cooks. The EEOC also alleges that one male employee has subjected to sexual harassment, including sexual comments, overtures, and unwanted sexual touching.	Sexual Harassment	Multiple

IL	USDC Northern District of Illinois Filed 9/20/17 Case 1:17cv6803 - Judge Ellis	The EEOC alleges that Charging Party and a class of female employees were subjected to a hostile work environment based on sex, including unspecified sexual comments, propositions, and touching. Charging Party was allegedly terminated after complaining of a hostile work environment.	Sexual Harassment Retaliation	Multiple
IL	USDC Northern District of Illinois Filed 9/19/17 Case 1:17cv6744 - Judge Guzman EEOC Press Release 9/19/17	The EEOC alleges that Charging Party was subjected to harassment, including derogatory comments and name-calling, from supervisors and coworkers based on his sexual orientation.	Sexual Orientation Harassment	Single
IL	USDC Northern District of Illinois Filed 9/18/17 Case 1:17cv6692 - Judge Pallmeyer EEOC Press Release 9/18/17	The EEOC alleges that Defendant discriminated against a class of African-American or Hispanic employees and applicants in favor of Korean employees and applicants by failing to hire or promote them into management due to their race or national origin. The EEOC further alleges that the named Charging Parties were subjected to harassment based on their race, including comments and slurs.	Race Harassment	Multiple
IL	USDC Northern District of Illinois Filed 9/20/17 Case 1:17cv6815 - Judge Rowland EEOC Press Release 9/21/17	The EEOC alleges that Charging Party was subjected to unspecified sexual harassment by a coworker. Charging Party was allegedly terminated after reporting her harassment due to sex and comments made in the work place about African-American employees.	Sexual Harassment Retaliation	Single
IN	USDC Southern District of Indiana Filed 9/19/17 Case 3:17cv147 - Judge Young EEOC Press Release 9/20/17	The EEOC alleges that Defendant had discriminated against several named employees and a class of similarly situated individuals based on their race (African American). Defendant allegedly makes job assignments based on the employees' race and on the racial preference of its residents. Defendants allegedly prohibit African-American employees from providing care to certain residents because of their race. The named Charging Parties were also allegedly subject to racial harassment and name-calling due to their race by residents and managers, among others.	Race Harassment	Multiple
MA	USDC Massachusetts Filed 9/27/17 Case 1:17cv11860 EEOC Press Release 9/27/17	The EEOC alleges that several named Charging Parties, and a class of female employees, were subjected to sexual discrimination and a sexually hostile work environment, including unwanted sexual overtures, propositions, sexual touching of the female employees and forced contact with their male supervisor. The named Charging Parties were allegedly retaliated against when they reported the harassment.	Sexual Harassment Retaliation	Multiple

MD	USDC Maryland Filed 7/5/17 Case 8:17cv1835 - Judge Xinis EEOC Press Release 7/5/17	Thee EEOC alleges that Defendant has engaged in a pattern and practice of failing to hire a class of African-American applicants for Custodian and Porter positions. Defendant allegedly told African-American applicants there were not any openings, and sometimes revoked existing offers of employment. Defendant also repeatedly emphasized the company's criminal background check policy to deter African American applicants. A named Area Manager also was allegedly subjected to racial harassment, including being called the n-word. Employees were allegedly retaliated against for reporting harassment based on race.	Race Harassment Retaliation	Multiple
MD	USDC Maryland Filed 7/20/17 Case 1:17cv2025 - Judge Blake EEOC Press Release 7/20/17	The EEOC alleges that Charging Party was subjected to a hostile work environment based on his race (African American) and was called racial slurs. When he complained about this treatment, no action was taken. Charging Party's supervisor also demanded that he shave his beard, which Charging Party wears in observance of his religion. Charging Party was allegedly retaliated against when he made complaints and was eventually forced to quit his job to avoid being fired.	Race Harassment Retaliation	Single
MD	USDC Maryland Filed 9/27/17 Case 8:17cv2864 EEOC Press Release 9/27/17	The EEOC alleges that Defendant engaged in a pattern and practice of discrimination and harassment based on national origin (African). Several named Charging Parties allege that they were subjected to actions including name-calling and discriminatory comments and discrimination in the terms and conditions of their employment, and were terminated due to their national origin.	National Origin Harassment Retaliation	Multiple
MD	USDC Maryland Filed 9/28/17 Case 1:17cv2881 - Judge Motz	The EEOC alleges that Charging Party was subjected to sexual harassment by her manager, including sexual comments, and unwanted sexual touching. The EEOC further alleges that other female employees were subjected to unwanted sexual comments, sexual overtures, and physical touching. Charging Party was allegedly terminated after complaining of the sexual harassment and a hostile work environment.	Sexual Harassment Retaliation	Multiple
MD	USDC Maryland Filed 8/28/17 Case 1:17cv2463 - Judge Bredar EEOC Press Release 8/28/17	The EEOC alleges that Defendants (one of which the EEOC claims is subject to successor liability) hired Hispanics into lower-paying jobs, denied them other opportunities, and subjected them to inferior working conditions.	National Origin Harassment Race Harassment	Multiple

MN	USDC Minnesota Filed 11/3/16 Case 0:16cv3823 - Judge Wright EEOC Press Release 11/3/16	The agency sues on behalf of two Charging Parties who allege that they were subjected to harassment based on their race by their white supervisor. The supervisor allegedly made racially derogatory comments and used racial slurs. Charging Parties allege that the harassment was witnessed by others and no action was taken in response to complaints.	Race Harassment	Multiple
MO	USDC Eastern District of Missouri Filed 9/28/2017 Case 4:17cv2493	Charging Party alleges that he was subjected to harassment based on his race, including being called "Oreo" and the "n-word." After complaining of harassment, Charging Party was allegedly transferred to another location in an inferior position. Defendant then terminated Charging Party's employment.	Race Harassment Retaliation	Single
MS	USDC Northern District of Mississippi Filed 2/8/17 Case 3:17cv23 - Judge England EEOC Press Release 2/9/17	Charging Party was allegedly subjected to sexual harassment by her supervisor, the store manager. The store manager allegedly made sexually explicit comments and suggestions, sexual gestures, and inappropriate text messages. Following Charging Party's complaint, an investigation was conducted and the Store Manager was terminated.	Sexual Harassment	Multiple
NC	USDC Middle District of North Carolina Filed 12/21/16 Case 1:16cv1429 - Judge Peake EEOC Press Release 12/21/16	Charging Party worked as a laborer for Defendant, and alleges that white members of his crew subjected him to a racially hostile work environment. The agency alleges that Charging Party was repeatedly called the "n-word" and threatened with physical violence by white crew members. No action was taken in response to his complaints of his alleged treatment.	Race Harassment	Single
NC	USDC Western District of South Carolina Filed 9/8/17 Case 3:17cv00535 - Judge Conrad EEOC Press Release 9/8/17	Charging Party was employed at Defendant as a dishwasher. During his employment, the EEOC alleges that he was subjected to lewd and offensive sexual comments and physical sexual assault from his assistant manager.	Sexual Harassment Disability Harassment	Single

ND	USDC North Dakota Filed 5/5/17 Case 1:17cv92 - Judge Hovland EEOC Press Release 5/5/17	The EEOC alleges that a North Dakota civil construction company violated civil rights law by subjecting an employee to a hostile work environment based on her sex and by subjecting her to work conditions that were so intolerable she was forced to resign. According to the lawsuit, Charging Party worked for Defendant from June to October 2013 as a truck driver. During Charging Party's employment, she was subjected to sexual harassment by several male coworkers. According to the EEOC, Charging Party complained to company owners and the site manager about the harassment, but the harassment continued and one owner suggested that she quit. Charging Party felt she had no choice but to resign, resulting in her constructive discharge.	Sexual Harassment	Single
ND	USDC North Dakota Filed 12/22/16 Case 1:16cv428 - Judge Hovland EEOC Press Release 12/22/16	Charging Party worked as a driver for Defendant, and alleges that he was harassed due to his sex (sexual orientation). Among other acts, Charging Party alleges that his coworkers and supervisor called him derogatory names, left pornographic magazines in his truck, painted his truck with pink polka dots, hearts, and rainbows, made sex-based and offensive gay jokes and comments.	Sexual Harassment Sexual Orientation Harassment	Single
NV	USDC Nevada Filed 8/8/17 Case 2:17cv2119 - Judge Du EEOC Press Release 8/8/17	The EEOC alleges that Defendant's General Manager subjected one Charging Party to sexual harassment and made derogatory comments about Charging Party's appearance. After Charging Party complained to Human Resources, she was terminated. Defendant also allegedly terminated Charging Party's husband and son, who also are Charging Parties in the EEOC's suit.	Sexual Harassment Retaliation	Multiple
NV	USDC Nevada Filed 9/21/17 Case 2:17cv2458 - Judge Du EEOC Press Release 9/21/17	The EEOC alleges that several female employees were subjected to sexual harassment by coworkers, including unwanted sexual overtures, touching, viewing pornography in the workplace, vulgar name-calling, and touching. The EEOC alleges that Defendant also maintains a policy that requires employees to report sexual harassment within 72 hours or waive all rights to recovery.	Sexual Harassment Retaliation	Multiple

NY	USDC Eastern District of New York Filed 8/14/17 Case 2:17cv4745 EEOC Press Release 8/14/2017	The EEOC alleges that four Charging Parties were subjected to ongoing harassment and called derogatory names based on their race and national origin (African American, Dominican, and Puerto Rican). Defendant allegedly had no anti-discrimination or harassment policy and no ability to complain about harassment. Charging Parties were allegedly retaliated against by having job responsibilities and hours changed and were constructively discharged.	National Origin Harassment Race Harassment Retaliation	Multiple
NY	USDC Southern District of New York Filed 6/8/17 Case 7:13cv4333 - Judge Briccetti EEOC Press Release 6/9/17	The EEOC alleges that Charging Party, a hostess, was harassed and subjected to a hostile work environment because she is transgender, and in retaliation for her complaints about the harassment. The EEOC alleges that Charging Party was called derogatory names related to her transgender status and was called the wrong gender pronouns by other employees. After Charging Party complained, the General Manager allegedly took no action. Charging Party was then terminated days after her complaint and after the Area Manager learned that she was transgender.	Sexual Harassment Retaliation	Single
NY	USDC Eastern District of New York Filed 3/30/17 Case 1:17cv1791 - Judge Glasser	The EEOC alleges that Defendant discriminated against the Charging party by subjecting her to quid pro quo sexual harassment and/or retaliation when it refused to hire her, in violation of Title VII.	Sexual Harassment Retaliation	Single
PA	USDC Eastern District of Pennsylvania Filed 9/29/17 Case 2:17cv4346 - Judge Sanchez EEOC Press Release 10/4/17	The EEOC alleges that a supervisor regularly called Charging Party and other African-American employees names such as “monkey,” “boy,” the “n-word,” and other racial slurs. Charging Party and other employees allegedly complained about the conduct, but no action was taken. One week after Charging Party’s most recent complaint his employment was terminated.	Race Harassment	Multiple
SC	USDC South Carolina Filed 5/3/17 Case 4:17cv1150 EEOC Press Release 5/4/17	EEOC alleges that Defendant discriminated against the two female Claimants by subjecting them to a sexually hostile work environment because of their sex.	Sexual Harassment	Multiple

TN	USDC Western District of Tennessee Filed 9/28/17 Case 2:17cv2717 - Judge Mays	The EEOC alleges that Charging Party was sexually harassed by her area manager, who was a convicted felon sex offender. The Area Manager allegedly subjected Charging Party to sexual comments, propositions, explicit comments, and physical contact. No action was taken after Charging Party complained of the harassment and she was allegedly terminated after filing a Charge with the EEOC.	Sexual Harassment Retaliation	Single
TX	USDC Southern District of Texas Filed 2/22/17 Case 4:17cv574 - Judge Bennett EEOC Press Release 2/22/17	Charging Party alleges that his coworkers harassed him based on his race (black), by wearing "KKK-style" hoods and commenting about the hoods. Charging Party alleges that after reporting the incidents, the HR director asked Charging Party to execute a statement stating that the harassment had not occurred and that his complaint had been addressed. Charging Party refused to sign. The next day, Charging Party was allegedly reprimanded for failing to provide a statement and for failing to obtain permission to take sick leave. Charging Party refused to sign the acknowledgments and was terminated.	Race Harassment Retaliation	Single
VA	USDC Western District of Virginia Filed 9/29/17 Case 1:17cv00041 EEOC Press Release 10/2/17	The EEOC claims a restaurant violated federal law by subjecting a female employee to a sexually hostile work environment and retaliating against her by reducing her hours. According to the EEOC's suit, the employee was employed as a hostess in 2015. The EEOC charged that she was subjected to unwelcome sexual comments and touching by a significantly older male manager. According to the EEOC's complaint, the manager had previously engaged in the same or similar sexual conduct with at least one other female employee. When the alleged sexual harassment occurred, the restaurant had no sexual harassment policy or employee complaint procedures in effect. The EEOC's complaint further charged that after the employee complained to the restaurant's general manager about the harassment, the company reduced her scheduled hours. The complaint alleges that the wife of the alleged harasser was responsible for scheduling the employee's hours after her complaint of sexual harassment was made.	Sexual Harassment Retaliation	Single

VA	USDC Eastern District of Virginia Filed 9/18/17 Case 2:17cv499 - Judge Morgan EEOC Press Release 9/18/17	The EEOC alleges that Charging Party was subjected to sexually explicit comments, suggestions, and gestures by a coworker. Charging Party allegedly reported the conduct several times to her supervisor, but the behavior did not stop. When Charging Party said that she wanted to go to human resources, her supervisor told her that doing so would threaten her employment. Three weeks after reporting the alleged harassment, Charging Party's employment was terminated for allegedly inconsistent performance reasons.	Sexual Harassment Retaliation	Single
WA	USDC Western District of Washington Filed: 7/20/2017 Case number 2:17cv01098/ EEOC Press Release 7/20/17	Charging Party was allegedly subjected to a hostile work environment based on his race (African American) by his coworkers and supervisors. Charging Party was allegedly called racial slurs and threatened. When Charging Party complained of his treatment he was retaliated against by being denied breaks and given less-favorable shifts.	Race Harassment Retaliation	Single
WA	USDC Eastern District of Washington Filed 6/12/17 Case 2:17cv210 EEOC Press Release 6/12/17	The EEOC alleges the defendant violated federal law by subjecting a Latina tractor driver to sexual harassment and then retaliating against her after she reported the abuse. According to the EEOC's lawsuit, Charging Party had worked for Defendant as a tractor driver for over three years when she transferred to another company orchard, where she was the only female in this job position. The EEOC charged that on her second day at the new location, charging party's direct supervisor drove her to a remote area and then made sexually explicit comments, proposition her for sex, and attempted to kiss her. After this incident, the supervisor assigned charging party to pick up trash and excluded her from meetings with the other tractor drivers. When charging party reported the harassment to upper management, she was given a choice of continuing to work under that supervisor or accepting a transfer to work as a warehouse sorter for lower pay. She took the latter.	Sexual Harassment Retaliation	Single

WV	USDC Northern District of West Virginia Filed 6/6/17 Case 2:17cv73 - Judge Bailey EEOC Press Release 6/6/17	The EEOC alleges that Charging Party was discriminated against and subjected to a hostile work environment due to her disability. Charging Party is deaf in one ear and partially deaf in one ear, and as a result has a speech impairment. The EEOC alleges that Charging Party was called derogatory names related to her alleged disability and mocked by her coworkers and one associate manager. Charging Party alleges that she complained of the treatment, but that following an investigation corrective action was not taken. As a result, the EEOC alleges that Charging Party was constructively discharged. Charging Party also applied for a lead furniture sales position, but another employee without a disability was selected because Charging Party was told that employee could "do the talking better."	Disability Harassment	Single
WY	USDC Wyoming Filed 3/31/17 Case 2:17cv63 - Judge Skavdahl EEOC Press Release 3/31/17	The EEOC alleges the employer discriminated against Charging Party because of his Post-Traumatic Stress Disorder by calling him "crazy'' and "psycho," and by calling the days on which he received therapy for his PTSD "Psycho Thursdays." The company's two principal owners knew about the harassment, and the harassment reached such an egregious level that he was constructively discharged.	Disability Harassment	Single

APPENDIX B - CHECKLIST ONE: LEADERSHIP AND ACCOUNTABILITY

(Excerpt from EEOC Task Force Report on Harassment in the Workplace)

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

- ☐ Leadership has allocated sufficient *resources* for a harassment prevention effort
- ☐ Leadership has allocated sufficient *staff time* for a harassment prevention effort
- ☐ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

- ☐ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- ☐ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- ☐ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- ☐ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- ☐ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
- ☐ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

- ☐ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
- ☐ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
- ☐ The organization conducts *workplace civility training* and *bystander intervention training*
- ☐ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

APPENDIX C - CHECKLIST TWO: AN ANTI-HARASSMENT POLICY

(Excerpt from EEOC Task Force Report on Harassment in the Workplace)

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

- ☐ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- ☐ An easy-to-understand description of prohibited conduct, including examples
- ☐ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
- ☐ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- ☐ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ☐ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ☐ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- ☐ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers
  and supervisors
- ☐ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- ☐ Is written in clear, simple words, in all languages commonly used by members of the workforce

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

APPENDIX D - CHECKLIST THREE: A HARASSMENT REPORTING SYSTEM AND INVESTIGATIONS

(Excerpt from EEOC Task Force Report on Harassment in the Workplace)

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- ☐ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ☐ Employer representatives who take reports seriously
- ☐ A supportive environment where individuals feel safe to report harassing behavior to management
- ☐ Well-trained, objective, and neutral investigators
- ☐ Timely responses and investigations
- ☐ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ☐ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ☐ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ☐ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ☐ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

APPENDIX E - CHECKLIST FOUR: COMPLIANCE TRAINING

(Excerpt from EEOC Task Force Report on Harassment in the Workplace)

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
  - ☐ Supported at the highest levels
  - ☐ Repeated and reinforced on a regular basis
  - ☐ Provided to all employees at every level of the organization
  - ☐ Conducted by qualified, live, and interactive trainers
  - ☐ If live training is not feasible, designed to include active engagement by participants
  - ☐ Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
  - ☐ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ☐ Includes examples that are tailored to the specific workplace and the specific workforce
  - ☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ☐ Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-Line Supervisors
  - ☐ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

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