U.S. Equal Employment Opportunity Commission

PROPOSED Enforcement Guidance on Harassment in the Workplace

SUBJECT:	PROPOSED Enforcement Guidance on Harassment in the Workplace
PURPOSE:	This transmittal issues for public input the Commission's proposed guidance on harassment in the workplace under EEOC-enforced laws.
When it is issued in final, the PROPOSED sub-regulatory document will supersede *Compliance Manual Section 615: Harassment* (1987); *Policy Guidance on Current Issues of Sexual Harassment* (1990); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990); *Enforcement Guidance on* Harris v. Forklift Sys., Inc. (1994); and *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999). It is intended to communicate the Commission's position on important legal issues.	
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ORIGINATOR:	Office of Legal Counsel

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I. Introduction

A. Background

In 1986, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank, FSB v. Vinson*[1] that workplace harassment can constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964. More than thirty-seven years later, harassment remains a serious workplace problem. Between the beginning of fiscal year (FY) 2018 and the end of FY 2022, thirty-five percent of the charges of

employment discrimination received by the Equal Employment Opportunity Commission ("the Commission" or "EEOC") included an allegation of harassment based on race, sex, disability, or another protected characteristic.[2] The actual cases behind these numbers reveal that many people still experience harassment that may be unlawful. The "#MeToo" movement brought renewed public focus on sexual harassment at work,[3] and racial harassment cases have remained prominent in recent years.[4]

Although many high-profile harassment cases involve harassment based on sex, race, or national origin, the EEOC also enforces laws prohibiting work-related harassment based on color, religion, disability, genetic information, and age (40 or over). This Commission-approved enforcement guidance presents a legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity ("EEO") statutes enforced by the Commission.[5] This guidance also consolidates, and therefore supersedes, several earlier EEOC guidance documents: *Compliance Manual Section 615: Harassment*; *Policy Guidance on Current Issues of Sexual Harassment* (1990); *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990); *Enforcement Guidance on* Harris v. Forklift Sys., Inc. (1994); and *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999). This document serves as a resource for staff of the Commission and may be helpful to other agencies that investigate, adjudicate, or litigate harassment claims, or that conduct outreach; for employers, employees, and practitioners; and for courts deciding harassment issues. Nothing in this document should be understood to prejudge the outcome of a specific charge filed with the EEOC.

As with any charge of discrimination filed with the EEOC, the Commission will evaluate claims alleging unlawful harassment based on all the facts and circumstances of the particular matter and the law. This document is not intended to be an exhaustive survey of all legal principles that might be appropriate in a particular case. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or Commission policies.[6]

B. Structure of this Guidance

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

- Covered Bases and Causation: Was the conduct based on the individual's legally protected characteristic under the federal EEO statutes?
- Discrimination with Respect to a Term, Condition, or Privilege of Employment: Did the harassing conduct result in discrimination with respect to a term, condition, or privilege of employment?
- Liability: Is there a basis for holding the employer liable for the conduct?

This guidance also addresses systemic harassment and provides links to other EEOC harassment-related resources, including *Promising Practices for Preventing Harassment*, a resource to assist employers in preventing and addressing harassment.

II. Covered Bases and Causation

Harassment is covered by the EEO laws only if it is based on an employee's legally protected characteristics.

The federal EEO laws prohibit workplace harassment if it is shown to be based on one or more of a complainant's characteristics that are protected by these statutes.[7] Section II.A. of this guidance identifies these legally protected characteristics, and § II.B. explains how to determine whether harassing conduct is *because of* them.

A. Covered Bases

- Race and color: Race-based harassment includes harassment based on a complainant's race, e.g., harassment because the complainant is Black, Asian American, white, or multiracial.[8] Examples of harassing conduct based on race include racial epithets or offensive comments about members of a particular race, or harassment based on stereotypes about the complainant's

race.[9] It also can include harassment based on traits or characteristics linked to an individual's race, such as the complainant's name, cultural dress, accent or manner of speech, and physical characteristics, including grooming practices (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups).[10] Color-based harassment includes harassment based on skin tone.[11]

> **Example 1: Color-based Harassment.** Shawn, a Pakistani-American with brown skin, files a charge of discrimination alleging that two of his direct supervisors have subjected Shawn to unlawful harassment based on color. Shawn alleges that on a near-daily basis, his supervisors call him "turd" and otherwise make comments to him that suggest his skin is the color of human feces. According to Shawn, one supervisor exited the bathroom, placed a cup containing feces on Shawn's desk, and stated the feces looked like Shawn. Based on these facts, Shawn has alleged harassment based on color.[12]

- National origin: National origin harassment includes ethnic epithets, derogatory comments about individuals of a particular nationality, and other harassment based on a complainant's, or the complainant's ancestors', place of origin. It also includes harassment based on stereotypes about the complainant's national origin.[13] It can include harassment regarding traits or characteristics linked to an individual's national origin, such as physical characteristics (e.g., skin tone), cultural characteristics (e.g., attire or diet), and linguistic characteristics (e.g., non-English language accent or a lack of fluency in English).[14]

- Religion: Religious harassment includes the use of religious epithets or offensive comments based on a complainant's religion (including atheism or lack of religious belief[15]), religious practices, or dress.[16] It also includes harassment based on religious stereotypes[17] and harassment because of a request for a religious accommodation or receipt of a religious accommodation.[18] It further encompasses coercing employees to engage in religious practices at work.[19]

- Sex: Harassment based on sex includes unwanted sexual attention or sexual coercion, such as demands or pressure for sexual favors, sexual assault, or sexual remarks.[20]

Harassment based on sex also includes non-sexual conduct based on sex,[21] such as sex-based epithets (for example, calling a colleague a ''c__t''), sexist comments (such as making comments that women do not belong in management or that men do not belong in nursing), or facially sex-neutral offensive conduct motivated by sex (such as bullying directed toward employees of a particular sex).[22]

> **Example 2: Sex-Based Harassment.** John, an employee in a supermarket bakery department, alleges that a coworker, Laverne, rubs up against him in a sexual manner, tells sexual jokes, and displays dolls made from dough in sexual positions. Based on these facts, John has alleged harassment based on his sex.

> **Example 3: Sex-Based Harassment.** Aiko, a construction worker on a road crew, alleges that she was subjected to unlawful sex-based harassment by her supervisor, who used sex-based epithets and disparaged women's participation in the construction industry. Based on these facts, Aiko has alleged harassment based on sex.

Sex-based harassment also includes harassment based on:

- Pregnancy, Childbirth, or Related Medical Conditions: Sex-based harassment includes harassment based on pregnancy,[23] childbirth, or related medical conditions,[24] including lactation.[25] This also can include harassment based on a woman's reproductive decisions, such as decisions about contraception[26] or abortion.[27]
- Sexual Orientation and Gender Identity: Sex-based discrimination includes discrimination based on sexual orientation and gender identity.[28] Accordingly, sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including how that identity is expressed.[29] Examples include epithets regarding sexual orientation or gender identity;[30] physical assault;[31] harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender;[32] intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity

(misgendering);[33] or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.[34]

> **Example 4: Harassment Based on Gender Identity.** Jennifer, a cashier at a fast food restaurant who identifies as female, alleges that supervisors, coworkers, and customers regularly and intentionally misgender her. One of her supervisors, Allison, frequently uses Jennifer's prior male name, male pronouns, and "dude" when referring to Jennifer, despite Jennifer's request for Allison to use her correct name and pronouns; other managers also intentionally refer to Jennifer as "he." Coworkers have asked Jennifer questions about her sexual orientation and anatomy and asserted that she was not female. Customers also have intentionally misgendered Jennifer and made threatening statements to her, but her supervisors did not address the harassment and instead reassigned her to duties outside of the view of customers. Based on these facts, Jennifer has alleged harassment based on her gender identity.[35]

- Age: Age-based harassment includes harassment of employees 40 or older because of their age.[36] This includes harassment based on negative perceptions about older workers.[37] It also includes harassment based on stereotypes about older workers, even if they are not motivated by animus, such as pressuring an older employee to transfer to a job that is less technology-focused because of the perception that older workers are not well-suited to such work or encouraging an older employee to retire.[38]

- Disability:[39] Disability-based harassment includes harassment based on the complainant's physical or mental disability.[40] This includes harassment based on stereotypes about individuals with disabilities in general or about an individual's particular disability. It also can include harassment based on traits or characteristics linked to an individual's disability, such as how an individual speaks, looks, or moves.[41]

  Disability-based harassment also includes:

- harassment because of an individual's request for, or receipt of, reasonable accommodation;[42]
- harassment because an individual is regarded as having an impairment, even if the individual does not have an ADA actual or record of disability; [43]
- harassment because an individual has a record of a disability, even if the individual currently does not have a disability;[44] and
- harassment based on the disability of an individual with whom the complainant is associated.[45]

- Genetic information: Harassment on the basis of genetic information includes harassment based on a complainant's, or a complainant's family member's, genetic test or based on a complainant's family medical history.[46] For example, harassment based on genetic information includes harassing an employee because the employee carries the BRCA gene, which is linked to an increased risk of breast and ovarian cancer, or because the employee's mother has cancer.

Harassment based on the perception that an individual has a particular protected characteristic, for example, the belief that a person has a particular national origin or religion, is covered by federal EEO law even if the perception is incorrect.[47] Thus, harassment of a Hispanic person because the harasser believes the individual is Pakistani is national origin harassment, and harassment of a Sikh man wearing a turban because the harasser thinks he is Muslim is religious harassment, even though the perception in both instances is incorrect.

The EEO laws also cover "associational discrimination." This includes harassment because the complainant associates with someone in a different protected class[48] or harassment because the complainant associates with someone in the same protected class.[49] Such association may include, but is not limited to, close familial relationships, such as marriage, or close friendship with another individual belonging to a protected group.[50]

Harassment that is based on the complainant's protected characteristic is covered even if the harasser is a member of the same protected class.[51]

Harassment may be based on more than one protected characteristic of an employee. For example, a Black woman might be harassed both because she is

Black and because she is a woman, or alternatively, solely because she is a Black woman. This last example is sometimes referred to as intersectional harassment, or harassment based on the intersection of two or more protected classes.[52] If a Black woman is harassed based on stereotypes about Black women, such harassment is covered. Similarly, if a woman age forty or older is harassed based on stereotypes about older women, this harassment is covered.[53]

Harassment based on one protected characteristic, such as national origin, may also overlap with harassment based on another characteristic, such as religion, because of the close association (actual or perceived) between two protected groups. For example, harassment against an individual who is Muslim and Middle Eastern may be based on both national origin and religion.[54]

Harassment based on protected characteristics includes harassment based on social or cultural expectations regarding how persons of a particular protected group, such as persons of a particular race, national origin, or sex, usually act, appear, or behave.[55] This includes, but is not limited to, harassment based on assumptions about racial, ethnic, or other protected characteristics, or sex-based assumptions about family responsibilities,[56] suitability for leadership roles,[57] or sex roles.[58]

As discussed below in section II.B., harassment need not explicitly refer to a protected characteristic to be based on that characteristic where there is other evidence establishing causation.

All retaliation claims, even if they potentially involve unlawful retaliatory harassment, are evaluated under the legal standard for retaliation.[59] This is different from the legal standard for unlawful harassment based on a protected class. For further discussion of retaliation, including potentially retaliatory harassment, see EEOC, *Enforcement Guidance on Retaliation and Related Issues* § II.B.3 (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)** .

B. Establishing Causation

Causation is established if the evidence shows that the complainant was subjected to harassment *because of* the complainant's protected characteristic, whether or

not the harasser explicitly refers to that characteristic.[60] The EEO statutes do not prohibit harassment that is not based on a protected characteristic.[61]

> **Example 5: Harassment Is Covered Because Conduct Was Motivated by a Protected Characteristic.** James, who is assigned by a temporary agency to work in a bank, alleges that his bank coworkers have subjected him to derogatory comments about his Japanese ethnicity, including epithets and teasing about his accent. Based on these facts, James has alleged harassment based on his national origin.[62]

> **Example 6: Harassment Is Not Covered Because There Is Insufficient Evidence That Conduct Was Motivated by a Protected Characteristic.** Isaiah, a customer service representative at a financial services firm, alleges he was subjected to harassment based on his national origin and color by his coworker, Zach. Isaiah asserts that, although he previously did not interact much with Zach, last winter Zach became increasingly hostile and rude, throwing paper at Isaiah, shoving him in the hall, and threatening to beat him up or otherwise harm him. The EEO investigation revealed that Zach's misconduct started shortly after Zach's girlfriend, who also worked for the financial services firm, ended their relationship and started dating Isaiah. No evidence was found in the investigation to link Zach's threats and harassing conduct to Isaiah's national origin or color. These facts are insufficient to establish that Zach's misconduct subjected Isaiah to harassment because of national origin and/or color.

The determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances.[63] Although causation must be evaluated based on the specific facts in a case, the principles discussed below will generally apply in determining causation. Not all of them will necessarily apply in every case.

- Facially discriminatory[64] conduct: Conduct that explicitly insults or threatens an individual based on a protected characteristic—such as racial epithets or graffiti, sex-based epithets, offensive comments about an individual's disability or physical assaults that are targeted based on a protected characteristic—discriminates on that basis.[65] The motive of the individual

engaging in such conduct is not relevant to whether the conduct is facially discriminatory. Such conduct also does not have to be directed at a particular worker based on that worker's protected characteristic, nor do all workers with the protected characteristic have to be exposed to the conduct. For example, degrading workplace comments about women in general, even if they are not related to a specific female employee, show anti-female animus on their face, so no other evidence is needed to show that the comments are based on sex.[66] Further, derogatory comments about women are sex-based even if all employees are exposed to the comments.[67]

> **Example 7: Causation Established Where Harassment Is Facially Discriminatory.** Kiran is an individual with a neuropathic condition that causes his muscles to atrophy and degenerate. As a result of his condition, Kiran walks with a limp and must wear leg braces. Kiran files a charge alleging that he has been subjected to a hostile work environment based on disability. Kiran alleges that on a near-daily basis his coworkers and supervisors at the facility where he works make fun of his limp and leg braces by mimicking his gait and calling him "Forrest Gump," "cripple," "Gumby," and "crippled ninja." Based on these facts, Kiran has alleged harassment based on disability.[68]

> **Example 8: Causation Established Where Harassment Is Facially Discriminatory.** Keith and his colleagues work in an open-cubicle style office environment, and they frequently make derogatory comments about gay men and lesbians. Horatio, who is gay, overhears the comments on a regular basis and is offended by them, even though they are not directed at him. Based on these facts, the conduct is facially discriminatory and subjects Horatio to harassment based on sexual orientation (which is a form of sex-based harassment), even though he was not specifically targeted by the comments.

- Stereotyping: Harassment is based on a protected characteristic if it is based on social or cultural expectations, be they positive, negative, or neutral, regarding how persons of a particular protected group usually act or appear.[69] This includes harassment based on sex-based assumptions about family

responsibilities,[70] suitability for leadership roles,[71] sex roles,[72] the expression of sexual orientation or gender identity,[73] or harassment based on stereotypes about racial or ethnic characteristics. Such stereotyping need not be motivated by animus or hostility toward that group.[74] For example, age-based harassment might include comments that an older employee should consider retirement so that the employee can enjoy the "golden years."[75] Comments that a female worker with young children should switch to a part-time schedule so that she can spend more time with her children may demonstrate harassment on the basis of sex.[76] Similarly, derogatory comments involving racial stereotypes may constitute race-based harassment.

> **Example 9: Causation Established Based on Sex Stereotyping.** Eric, an iron worker, alleges he was subjected to sexual harassment from his foreman, Joshua. The investigation reveals that Joshua found a remark Eric made to be "feminine" and then began calling Eric "pu__y," "princess," and "fa___t," often several times a day. Several times a week, Joshua approached Eric from behind and simulated intercourse with him. On about ten occasions, Joshua exposed himself to Eric. Based on these facts, the investigator concludes that Joshua targeted Eric based on his perception that Eric did not conform to traditional male stereotypes and subjected Eric to harassment based on sex.[77]

- Context: Conduct must be evaluated within the context in which it arises.[78] In some cases, the discriminatory character of conduct that is not facially discriminatory becomes clear when examined within the specific context in which the conduct takes place or within a larger social context. For example, the Supreme Court observed that use of the term "boy" to refer to a Black man may reflect racial animus depending on such factors as "context, inflection, tone of voice, local custom, and historical usage."[79] In some contexts, terms that may not be facially discriminatory when viewed in isolation, such as "you people," may operate as "code words" revealing an intent to discriminate against a protected group.[80]

> **Example 10: Causation Established by Social Context.** Ron, a Black truck driver, finds banana peels on his truck on multiple occasions. After the third of these occasions, Ron sees two

white coworkers watching his reaction to the banana peels. An investigation reveals no evidence that banana peels were found on any other truck or that Ron found any trash on his truck besides the banana peels. Based on these facts, an investigator concludes that the appearance of banana peels on Ron's truck was not coincidental. The investigator further finds that the use of banana peels invokes "monkey imagery" that, given the history of racial stereotypes against Black individuals, was intended as a racial insult. It thus constitutes harassment based on race.[81]

- Link between harassment that is not explicitly connected to a protected basis and facially discriminatory conduct: Conduct that is neutral on its face may be discriminatory when linked to other conduct that is facially discriminatory, such as race-based epithets or derogatory comments about individuals with disabilities. Facially neutral conduct therefore should not be separated from facially discriminatory conduct and discounted as non-discriminatory.[82] In some instances, however, facially discriminatory conduct may not be sufficiently related to facially neutral conduct to establish that the latter also was discriminatory.[83]

  Example 11: Facially Neutral Conduct Sufficiently Related to Religious Bias. Imani, a devout Christian employed as a customer service representative, alleges that coworkers made offensive comments or engaged in other hostile conduct related to her religious beliefs and practices, including suggesting that Imani belonged to a cult or worshipped the devil; calling her religious beliefs "crazy"; drawing devil horns, a devil tail, and a pitchfork on her Christmas photo; and cursing the Bible and teasing her about Bible reading. In addition, the same coworkers excluded Imani from office parties and subjected her to curse words that the coworkers knew Imani regarded as offensive because of her religion. Although some of the coworkers' conduct was facially neutral with respect to religion, the investigator concludes that such conduct was closely related to the religious harassment and thus that the entire pattern of harassment was based on Imani's religion.[84]

- Timing: If harassment began or escalated shortly after the harasser learned of the complainant's protected status, e.g., pregnancy, sexual orientation, gender identity, religion, or disability, the timing may suggest that the harassment was discriminatory.[85]

- Comparative evidence: Evidence showing qualitative and/or quantitative differences in the conduct directed against individuals in different groups can support an inference that the harassment of workers subjected to more, or more severe, harassment was based on their protected status.[86]

  Example 12: Comparative Evidence Gives Rise to Inference that Harassing Conduct Is Based on a Protected Characteristic. Tyler is a manager for an educational services firm. Tyler directly supervises two women, Kailey and Anu, and two men, Sandeep and Levi. Tyler grants Kailey's request for time off to visit her dying sister. When Kailey returns, Tyler confronts her and yells at her for not reading her "damn email" while she was away. From then on, Tyler regularly hovers over Kailey and Anu as they work to make sure they don't "mess up." Tyler also yells and shakes his fist at Kailey and Anu when he is angry at them. This conduct continues, and Kailey and Anu file EEOC charges alleging harassment based on sex. During the investigation, the investigator finds that Sandeep and Levi report that Tyler, although occasionally irritable, generally engages in friendly banter with them that is different from the aggressiveness that Tyler displays toward female employees. Tyler sometimes even allows Sandeep and Levi to relax in his office in the afternoons, doing little or no work. Tyler also permits Sandeep and Levi to leave the office early and does not monitor their work performance. Tyler's different treatment of women and men who are similarly situated would support an investigator's conclusion that Tyler's treatment of Kailey and Anu was based on their sex.[87]

- Causation Issues Related to Sex-Based Harassment. A claim of sex-based harassment may rely on any of the causation theories described in the preceding sections and in this section. The Supreme Court has addressed three non-exclusive evidentiary routes for establishing causation in a sexual

harassment claim: (1) explicit or implicit proposals of sexual activity; (2) general hostility toward members of the complainant's sex ; and (3) comparative evidence showing how the harasser treated persons who shared the complainant's sex compared to the harasser's treatment of those who did not.[88] As noted, these three routes are not exclusive; they are examples of ways in which harassment based on sex (including pregnancy, sexual orientation, and gender identity) may be established.[89] For example, harassment also is sex-based if the harassment occurs because of sex stereotyping.[90] Additionally, hostility may be directed toward only one individual based on sex.[91] The same legal principles apply regardless of whether the harasser and complainant are of the same sex.[92]

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

A. Background: Distinguishing an Explicit Change to the Terms, Conditions, or Privileges of Employment from a Hostile Work Environment

For an employer to be liable under an EEO statute for workplace harassment based on a protected trait, the harassment must affect a "term, condition, or privilege" of employment.[93] In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court provided two examples of such unlawful harassment: (1) an explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic, e.g., firing an employee because the employee rejected sexual advances, and (2) conduct that constructively[94] changes the terms or conditions of employment through creation of a hostile work environment.[95]

The first type of sexual harassment claim was initially described as "quid pro quo" harassment.[96] In early sexual harassment cases, quid pro quo described a claim in which a supervisor carried out a threat to retaliate against an employee for rejecting the supervisor's advances.[97]

However, citing the Supreme Court's 1998 decision in *Burlington Industries, Inc. v. Ellerth*, the Second Circuit later explained that a quid pro quo allegation now only

"makes a factual claim about the particular mechanism by which a plaintiff's sex became the basis for an adverse alteration of the terms or conditions of [the plaintiff's] employment."[98] The underlying issue in a quid pro quo allegation is the same as in any claim of disparate treatment (i.e., intentional discrimination): whether the claimant has satisfied the statutory requirement of establishing "discriminat[ion] . . . because of sex" affecting the "terms [or] conditions of employment."[99] For example, if a supervisor threatens to deny an employee a promotion or other job benefit for rejecting sexual advances and subsequently denies the job benefit, the denial of the job benefit itself is an explicit change to the terms and conditions of employment and thus constitutes unlawful sex discrimination.[100] Even if the threat is never carried out, the threat itself is a particularly severe form of harassment and would constitute unlawful sex discrimination if it establishes a hostile work environment, either alone or in concert with other harassing conduct, as described below.[101]

To be actionable absent such an explicit change to the terms or conditions of employment, the harassment must change the terms or conditions of employment by creating a hostile work environment. Such harassment is actionable if, as a whole, the conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[102] As the Supreme Court explained with respect to Title VII in *Harris v. Forklift Systems, Inc.*:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[103]

Thus, absent an explicit change to the terms or conditions of employment, harassing conduct based on a protected characteristic is actionable when it is sufficiently severe or pervasive to create an objectively and subjectively hostile work environment.[104] A hostile work environment claim may encompass any hostile conduct that affects the complainant's work environment, including employer conduct that may be independently actionable. For example, if a woman was demoted because she refused to submit to unwanted sexual advances, the demotion would be independently actionable as sex discrimination and also actionable as part of a hostile work environment.[105]

The EEO statutes are not limited to discriminatory conduct that has tangible or economic effects and instead "strike at the entire spectrum of disparate treatment."[106] However, these statutes also do not impose a general civility code that covers "run-of-the-mill boorish, juvenile, or annoying behavior."[107] As discussed below in section III.B., the severe-or-pervasive standard takes a "middle path" that requires the conduct to be more than merely offensive but does not require that the conduct cause psychological harm.[108]

Whether conduct creates a hostile work environment depends on the totality of the circumstances, and no single factor is determinative.[109] Some such circumstances include the frequency and severity of the conduct; the degree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee's work performance; and the degree to which it caused the complainant psychological harm.[110] If harassing acts are based on multiple protected characteristics, and the acts are sufficiently related to be considered part of the same hostile work environment, then all the acts should be considered together in determining whether the conduct created a hostile work environment.[111]

> **Example 13: Age-Based Harassment Creates Hostile Work Environment.** Henry is a 62-year-old consultant at a professional services company. Ryan, his supervisor, calls him "old man" on a daily basis. Since Henry's 60th birthday, Ryan has repeatedly asked him when he plans to retire, saying he can't wait to bring in "young blood" and "fresh ideas." During a recent staff meeting, Ryan reminded staff to get their flu shots, then looked at Henry and said, "Although I wouldn't be heartbroken if the flu took out some of the old timers." Henry asked Ryan if he was referring to him, and Ryan replied, "Absolutely, old man." Henry reports feeling targeted and ashamed by Ryan's comments. Based on these facts, the investigator concludes that Ryan has subjected Henry to a hostile work environment based on age.[112]

B. Hostile Work Environment

These are key questions that typically arise in evaluating a hostile work environment claim:

- **Was the conduct both objectively and subjectively hostile?**
  - Objective hostility: was the conduct sufficiently severe or pervasive to create a hostile work environment?
  - Subjective hostility: did the complainant actually find the conduct hostile?
- **What conduct is part of the hostile work environment claim?**
  - Can conduct that occurred outside the workplace be considered?
  - Can conduct that was not specifically directed at the complainant be considered?

Even if a complainant subjectively finds conduct based on a protected characteristic to be offensive, such conduct does not constitute a violation of an EEO law unless it is also sufficiently severe or pervasive to create an objectively hostile work environment.[113] Conduct need not be both severe and pervasive: The more severe the harassment, the less pervasive it must be, and vice versa, to establish a hostile work environment.[114] There is neither a "magic number" of harassing incidents that automatically establishes a hostile work environment nor a minimum threshold for severity.[115] Whether a series of events is sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case, viewed in light of the totality of the circumstances.[116]

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

A complainant need not show that discriminatory conduct harmed the complainant's work performance to prove a hostile work environment. Rather, the evidence must establish that the harassment was sufficiently severe or pervasive to "alter[] the terms or conditions" of the complainant's employment.[117] Similarly, actionable harassment can be established in the absence of psychological injury, though evidence of psychological harm from the harassment may be relevant to demonstrating a hostile work environment.[118]

Example 14: Hostile Work Environment Created Even Though Complainant Continued to Perform Well. Irina works as a sales representative for a freight transportation company. She and her coworkers sit in adjacent cubicles. Her coworkers, both men and women, often discuss their sexual liaisons in graphic detail; use sex-based epithets when describing women; look at pornographic materials; and, on weekend shifts, occasionally come to the office only partly clothed (e.g., a man not wearing a shirt, another man wearing only a towel after leaving the gym). Irina was horrified by the loudness and vulgarity of the conduct, and she frequently left the office crying. Despite this conduct, however, Irina could meet her daily and weekly quotas, and her work continued to be rated in her performance review as above average. Irina filed an EEOC charge alleging a hostile work environment based on sex. Based on these facts, an EEOC investigator concludes that Irina was subjected to a hostile work environment. Although the harassment did not result in a decline in her work performance or in any apparent psychological injury, the nature of the conduct and Irina's reactions to it are sufficient to establish that the ongoing sexual conduct creates a hostile work environment because the conduct made it more difficult for a reasonable person in Irina's situation to do her job.[119]

1. Severity

a. General Principles

Because a "supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[120] harassment by a supervisor or other individual with authority over the complainant typically has more impact on a complainant's work environment than similar misconduct by an individual lacking such authority.[121] Moreover, the severity of the harassment may be heightened if the complainant reasonably believes that the harasser has authority over her, even if that belief is mistaken.[122]

The more directly harassment affects the complainant, the more likely it is to negatively affect the complainant's work environment. Thus, harassment is generally more probative of a hostile work environment if it occurs in the complainant's presence than if the complainant learns about it secondhand.

Nevertheless, a complainant's knowledge of harassing conduct that other employees have separately experienced may be relevant to determining the severity of the harassment in the complainant's work environment.[123]

Some conduct may be more severe if it occurs in the presence of others, such as the complainant's coequals, subordinates, or clients. For example, a worker's sexually degrading comments may be more severe if made in the presence of the complainant and the complainant's subordinates rather than solely in the complainant's presence due to the humiliating nature of the interaction.[124] Conversely, some conduct may be more severe when the complainant is alone with the offending individual because the isolation may enhance the threatening nature of the discriminatory conduct.[125]

Because the severity of harassment depends on all of the circumstances, the considerations discussed above are not exclusive. Other factors may be relevant in evaluating the severity of alleged harassment. For example, the severity of harassment may be enhanced if a complainant has reason to be believe that the harasser is insulated from corrective action. This could arise if the harasser is a highly valued employee, or the employer has previously failed to take appropriate corrective action in similar circumstances.[126]

b. Hostile Work Environment Based on a Single Incident of Harassment

In limited circumstances, a single incident of harassment can result in a hostile work environment. The following are examples of conduct that courts have found sufficiently severe to establish a hostile work environment based on a single incident:

- Sexual assault,[127]
- Sexual touching of an intimate body part,[128]
- Physical violence or the threat of physical violence,[129]
- The use of symbols of violence or hatred toward individuals sharing the same protected characteristic, such as a swastika, an image of a Klansman's hood, or a noose,[130]
- The use of animal imagery that denigrates individuals sharing a protected characteristic, such as comparing the employee to a monkey, ape, or other

animal,[131]

- A threat to deny job benefits for rejecting sexual advances,[132] and
- The use of the "n-word" by a supervisor in the presence of a Black subordinate.[133]

Using epithets based on protected characteristics is a serious form of workplace harassment. As stated by one court, epithets are "intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'"[134]

2. Pervasiveness

Most hostile work environment claims involve a series of acts. More frequent but less serious incidents can create a hostile work environment.[135] The focus is on the cumulative effect of these acts, rather than on the individual acts themselves. As noted above, there is not a "magic number" of harassing incidents that automatically establishes a hostile work environment. Whether a series of events is sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each case.[136] Relevant considerations may include the frequency of the conduct[137] and the relationship between the number of incidents and the time period over which they occurred.[138]

> **Example 15: Hostile Work Environment Created by Pervasive Sexual Harassment.** Juan, who works as a passenger service assistant for an airline, alleges that Lydia, a female coworker, sexually harassed him. The evidence shows that Lydia directed sexual overtures and other sex-based conduct at Juan as often as several times a week over a period of six months, despite his repeated insistence that he was not interested. For example, Lydia gave Juan revealing photographs of herself, sent him notes asking for a date, described fantasies about him, and persistently told him how attractive he was and how much she loved him. Based on these facts, an investigator concludes that, regardless of whether the conduct was severe, it was sufficiently pervasive to create a hostile work environment.[139]

Example 16: Extensive Sexual Favoritism Creating a Hostile Work Environment. Tasanee, an employee at a government agency, alleges that she has been subjected to a hostile work environment based on her sex. The evidence shows that supervisors engaged in consensual sexual relationships with female subordinates that were publicly known and behaved in sexually charged ways with other agency employees in public. Supervisors rewarded the subordinates who were in relationships or who acceded without objection to the behavior by granting them promotions, awards, and other benefits. Because the conduct was pervasive and could reasonably affect the work performance and motivation of other workers who found the extensive favoritism offensive, the evidence is sufficient to show that Tasanee was subjected to a sexually hostile work environment.[140]

C. Subjectively and Objectively Hostile Work Environment

The Supreme Court explained in 1993 in *Harris v. Forklift Systems, Inc.* that to establish a hostile work environment, offensive conduct must be both subjectively hostile and objectively hostile.[141]

1. Conduct That Is Subjectively and Objectively Hostile Is Also Necessarily Unwelcome

Although a complainant alleging a hostile work environment must show that the harassment was unwelcome, conduct that is subjectively and objectively hostile also is necessarily unwelcome. In the Commission's view, demonstrating unwelcomeness logically is part of demonstrating subjective hostility. If, for example, a complainant establishes that a series of lewd, sexist, and derogatory comments were subjectively hostile, then those comments also would be, by definition, unwelcome. In some circumstances, evidence of unwelcomeness also may be relevant to the showing of objective hostility.

2. Derivation of Unwelcomeness Inquiry

The unwelcomeness inquiry derives from the Supreme Court's 1986 decision in *Meritor Savings Bank, FSB v. Vinson*, where the Court stated that the "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome,'"[142] and from the 1980 EEOC Guidelines upon which the Court relied.

[143] In *Meritor*, the Court focused on the concept of unwelcomeness in order to distinguish it from the concept of voluntariness, noting that the complainant's participation in the challenged conduct did not necessarily mean that she found it welcome.[144] When the Supreme Court refined the hostile work environment analysis in 1993, in *Harris*, to require a showing that the conduct was both subjectively and objectively hostile,[145] the Court did not explicitly eliminate unwelcomeness as the gravamen of a harassment claim. However, it is the Commission's position that this requirement was effectively subsumed into the Court's new requirement of demonstrating that conduct was both subjectively and objectively hostile.

Following *Harris*, a number of courts have addressed unwelcomeness as part of determining subjective hostility, because conduct that is subjectively hostile will also, necessarily, be unwelcome.[146] Other courts continue to analyze "unwelcomeness" as a separate element in a plaintiff's prima facie harassment case, in addition to the "subjectively and objectively hostile work environment" analysis.[147] In the Commission's view, this approach may import redundancy or confusion into the legal analysis of harassment and therefore be an unnecessary step in a court's analysis.

3. Subjectively Hostile Work Environment

In general, the complainant's own statement that the complainant perceived conduct as hostile is sufficient to establish subjective hostility.[148] A subjectively hostile work environment also may be established if there is evidence that an individual made a complaint about the conduct, as it follows logically that the individual found it hostile.[149] Similarly, if there is evidence that the individual complained to family, friends, or coworkers about the conduct, it is likely that the individual found it subjectively hostile.[150]

Whether conduct is subjectively hostile depends on the perspective of the complainant. Thus, if a male complainant does not welcome sexual advances from a female supervisor, it is irrelevant whether other men in the workplace would have welcomed these advances.[151] Moreover, the fact that an individual tolerated or even participated in the conduct is not dispositive; for example, an employee might have experienced derogatory comments or other conduct targeted at the employee's racial or national origin group as hostile but felt that there was no other choice but to "go along to get along."[152]

The complainant's subjective perception may be at issue, however, if there is evidence that the complainant did not find the harassment to be hostile, such as the complainant's statement that the complainant did not feel harassed by the challenged conduct.[153]

A complainant's subjective perception, however, can change over time. For example, a complainant who welcomed certain conduct in the past might subsequently perceive similar conduct as hostile after a certain point in time, such as after the end of a romantic relationship.[154] Moreover, although the complainant may welcome certain conduct, such as sexually tinged conduct, from a particular employee, that does not mean that the complainant also would welcome it from other employees.[155] Nor does acceptance of one form of sexually tinged conduct mean that the complainant would welcome all sexually tinged conduct, particularly conduct of a more severe nature.[156]

4. Objectively Hostile Work Environment

In addition to being subjectively hostile, the conduct in question must create an objectively hostile work environment, that is, an environment that a reasonable person in the plaintiff's position would find hostile.[157] The impact of conduct must be evaluated in the context of "surrounding circumstances, expectations, and relationships."[158]

The determination of whether harassment was objectively hostile requires "an appropriate sensitivity to social context"[159] and should be made from the perspective of a reasonable person of the complainant's protected class.[160] Thus, if a Black individual alleges racial harassment, the harassment should be evaluated from the perspective of a reasonable Black individual in the same circumstances as the complainant. Conduct can establish a hostile work environment even if some members of the complainant's protected class did not or would not find it to be hostile.[161]

In addition to protected status, other personal or situational[162] characteristics of a particular complainant may affect whether the complainant reasonably perceives certain conduct as creating a hostile work environment. For example, if a teenager was harassed by a substantially older individual, then the age difference may intensify the perceived hostility of the behavior, which would be relevant to both subjective and objective hostility.[163] Similarly, if an undocumented worker is

targeted for harassment, then the heightened risk of deportation may contribute to both subjective and objective hostility.[164]

> **Example 17: Religion-Based Harassment Creates an Objectively Hostile Work Environment.** Josephine, an IT support specialist at a regional medical facility in the South, attends an employee appreciation barbecue lunch hosted by her employer. When asked by colleagues why Josephine is not eating any of the barbecued pig, Josephine explains that she is Jewish and observes her religion's kashrut dietary laws, which prohibit her from eating pork. After the barbecue, a few coworkers begin making comments to or within earshot of Josephine, such as calling Josephine "Jew-sphine," questioning why Josephine even works because she must have a lot of "Jew money"[165] in savings accounts, and stating that "Jews control the media." Based on these facts, the investigator concludes that this conduct, viewed from the perspective of a reasonable Jewish person, created an objectively hostile work environment based on religion.

> **Example 18: Disability-Based Harassment Creates an Objectively Hostile Work Environment.** Jin, a cook, has Post-Traumatic Stress Disorder (PTSD). He tells his coworkers that he served in Iraq on active duty, has PTSD, and as a result, is uncomfortable with sudden loud noises and unanticipated physical contact. He asks them to tell him in advance about any anticipated loud noises, and requests that they avoid approaching him from behind without warning. Lila, a server, regularly drops or bangs on metal trash cans and sneaks up behind Jin while he is working, because she thinks his response is funny. Jin is so rattled after these encounters that he sometimes mixes up orders or fails to cook the food properly. Jin repeatedly tells Lila to stop, to no avail, and the conduct continues. Based on these facts, the investigator concludes that Lila's harassment, viewed from the perspective of a reasonable person with PTSD, created an objectively hostile work environment based on disability.

Although conduct must be evaluated in the context of the specific work environment in which it arose, there is no "crude environment" exception to Title VII if the harassment otherwise meets the standard of severe or pervasive harassing

conduct.[166] Moreover, prevailing workplace culture does not excuse discriminatory conduct.[167] For example, public displays of pornography or sexually suggestive imagery demeaning women can contribute to an objectively hostile work environment for female employees, even if it is a long-standing practice.[168]

As discussed above, in the Commission's view, demonstrating unwelcomeness logically is inherently part of demonstrating subjective hostility. In some circumstances, evidence of unwelcomeness may also be relevant to the showing of objective hostility.[169] When analyzing whether conduct is objectively hostile, some courts have focused on whether the harasser had notice that the conduct was unwelcome—in other words, whether the complainant had communicated, or the alleged harasser otherwise had reason to know, that the complainant did not welcome it.[170] Such notice may be relevant in determining whether it is objectively reasonable for a person in the complainant's position to have perceived ongoing conduct as hostile.[171] For example, flirtatious behavior or asking an individual out on a date may, or may not, be facially offensive, depending on the circumstances. If the actor is on notice, however, that the conduct is unwelcome, then a reasonable person in the complainant's position may perceive the actor's persistence in flirting or asking for a date to be hostile.[172]

The same may be true in the context of religious expression. If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile. If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile.[173]

D. The Scope of Hostile Work Environment Claims

1. Conduct Must Be Sufficiently Related

Because the incidents that make up a hostile work environment claim constitute a single unlawful employment practice, the complainant can challenge an entire pattern of conduct, as long as at least one incident that contributed to the hostile work environment is timely.[174] The earlier conduct, however, must be sufficiently related to the later conduct to be "part of the same actionable hostile work environment practice" claim.[175] Relevant considerations depend on the specific facts but may include the similarity of the actions involved, the frequency of the conduct, and whether the same individuals engaged in the conduct.[176]

A hostile work environment claim may include any hostile conduct that affects the complainant's work environment, even conduct that may be independently actionable. For example, a racially discriminatory transfer to a less desirable position that is separately actionable also may contribute to a racially hostile work environment if the action was taken by a supervisor who frequently used racial slurs.[177] Under such circumstances, the transfer could be challenged as part of a hostile work environment claim and would be considered in determining whether the conduct was sufficiently severe or pervasive to create a hostile work environment. In addition, if the transfer occurred within the filing period, then the complainant could also bring a separate claim alleging discriminatory transfer. For more information on the timeliness of hostile work environment claims, see EEOC, *Compliance Manual Section 2: Threshold Issues* § 2-IV.C.1.b (2009), **https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b (https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b)** .

> **Example 19: Earlier Harassment Sufficiently Related to Later Harassment.** Noreen alleges that she was subjected to harassment based on her religion (Islam) and national origin (Pakistani). Noreen says that her team leader in the packaging department, Josiah, made offensive comments about her accent, religion, and ethnicity. Noreen complained to the plant manager, who did not take any action, and Josiah's harassment continued. At her own request, Noreen was transferred to the stretch wrap department. Soon after, she saw Josiah speaking with Franklin, a stretch wrap employee, while pointing at Noreen and laughing. Starting the next day, Franklin regularly referred to Noreen using religious and ethnic slurs, including "muzzie," "terrorist," and "paki." Franklin also refused to fill in for her when she needed to take a break. Noreen complained to the plant manager about Franklin's conduct, but again the plant manager did not take any action. Here, Noreen experienced harassment in two different departments by different harassers, but the conduct was similar in nature. The harassment in the second department occurred shortly after the harassment in the first department; the harassment in the second department started after the two harassers met; and the plant manager was responsible for addressing harassment in both departments. Based on these facts, the investigator concludes that the harassment experienced by

Noreen in the two departments constitutes part of the same hostile work environment claim.[178]

Example 20: Earlier Harassment Insufficiently Related to Later Harassment. Cassandra, who worked for a printing company, alleges that she was subjected to sexual harassment when she was in the production department and also after she was transferred to the estimating department. Cassandra says that, while in the production department, she was exposed to sexually explicit discussions, sexual jokes, and vulgar language. Although she was no longer exposed to most of the harassment after her transfer to the estimating department, Cassandra overheard a male worker on the other side of her cubicle wall tell someone that if a weekend trip with one of his female friends "was not a sleepover, then she wasn't worth the trip." The sleepover comment was made nearly a year after Cassandra's transfer and was not directed at Cassandra or made for her to hear. Other than that comment, Cassandra did not experience any alleged harassment after her transfer to the estimating department, which did not interact with the production department. Based on these facts, the investigator concludes that the alleged harassment experienced by Cassandra in the production department was not part of the same hostile work environment claim as the alleged harassment in the estimating department.[179]

2. Types of Conduct

a. Conduct That Is Not Directed at the Complainant

Harassing conduct can affect an employee's work environment even if it is not directed at that employee, although the more directly it affects the complainant, the more probative it is likely to be of a hostile work environment.[180] For instance, the use of gender-based epithets may contribute to a hostile work environment for women even if the epithets are not directed at them.[181] Similarly, anonymous harassment, such as racist or anti-Semitic graffiti or the display of a noose or a swastika, may create or contribute to a hostile work environment, even if it is not clearly directed at any particular employees.[182] Offensive conduct that is directed at other individuals of the complainant's protected class also may contribute to a hostile work environment for the complainant. Such conduct may even occur

outside of the complainant's presence as long as the complainant becomes aware of the conduct during the complainant's employment and it is sufficiently related to the complainant's work environment.[183]

> **Example 21: Conduct Not Directed Against Complainant that Contributes to a Hostile Work Environment.** Lilliana is the District Manager for an insurance company. Peter reports to Lilliana and is an Assistant District Manager; he oversees four sales representatives. Lilliana is white, and Peter and the four sales representatives are Black. Over the two years that Peter has worked for the insurance company, Lilliana has used the term "n____r" when talking to Peter's subordinates; she also told Peter that his "black sales representatives are too dumb to be insurance agents"; and on another occasion she called the corporate office to ask them to stop hiring Black sales representatives. Some of the comments were made in Peter's presence, and Peter learned about other comments secondhand, when sales representatives complained to him about them. Based on these facts, an investigator finds that Lilliana's conduct toward Peter's subordinates contributed to a hostile work environment for Peter because the comments either occurred in Peter's presence or he learned about them from others.[184]

In some circumstances, an individual who has not personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging that they have been harmed by unlawful harassment of a third party.[185]

> **Example 22: Individual Harmed by Unlawful Harassment of Third Party.** Sophie, who is white and Christian, works in an accounting office with her coworker Quentin, who is Black and Muslim, and their mutual supervisor, Jordan, who is white and Christian. They work together in the office. Jordan makes frequent offensive comments about Quentin's race and religion. One day, after referring to Quentin with the n-word and calling him a "terrorist," Jordan tells Sophie to hide Quentin's work files on the office server to "make his life difficult" and to reschedule a series of important team meetings so that they will conflict with Quentin's daily prayers, effectively excluding him from the meetings. Sophie initially objects, but Jordan

tells her that "if you want a future here, you better do what I tell you." Fearing workplace repercussions if she fails to comply, Sophie reluctantly participates in the ongoing race- and religion-based harassment of Quentin.

Sophie and Quentin both file EEOC charges. Quentin's allegation is that he faced a hostile work environment based on his race and religion; Sophie's allegation is that Quentin faced a hostile work environment based on his race and religion and she was forced to participate in it. Based on evidence that the harassment occurred on a regular basis and included serious and offensive conduct, including harassment designed to interfere with Quentin's work performance and ostracize him, the investigator concludes that Quentin was subjected to a hostile work environment based on his race and religion.

The investigator further concludes that, although Sophie was not personally subjected to unlawful harassment based on her race, religion, or other protected status, she had standing to file a charge and obtain relief for any harm she suffered as a result of the unlawful harassment of Quentin, because she was required as part of her job duties to participate in the harassment.[186]

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

A hostile work environment claim may include conduct that occurs in a work-related context outside an employee's regular workplace.[187] For instance, harassment directed at an employee during the course of employer-required training occurs within the "work environment," even if the training is not conducted at the employer's facility.[188]

Example 23: Harassment During Off-Site Employer-Hosted Party Was Within Work Environment. Fatima's employer hosts its annual holiday party in a private restaurant. One of her coworkers, Tony, drinks to excess, and at the end of the evening attempts to grope and kiss Fatima. Although Tony's behavior occurred outside Fatima's regular workplace and at a private restaurant unaffiliated with her employer, it occurred in a work-related context. Therefore, based on these facts, the harassment occurred in Fatima's work environment for purposes of a Title VII sexual harassment claim.

Conduct also occurs within the work environment if it is conveyed using work-related communications systems, accounts, or platforms, such as an employer's email system, electronic bulletin board, instant message system, videoconferencing technology, intranet, public website, or official social media accounts.[189] As with conduct within a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. This can include, for instance, sexist comments made during a video meeting, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image.

> **Example 24: Conduct on Employer's Email System Contributing to a Hostile Work Environment.** Ted and Perry are coworkers in an accounting firm. Ted is white, and Perry is Black. Ted sends jokes every Monday morning from his work computer and work email account to colleagues, including Perry. Many of the jokes are off-color and involve racial stereotypes, including stereotypes about Black individuals. Perry complains to Ted and their mutual supervisor after several weeks of Ted's emails, but Ted is not instructed to stop. After several more weekly emails, Perry files a charge of discrimination with the EEOC. Based on these facts, an investigator finds that the racial jokes sent by Ted contributed to a hostile work environment for Perry because, among other reasons, they were sent using Ted's work computer and work email account and were sent to colleagues in the workplace.

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

Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment.[190] For instance, if a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment.[191]

Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace.[192] For example, if an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment.

> **Example 25: Conduct on Social Media Platform Outside Workplace.** Rochelle, a Black woman, works at an assisted living facility as a home health aide. She alleges that two Black coworkers of Caribbean descent, Martina and Terri, subjected her to a hostile work environment based on national origin. The investigation reveals that Martina's and Terri's harassing conduct included mocking Rochelle, blocking doorways, and interfering with her work, and that it culminated in an offensive post on the social media service Instagram. In the post, Martina and Terri included two images of Rochelle juxtaposed with an image of the fictional ape Cornelius from the movie *The Planet of the Apes*, along with text explicitly comparing Rochelle to Cornelius. Rochelle learned about the post from another coworker, Jenna. Based on these facts, an investigator finds that the combined conduct, including the Instagram post, was sufficient to create a hostile work environment.[193]

Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace.

Finally, harassment by a supervisor that occurs outside the workplace is more likely to contribute to a hostile work environment than similar conduct by coworkers, given a supervisor's ability to affect a subordinate's employment status.[194]

IV. Liability

A. Overview of Liability Standards in Harassment Cases

When a complainant establishes that the employer made an explicit change to a term, condition, or privilege of employment linked to harassment based on a protected characteristic (sometimes described as "quid pro quo" as described in § III.A.), the employer is liable and there is no defense.[195]

In cases alleging a hostile work environment, one or more standards of liability will apply. Which standards are applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Each standard is discussed in detail in §§ IV.B. and IV.C., below. To summarize:

- If the harasser is a proxy or alter ego of the employer, the employer is automatically liable for the hostile work environment created by 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 and there is no defense to liability. This is true even if the supervisor is not a proxy or alter ego.
- If the harasser is a supervisor (but not a proxy or alter ego) and the hostile work environment does *not* include a tangible employment action, the employer is vicariously liable for the actions of the harasser but the employer may limit its liability or damages under this standard of liability if it can prove the *Faragher-Ellerth* affirmative defense, which is explained below at § IV.C.2.b.
- If the harasser is any person other than a proxy, alter ego, or supervisor, the employer is liable for the hostile work environment created by the harasser's conduct if the employer was negligent in that it failed to act reasonably to prevent the harassment or to take reasonable corrective action in response to the harassment when the employer was aware or should have been aware of it.

Negligence provides a minimum standard for employer liability,[196] regardless of the status of the harasser.[197] Other theories of employer liability — automatic liability (for harassment by proxies and alter egos) and vicarious liability (for harassment by supervisors) — are additional bases for employer liability that supplement[198] and do not replace the negligence standard.[199]

If the complainant challenges harassment by one or more supervisors and one or more coworkers or non-employees and the harassment is part of the same hostile work environment claim,[200] separate analyses of employer liability should be conducted in accordance with each harasser's classification (e.g., proxy, supervisor, coworker).[201]

B. Liability Standard for a Hostile Work Environment Depends on the Role of the Harasser

The liability standard for a hostile work environment depends on whether the harasser is a:

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

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

1. Proxy or Alter Ego of the Employer

An individual is considered an alter ego or proxy of the employer if the individual possesses such high rank or authority that his or her actions can be said to speak for the employer.[202] Individuals who might be considered proxies include sole proprietors and other owners; partners; corporate officers; and high-level managers whose authority or influence within the organization is such that their actions could be said to "speak for" the employer.[203] By contrast, a supervisor does not qualify as the employer's alter ego merely because the supervisor exercises significant control over the complaining employee.[204]

2. Supervisor

In the context of employer liability for a hostile work environment, an employee is considered a "supervisor" if the individual is "empowered by the employer to take tangible employment actions against the victim."[205]

A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer.[206] Examples of tangible employment actions include hiring and firing, failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits.[207] In some cases, a decision may constitute a tangible employment action even though it does not have immediate direct economic consequences, such as a change in job duties that limits the affected individual's eligibility for promotion[208] or a demotion with a substantial reduction in job responsibilities but without a loss in pay.[209]

Even if an individual is not the final decision maker as to tangible employment actions affecting the complainant, the individual would still be considered a supervisor if the individual has the "power to *recommend* or otherwise substantially influence tangible employment actions."[210]

Finally, an employee who does not have actual authority to take a tangible employment action with respect to the complainant can still be considered a supervisor if, based on the employer's actions, the harassed employee reasonably believes that the harasser has such power.[211] The complainant might have such a reasonable belief where, for example, the chain of command is unclear or the harasser has broad delegated powers.[212] In these circumstances, the harasser is said to have "apparent authority."[213]

3. Non-Supervisory Employees, Coworkers, and Non-employees

Federal EEO laws protect employees against unlawful harassment by other employees who do not qualify as a proxy/alter ego or a "supervisor," i.e., other employees without actual or apparent authority to take tangible employment actions against the employee(s) subjected to the harassment. These other employees may include coworkers and shift leads or other workers with limited authority over the complainant. Employees are further protected against unlawful harassment by non-employees, such as independent contractors,[214] customers,

[215] students,[216] hospital patients and nursing home residents,[217] and clients of the employer.[218]

C. Applying the Appropriate Standard of Liability in a Hostile Work Environment Case

Once the status of the harasser is determined, the appropriate standard can be applied to assess employer liability for a hostile work environment.

1. Alter Ego or Proxy - Automatic Liability

If the harasser is an alter ego or proxy of the employer, the employer is automatically liable for unlawful harassment and has no defense.[219] Thus, a finding that the harasser is an alter ego or proxy is the end of the liability analysis. This is true whether or not the harassment includes a tangible employment action.

> **Example 26: Harasser Was Employer's Alter Ego.** Gina, who is Peruvian-American, alleges that she was harassed because of her national origin by the company Vice President, Walter. The investigation reveals that Walter was the only corporate Vice President in the organization, answering only to the company's President, and he exercised managerial responsibility over the Respondent's operations. Based on these facts, given Walter's high rank within the company and his significant control over the company's operations, the investigator concludes that Walter was the Respondent's alter ego, subjecting it to automatic liability for a hostile work environment resulting from his harassment.

2. Supervisor - Vicarious Liability

An employer is vicariously liable for a hostile work environment created by a supervisor.[220] Under this standard, liability for the supervisor's harassment is attributed to the employer. Unlike situations where the harasser is an alter ego or proxy of the employer, an employer may have an affirmative defense, known as the *Faragher-Ellerth* defense, when the harasser is a supervisor. The availability of *Faragher-Ellerth* defense is dependent on whether the supervisor took a tangible employment action against the complainant as part of the hostile work

environment. If the *Faragher-Ellerth* defense is available, the employer bears the burden of proof with respect to the elements of that defense.

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

If the supervisor *did not take a tangible employment action*, then the employer can raise the *Faragher-Ellerth* affirmative defense to vicarious liability by proving both of the following:

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

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

An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.[221] As previously noted, agency principles generally govern employer liability for a hostile work environment. The Supreme Court stated in *Ellerth* that "[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."[222] Therefore, when a hostile work environment includes a tangible employment action, the "action taken by the supervisor becomes for Title VII purposes the act of the employer,"[223] and the employer is liable.[224]

The tangible employment action may occur at any time during the course of the hostile work environment, and need not occur at the end of employment or serve as the culmination of the harassing conduct.[225] For example, if a supervisor subjects an employee to a hostile work environment by making frequent sexual comments and denying pay increases because the employee rejects the sexual advances,[226] then the employer is liable for the hostile work environment created by the

supervisor and there is no defense.[227] This is true even though the supervisor's tangible employment action, here denial of pay increases, did not occur at the end of the employee's employment.

An unfulfilled threat to take a tangible employment action does not itself constitute a tangible employment action, but it may contribute to a hostile work environment.[228] By contrast, fulfilling a threat of a tangible employment action because a complainant rejects sexual demands (e.g., denying a promotion) constitutes a tangible employment action. Finally, fulfilling a promise to provide a benefit because the complainant submits to sexual demands (e.g., granting a promotion or not terminating the complainant after the complainant submits to sexual demands) constitutes a tangible employment action.[229]

b. Hostile Work Environment Without a Tangible Employment Action: Establishing the *Faragher-Ellerth* Affirmative Defense

If harassment by a supervisor creates a hostile work environment that did not include a tangible employment action, the employer can raise an affirmative defense to liability or damages. In *Faragher* and *Ellerth*, the Supreme Court explained that the defense requires the employer to prove that:

- 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.[230]

In establishing this affirmative defense, the Supreme Court sought "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees."[231] The Court held that this carefully balanced defense contains "two *necessary* elements:"[232] (1) the employer's exercise of reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee's unreasonable failure to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[233] Thus, in circumstances in which an employer fails to establish one or both prongs of the affirmative defense, the employer will be liable for the harassment. For example, if the employer is able to

show that it exercised reasonable care but cannot show that the employee unreasonably failed to take advantage of preventive or corrective opportunities, the employer will not be able to establish the defense.

Example 27: Employer Fails to Establish Affirmative Defense. Chidi files a charge alleging that he was subjected to national origin harassment by his supervisor, Ang. The employer does not have a written anti-harassment policy and does not offer comprehensive anti-harassment training. Instead, employees are told to "follow the chain of command" if they have any complaints, which would require Chidi to report to Ang. The evidence shows that during meetings with Chidi and his coworkers, Ang repeatedly directed egregious national origin-based epithets at Chidi, and that Ang's conduct was sufficient to create a hostile work environment. Chidi reported Ang's harassment to his manager (who was also Ang's supervisor) on at least two separate occasions. Each time, the manager simply responded, "That's just Ang—don't take it seriously." Based on these facts, the investigator concludes that the employer cannot establish either prong of the affirmative defense. The employer did not exercise reasonable care to prevent or to promptly correct the harassment. Further, the employer cannot establish that Chidi unreasonably failed to take advantage of the employer's complaint process. Based on these facts, the employer is liable for supervisor harassment under Title VII.

Example 28: Employer Avoids Liability by Establishing Affirmative Defense. Kit files a charge alleging that they were subjected to a hostile work environment by their supervisor because of race. The supervisor's harassment was not severe at first but grew progressively worse over a period of several months. The employer had an effective anti-harassment policy and procedure, which it prominently displayed on its employee website and provided to all employees through a variety of other means. In addition, the employer was not aware of any harassment by this supervisor in the past.[234] Kit never complained to the employer about the harassment or took any other steps to avoid harm from the harassment. The employer learned of the supervisor's conduct from Kit's coworker, who observed the harassment. After learning about it,

the employer took immediate corrective action that stopped the harassment. Based on these facts, the employer is not liable for the supervisor's harassment of Kit, because the employer had an effective policy and procedure and took prompt corrective action upon receiving notice of the harassment and Kit could have used the effective procedure offered by the employer or taken other appropriate steps to avoid further harm from the harassment, but failed to do so.

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

The first prong of the affirmative defense requires the employer to show that it exercised reasonable care *both* to prevent harassment *and* to correct harassment. More specifically, an employer must show both that it took reasonable steps to prevent harassment *in general*, as discussed immediately below, and that it took reasonable steps to prevent and to correct the specific harassment raised by a particular complainant. Because the questions of whether the employer acted reasonably to prevent and to correct the specific harassment alleged by the complainant also arise when analyzing employer liability for non-supervisor harassment, those issues are discussed in detail at § IV.C.3.a. (addressing unreasonable failure to prevent harassment) and § IV.C.3.b. (addressing unreasonable failure to correct harassment). The principles discussed in those sections also apply when determining whether the employer has shown under the first prong of the affirmative defense that it acted reasonably to prevent and to correct the harassment alleged by the complainant.

Title VII does not specify particular steps an employer must take to establish that it exercised reasonable care to prevent and correct harassment; instead, as discussed below, the employer will satisfy its obligations if, as a whole, its efforts are reasonable.[235] In assessing whether the employer has taken adequate steps, the inquiry typically begins by identifying the policies and practices an employer has instituted to prevent harassment and to respond to complaints of harassment. These steps usually consist of promulgating a policy against harassment, establishing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities, and monitoring the workplace to ensure adherence to the employer's policy.[236]

For an anti-harassment *policy* to be effective, it should generally have the following features, at a minimum:

- the policy defines what conduct is prohibited;
- the policy is widely disseminated;[237]
- the policy is comprehensible to workers,[238] including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;[239]
- the policy requires that supervisors report harassment when they are aware of it;[240]
- the policy offers multiple avenues for reporting harassment, thereby, allowing employees to contact someone other than their harassers;[241]
- the policy clearly identifies accessible[242] points of contact to whom reports of harassment should be made and includes contact information;[243] and
- the policy explains the employer's complaint process, including the process's anti-retaliation and confidentiality protections.

For a complaint *process* to be effective, it should generally have the following features, at a minimum:

- the process provides for prompt and effective investigations and corrective action;[244]
- the process provides adequate confidentiality protections;[245] and
- the process provides adequate anti-retaliation protections.[246]

For *training* to be effective, it should generally have the following features, at a minimum:[247]

- It explains the employer's anti-harassment policy and complaint process, including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
- It describes and provides examples of prohibited harassment, as well as conduct that, if left unchecked, might rise to the level of prohibited harassment;

- It provides information about employees' rights if they experience, observe, become aware of, or report conduct that they believe may be prohibited;
- It provides supervisors and managers information about how to prevent, identify, stop, report, and correct harassment, such as actions that can be taken to minimize the risk of harassment, and clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of;
- It is tailored to the workplace and workforce;
- It is provided on a regular basis to all employees; and
- It is provided in a clear, easy-to-understand style and format.

However, even the best anti-harassment policy, complaint procedure, and training will not necessarily establish that the employer has exercised reasonable care to prevent harassment – the employer must also implement these elements effectively.[248] Thus, evidence that an employer has a comprehensive anti-harassment policy and complaint procedure will be insufficient standing alone to establish the first prong of the defense if the employer fails to implement those procedures or to appropriately train employees.[249] Similarly, the first prong of the defense would not be established if evidence shows that the employer adopted or administered the policy in bad faith or that the policy was otherwise defective or dysfunctional.[250] Considerations that may be relevant to determining whether an employer unreasonably failed to prevent harassment are discussed in detail at § IV.C.3.a, below.

Likewise, the existence of an adequate anti-harassment policy and complaint procedure, and training is not dispositive on the issue of whether an employer exercised reasonable care to correct harassing behavior of which it knew or should have known.[251] For example, if a supervisor witnesses harassment by a subordinate, the supervisor's knowledge of the harassment is imputed to the employer, and the duty to take corrective action will be triggered.[252] If the employer fails to exercise reasonable care to correct the harassing behavior, it will be unable to satisfy prong one of the *Faragher-Ellerth* defense, regardless of any policy, complaint procedure, or training. The duty to exercise reasonable care to correct harassment for which an employer had notice is discussed in detail at § IV.C.3.b., below.

Example 29: Employer Liable Because It Failed to Exercise Reasonable Care in Responding to Harassment – Employee Reported to a Supervisor. Aisha, who works as a cashier in a fast-food restaurant, files a charge alleging that she was sexually harassed by one of her supervisors, Pax, an assistant manager. The investigation reveals that Aisha initially responded to Pax's sexual advances and other sexual conduct by telling him that she was not interested and that his conduct made her uncomfortable. Pax's conduct persisted, however, so Aisha spoke to the restaurant's other assistant manager, Mallory, who, like Pax, was designated as Aisha's direct supervisor. Respondent has an anti-harassment policy, which is distributed to all employees. The policy states that all supervisors are required to report and address potentially harassing conduct when the supervisor becomes aware of such conduct. Mallory, however, did not report Pax's conduct or take any action because she felt Aisha was being overly sensitive. Pax continued to sexually harass Aisha, and a few weeks after speaking with Mallory, Aisha contacted the Human Resources Director. The following day, Respondent placed Pax on paid administrative leave, and a week later, after concluding its investigation, Respondent terminated Pax. Respondent contends that it took reasonable corrective action by promptly responding to Aisha's complaint to Human Resources. Because Mallory was one of Aisha's supervisors, and was therefore responsible for reporting and addressing potential harassment, Respondent could not establish the affirmative defense, having failed to act reasonably to address the alleged harassment after Aisha spoke with Mallory.

Example 30: Employer Liable Because It Failed to Exercise Reasonable Care in Responding to Harassment –Supervisor Witnessed Harassment. Respondent, a large department store, has an anti-harassment policy. The policy is, on its face, effective: for example, it describes harassment; provides multiple avenues for reporting harassment, including a 1-800 number operated by a third-party vendor; and contains an anti-retaliation provision. The policy is distributed to all employees at the time of their hire and can be accessed any time via computer terminals that all employees can use. Further, Respondent ensures that all employees receive annual anti-

harassment training that reminds employees of the policy, including their rights and obligations under the policy.

Claudia works as an overnight stocker in Respondent's housewares department. Claudia is directly supervised by Dustin, the housewares department manager. On an almost nightly basis, Dustin likes to "play a game" in which he hides between store aisles and jumps out with his penis exposed to Claudia. Ravi, who manages Respondent's produce section, has witnessed Dustin expose his penis to Claudia on a few occasions. Ravi once admonished Dustin for being a "child" and told him "acting like that will lead to you getting fired," but took no further action to address the harassment. Claudia was embarrassed by the harassment but was afraid that complaining would jeopardize her job, so she never reported the harassment, either to Respondent or the 1-800 number. Respondent cannot establish the affirmative defense. While Respondent appears to have acted reasonably in its efforts to prevent harassment by adopting a comprehensive and effective anti-harassment policy and providing training, it did not act reasonably to correct harassment that it knew about through Ravi's direct observation.

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

The second prong of the *Faragher-Ellerth* affirmative defense requires the employer to show that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[253] An employer that has exercised reasonable care will not be liable if the complainant could have avoided all harm from unlawful harassment but unreasonably failed to do so.[254] Moreover, if the employee unreasonably delayed complaining and an earlier complaint could have avoided some but not all of the harm from the harassment, then the employer might be able to use the affirmative defense to reduce damages, even if it could not eliminate liability altogether.[255]

Example 31: Employer Limits Damages by Establishing Affirmative Defense. Nina files a charge alleging that she was subjected to national origin harassment by her supervisor, Samantha.

> The evidence shows that the harassment began when Samantha used egregious epithets to refer to Nina's national origin during an informal meeting with Nina's coworkers, conduct that was sufficient standing alone to create a hostile work environment. Although Samantha's harassment continues, Nina does not complain until four months later, when she accepts a position with another employer. Nina states she did not complain during her employment because she did not want to "rock the boat" or cause Samantha to be fired. The investigator concludes that the employer has established both elements of the affirmative defense with respect to the continuing harassment after the meeting because Nina could have avoided this harm by complaining promptly. However, the employer is liable for the hostile work environment created by Samantha's initial use of the egregious epithets because Nina could not have avoided this harm by complaining earlier.

Proof that the employee unreasonably failed to use the employer's complaint procedure will normally establish the second prong of the affirmative defense.[256] In some circumstances, however, there will be evidence of a reasonable explanation for an employee's delay in complaining or failure to utilize the employer's complaint process.[257] In addition, there will be instances when an employee's use of mechanisms other than the employer's official complaint process will be sufficient to demonstrate that the employee took reasonable steps to avoid harm from the harassment.

The reasonableness of an employee's decision not to use the employer's complaint procedure, or timing in doing so, depends on the particular circumstances and information available to the employee *at that time*.[258] An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. An employee might reasonably ignore a small number of minor incidents, hoping that the harassment will stop without resorting to the complaint process.[259] The employee also may choose to tell the harasser directly to stop the harassment and then wait to see if the harasser stops before complaining to management. If the harassment persists or worsens, however, then further delay in complaining might be unreasonable.

Even if the employee uses the employer's official complaint process, simply filing the complaint does not necessarily show that the employee acted reasonably in

using the process. If, for example, the complainant unreasonably failed to cooperate in the investigation, the complaint would not qualify as a reasonable effort to avoid harm.[260]

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

There may be reasonable explanations for an employee's delay in complaining or failure to utilize the employer's complaint process.[261] For example:

- Employer-created obstacles to filing complaints: An employee's failure to use the employer's complaint procedure could be reasonable if that failure was based on employer-created obstacles to filing complaints. For example, if the process entailed undue expense by the employee,[262] inaccessible points of contact for making complaints,[263] or intimidating or burdensome requirements, failure to use the process could be reasonable.

- Ineffective complaint mechanism: As a general matter, an employee's subjective belief that reporting harassment will be futile, without more, will not constitute a reasonable basis for failing to take advantage of preventive or corrective opportunities provided by an employer.[264] However, an employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on a *reasonable* belief that the complaint process was ineffective. For example, an employee might have a reasonable belief that the complaint process would be ineffective if the persons designated to receive complaints were all close friends of the harasser.[265] A failure to complain also might be reasonable if the complainant was aware of instances in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or by coworkers.[266]

- Risk of retaliation: A generalized fear of retaliation, standing alone, will not constitute a reasonable basis for failing to take advantage of preventive or corrective opportunities provided by an employer.[267] However, an employee's failure to use the employer's complaint procedure would be reasonable if the employee *reasonably* feared retaliation as a result of complaining about harassment.[268] An employer's complaint procedure should provide assurances that complainants will not be subjected to retaliation. Even in the face of such assurances, however, an employee might reasonably fear retaliation in some instances. For example, if the harasser

threatened the employee with reprisal for complaining, then the employee's decision not to report or to delay reporting the harasser would likely be reasonable.[269] Similarly, an employee's failure to complain could be reasonable if the employee or another employee had previously been subjected to retaliation for complaining about harassment.[270] By contrast, because it may not be possible for an employer to completely eliminate all unpleasantness that an employee may experience in reporting harassment, a failure to report or delay in reporting will not be considered reasonable if based merely on concerns about ordinary discomfort or embarrassment.[271]

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

Even if an employee failed to use the employer's complaint process, the employer will not be able to establish the *Faragher-Ellerth* affirmative defense if the employee took other reasonable steps to avoid harm from the harassment. A promptly filed union grievance while the harassment is ongoing, for example, could qualify as a reasonable effort to avoid harm.[272] Similarly, a temporary employee who is harassed at the client's workplace generally would be free to report the harassment to either the employment agency or the client, reasonably expecting that the entity she notified would act to correct the problem.[273]

3. Non-supervisory Employees (E.g., Coworkers) and Non-employees - Negligence[274]

An employer is liable for a hostile work environment created by non-supervisory employees or by non-employees if it was negligent because:

- **it unreasonably failed to prevent the harassment;**

  OR

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

Although the negligence standard is principally applied in cases involving harassment by a non-supervisory employee or non-employee, it also can be applied in cases involving harassment by a supervisor or alter ego/proxy.[275]

a. Unreasonable Failure to Prevent Harassment

An employer is liable for a hostile work environment created by non-supervisory employees or non-employees where the employer was negligent by failing to act reasonably to prevent harassment from occurring.[276] Although the relevant considerations will vary from case to case, some of the considerations may include:

1) **Adequacy of the employer's anti-harassment policy, complaint procedures, and training:** As with the first prong of the *Faragher-Ellerth* affirmative defense (which only applies to harassment by a supervisor), assessing negligence on the part of an employer starts with whether the employer had an adequate anti-harassment policy, complaint procedures, and training to ensure employees understand their rights and responsibilities pursuant to the policy.[277] The elements described in § IV.C.2.b.i., above, with regard to an effective policy and complaint procedure apply here as well.

2) **Nature and degree of authority, if any, that the alleged harasser exercised over the complainant:**[278] Employers have a heightened responsibility to protect employees against harassment by other employees whom it has "armed with authority"[279] even if the other employees are not "supervisors."[280]

3) **Adequacy of the employer's efforts to monitor the workplace**,[281] such as by training supervisors and other appropriate officials on how to recognize potential harassment and by requiring them to report or address harassment that they either are aware of or reasonably should have known about.

4) **Adequacy of the employer's steps to minimize known or obvious risks of harassment**, such as harassment by inmates incarcerated in a maximum-security prison;[282] in workspaces that are isolated, decentralized, homogenous, or rely on customer service or client satisfaction; and against employees who are vulnerable, young, do not conform to workplace norms based on societal stereotypes, or who are assigned to complete monotonous or low-intensity tasks.[283]

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

Even if an employer acted reasonably to prevent harassment by coworkers or non-employees, it is still liable for a hostile work environment if it was negligent because it did not act reasonably to correct harassment about which it knew or should have known.[284]

Notice

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

Corrective Action

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

i. Notice

The first element that triggers an employer's duty to take reasonable corrective action against harassment is the employer's notice of the harassment.[285]

An employer has actual notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it.[286] Thus, if harassment is observed by or reported to any individual who is responsible for reporting harassment to management, then the employer has actual notice of the harassment.[287] Likewise, if harassment is observed by or reported to an individual responsible for taking corrective action, then the employer has actual notice of the harassment.[288]

An employer also has actual notice of harassment if an employee with a general duty to respond to harassment under the employer's anti-harassment policy, such as the EEO Director, a manager, or a supervisor who does not directly supervise either the harasser or the target of the harassment but who does have a duty to report harassment is aware of it.[289] In addition, an employer has notice if someone

qualifying as the employer's proxy or alter ego, such as an owner or high-ranking officer, has knowledge of the harassment.[290]

> **Example 32: Employer Had Notice of Harassment.** Lawrence, a Black man in his 60s, was employed as a laborer in a distribution yard for Respondent. Lawrence alleges that he was subjected to race- and age-based harassment by coworkers and that Respondent failed to take appropriate corrective action after he complained. Respondent contends that it was never notified of the alleged harassment until after Lawrence had been fired for misconduct, and he filed an EEOC charge. The investigation reveals that Lawrence complained to the "yard lead," who was responsible for instructing and organizing teams of yard workers. According to Respondent's policy, the yard lead was expected to report problems to the yard manager, who had authority to take disciplinary action against employees. Based on this evidence, the investigator concludes that the yard lead was responsible for referring Lawrence's complaints to an appropriate official authorized to take corrective action. Therefore, based on these facts, Respondent had actual notice of the alleged harassment.[291]

A complaint can be made by a third party, such as a friend, relative, or coworker, and need not be made by the target of the harassment. For example, if an employee witnesses a coworker being subjected to racial epithets by a person at work, and that employee reports it to the appropriate personnel in Human Resources, the employer is on notice of potentially harassing behavior. Similarly, even if no one complains, the employer still has notice if someone responsible for correcting or reporting harassment becomes aware of the harassment, such as by personally witnessing it.[292]

The employer's duty to take corrective action is triggered if the notice it has received is sufficient to make a reasonable employer aware of the possibility that an individual is being subjected to harassment on a protected basis. While no "magic words" are required to initiate a harassment complaint, the complaint (or other vehicle for notice) must identify potentially unlawful conduct in some way.[293] Therefore, a complaint simply that a coworker's conduct was "rude" and "aggravating" might not provide sufficient notice depending on the circumstances. Conversely, evidence that an employee had engaged in "unwanted touching" of

another employee likely would be sufficient to alert the employer of a reasonable probability that the second employee was being sexually harassed and that it should investigate the conduct and take corrective action.[294]

> **Example 33: Employer Had Notice of Harassment.** Respondent contends that it did not have notice of Jim's alleged sexual harassment of Susan, one of his coworkers. The investigation reveals, however, that Susan requested a schedule change when she was scheduled to work alone with Jim, and that Susan's coworkers told her supervisor, Stacey, that Susan wanted to avoid working with Jim. Also, Jim told Stacey that he may have "done something or said something that [he] should not have to Susan." When Stacey asked Susan about working with Jim, she became "teary and red" and said, "I can't talk about it." Stacey responded by saying, "That's good because I don't want to know what happened." In addition, Respondent was aware that Jim had engaged in sexual harassment of female employees in the past. Under the circumstances, Stacey had enough information to suspect that Jim was sexually harassing Susan. As Susan's supervisor, she had the responsibility to take corrective action, if she had the authority, or to notify another official who did have the authority.[295]

Although an employer cannot be found liable for conduct that does not violate federal EEO law, the duty to take corrective action may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.[296]

Notice of harassing conduct directed at one employee might serve as notice not only of the harasser's potential for further harassment of the same employee but also of the harasser's potential to harass others. Factors in assessing the relevance of the employer's knowledge of prior harassment can include the "extent and seriousness of the earlier harassment and the similarity and nearness in time to the later harassment."[297]

An employer has constructive notice of harassing conduct if, under the circumstances presented, a reasonable employer should know about the conduct.[298] Most commonly, an employer is deemed to have constructive notice if harassing conduct is severe, widespread, or pervasive so that individuals

responsible for taking action with respect to the harassment reasonably should know about it.[299] An employer also may be deemed to have constructive notice of harassment if it did not have reasonable procedures for reporting harassment.[300]

Example 34: Employer Had Constructive Notice of Harassment. Joe, who is Mexican-American, works as an Automotive Parts Salesman for a car dealership. Joe's job requires him to frequently enter Respondent's Service Department. At least once per day while in the Service Department, the Service Foreman, Ronald, yells across the room, calling Joe "Wetback," "Spic," and "Mexican Mother F--." Ronald is supervised by Aseel, the Service Department Manager. Because Ronald is Joe's coworker, the first question is whether the employer knew or should have known of the harassment. During the EEOC's investigation of Joe's harassment complaint, coworkers testified that Ronald's name-calling permeated the Service Department, even after Respondent provided anti-harassment training to all of the employees working at Joe's location. Multiple coworkers testified that the harassment occurred in front of them, and it seemed like Ronald enjoyed having an audience. Based on this evidence, the investigator concludes that Respondent had constructive notice of the hostile work environment because Service Manager Aseel knew or should have known about Ronald's conduct.[301]

ii. Reasonable Corrective Action

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

a) Prompt and Adequate Investigation

An investigation is prompt[302] if it is conducted reasonably soon after the complaint is filed or the employer otherwise has notice of possible harassment. For instance, an employer that opens an investigation into a complaint one day after it is filed clearly has acted promptly.[303] An employer that waits two months to open an investigation, on the other hand, can be presumed, absent other facts, not to have

acted promptly.[304] In other instances, what is "reasonably soon" is fact-sensitive and depends on such considerations as the nature and severity of the alleged harassment and the reasons for delay.[305] For example, when faced with allegations of physical touching, an employer that, without explanation, does nothing for two weeks likely has not acted promptly.[306]

An investigation is adequate if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."[307] 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. The alleged harasser therefore should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. 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.[308] Accordingly, whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility.

> **Example 35: Employer Failed to Conduct Adequate Investigation.** George, a construction worker, repeatedly complains to the superintendent that he is being harassed because of his disability by Phil, a coworker. After about two weeks, the superintendent asks a friend of his to conduct an investigation, even though this individual is not familiar with EEO law or the harassment policy and has no experience conducting harassment investigations. Another week later, the investigator contacts George and Phil and meets with them individually for about 10 minutes each. During the meeting with George, the investigator never asks him any questions and does not take any notes. Without first consulting with the employer's EEO officer, the investigator issues a single-page memorandum concluding that there is no basis for finding that George was harassed without further explanation. Based on these facts, Respondent has not conducted an adequate investigation.[309]

Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws.[310]

Employers should retain records of all harassment complaints and investigations.[311] These records can help employers identify patterns of harassment, which can be useful for improving preventive measures, including training. These records also can be relevant to credibility assessments and disciplinary measures.

In some cases, it may be necessary, given the seriousness of the alleged harassment, for the employer to take intermediate steps to address the situation while it investigates the complaint.[312] Examples of such measures include making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. As a rule, an employer should make every reasonable effort to minimize the burden or negative consequences to an employee who complains of harassment, pending the employer's investigation.

Corrective action that leaves the complainant worse off also could constitute unlawful retaliation if motivated by retaliatory bias.[313] The employer should take measures to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

b) Appropriate Corrective Action

To avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment" under the particular circumstances at that time.[314] Corrective action should be designed to stop the harassment and prevent it from continuing.[315] The reasonableness of the employer's corrective action depends on the particular facts and circumstances at the time when the action is taken.[316]

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

1) Proportionality of the corrective action: Corrective action should be proportionate to the seriousness of the offense.[317] If the harassment was minor, such as "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is

necessary. In other circumstances, separating the harasser and the complainant may be adequate. On the other hand, if the harassment was severe or persistent despite prior corrective action, then suspension or discharge of the harasser may be necessary.[318]

2) Authority granted harasser: Employers have a heightened responsibility to protect employees against abuse of official power. To that end, employers must take steps to prevent employees who have been granted authority over others from using it to further harassment, even if that authority is insufficient to establish vicarious liability.[319] Thus, the nature and degree of the harasser's authority should be considered in evaluating the adequacy of corrective action.[320]

3) Whether harassment stops: After taking corrective action, an employer should monitor the situation to ensure that the harassment has stopped. Whether the harassment stopped is a key factor indicating whether the corrective action was appropriate. However, the continuation of harassment despite an employer's corrective action does not necessarily mean that the corrective action was inadequate.[321] For example, if an employer takes appropriate proportionate corrective action against a first-time offender who engaged in mildly offensive sexual conduct, yet the same employee subsequently engages in further harassment, then the employer may not be liable if it also responded appropriately to the subsequent misconduct by taking further corrective action appropriate to the pattern of harassment. On the other hand, an employer who takes no action in response to a complaint of harassment may not be shielded from liability by the fact that the harassment "fortuitously stops."[322]

4) Effect on complainant: An employee who in good faith complains of harassment should ideally face no burden because of the corrective action the employer takes to stop harassment or prevent it from occurring; for example, corrective action generally should not involve involuntarily transferring the complaining employee while leaving the alleged harasser in place.[323] However, the employer may place some burdens on the complaining employee as part of the corrective action it imposes on the harasser if it makes every reasonable effort to minimize those burdens or adverse consequences.[324]

5) Options available to the employer:[325] Although employers are responsible for addressing harassment by anyone in the workplace, employers may have fewer options for influencing the conduct of some non-employees, thereby limiting the remedial options available,[326] or may have limited control over the work environment, such as a joint employer that assigns employees to work at client sites. Employers also may have less ability to control conduct arising outside the workplace that can contribute to a hostile work environment. Employers' corrective actions are to be assessed based on how they deploy the "arsenal of incentives and sanctions" they have available to address harassment.[327]

6) The extent to which the harassment was substantiated: Where an employer conducts a thorough investigation but is unable to determine with sufficient confidence that the alleged harassment occurred, its response may be more limited. An employer is not required to impose discipline if, after a thorough investigation, it concludes that the alleged harassment did not occur, or if it has inconclusive findings.[328] Nonetheless, if the employer is unable to determine whether the alleged harassment occurred, the employer may wish to consider preventive measures, such as counseling, training, monitoring, or issuing general workforce reminders about the employer's anti-harassment policy.[329]

> **Example 36: Employer failed to take reasonable corrective action.** Malak, a server at a sports bar, is visibly pregnant. Every Sunday, Kevin and Troy spend the afternoon at the bar cheering on their favorite football team, and they usually sit in Malak's section. They repeatedly ask if they can rub her belly "for luck" before games, and berate her when she refuses, calling her a "mean mama." They also frequently make beeping sounds and yell, "Careful! Wide load!" when Malak serves other tables. In addition, they ask if she plans to breastfeed and offer to "help out with practice sessions." Sven, a manager, overhears Kevin and Troy, laughs, and says halfheartedly, "C'mon guys, give her a break." They ignore him and continue to comment about Malak's pregnancy. Malak complains to Sven, who throws up his hands and says, "Hey, I did what I could. What else do you want me to do? If I barred everyone who made a few dumb comments when they were drunk, we'd have no customers at

all." Based on these facts, the employer has failed to take reasonable corrective action to address Kevin and Troy's pregnancy-based harassment of Malak.

Example 37: Employer took reasonable corrective action. Same facts as above, but instead of laughing and making a halfhearted request that Kevin and Troy stop harassing Malak, Sven tells Kevin and Troy that they must stop making comments about Malak's pregnancy and warns them that they will be barred from the establishment if they persist. Sven tells Malak to notify him or another manager immediately if the comments continue. Sven also asks Malak if she would like Kevin and Troy reseated in another section, but she declines, and he asks other managers to keep an eye on Kevin and Troy to make sure the two men do not continue to harass Malak. Three weeks later, Kevin and Troy resume making offensive pregnancy-related comments to Malak. Before Malak can notify Sven, another manager does so, and Sven promptly gives Kevin and Troy their check, directs them to pay, and notifies them they are no longer welcome at the bar. Based on these facts, the employer has taken adequate corrective action to address Kevin and Troy's pregnancy-based harassment of Malak.

7) Special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression: Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship. Employers, however, also have a duty to protect workers against religiously motivated harassment. Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment. [330] As with other forms of harassment, an employer should take corrective action before the conduct becomes sufficiently severe or pervasive to create a hostile work environment.[331]

Corrective action in response to a harassment complaint must be taken without regard to the complainant's protected characteristics. Thus, employers should follow consistent processes for all harassment claims, to determine what corrective action, if any, is appropriate. For example, it would violate Title VII if an employer

assumed that a male employee accused of sexual harassment by a female coworker had engaged in the alleged conduct based on stereotypes about the "propensity of men to harass sexually their female colleagues."[332]

In some circumstances, an employee may report harassment but ask that the employer keep the matter confidential and take no action. Although it may be reasonable in some circumstances to honor the employee's request when the conduct is relatively mild, it may not be reasonable to do so, for instance, if it appears likely that the harassment was severe[333] or if employees other than the complainant are vulnerable.[334] One mechanism to help minimize such conflicts would be for the employer to set up an informational phone line or website that allows employees to ask questions or share concerns about harassment anonymously.[335] In such circumstances, the employer also may be required to take general corrective action to reduce the likelihood of harassment in the future, such as recirculating its anti-harassment policy.

If an individual has been assigned by a temporary employment agency to work for a client, then both the temporary agency and the client may jointly employ the individual during the period when the individual works for the client.[336] If a worker is jointly employed by two or more employers, then each of the worker's employers may be responsible for taking corrective action to address any alleged harassment about which it has notice.[337] An employer has the same responsibility to prevent and correct harassment of temporary employees as harassment of permanent employees.[338] Therefore, under such circumstances, if the worker complains about harassment to the client and temporary employment agency, then both entities would be responsible for taking corrective action.[339] Joint employers are not required to take duplicative corrective action, but each has an obligation to respond to potential harassment, either independently or in cooperation. Once the employee complains to either entity, that entity is responsible to take reasonable steps within its control to address the harassment and to work with the other entity, if necessary, to resolve the discrimination.[340]

As with any employer, a temporary employment agency is responsible for taking reasonable corrective action within its own control. This is true regardless of whether the temporary employment agency's client is also a joint employer. Corrective action may include, but is not limited to: ensuring that the client is aware of the alleged harassment; insisting that the client conduct an investigation and take appropriate corrective measures on its own; working with the client to jointly

conduct an investigation and/or identify appropriate corrective measures; following up and monitoring to ensure that corrective measures have been taken; and providing the worker with the opportunity to take another job assignment at the same pay rate, if such an assignment is available and the worker chooses to do so.

Example 38: Temporary Agency Takes Adequate Corrective Action, But Client Does Not. Jamila, an Arab American Muslim woman, is assigned by a temporary agency to work for a technology company on a software development project. The evidence establishes that the temporary agency and technology company are joint employers of Jamila. Soon after Jamila starts working, Eddie, one of her coworkers, begins making frequent comments about her religion and ethnicity. For example, Eddie says that Middle Eastern Muslims "prefer to solve problems with their bombs, rather than their brains" and that they "pray for America's destruction." He also says that "the Middle East's number one export is terrorism," and recommends that Jamila's work be reviewed carefully "to make sure she's not embedding bugs on behalf of terrorists." Jamila tells Eddie to stop, but he refuses. Jamila complains to the temporary agency, which promptly notifies the technology company and requests that it take corrective action. The technology company refuses to take any action, explaining that Eddie is one of its most experienced programmers, that his assistance is crucial to the project's satisfactory completion, and that his reputation in the tech industry has attracted numerous prestigious clients to the company. The temporary agency promptly reassigns Jamila to a different client at the same pay rate.[341] The temporary agency also declines to assign other workers to the technology company until the company takes appropriate corrective action to address Eddie's conduct. Based on these facts, the temporary agency took appropriate corrective action as to Jamila, while the technology company did not.

V. Systemic Harassment

A. Harassment Affecting Multiple Complainants

Like other forms of discrimination, harassment can be systemic, subjecting multiple individuals to a similar form of discrimination. If harassment is systemic, then the harassing conduct could subject all the employees of a protected group to the same circumstances. For example, evidence might show that the Black employees working on a particular shift were subjected to, or otherwise knew about, the same racial epithets, racial imagery, and other offensive race-based conduct.[342] In such a situation, evidence of widespread race-based harassment could be used to establish that each Black employee working on that shift was individually subjected to an objectively hostile work environment.

> **Example 39: Same Evidence of Racial Harassment Establishes Objectively Hostile Work Environment for Multiple Employees.** Charging Parties (CPs), five Black correctional officers, allege that they were subjected to racial harassment. CPs, who were the only Black officers on their shift, alleged that they experienced demoralizing racial treatment and jokes, including aggressive treatment by dog handlers stationed at the entrance and racial references and epithets, such as the n-word, "back of the bus," and "the hood." Much of the conduct occurred in a communal setting, such as the cafeteria, in which supervisors participated or laughed at the conduct without objecting. The evidence shows that this conduct occurred regularly, up to several times a week during the approximately one-year period before CPs filed EEOC charges, despite CPs' repeated objections. Although none of the CPs were personally subjected to every harassing incident, the harassers treated them as a cohesive group, and each became aware of harassment experienced by the others. Based on these facts, the investigator concludes that each of the CPs was subjected to an objectively hostile work environment based on race.[343]

B. Pattern-or-Practice Claims

In some situations involving systemic harassment, the evidence may establish that the employer engaged in a "pattern or practice" of discrimination, meaning that the

employer's "standard operating procedure" was to tolerate harassment creating a hostile work environment.[344] This inquiry focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"[345] – in other words, whether the work environment, as a whole, was hostile.[346] 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.[347] In another case, the EEOC obtained a $240 million jury verdict on behalf of a group of individuals with intellectual disabilities who had been verbally and physically abused, as well as financially exploited. Verbal abuses included frequently referring to the employees as "retarded," "dumb ass," and "stupid."[348]

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.[349]

> **Example 40: Evidence of Sexual Harassment Establishes Pattern-or-Practice Violation.** Zoe alleges that she has been subjected to ongoing sexual harassment at Respondent's soap manufacturing plant in City. The investigation reveals that female employees throughout the City plant have been frequently subjected to physically invasive conduct by male coworkers, including the touching of women's breasts and buttocks; that women have been targeted by repeated sexual comments and conduct; and that there are open displays of sexually offensive materials throughout the plant, including pornographic magazines and calendars. The investigation further reveals that Respondent either knew or should have known about the widespread sexual harassment. In particular, much of the harassment occurred openly in public places, such as the display of pornography, and many incidents, such as sexual comments, occurred in the presence of supervisors who were required by Respondent's anti-harassment policy to report sexual harassment to the Human Resources Department. Finally, although

management has taken some corrective action in isolated cases, there is no evidence that management has taken steps to determine whether the harassment is part of a systemic problem requiringappr opriate plant-wide corrective action. Based on these facts, the investigator determines that Respondent has subjected female employees at City plant to a pattern or practice of sexual harassment. **[350]**

VI. Selected EEOC Harassment Resources

A. EEOC Harassment Home Page: **https://www.eeoc.gov/harassment (https://www.eeoc.gov/harassment)**

B. EEOC Sexual Harassment Home Page: **https://www.eeoc.gov/sexual-harassment (https://www.eeoc.gov/sexual-harassment)**

C. EEOC Select Task Force on the Study of Harassment in the Workplace: **https://www.eeoc.gov/eeoc-select-task-force-study-harassment-workplace (https://www.eeoc.gov/eeoc-select-task-force-study-harassment-workplace)**

D. Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of HarassmentintheWorkplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/june-2016-report-co-chairs-select-task-force-study-harassment-workplace (https://www.eeoc.gov/june-2016-report-co-chairs-select-task-force-study-harassment-workplace)**

E. Promising Practices for Preventing Harassment: **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)**

F. Promising Practices for Preventing Harassment in the Federal Sector: **Promising Practices for Preventing Harassment in the Federal Sector | U.S. Equal Employment Opportunity Commission (eeoc.gov) (https://www.eeoc.gov/federal-sector/reports/promising-practices-preventing-harassment-federal-sector)**

G. EEOC Retaliation Home Page: **https://www.eeoc.gov/retaliation (https://www.eeoc.gov/retaliation)**

H. Enforcement Guidance on Retaliation and Related Issues: **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues)**

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

[2] *See* EEOC, *All Charges Alleging Harassment (Charges filed with EEOC) FY 2010-FY 2022*, **https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm (https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm)** (last visited July 17, 2023); EEOC, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022*, **https://www.eeoc.gov/data/all-statutes-charges-filed-eeoc-fy-1997-fy-2022 (https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.eeoc.gov%2Fdata%2Fall-statutes-charges-filed-eeoc-fy-1997-fy-2022&data=05%7C01%7CTERRI.YOUNGBLOOD%40EEOC.GOV%7C9a2935650ec348b5ff9008dbbec611d2%7C3ba5b9434e564a2f9b91b1f1c37d645b%7C0%7C0%7C638313530138099867%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=q8dh0Wd3Z3kicydnnD4wNCO86DXUA2b56k%2BsxmzFY%2BY%3D&reserved=0)** (last visited July 17, 2023).

[3] *See, e.g.*, Laura Kusisto, *Weinstein Verdict Signals Cultural Shift on Sexual Assault*, Wall Street Journal, Feb. 25, 2020, **https://www.wsj.com/articles/weinstein-verdict-signals-cultural-shift-on-sexual-assault-11582664912 (https://www.wsj.com/articles/weinstein-verdict-signals-cultural-shift-on-sexual-assault-11582664912)** ; *see also* The Associated Press, *#MeToo poll: Many in US more willing to call out misconduct*, The Associated Press, Oct. 15, 2021, **https://apnews.com/article/sexual-misconduct-metoo-79688da3a0c3519d2a76b5b6e6b23ba7 (https://apnews.com/article/sexual-misconduct-metoo-79688da3a0c3519d2a76b5b6e6b23ba7)** (noting that thirty-five percent of Americans say that sexual misconduct is an "extremely" or "very" serious problem in the workplace, and forty-seven percent of Americans say it is a "somewhat" serious problem in the workplace).

The EEOC's 2016 publication of the report of the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace, discussing workplace risk

factors, potential responses to those factors, and other recommendations, may serve as a resource to employers and other covered entities. *See generally* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** .

[4] *See, e.g*., *EEOC v. T.M.F Mooresville, LLC*, No. 5:21-cv-00128 (W.D.N.C. consent decree entered Aug. 24, 2022) ($60,000 settlement on behalf of a class of white housekeeping employees allegedly subjected to harassment based on race, which included use of racially derogatory terms such as "white trash"); *EEOC v. Chicago Meat Auth., Inc.*, No. 1:18-cv-01357 (N.D. Ill. consent decree entered Oct. 7, 2021) ($1.1 million settlement of lawsuit alleging racial harassment, including racial epithets and slurs; hiring discrimination; and retaliation against Black and African American employees and applicants); *EEOC v. CCC Grp.,* 1:20-cv-00610 (N.D.N.Y. consent decree entered Aug. 9, 2021) ($420,00 settlement on behalf of seven Black employees at an industrial construction site allegedly subjected to repeated racist slurs, displays of nooses, and comments about lynchings by white supervisors and coworkers); *EEOC v. Kimco Staffing Servs., Inc.*, No. 5:19-cv-01838 (C.D. Cal. consent decrees entered May 25, 2021 and June 22, 2021) (settlements requiring Ryder Integrated Logistics, Inc. and Kimco Staffing Services, Inc. to each pay $1 million to Black employees allegedly subjected to racial harassment—which included racial slurs and epithets such as "Negra Fea," "Aunt Jemima," "black girl," and "black boy"—and other disparate treatment and retaliation); *EEOC v. Nabors Corp. Serv., Inc.*, No. 5:16-cv-00758 (W.D. Tex. consent decree entered Nov. 12, 2019) ($1.2 million settlement on behalf of nine Black employees and one white employee based on alleged racial harassment, which included employees being addressed as "n____r" and being referred to as the "colored crew," and retaliation, among other allegations); *EEOC v. Master Marine, Inc.*, No. 1:18-cv-00269 (S.D. Ala. consent decree entered Nov. 30, 2018) ($102,000 settlement on behalf of an Asian welder and three Black employees who were allegedly subjected to racially derogatory slurs, including daily use of slurs such as "n____r," "monkey boy," "n____r boy," "noodle-eating bastard," and "rice-boy," in addition to other discriminatory conduct); *EEOC v. Cudd Energy Servs.*, No. 4:15-cv-00037 (D.N.D. consent decree entered July 19, 2018) ($39,900 settlement on behalf of an Asian employee who was allegedly subjected to harassment based on race, including being called "little Asian" and "Chow" based

on an Asian character in the movie "Hangover" and being physically assaulted by a supervisor); *EEOC v. Laquila Grp.,* 1:16-cv-05194-PK (E.D.N.Y. consent decree entered Dec. 1, 2017) ($625,000 settlement on behalf of six Black construction workers allegedly routinely harassed by white foremen, including slurs such as "gorilla" and "monkey").

[5] 42 U.S.C. § 2000e-5 (Title VII); 29 U.S.C. § 626 (Age Discrimination in Employment Act (ADEA)); 42 U.S.C. § 12117(a) (Americans with Disabilities Act (ADA)); 42 U.S.C. § 2000ff-6(a) (Genetic Information Nondiscrimination Act (GINA)). This guidance addresses harassment claims under provisions of the federal EEO laws that prohibit discrimination by employers, including section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (private sector and state and local government) and section 717 of Title VII, 42 U.S.C. § 2000e-16(a) (federal agencies). It does not address potential claims of unlawful harassment under provisions that prohibit discrimination by other entities covered under Title VII, such as employment agencies and labor organizations, including sections 703(b) and 703(c) of Title VII, 42 U.S.C. §§ 2000e-2(b) and 2000e-2(c). *See, e.g.*, *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84-85 (1st Cir. 2007) (upholding a jury verdict finding a union liable for sexual harassment that occurred during a union-sponsored bus trip).

The standards discussed here under EEOC-enforced laws will not necessarily apply to claims alleging unlawful harassment under other federal laws or under state or local laws.

[6] 29 C.F.R. § 1695.2(c)(7)(i).

[7] The federal EEO laws do not prohibit employers from issuing more expansive internal policies prohibiting behavior that does not amount to unlawful harassment, for example, bullying that falls short of unlawful harassment. For a description of unwelcome conduct in the workplace, see Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 3, 54-55 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** .

[8] Discrimination against persons of a particular racial group, for example, Asian Americans, also may constitute harassment based on national origin in certain

factual scenarios. Harassment based on color also may constitute harassment based on race or national origin in certain circumstances. Harassment based on national origin is described below.

[9] *See, e.g.*, *Laurent-Workman v. Wormuth*, 54 F.4th 201, 212 (4th Cir. 2022) (holding that the plaintiff had established at least a plausible claim of race-based harassment where a white coworker's statements that she "could not understand African Americans because they cannot speak properly communicated racial enmity by summoning an odious trope about African American speech patterns"); *Gates v. Bd. of Educ.*, 916 F.3d 631, 633-34, 640-41 (7th Cir. 2019) (concluding that a reasonable jury could find that the plaintiff was subjected to a racially hostile work environment based on three incidents with his supervisor, specifically, that his supervisor made a joke in which he referred to the plaintiff as a "sh_t-sniffing n____r," threatened to write up the plaintiff's "black a_s," and stated he was "tired of you people" and again referred to the plaintiff as a n____r); *Ellis v. Houston*, 742 F.3d 307, 314, 320-21 (8th Cir. 2014) (reversing a grant of summary judgment for the defendants on the plaintiffs' racial harassment claims under 42 U.S.C. §§ 1981 and 1983 where there was evidence of a widespread pattern of racial harassment that included racial stereotyping, such as referring to the African American plaintiffs as a "gang" or "the back of the bus" and addressing them with comments about the "hood" or fried chicken and watermelon); *Boone v. Old Colony Young Men's Christian Ass'n*, No. 13-13131, 2015 WL 7253676, at *3 (D. Mass. Nov. 17, 2015) (concluding that a reasonable jury could find that a reference to a pornographic movie with a title based on racial stereotypes constituted race-based harassment); *Chambers v. Walmart Stores, Inc.*, No. 1:14CV996, 2015 WL 4479100, at *1, *3 (M.D.N.C. July 22, 2015) (recommending denial of a motion to dismiss a racial harassment claim alleging that a manager used racial slurs and negative racial stereotypes, such as referring to African American people as "Blackie" and using the term "ghetto" to describe the appearance of the store), *report and recommendation adopted*, 2015 WL 5147056 (Sept, 1, 2015).

[10] *See* EEOC, *Compliance Manual Section 15: Race & Color Discrimination* § 15-II (2006), **https://www.eeoc.gov/policy/docs/race-color.html#II (https://www.eeoc.gov/policy/docs/race-color.html#II)** ; *see also, e.g.*, *Ellis*, 742 F.3d at 314 (noting "[o]ffensive comments . . . about the qualities of black hair and black hairstyles" when describing a pattern of race-based harassment); *Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 864 (8th Cir. 2010) (concluding that the evidence was sufficient to establish that the plaintiff's work environment was hostile where,

among other things, the plaintiff alleged that she was admonished for answering the phones because "customers weren't used to hearing a black voice").

[11] *See, e.g.*, *EEOC v. Pioneer Hotel, Inc.*, No. 2:11-CV-01588, 2013 WL 3716447, at *3 (D. Nev. July 15, 2013) (denying a motion to dismiss a claim of harassment against a class of Latino and/or dark-skinned employees based on national origin and/or skin color); *Wiltz v. Christus Hosp. St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *8 (E.D. Tex. Mar. 10, 2011) (stating harassment is based on color when the complained-of conduct has a color-related character or purpose and collecting cases supporting the same); *Brack v. Shoney's, Inc.*, 249 F. Supp. 2d 938, 953-55 (W.D. Tenn. 2003) (holding there was sufficient evidence of color-based harassment to survive the employer's summary-judgment motion where the plaintiff's supervisor called him "little black sheep" and expressed a preference for a "fair skinned" manager, among other things); *cf. Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 477 (5th Cir. 2015) (vacating summary judgment for the employer regarding its failure to promote the plaintiff to a managerial position where the plaintiff offered evidence that she was qualified for the position and provided direct evidence that she was not considered for the position because of her skin color); *Arrocha v. City Univ. of New York*, No. CV-02-1868 (SJF)(LB), 2004 WL 594981, at *6 (E.D.N.Y. Feb. 9, 2004) (concluding that the plaintiff had alleged color, not race, discrimination where the plaintiff claimed light-skinned Hispanics were favored over dark-skinned Hispanics); *Walker v. Sec'y of the Treasury*, 713 F. Supp. 403, 405-08 (N.D. Ga. 1989) (concluding that the plaintiff stated a claim for relief under Title VII where she alleged that her supervisor, a Black woman with dark skin, terminated the plaintiff, also a Black woman, because of her light skin color), *aff'd without opinion*, 953 F.2d 650 (11th Cir. 1992).

[12] This example is based on the facts in *EEOC v. Rugo Stone, LLC*, No. 1:11-cv-915 (E.D. Va. consent decree entered Mar. 6, 2012).

[13] *See, e.g.*, *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (concluding that the plaintiff could establish that he was harassed based on his national origin, Korean, where his supervisor allegedly subjected Korean workers to abuse based on their failure to "live up" to the stereotype that Korean workers are "better than the rest").

[14] *See* 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity . . . because an individual has the physical, cultural or linguistic

characteristics of a national origin group."); EEOC, *Enforcement Guidance on National Origin Discrimination* § II.B (2016), **https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_Toc451518801 (https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_Toc451518801)** (stating that national origin discrimination includes discrimination based on physical, linguistic, or cultural traits); *see also, e.g.*, *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-801 (8th Cir. 2003) (holding that evidence of frequent harassment, including taunts about a Hispanic employee's accent and statements that "Hispanics should be cleaning" and that "Hispanics are 'stupid,'" was sufficient to show that an employee was subjected to pervasive harassment that created a hostile work environment); *Gonzales v. Eagle Leasing Co.*, No. 3:13-CV-1565, 2015 WL 4886489, at *5 (D. Conn. Aug. 14, 2015) (holding that a reasonable jury could find that the plaintiff was subjected to a hostile work environment based on race, national origin, and ethnicity where the harassment included derogatory comments about traditional Cuban food); *Garcia v. Garland Indep. Sch. Dist.,* No. 3:11-CV-502, 2013 WL 5299264, at *4-6 (N.D. Tex. Sept. 20, 2013) (declining to grant summary judgment where a hostile work environment claim included an allegation that the defendant's employees mocked the plaintiff's mispronunciation of words and ridiculed her for lack of English fluency); *Syed v. YWCA of Hanover*, 906 F. Supp. 2d 345, 355-56 (M.D. Pa. 2012) (holding that a fact finder could infer that harassment was based on race or national origin where the plaintiff's supervisor criticized her "awful" Pakistani-styled dress, called her a "brown b___h," suggested she did not know how to open a door due to her national origin, and told her she needed to learn to drive because "we don't ride camel[s] here").

[15] *Cf. Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (noting that firing someone for being an atheist violates Title VII's prohibition against religious discrimination).

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

[17] *See, e.g.*, *Sunbelt Rentals, Inc.*, 521 F.3d at 316-18 (reversing summary judgment for the employer where there was evidence that a Muslim employee was subjected to persistent religious harassment, which included repeatedly referring to the employee as "Taliban" or "towel head," challenging the employee's allegiance to the United States, and stereotyping Muslims as terrorists).

[18] *See, e.g.*, *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 279 (3d Cir. 2001) (holding that a reasonable jury could find that hostility directed toward an Orthodox Jewish college professor regarding her insistence that she not work during the Sabbath constituted harassment based on religion); *Ibraheem v. Wackenhut Servs., Inc.*, 29 F. Supp. 3d 196, 203, 214 (E.D.N.Y. 2014) (holding that a reasonable jury could conclude that the plaintiff was subjected to unlawful religious harassment after he received an exception to the employer's no-beard policy as a reasonable accommodation when, for example, supervisors asked the plaintiff to see the letter documenting his religion and disciplined him for various infractions shortly thereafter).

[19] *See, e.g.*, *EEOC v. United Health Programs of Am., Inc.*, No. 1:14-cv-3673 (KAM), 2020 WL 1083771, at *5-11 (E.D.N.Y. Mar. 6, 2020) (affirming jury verdict concerning a hostile work environment based on religion where employees were forced to participate in "new age" religious activities at work against their wishes).

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

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

[22] *See EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005) (stating that a "pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate

Title VII"); *see also infra* Example 12: Comparative Evidence Gives Rise to Inference that Harassing Conduct Is Based on a Protected Characteristic.

[23] *See Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict finding the plaintiff was subjected to a hostile work environment based on pregnancy where the plaintiff's supervisor made numerous derogatory comments about her pregnancy and required the plaintiff to provide advance notice and documentation of doctor's appointments, even though the plaintiff's coworkers were not required to provide such information for appointments); *Fugarino v. Milling, Benson, Woodward LLP*, No. 21-594, 2022 WL 6743191, at *3 (E.D. La. Oct. 11, 2022) (denying summary judgment to the employer on the plaintiff's claim of pregnancy-based harassment alleging, among other things, that she was subjected to comments about the size of her breasts, the "shape and curves of her body" as an Italian pregnant woman, and how her "'milk' would come in" and make her breasts even larger); *Young v. AlaTrade Foods, LLC*, 2:18-CV-00455-KOB, 2019 WL 4245688, at *2 (N.D. Ala. Sep. 6, 2019) (denying summary judgment to the employer on the plaintiff's sexual harassment claim alleging that she was subjected to conduct that included comments from the plaintiff's supervisor who, upon learning she was pregnant, told her "he was upset because he did not want anyone else to have her," "made sexual hand gestures with his smock in front of her and told her that she had 'nice breasts' that were 'a nice size for sucking,'" said she had a "fine sexy ass," touched her, whispered in her ear, touched/grazed her buttocks, and showed her pictures of himself partially undressed).

[24] 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions ....").

[25] *See Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1260 (11th Cir. 2017) (concluding that Title VII prohibits discrimination based on breastfeeding); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating).

[26] *See* EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* § I.A.3.d (2015), **https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IA3d (https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IA3d)** (stating

that Title VII prohibits discrimination against a woman because she uses contraceptives and citing cases).

[27] *See id.* § I.A.4.c, **https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IA4c (https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IA4c)** ; *see also, e.g.*, *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (holding that Title VII prohibits discrimination against a female employee because she has had an abortion); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (same). Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. *Velez v. Novartis Pharms. Corp*., 244 F.R.D. 243, 267 (S.D.N.Y. 2007) (concluding that a declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

[28] *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 995 (8th Cir. 2022) ("*Bostock* held that the statute's prohibition on employment discrimination 'because of sex' encompasses discrimination on the basis of sexual orientation and gender identity."); *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. 2021) ("Under *Bostock v. Clayton County*, discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII.").

In decisions regarding federal employees, the Commission has also concluded that discrimination on the basis of sexual orientation or gender identity violates Title VII. *See, e.g.*, *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *10-13 (Apr. 1, 2015) (finding that harassment violated section 717 of Title VII, which prohibits federal agencies from engaging in employment discrimination on the basis of sex, because the harassment was based on the plaintiff's gender identity); *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 15, 2015) (concluding as a matter of law that sexual orientation is inherently "a 'sex-based consideration,'" and that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under section 717 of Title VII).

[29] *Bostock* itself concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision logically extends to claims of harassment. Indeed, courts have readily found post-*Bostock* that claims of harassment based on one's sexual orientation or gender identity are cognizable

under Title VII. *See, e.g.*, *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 121 (4th Cir. 2021) ("[T]he Supreme Court's holding in *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes."); *Doe v. City of Det.*, 3 F.4th 294, 300 n.1 (6th Cir. 2021) (stating that harassment on the basis of transgender identity is sex discrimination under Title VII because "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex"); *Simmons v. Starved Rock Casework LLC*, No. 20-CV-1684-JPS-JPS, 2021 WL 5359017, at *2 (E.D. Wis. Nov. 17, 2021) (finding that the plaintiff had stated a claim for relief by alleging a hostile work environment based on his heterosexual status); *Boney v. Tex. A&M Univ.*, No. 4:19-CV-2594, 2021 WL 3640714, at *4 n.5 (S.D. Tex. July 19, 2021) ("The Fifth Circuit has construed the Supreme Court's recent decision in *Bostock* as holding that Title VII prohibits workplace discrimination based on homosexuality[; therefore] a plaintiff may establish a Title VII violation by showing a hostile work environment based on sexual orientation discrimination." (citing *Newbury v. City of Windcrest*, 991 F.3d 762, 766-77 (5th Cir. 2021))); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc*., 884 F.3d 560, 571 (6th Cir. 2018) (Title VII covers both failure to conform to sex stereotypes and transgender or transitioning status), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) ("It naturally follows [from *Bostock*] that discrimination based on gender stereotyping falls within Title VII's prohibitions."). In addition, in the context of federal sector cases, the Commission has concluded that sex-based harassment includes harassment based on sexual orientation or gender identity. *See, e.g.*, *Lusardi*, 2015 WL 1607756, at *10-13 (finding that harassment based on the plaintiff's transgender status violates section 717); *Baldwin*, 2015 WL 4397641, at *7-8 (stating that discrimination, including harassment, that is based on sexual orientation violates section 717).

[30] *See, e.g.*, *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F. Supp. 3d 154, 173 (D. Md. 2022); *Brooks v. Temple Univ. Health Sys., Inc.*, No. 21-1803, 2022 WL 1062981, at *12 (E.D. Pa. April 8, 2022).

[31] *See, e.g.*, *Roberts v. Glenn Indus. Grp., Inc.*, 998 F. 3d 111, 121 (4th Cir. 2021) (stating that alleged physical assaults may be part of a pattern of objectionable, sex-based discriminatory behavior that supports a hostile environment claim); *Eller*, 580 F. Supp. 3d at 173 (holding that a reasonable jury could find that alleged harassment, which included "multiple physical assaults, including one incident when [a transgender teacher] was shoved out of a door, and two incidents . . . when

students who had used slurs about her transgender status stepped and pressed down hard on her foot," was objectively severe or pervasive).

[32] *See, e.g.*, *Brooks*, 2022 WL 1062981, at *12 (stating that comments that included "being picked on for his feminine presentation" may be "severe enough to alter the conditions of one's work environment").

[33] Courts—even prior to the Supreme Court's *Bostock* decision—have viewed evidence of intentional misgendering as supportive of a hostile work environment claim. *See, e.g.*, *Houlb v. Saber Healthcare Grp.*, No. 1:16CV02130, 2018 WL 1151566, at *2 (N.D. Ohio Mar. 2, 2018) (holding that the alleged misgendering, together with the other alleged offensive conduct, was sufficiently severe or pervasive to constitute a violation of Title VII for purposes of summary judgment); *Tudor v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2017 WL 4849118, at *1 (W.D. Okla. Oct 26, 2017) (same); *Versace v. Starwood Hotels & Resorts Worldwide, Inc.*, No: 6:14–cv–1003–Orl–31KRS, 2015 WL 12820072, at *7 (M.D. Fla. Dec. 3, 2015) (considering alleged misgendering to support the plaintiff's hostile environment claim, but finding the alleged incidents to be insufficiently frequent or severe to constitute a violation); *see also Triangle Doughnuts, LLC*, 472 F. Supp. 3d at 129-30 (holding that the employee plausibly alleged sex-based harassment based in part on being misgendered); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 758 (S.D. Ohio 2018) (same). The Commission is not aware of any cases in which a court has held that evidence of misgendering is irrelevant to a hostile work environment claim. There are some cases in which allegations of misgendering were not considered by the court in determining whether the plaintiff had established a hostile work environment claim, but not because the court believed that misgendering is irrelevant to such a claim. *See, e.g.*, *Barreth v. Reyes 1, Inc.*, No. 5:19-cv-00320-TES, 2020 WL 4370137, at *7 (M.D. Ga. July 29, 2020) (holding that the allegation was a "naked assertion" devoid of the factual detail necessary to meet general pleading standards); *Milo v. Cybercore Techs., LLC*, No. SAG-18-3145, 2020 WL 134537, at *7 (D. Md. Jan 13, 2020) (finding that the plaintiff's allegations of misgendering were not specific enough to allow the court to "determine the nature and extent of the harassment"); *Versace*, 2015 WL 12820072, at *5-6 (holding that certain of the plaintiff's allegations were untimely, and that others were "conclusory and generalized").

In federal sector cases, the Commission has concluded that misgendering and denial of access to a bathroom consistent with the individual's gender identity may

constitute sex discrimination in violation of Title VII. *See, e.g.*, *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that repeated, intentional misuse of the name or pronoun with which a transgender employee identifies may constitute sex-based harassment); *Lusardi*, 2015 WL 1607756, at *10-13 (holding that a supervisor's repeated and intentional use of the incorrect name and pronouns for the complainant, in addition to the agency's refusal to allow the complainant to use the restroom consistent with her gender identity, were actions sufficiently severe or pervasive to subject the complainant to a hostile work environment based on her sex).

[34] *See, e.g.*, *Triangle Doughnuts*, 472 F. Supp. 3d at 129, 135 (listing allegations that plaintiff was prevented from using a bathroom that was consistent with her gender identity as among the allegations that supported her Title VII and ADA hostile work environment claims). Similarly, courts have found, under Title IX, that denial of access to a bathroom consistent with one's gender identity is sex discrimination. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.,* 972 F.3d. 586, 616 (4th Cir. 2020); *Whitaker ex. rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1049-50 (7th Cir. 2017); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-222 (6th Cir. 2016) (per curiam). *But see Adams by and through Kasper v. Sch. Bd.*, 57 F.4th 791, 811-15 (11th Cir. 2022) (en banc). In addition to being part of a harassment claim, denial of access to a bathroom consistent with one's gender identity may be a discriminatory action in its own right and should be evaluated accordingly. *See, e.g.*, *Lusardi*, 2015 WL 1607756, at *6-10 (finding that the agency subjected a transgender employee to disparate treatment when it restricted her access to the common women's restroom on account of her gender identity).

[35] This example is based on the facts in *Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020).

[36] The ADEA does not apply to discrimination or harassment based on workers being younger than others, such as harassment based on the belief that someone is too young for a certain position, even if the targeted individual is 40 or over. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that the ADEA does not prohibit favoring older workers over younger workers, even if the younger workers are within the protected class of individuals 40 or over).

[37] *See, e.g.*, *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 442-43 (5th Cir. 2011) (holding that a fact finder could conclude that the plaintiff, a used car salesperson, was subjected to a hostile work environment based on his age where the plaintiff's

supervisor had made profane, age-based references to the plaintiff up to half a dozen times a day, the supervisor had engaged in physically threatening behavior toward the plaintiff, and the supervisor had "steered" sales away from the plaintiff and toward younger salespersons).

[38] *See, e.g.*, *Wilson v. Cox*, 753 F.3d 244, 247-49 (D.C. Cir. 2014) (ruling that a reasonable factfinder could conclude that discriminatory intent motivated the employer's decision to abolish a resident employee program and terminate the plaintiff where the official responsible for abolishing the program stated that the residents "didn't come here to work, [they] came here to retire" and expressed concern that older guards tended to fall asleep on duty, but he had only heard of one guard falling asleep on duty); *see also Written Testimony of Patrick Button, Assistant Professor, Department of Economics, Tulane University*, EEOC Meeting of June 14, 2017 - The ADEA @ 50 - More Relevant Than Ever, **https://www.eeoc.gov/meetings/meeting-june-14-2017-adea-50-more-relevant-ever/button (https://www.eeoc.gov/meetings/meeting-june-14-2017-adea-50-more-relevant-ever/button)** (discussing evidence of age discrimination in hiring).

[39] Under Title I of the Americans with Disabilities Act, a disability is "a physical or mental impairment that substantially limits one or more [of an individual's] major life activities"; a "record of such an impairment"; or "being regarded as having such an impairment." *Id.* § 12102(1).

[40] *See, e.g.*, *Quiles-Quiles v. Henderson*, 439 F.3d 1, 4, 7-8 (1st Cir. 2006) (affirming a jury verdict finding that a Postal Service employee was subjected to a hostile work environment based on his mental disability (depression) when supervisors mocked him on a daily basis about his mental impairment and commented to other employees that he was a "great risk" because he was receiving psychiatric treatment); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 178-79 (4th Cir. 2001) (upholding a jury finding that the plaintiff, who suffered from chronic back issues, was subjected to a hostile work environment based on disability where two supervisors constantly berated him and other workers with disabilities and encouraged other employees to ostracize workers with disabilities and refuse to give them materials they needed to do their jobs).

[41] *See, e.g., Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 75-76 (2d Cir. 2019) (concluding that an employee with Tourette's Syndrome and obsessive compulsive disorder had raised a material issue of fact as to whether he was subjected to

ongoing and pervasive discriminatory conduct based on disability when coworkers mocked his verbal and physical tics); *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 446 (5th Cir. 2017) (concluding that a reasonable jury could find that the plaintiff was subjected to severe or pervasive disability-based harassment where he had presented evidence that coworkers repeatedly mocked his stutter and his supervisor mocked him in a department-wide meeting); *Martsolf v. United Airlines, Inc.*, No. 13-1581, 2015 WL 4255636, at *13 (W.D. Pa. July 14, 2015) (rejecting the employer's motion for summary judgment on the disability-based harassment claim of a plaintiff with a hearing and speech disability where there was evidence that employees screamed at the plaintiff when she could not hear them and mocked the way she spoke); *cf. EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733 (5th Cir. 2007) (affirming jury verdict finding intentional discrimination where, among other things, a supervisor "stated that he no longer wanted to see [the plaintiff's] 'crippled crooked self, going down the hall hugging the walls'").

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

[43] 42 U.S.C. § 12102(1)(C), (3) (providing that an individual has a disability if the individual is "regarded as having . . . an impairment"; and that an individual meets this requirement if the individual has been "subjected to an action prohibited [under the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity"); 29 C.F.R. § 1630.2(g)(1)(iii) (noting that the ADA's protections apply where an "individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor'"); *see, e.g.*, *Quiles-Quiles*, 439 F.3d at 5-8 (concluding with respect to the plaintiff's disability harassment claim that the evidence supported the jury's finding that the plaintiff was discriminated against because he was either actually disabled or perceived as such by his employer).

[44] 42 U.S.C. § 12102(1)(A)-(B) (including within the definition of disability a record of a physical or mental impairment).

[45] The ADA expressly prohibits associational discrimination. *See* 42 U.S.C. § 12112(b)(4) (stating that discrimination against a qualified individual with a disability includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"); 29 C.F.R. § 1630.8 ("It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or *otherwise discriminate against*, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." (emphasis added)); *see, e.g.*, *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467-70 (2d Cir. 2019) (ruling that the plaintiff stated a claim of associational discrimination under the ADA where he alleged that he was qualified to perform his job but was discriminated against based on his employer's perception that he was unavailable or distracted due to his daughter's medical condition).

Harassment based on association under other EEO statutes also is discussed below at notes 48 through 50.

[46] 42 U.S.C. § 2000ff(4)(A).

[47] *See, e.g.*, *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299 (11th Cir. 2012) ("[A] harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers repeatedly referred to an employee of Indian descent as "Taliban" or "Arab" and stated that "[t]his is America . . . not the Islamic country where you came from," even though the harassing comments did not accurately describe the employee's actual country of origin); *Kallabat v. Mich. Bell Tel. Co.*, No. 12-CV-15470, 2015 WL 5358093, at *3-4 (E.D. Mich. June 18, 2015) (denying summary judgment to the employer on the plaintiff's claim that he was harassed based on the mistaken perception that he was Muslim); *Arsham v. Mayor & City Council of Balt.*, 85 F. Supp. 3d 841, 844, 849 (D. Md. 2015) (holding that an employee of Persian descent stated a valid claim of national origin discrimination and harassment even though her employer mistakenly believed her to be a member of the Parsee ethnic group, which the plaintiff researched and believed originated in

India and was a lower caste); *cf. Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571-72 (3d Cir. 2002) (holding that the ADA prohibits retaliation against an individual based on the misperception that he had engaged in protected activity, reasoning that "[w]hat is relevant is that the [individual] . . . was treated worse than he otherwise would have been for reasons prohibited by the statute"). *But see, e.g.*, *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788, 2013 WL 5819703, at *3-4 (D. Kan. Oct. 29, 2013) (stating that "perceived" discrimination claims are not cognizable under Title VII); *El v. Max Daetwyler Corp.*, No. 3:09-CV-415, 2011 WL 1769805, at *5-6 (W.D.N.C. May 9, 2011) (rejecting the proposition that Title VII provides a claim for discrimination based on misperception), *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

[48] *See, e.g.*, *Frith v. Whole Foods Mkt., Inc.*, 38 F.4th 263 (1st Cir. 2022) (concluding that claims alleging discrimination based on interracial association "are fundamentally consistent with *Bostock* [*v. Clayton County*, 140 S. Ct. 1731 (2020)] and Title VII's plain language prohibiting action 'because of such individual[ ]' plaintiff's race"); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (observing that "Title VII protects individuals who . . . are 'victims of discriminatory animus toward [protected] third persons with whom the individuals associate'" and that a complainant may be discriminated against based on his own race because the difference between his race and the race of the individual with whom he associated was the cause of the discrimination (quoting *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999))); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138-39 (2d Cir. 2008) (holding that Title VII prohibits discrimination based on interracial association and observing that multiple other circuits agree); *cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011) (holding that the plaintiff had standing to sue under Title VII where he alleged that his employer terminated him in order to retaliate against his fiancée for a sex discrimination charge she filed against their mutual employer; in authorizing a "person aggrieved" to file a charge or bring a lawsuit, Title VII provides a cause of action to those within the "zone of interests" "arguably [sought] to be protected by the statute"); *Kelleher*, 939 F.3d at 467-70 (ruling that the plaintiff had stated a claim of associational discrimination under the ADA where he alleged that he was qualified to perform his job but was discriminated against based on his employer's perception that he was unavailable or distracted due to his daughter's medical condition).

[49] *See, e.g.*, *Zarda Altitude Express, Inc.*, 883 F.3d 100, 128 (2d Cir. 2018) (en banc) ("[W]e hold that sexual orientation discrimination, which is based on an employer's

opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination 'because of ... sex.'"), *aff'd on other grounds*, 140 S. Ct. 1731 (2020).

[50] *See, e.g.*, *Barrett*, 556 F.3d at 513-14 (holding that white employees could claim racial harassment based on their friendship with African American coworkers); *Chacon v. Ochs*, 780 F. Supp. 680, 682 (C.D. Cal. 1991) (holding that Title VII encompasses a claim of harassment against a non-Hispanic woman based on her marriage to a Hispanic man); *cf. Kengerski v. Harper,* 6 F.4th 531, 534-35, 539 (3d Cir. 2021) (noting that associational discrimination is not limited to close or substantial relationships and ruling that the complainant could pursue his retaliation claim for making a complaint regarding harassment based on his association with his biracial grand-niece).

[51] *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77-79 (1998) (involving male employees sexually harassing a male coworker); *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 908 (7th Cir. 2018) (rejecting "entirely" the view that it "strains credulity" that African Americans might be subjected to unlawful race-based harassment where many managers in the same workplace were also African American and explaining that there are many reasons why women and minorities might tolerate discrimination against members of their own class or might participate in the discrimination themselves).

[52] *See, e.g.*, *Masud v. Rohr-Grove Motors, Inc.*, No. 13 C 6419, 2015 WL 5950712, at *3-5 (N.D. Ill. Oct 13, 2015) (denying summary judgment for the employer on the plaintiff's harassment claim based on "evidence, viewed in the light most favorable to plaintiff, support[ing] a pervasive pattern of discriminatory harassment based on not one but various protected characteristics all at once"); *see also Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994) (recognizing a claim of intersectional discrimination against an Asian woman); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032-34 (5th Cir. 1980) (recognizing Black women as a "distinct protected subgroup").

[53] *See, e.g.*, *Frappied v. Affinity Gaming Black Hawk, LLC,* 966 F.3d 1038, 1048 (10th Cir. 2020) (recognizing Title VII claim alleging discrimination against older women).

[54] *E.g.*, *Ahmed v. Astoria Bank*, 690 F. App'x 49, 51 (2d Cir. 2017) (holding that a reasonable jury could find that the plaintiff was subjected to unlawful harassment based on race, national origin, and religion, based in part on a senior supervisor's

comments that she should remove her hijab, which he called a "rag," and his comment on September 11, 2013, that the plaintiff and two other Muslim employees were "suspicious" and that he was thankful he was "in the other side of the building in case you guys do anything").

[55] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Tang v. Citizens Bank*, 821 F.3d 206 (1st Cir. 2016) (reversing summary judgement for the employer where harassment of an Asian woman included a discussion of the purported obedience of Asian women); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459 (5th Cir. 2013) (en banc) (upholding a jury verdict on the grounds that a claim that a male employee was harassed because of sex could be established by evidence showing that the male harasser targeted the employee for not conforming to the harasser's "manly-man" stereotype); *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. 2013) (harassment of a female employee in a heavily male environment included telling her to "pee like a man" and ridiculing her for carrying a purse); *Rosario v. Dep't of Army*, 607 F.3d 241, 244 (1st Cir. 2010) (harassment included a supervisor constantly complaining about the plaintiff's work attire and bringing coworkers to look at her clothes); *Prowel v. Wise Bus. Forms, Inc*. 579 F.3d 285 (3d Cir. 2009) (denying summary judgment for employer where the plaintiff was harassed based on gender stereotypes of how a man should look, speak, and act because the plaintiff had a high voice, walked in a certain manner, did not curse, and was very well groomed, crossed his legs, and discussed topics like art, music, and interior design); *Kang v. U. Lim Am., Inc.*, 296 F.3d 810 (9th Cir. 2002) (hostile work environment claim based on supervisor's stereotypical notions that Korean workers were better than others and that the plaintiff failed to live up to his supervisor's expectations); *Nichols v. Azteca Rest. Enters*., 256 F.3d 864 (9th Cir. 2001) (systemic abuse of a male restaurant employee for failing to conform to male stereotypes); *Eller v. Prince George's Cty. Pub. Sch.*, 580 F. Supp. 3d 154 (D. Md. 2022) (harassment of transgender teacher; employer's response included trying to hide plaintiff's gender identity by restricting her clothes, footwear, and make-up and nail polish); *Membreno v. Atlanta*, No. 19-cv-00369-PX, 2021 WL 409746 (D. Md. Feb. 5, 2021) (harassment of transgender worker included questioning how a man could be attracted to her and ridiculing and demeaning her when she used the ladies' bathroom to the point that she would avoid relieving herself); *Doe v. Triangle Donuts, LLC* , 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (harassment of transgender worker included being subjected to a stricter dress code

than other female employees); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018) (denying motion to dismiss transgender woman's hostile work environment claim, which included allegations that she was told to "just dress like a man," that she made an "ugly woman," and that after the worker complained of several years of harassment, she was told to "be like a man" and "act like a man"); *Salinas v. Kroger Tex., L.P.*, 163 F. Supp. 3d 419 (S.D. Tex. 2016) (harassment of male coworker was based on the harasser's perception that the plaintiff was effeminate and had "a body like a woman"); *Barrett v. Pennsylvania Steel Co.*, 2014 WL 3572888 (E.D. Pa. July 21, 2014) (male plaintiff who worked in "office" portion of facility stated claim of sex harassment where he alleged that he was "made fun of and sexually harassed because he did not participate in cursing or engage in crude banter as did his male co-workers from the 'shop' portion of the facility"); *Rubin v. Kirkland Chrysler-Jeep, Inc.*, 98 Fair Empl. Prac. Cas. (BNA) 159, 2006 WL 1009338 (W.D. Wash. Apr. 13, 2006) (harassment included references to stereotypes of Jews as both cheap and unduly interested in money).

[56] *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *6 (D. Minn. Aug. 13, 2004) (concluding that the plaintiff had presented sufficient evidence to send her harassment claim to a jury where she experienced repeated comments and other conduct implying or stating that she was unqualified and could be fired at any time because she was a woman and because she spent too much time caring for her children); *see also Chadwick v. Wellpoint*, *Inc.*, 561 F.3d 38, 42, 47-48 (1st Cir. 2009) (holding that a reasonable jury could find that the plaintiff, the mother of an eleven-year-old and six-year-old triplets, was denied a promotion based on the "common stereotype about the job performance of women with children").

[57] *See Burns v. Johnson*, 829 F.3d 1, 13-14, 17 (1st Cir. 2016) (holding that a reasonable jury could conclude that a male supervisor's harassment of a female subordinate was based, in part, on the gender stereotype that women do not belong in positions of leadership).

[58] *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250.

[59] Any retaliatory conduct can be challenged under the standard for retaliation set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). If the harassing conduct might deter a reasonable person from engaging in protected activity, even if it was insufficiently severe or pervasive to alter the terms and conditions of employment to create a hostile work environment, there would be actionable retaliation, assuming that the other requirements for showing retaliation

are met. *See, e.g.*, *Martinelli v. Penn Millers Ins. Co*, 269 F. App'x 226, 230 (3d Cir. 2008) (observing that after *Burlington Northern*, an employee claiming "retaliation by workplace harassment" is "no longer required to show that the harassment was severe or pervasive").

[60] The causation principles discussed in this enforcement guidance focus on hostile work environment claims. As discussed below in § III.A, however, unlawful harassment can also involve an explicit change to a term or condition of employment, such as the denial of a promotion for rejecting sexual advances. For more guidance on how to evaluate an allegation involving an explicit change to employment, refer to EEOC guidance that discusses discriminatory employment decisions. *See, e.g.*, EEOC, *Enforcement Guidance on National Origin Discrimination* § III (2016), **https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518806 (https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518806)** .

[61] *See, e.g.*, *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 991 (8th Cir. 2003) (holding that the employer was entitled to summary judgment where evidence showed that harassment was based on inter-departmental politics and personality conflicts).

[62] As discussed below in § III.B, even if harassment is based on a protected characteristic, it is not unlawful unless it is sufficiently severe or pervasive to create a hostile work environment. In addition, as discussed in § IV, James's employer's liability depends on the relationship of the harasser to the employer and the nature of the hostile work environment.

[63] *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986) (citing 29 C.F.R. § 1604.11(b) for the proposition that "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances'").

[64] In this document, use of the term "discriminatory" to describe conduct means only that the conduct was based on a protected characteristic and does not indicate that conduct necessarily satisfies other legal requirements to establish that the conduct violates federal EEO laws, such as creating a hostile work environment.

[65] *See, e.g.*, *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 (1st Cir. 2019) (stating that "the use of sexually degrading, gender-specific epithets, such as . . . 'b[__]ch,' . . . constitute[s] harassment based upon sex" (omissions and second alternation in original) (quoting *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007))); *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 80, 89 (1st Cir. 2006) (agreeing with the lower court that there was sufficient evidence to support the jury verdict on the plaintiff's ADA hostile work environment claim where the plaintiff had a medical condition relating to sexual dysfunction and was subjected to "constant mockery and harassment . . . by fellow coworkers and supervisors alike due to his condition," including comments about impotence, his "pump," and his sexual functioning); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185-86 (4th Cir. 2001) (holding that a workplace where a supervisor constantly referred to African Americans as "monkeys" and "n____rs" was a racially hostile work environment, noting that "the word 'n[____]r' is pure anathema to African-Americans" and that calling someone a "monkey" "goes far beyond the merely unflattering; it is degrading and humiliating in the extreme").

[66] *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 271 (6th Cir. 2009) (concluding that women were subjected to sex discrimination by conduct that was patently degrading to women, even though members of both sexes were exposed to the conduct, and concluding that such conduct discriminates against women, irrespective of the harasser's motive); *see also Roy*, 914 F.3d at 63 (noting that gender-specific epithets can ground a harassment claim "[r]egardless of [the harasser's] particular and subjective motives"); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1001 (10th Cir. 1996) (concluding that sex-based epithets discriminated against the plaintiff based on her sex even if they were motivated by gender-neutral reasons); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (concluding that use of the terms "n____r-rigged" and "black ass" supported a race-based hostile work environment claim even though, the employer asserted, they were not "intended to carry racial overtones"); *cf. Int'l Union, United Auto., Aerospace & Agric. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1228-31 (10th Cir. 2015) (concluding that the district court erred in discounting the environmental effect of offensive race-based

conduct when the court focused on the "ostensibly benign motivation or intent" of the alleged harassers).

[67] *Sharp v. S&S Activewear, LLC*, 69 F.4th 974, 981 (9th Cir. 2023) (concluding that "sexually graphic, violently misogynistic" music can give rise to a sex-based hostile work environment claim and that even if the music was not directed toward a particular woman, "female employees allegedly experienced the content in a unique and especially offensive way"); *Gallagher*, 567 F.3d at 271 (concluding that women were subjected to sex discrimination by conduct that was patently degrading to women, even though members of both sexes were exposed to the conduct).

[68] This example is based on the facts in *Mangel v. Graham Packaging Co., L.P.*, No. 14-CV-0147-BR, 2016 WL 1266257 (W.D. Pa. Apr. 1, 2016).

[69] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303 (4th Cir. 2019) (concluding that the plaintiff's allegation that male coworkers started a rumor that she had sex with her boss to obtain a promotion invoked the "deeply rooted perception—one that unfortunately still persists—that generally women, not men, use sex to achieve success"); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459 (5th Cir. 2013) (en banc) (upholding a jury verdict on the grounds that a claim that a male employee was harassed because of sex could be established by evidence showing that the male harasser targeted the employee for not conforming to the harasser's "manly-man" stereotype).

[70] *See Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *6 (D. Minn. Aug. 13, 2004) (concluding that the plaintiff had presented sufficient evidence to send her harassment claim to a jury where she experienced repeated comments and other conduct implying or stating that she was unqualified and could be fired at any time because she was a woman and because she spent too much time caring for her children); *see also Chadwick v. Wellpoint*, *Inc.*, 561 F.3d 38, 42, 47-48 (1st Cir. 2009) (holding that a reasonable jury could find that the plaintiff, the mother of an eleven-year-old and six-year-old triplets, was denied a promotion based on the "common stereotype about the job performance of women with children").

[71] *See Burns v. Johnson*, 829 F.3d 1, 13-14, 17 (1st Cir. 2016) (holding that a reasonable jury could conclude that a male supervisor's harassment of a female subordinate was based, in part, on the gender stereotype that women do not belong in positions of leadership).

[72] *See, e.g.*, *Price Waterhouse*, 490 U.S. at 250.

[73] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (observing that a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes") (citing *Price Waterhouse*, 490 U.S. at 251); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (stating that "discrimination against a plaintiff who is trans[gender]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman"); *see also supra* note 55.

[74] *See, e.g.*, *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (concluding that the plaintiff could establish that he was harassed based on his national origin, Korean, where his supervisor allegedly subjected Korean workers to abuse based, in part, on their failure to "live up" to the stereotype that Korean workers are "better than the rest").

[75] *See, e.g.*, *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 116 (2d Cir. 2007) (holding that "the relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class," and observing that a supervisor's assertion that an employee, who was in her sixties, was well suited to work with seniors was not offensive but nevertheless had a strong tendency in the circumstances to show that the supervisor believed the employee, because of her age, was not well-suited to deal with younger clientele), *abrogated on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

[76] *See, e.g.*, *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) (upholding a jury verdict where a reasonable jury could conclude that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake").

[77] This example is based on the facts in *EEOC v. Boh Bros. Construction Co., LLC*, 731 F.3d 444, 449-50, 457-60 (5th Cir. 2013).

[78] *See, e.g.*, *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 (1st Cir. 2019) (noting that "a reasonable jury could infer that" a comment about the plaintiff's body "was made in part because of her sex, given the context" that included evidence that her coworkers regularly "sexualiz[ed]" her and "emphasiz[ed] aspects of her appearance, such as her blonde hair"); *Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 216-17 (1st Cir. 2016) (considering the context, use of the word "ass" was based on sex); *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 85 (2d Cir. 2010) (Calabresi, J., concurring) (viewing comment by male coworker about the plaintiff's "big fat ass" to be based on sex).

[79] *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam); *see also Paasewe v. Action Grp., Inc.*, 530 F. App'x 412, 416 (6th Cir. 2013) (per curiam) (holding that a reasonable jury could find that the plaintiff was subjected to race-based harassment where the plaintiff's coworker called him "boy" and threatened his life).

[80] *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082-83 (3d Cir. 1996) (stating that racial harassment could be based on "code words," which referred to Black employees as "another one," "one of them," "that one in there," and "all of you"); *cf. Martin v. Brondum*, 535 F. App'x 242, 244 (4th Cir. 2013) (explaining in a case involving an alleged violation of the Fair Housing Act that "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications" (alteration in original) (quoting *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 974 (8th Cir. 2012))); *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 579 (8th Cir. 1999) (characterizing a supervisor's use of the phrase, "your kind" as "offensive and racially tinged").

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

[82] *See, e.g.*, *Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388 (2d Cir. 2020) ("Our case law is clear that when the same individuals engage in some harassment that is explicitly discriminatory and some that is not, the entire course of conduct is relevant to a hostile work environment claim."); *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547-48 (2d Cir. 2010) (stating that circumstantial evidence that facially sex-neutral acts were part of a pattern of sex discrimination may include evidence that the same individual engaged in multiple acts of harassment, some facially sex-

based and some not); *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) (stating that conduct that appears gender-neutral in isolation may appear gender-based when viewed in the context of the broader work environment); *Shanoff v. Ill. Dep't of Hum. Servs.*, 258 F.3d 696, 705 (7th Cir. 2001) (stating that a reasonable person could conclude that comments that were not facially discriminatory were "sufficiently intertwined" with facially discriminatory remarks to establish that the former were motivated by hostility to the plaintiff's race and religion); *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (stating that "[c]ourts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category").

[83] *See, e.g.*, *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010) (concluding that facially neutral harassment was not connected to overtly racial conduct as they "lack[ed] any congruency of person or incident"), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc).

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

[85] *See, e.g.*, *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 236-37 (5th Cir. 2001) (upholding a jury verdict and concluding that the jury could have found that harassment, which began "almost immediately" after a supervisor learned that the plaintiff was HIV-positive, was based on disability).

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

[87] The facts in the example were adapted from *National Education Ass'n, Alaska*, 422 F.3d at 842-44.

[88] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

[89] *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455-56 (5th Cir. 2013) (en banc) (agreeing with sister circuits that the three evidentiary paths in *Oncale* are not exclusive); *see also, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir.

2005) ("These routes, however, are not exhaustive."); *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale*'s list as "non-exhaustive").

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

[91] *See, e.g., Oncale*, 523 U.S. at 80 (noting that a fact finder might reasonably find harassment based on sex if, for example, "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace").

[92] *Id.* at 79-81.

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

[94] With respect to harassment claims, the Supreme Court has referred to two types of changes to the terms, conditions, or privileges of employment as "explicit" and "constructive" changes. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998). The terms are used in this document to facilitate discussion of the standards attached to each type of change to the terms or conditions of employment.

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

[96] Quid pro quo harassment also has arisen in the context of religious harassment where a supervisor denies a job benefit to an employee who refuses to adhere to the supervisor's religious principles. *See Venters v. City of Delphi*, 123 F.3d 956, 976-77 (7th Cir. 1997) (concluding that a jury could find that a radio dispatcher was subjected to quid pro quo religious harassment when she was discharged by the police chief for not adhering to his religious beliefs).

[97] *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977) (holding that the plaintiff had alleged discrimination based on her sex when she rejected her supervisor's advances and her position was abolished; the plaintiff alleged that, as a woman, she had been the target of her supervisor's sexual desires and no male had been subjected to similar conduct); *cf. Meritor Sav. Bank, FSB*, 477 U.S. at 65

(distinguishing between a sexual harassment claim linked to the "grant or denial of an economic *quid pro quo*" and a hostile work environment claim).

[98] *Gregory v. Daly*, 243 F.3d 687, 698 (2d Cir. 2001). In *Ellerth*, 524 U.S. at 751-54, 765, the Supreme Court questioned the utility of the "quid pro quo" designation for purposes of assigning liability, holding instead that employers are vicariously liable for a hostile work environment created by supervisor harassment if it culminates in a tangible employment action. A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer. *Id.* at 761-62. For a detailed discussion of "tangible employment action," see § IV.B.2., below.

The Supreme Court has explained that the concept of a "tangible employment action" is intended "only to 'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (alteration in original) (quoting *Ellerth*, 524 U.S. at 760); *see also Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (describing *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), as delineating two categories of hostile work environment claims distinguished by the presence or absence of a tangible employment action). *Ellerth* does not address the scope of either Title VII's general antidiscrimination provision or Title VII's antiretaliation provision. *Burlington N.*, 548 U.S. at 65.

[99] Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Respondent at 16, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *see also Ellerth*, 524 U.S. at 752 (noting that the terms "quid pro quo" and "hostile work environment" do not appear in the text of Title VII).

[100] *Ellerth*, 524 U.S. at 753-54.

[101] *See* § III.B.1, below (discussing how to assess severity of harassment).

[102] *Meritor Sav. Bank, FSB*, 477 U.S. at 67 (1986) (alteration in original) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

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

[104] For a discussion of when conduct is sufficiently severe or pervasive to create a hostile work environment, see § III.B., below. For a discussion of when conduct

creates an objectively and subjectively hostile work environment, see § III.C., below.

[105] Section III.D.1., below, discusses how to assess timeliness and how to determine whether conduct is sufficiently related to be part of the same hostile work environment claim.

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

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

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

[109] *See, e.g.*, *id.* at 22-23 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

[110] *Id.* at 23.

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

See § III.D.1, for a discussion of how to determine whether conduct is sufficiently related to be considered part of the same hostile work environment claim.

[112] This example is based generally on the facts in *Preuss v. Kolmar Labs., Inc.*, 970 F. Supp. 2d 171 (S.D.N.Y. 2013).

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

[114] *See, e.g.*, *Alamo v. Bliss*, 864 F.3d 541, 550 (7th Cir. 2017) (explaining that in determining whether offensive language created a hostile work environment, the court "look[s] to the 'pervasiveness and severity' of language used, which [the court has] described as being 'inversely related'" (quoting *Cerros v. Steel Techs., Inc.* 398 F.3d 944, 951 (7th Cir. 2005))); *Flood v. Bank of Am. Corp*., 780 F.3d 1, 11-12 (1st Cir. 2015) (explaining that harassment may be actionable without being both severe and pervasive and that the "severity . . . may vary inversely with its pervasiveness" (quoting *Nadeau v. Rainbow Rugs, Inc.*, 675 A.2d 973, 976 (Me. 1996))); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 1000 (9th Cir. 2010) (stating that the "required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct" (quoting *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001))).

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

[116] A hostile work environment may be so intolerable that an employee is compelled to resign employment. Under these circumstances, the employee is said to have been subjected to a constructive discharge. *Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004). To establish a constructive discharge claim under such circumstances, the employee must both establish a hostile work environment and show that "working conditions [became] so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Id.* at 141, 149 ("Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case."); *Green v. Brennan*, 578 U.S. 547, 559 (2016) (observing that the *Suders* holding that a hostile work environment claim is a "lesser included component" of the "graver claim" of constructive discharge was

"no mere dictum"). "[H]arassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." *Suders*, 542 U.S. at 148.

[117] *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998); see also Harris,* 510 U.S. at 22 (explaining that "Title VII comes into play before the harassing conduct leads to a nervous breakdown" as "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance"); *see also Ford v. Jackson Nat. Life Ins. Co.*, 45 F.4th 1202, 1231 (10th Cir. 2022) (stating that if "the condition of Ford's employment was altered for the worse" because of the alleged sexual harassment, then the fact that she "continued to proceed through the ranks" provided "no reason" for the court to dismiss her hostile work environment claim); *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 330 (4th Cir. 2010) (stating that the issue is not whether work has been impaired but whether the work environment has been discriminatorily altered and that the "fact that a plaintiff continued to work under difficult conditions is to her credit, not the harasser's"); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 274 (6th Cir. 2009) (concluding that the district court erred in requiring evidence that the complainant's work performance suffered measurably as a result of harassment rather than merely evidence that harassment made it more difficult to do the job); *Dawson v. Cnty. of Westchester*, 373 F.3d 265, 274 (2d Cir. 2004) (stating that the crucial question is "whether the workplace atmosphere, considered as a whole, undermined plaintiffs' ability to perform their jobs, compromising their status as equals to men in the workplace").

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

[119] This example is based on the facts in *Gallagher*, 567 F.3d at 266-69.

[120] *Ellerth*, 524 U.S. at 763; *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc) (quoting *Ellerth*, 524 U.S. at 763).

[121] *See Gates v. Bd. of Educ.*, 916 F.3d 631, 638 (7th Cir. 2019) (stating that the circuit has "repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a coworker's"); *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 445 (9th Cir. 2017) (concluding that a reasonable jury could find that the alleged sexual harassment was actionable, in part, because of the harasser's status as a supervisor); *Steck v. Francis*, 365 F. Supp. 2d 951, 971-72 (N.D. Iowa 2005) (stating that a supervisor's agency relation increases the impact of harassment by

the supervisor); *see also Fairbrook Med. Clinic, P.A.*, 609 F.3d at 329 (stating that the severity of the harasser's conduct was exacerbated by his significant authority over the complainant); *Rodgers*, 12 F.3d at 675 (stating that a supervisor's use of "n____r" has a more severe impact on the work environment than its use by coworkers); *cf. Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 231 (4th Cir. 2022) (stating that although the repeated use of the n-word was by a six-year-old, "the boy who uttered the slurs was not just any 'young child,' but the grandson of OLC's owners and the son of a supervisor being groomed to take over the family business … and [t]hus, a reasonable person in Chapman's position could 'fear that the child had his relative's ear and could make life difficult for her'" (citation omitted)).

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

[123] *See, e.g.*, *Warf v. U.S. Dep't of Veterans Affairs*, 713 F.3d 874, 878 (6th Cir. 2013) ("Evidence of other sexual harassment claims may help support a hostile work environment claim, but evidence of harassment to others does not weigh as heavily as evidence directed against the plaintiff."); *Ziskie v. Mineta*, 547 F.3d 220, 224-225 (4th Cir. 2008) (stating that conduct personally experienced by the plaintiff may be more probative of a hostile work environment than conduct she did not witness, but all the evidence should be considered: "[h]ostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look different in light of evidence that a number of women experienced similar treatment"); *see also infra* notes 180-184 and accompanying text.

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

significance of the fact that sexually harassing conduct was directed at the female complainant in the presence of male clients).

[125] *See, e.g.*, *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945-46 (8th Cir. 2016) ("Actions that might not rise to the level of severe or pervasive in an office setting take on a different character when the two people involved are stuck together for twenty-four hours a day with no other people—or means of escape—for miles around.").

[126] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 24-25 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** (discussing "superstar" harassers).

[127] *E.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 982-84 (7th Cir. 2008) (concluding that, in the case of a complainant who alleged that her coworker raped her, the severity of the sexual assault alleged would be sufficient to establish an objectively hostile work environment).

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

[129] *See Patterson v. Cnty. of Oneida*, 375 F.3d 206, 230 (2d Cir. 2004) (concluding that a hostile work environment based on race could be established by a single incident in which the plaintiff was allegedly punched in the ribs and temporarily blinded by having mace sprayed in his eyes because of his race); *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999) (concluding that harassing a female employee based on her sex by damaging her wrist to the point that surgery was required "easily qualifies as a severe enough isolated occurrence to alter the conditions of her employment"); *cf. Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 496-97 (4th Cir. 2015) (concluding that a reasonable jury could find that two anonymous notes placed in the plaintiff's mailbox, although not pervasive, were sufficiently severe to create hostile work environment where the notes referred to lynching and were in the form of a mock hunting license for African Americans).

[130] *E.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1145 (10th Cir. 2008) (concluding that a "jury could easily find that the noose was an egregious act of discrimination calculated to intimidate African-Americans"); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 213 (D. Mass. 2006) (holding that a reasonable jury could conclude that display of a noose in an African American employee's work area was sufficient to create a hostile work environment); *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001) (stating that a "noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence" and that the "effect of such violence on the psyche of African-Americans cannot be exaggerated"); *Yudovich v. Stone*, 839 F. Supp. 382, 391 (E.D. Va. 1993) (finding that one of the plaintiffs' supervisors expressed hostility toward the plaintiffs' religion by, among other things, keeping a coffee mug displaying a swastika on his desk).

[131] *See, e.g.*, *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (stating that calling an African American employee "porch monkey" was "about as odious as the use of the word 'n[____]r'"); *Henry v. CorpCar Servs. Houston, Ltd.*, 625 F. App'x 607, 611, 613 (5th Cir. 2015) (concluding that although the alleged harassment was brief as it had occurred over only two days, a jury could find that it was sufficiently severe to create a hostile work environment where, among other things, African American employees were compared to gorillas); *see also Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (agreeing with the plaintiff that using the term "monkey" to refer to African Americans was "roughly equivalent" to using the term "n____r"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (stating that use of "monkey" to describe African Americans was "degrading and humiliating in the extreme").

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

are denied may cause "real emotional strife," including "anxiety, distress, and loss of productivity regardless of whether the threat is carried out").

[133] *See Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) ("The incident Woods has pleaded—that his supervisor directly called him a 'Lazy Monkey A__ N___' in front of his fellow employees—states an actionable claim of hostile work environment."); *Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017); *Rodgers v. W.–S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment . . .' than the use of an unambiguously racial epithet such as 'n[____]r' by a supervisor in the presence of his subordinates." (citation omitted)); *see also Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[I]n my view, being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment. That epithet has been labeled, variously, a term that 'sums up . . . all the bitter years of insult and struggle in America,' 'pure anathema to African-Americans,' and 'probably the most offensive word in English.'" (citations omitted)).

[134] *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) (quoting *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983)); *see also, e.g.*, *Johnson v. PRIDE Indus.*, 7 F.4th 392, 403-04 (5th Cir. 2021) (holding that the plaintiff could establish a hostile work environment based on harassment that included the use of "mayate," which the plaintiff knew was Spanish for the n-word, by a fellow employee who outranked him); *Passananti v. Cook Cnty.*, 689 F.3d 655, 665 (7th Cir. 2012) ("A raft of case law . . . establishes that the use of sexually degrading, gender-specific epithets, such as 'sl[_]t,' 'c[__]t,' 'wh[__]e,' and 'b[___]h,' . . . has been consistently held to constitute harassment based upon sex." (quoting *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229-30 (1st Cir. 2007))); *Hawkins v. City of Philadelphia*, 571 F. Supp. 3d 455, 464 (E.D. Pa. 2021) (stating that "[t]he term 'f____t' is so replete with homophobic animus that, if used, instantly separates an individual who identifies as gay from everyone else in the workplace"); *Johnson v. Earth Angels*, 125 F. Supp. 3d 562, 569 (M.D.N.C. 2015) (stating that racial epithets used by supervisors went "far beyond the merely unflattering" and were "degrading and humiliating in the extreme" (quoting *Boyer-Liberto*, 786 F.3d at 280)).

[135] *See, e.g.*, *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 439, 442-46 (9th Cir. 2017) (concluding that a reasonable jury could find that the plaintiff was subjected to a hostile work environment where her supervisor greeted her with "at least a hundred" "unwelcome hugs and at least one unwelcome kiss" over a twelve-year

period); *Hall v. City of Chicago*, 713 F.3d 325, 332 (7th Cir. 2013) ("[I]ncidents, which viewed in isolation seem relatively minor, that consistently or systematically burden women throughout their employment are sufficiently pervasive to make out a [sex-based] hostile work environment claim."); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998 (9th Cir. 2010) (determining that a genuine issue of material fact existed as to the abusiveness of the complainant's work environment where, after the complainant twice rejected his coworker's advances, this coworker and other coworkers subjected the complainant to six months of constant sexual pressure and humiliation); *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 161-163 (5th Cir. 2007) (concluding that there was a genuine issue of material fact as to whether the complainant's supervisor created a hostile work environment where, although not all of the supervisor's phone calls to the complainant carried sexual overtones, the frequency of unwanted attention over a four-month period amounted to pervasive harassment).

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

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

[138] *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010) (concluding that, given the short time frame and number of incidents involved, the plaintiff established a genuine issue as to whether she was subjected to a hostile work environment).

[139] This example is based on the facts in *EEOC v. Prospect Airport Services, Inc.*, 621 F.3d at 993-96, 1000-01.

[140] This example is based on the facts in *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (holding that the plaintiff stated a prima facie case of sexual harassment based on evidence that managers harassed female employees by bestowing preferential treatment on those who submitted to sexual advances).

[141] 510 U.S. 17, 21-22 (1993).

[142] 477 U.S. 57, 68 (1986).

[143] 29 C.F.R. § 1604.11(a) (defining sexual harassment as including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature").

[144] *Meritor Sav. Bank, FSB*, 477 U.S. at 68.

[145] 510 U.S. at 21-22.

[146] *See, e.g*., *Johnson v. Advocate Health & Hosps. Corp.,* 892 F.3d 887, 904 (7th Cir. 2018) (holding that because a reasonable jury could find that the conduct was unwelcome, there was an issue of material fact regarding subjective hostility); *Kokinchak v. Postmaster Gen. of the U.S*, 677 F. App'x 764, 767 (3d Cir. 2017) (treating unwelcomeness and subjective hostility as the same issue); *Horney v. Westfield Gage Co.*, *Inc.*, 77 F. App'x 24, 29 (1st Cir. 2003) (treating unwelcomeness and subjective hostility as the same issue); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873 (9th Cir. 2001) (explaining that the issue of subjective hostility turns on whether conduct was unwelcome to the plaintiff).

[147] *See, e.g.*, *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (stating that unwelcomeness is one of the requirements in establishing a hostile work environment based on sex); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016) (same); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (stating that unwelcomeness is one of the requirements in establishing a hostile work environment based on race); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1248 (11th Cir. 2014) (same).

[148] *See, e.g.*, *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1285 (11th Cir. 2018) (concluding that the plaintiff's testimony about the impact that the alleged racial harassment had on her was sufficient for a jury to find that the plaintiff subjectively perceived the conduct as hostile, notwithstanding her failure to report the conduct to supervisors); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) (concluding that subjective hostility was established through unrebutted testimony and his complaints to supervisors and the EEOC); *Horney*, 77 F. App'x at 29 (concluding that subjective hostility/unwelcomeness was established by the plaintiff's testimony that the conduct she complained about made her feel offended and humiliated); *Nichols*, 256 F.3d at 873 (concluding that subjective

hostility/unwelcomeness was established by the plaintiff's complaints and his unrebutted testimony that conduct was unwelcome); *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341-42 (10th Cir. 1998) (concluding that evidence established a jury issue as to subjective hostility where the plaintiff testified that harassment made her "more and more stressed out and pretty cracked," that she "hated" the conduct, that she was "pretty shocked," and that she "just wanted to avoid the whole situation").

[149] *See, e.g.*, *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 223 (5th Cir. 2023) (concluding that the plaintiff presented sufficient evidence that she subjectively viewed the alleged harassment as hostile where she "complained about the harassment, reported it to her supervisors, and suffered psychological harm"); *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (concluding that there was sufficient evidence in the record showing that a teenage server at a restaurant found her supervisor's comments and conduct subjectively offensive because she repeatedly informed him that his conduct was unwelcome and complained to two other restaurant managers about the conduct).

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

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

[152] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (explaining that the correct inquiry is whether the complainant experienced the conduct as unwelcome, not whether she voluntarily participated in it); *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 754-55 (10th Cir. 2014) (concluding that the issue of whether sexual conduct was unwelcome was a matter for the jury to decide, regardless of whether the plaintiff's participation in it was voluntary).

[153] *E.g.*, *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1047-48 (8th Cir. 2005) (concluding that the complainant failed to establish a prima facie case of sexual harassment where she stated that she did not feel harassed by the conduct); *Newman v. Fed. Express Corp.*, 266 F.3d 401, 405-06 (6th Cir. 2001) (concluding that

the plaintiff did not subjectively perceive conduct as hostile where he testified during a deposition that he did not consider a racially charged hate letter a "big deal," that he was not surprised, shocked, or disturbed by it, and that he would lose no sleep over it).

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

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

[156] *See Gerald v. Univ. of P.R.*, 707 F.3d 7, 17 (1st Cir. 2013) (stating that telling risqué jokes did not signal that the plaintiff was amenable to being groped at work); *Pérez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 28 (1st Cir. 2011) (stating that acquiescence to a customary greeting among employees—a kiss on the cheek—was not probative of the complainant's receptiveness to his supervisor's sucking on his neck).

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

[158] *Id.* at 81-82; *see also Reeves v. C.H. Robinson Worldwide*, *Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (en banc) (stating that the analysis requires proceeding with "'[c]ommon sense, and an appropriate sensitivity to social context,' to distinguish between general office vulgarity and the 'conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive'" (quoting *Oncale*, 523 U.S. at 82)); *Hood v. Nat'l R.R. Passenger Corp.*, 72 F. Supp. 3d 888, 893 (N.D. Ill. 2014) (stating that the joking manner in which the challenged comments were made was a relevant consideration in evaluating the severity of Hispanic employees' use of "gringo" to refer to the white complainant).

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

[160] *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) ("Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. . . . By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's race, we

recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff."); *see also Caver v. City of Trenton*, 420 F.3d 243, 262 (3d Cir. 2005) (stating that a hostile work environment requires evidence establishing that the harassment would have adversely affected a reasonable person of the same protected class in the plaintiff's position), *abrogated on other grounds by Jensen v. Potter*, 435 F.3d 444, 449 n.3 (3d Cir. 2006); *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (noting that the failure to adopt the perspective of the complainant's protected class might result in applying the stereotypical views that Title VII was designed to outlaw); *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (evaluating the sexual harassment claim of a female plaintiff from the viewpoint of a "reasonable woman"); *cf. Baugham v. Battered Women, Inc.*, 211 F. App'x 432, 438 (6th Cir. 2006) (stating that the severity of harassment is evaluated from the "perspective of a reasonable person in the employee's shoes, considering the totality of the circumstances" (citing *Oncale*, 523 U.S. at 81)).

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

[162] *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945-46 (8th Cir. 2016) (Ph.D. candidate's physical well-being in a remote location and academic future was dependent on a leading expert in the candidate's field of study who harassed her on a research trip).

[163] *See EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 429, 433 (7th Cir. 2012) (stating that the ten-year age disparity between the teenage complainant and the

older harasser, coupled with his authority over her, could have led a rational jury to conclude that the harassment resulted in a hostile work environment).

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

[165] *Prettyman v. LTF Club Opers. Co.*, No. 1:18-cv-122, 2018 WL 5980512, at *6 (E.D. Va. Nov. 13, 2018) ("Much of this historical antipathy toward Jews was grounded in economic antisemitism, which makes comments about 'Jewish money' all the more objectionable and offensive. These words and phrases about Jews, like the n-word, are so serious and severe that they instantly signal to an employee that he or she is unwelcome in the work place because of his or her religion.").

[166] *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (rejecting the district court's suggestion that harassment might be discounted in an environment that was "inherently coarse"; "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most"); *see also Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) (stating that a "member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct"); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) ("[W]e squarely denounce the notion that the increasing regularity of racial slurs and graffiti renders such conduct acceptable, normal, or part of 'conventional conditions on the factory floor.'"); *Vollmar v. SPS Techs., LLC*, No. 15-2087, 2016 WL 7034696, at *6 (E.D. Pa. Dec. 2, 2016) (concluding that even in a work environment in which foul language and joking are commonplace, the employer can be liable for fostering a hostile work environment for female employees).

[167] *Smith v. Sheahan,* 189 F.3d 529, 535 (7th Cir. 1999); *see also Reeves*, 594 F.3d at 803, 812-13 (holding that the plaintiff, the only woman working on the sales floor, could establish a sexually hostile work environment based on vulgar, sex-based conduct, even though the conduct had begun before she entered the workplace);

Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) ("We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment . . . ."); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part, dissenting in part) (stating that a female employee should not have to assume the risk of a hostile work environment by voluntarily entering a workplace in which sexual conduct abounds); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (rejecting the contention that racial epithets that were common in the defendant's industry could not establish a hostile work environment based on race).

[168] *See, e.g.*, *Reeves*, 594 F.3d at 811-12 (concluding that a reasonable jury could find that the conduct in the plaintiff's office, including use of the terms "wh__e," "b___h," and "c__t," vulgar discussions of women's body parts, and the pornographic image of a woman in the office, contributed to conditions that were humiliating and degrading to women on account of their gender and thus could have created an abusive working environment).

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

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

regarding whether conduct was unwelcome where he repeatedly told his coworker, "I'm not interested," yet she continued to make sexual overtures).

[171] *See Webb-Edwards v. Orange Cnty. Sheriff's Office*, 525 F.3d 1013, 1027-28 (11th Cir. 2008) (concluding that the plaintiff failed to demonstrate that the harasser's conduct was severe or pervasive, in part because the conduct ended after the plaintiff told the harasser that it made her uncomfortable); *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 704 (7th Cir. 2001) (stating that repeated harassment that continues despite an employee's objections is indicative of a hostile work environment); *Moore v. Pool Corp*., 304 F. Supp. 3d 1148, 1160 (N.D. Ala. 2018) (concluding that a jury could conclude that alleged racial harassment by a customer was objectively hostile, where the customer not only called the plaintiff a "n____r" five to seven times a year over several years, but the customer continued the harassment even after the plaintiff objected and asked the customer to stop using the racial epithet).

[172] *See, e.g.*, *Christian v. Umpqua Bank*, 984 F.3d 801, 806-07, 811 (9th Cir. 2020) (concluding that the evidence created a triable issue as to whether a customer's harassment of the complainant was sufficiently severe or pervasive where the customer persisted in asking the complainant on dates, sending her notes and letters, and repeatedly "pester[ing] her" for months after the complainant asked him to stop).

[173] *See* EEOC, *Compliance Manual Section 12: Religious Discrimination* § 12-III.B.2.b (2021), **http://www.eeoc.gov/policy/docs/religion.html#_Toc203359509 (http://www.eeoc.gov/policy/docs/religion.html#_Toc203359509)**); *Venters v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (concluding that a reasonable person in the plaintiff's position could have found the work environment hostile where the supervisor's remarks were uninvited, intrusive, and continued even after the employee informed her supervisor that his comments were inappropriate).

[174] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002) (explaining that because a hostile work environment is a single unlawful employment action, a court should not separate individual acts that are part of the broader claim when analyzing timeliness or liability).

[175] *Morgan*, 536 U.S. at 120. *Compare Ford v. Jackson Nat. Life Ins. Co.*, 45 F.4th 1202, 1229 (10th Cir. 2022) (holding that a pre-filing period incident in which a manager had engaged in sexually suggestive conduct with a vodka bottle was part

of the same hostile work environment as subsequent conduct by other workers that demonstrated "the same type of sex-based hostility that Ford ha[d] repeatedly complained of"), *Maliniak v. City of Tucson*, 607 F. App'x 626, 628 (9th Cir. 2015) (concluding that an offensive sign posted within the 300-day charge-filing time period was sufficiently related to the offensive signs that pre-dated the charge-filing period to be considered part of the same actionable hostile work environment claim, where both sets of signs denigrated women), *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013) (concluding that the plaintiff could proceed with her hostile work environment claim under *Morgan*'s single unlawful employment practice theory where at least one incident—being called a "b___h" during a meeting—occurred within the charge-filing period and many of the acts that fell outside the filing period involved similar conduct by the same individuals), *and EEOC v. Fred Meyer Stores, Inc.*, 954 F. Supp. 2d 1104, 1121-23 (D. Or. 2013) (concluding that sexual harassment of a retail store employee by a customer that occurred before the employee's six-month absence could be considered along with harassment that occurred after she returned in determining whether she was subjected to a hostile work environment, where the conduct involved the same customer engaging in similar physical harassment before and after the employee's absence from the workplace, and despite the employee's complaint, the harasser was allowed to continue frequenting the store before he sexually harassed her again), *with Martinez v. Sw. Cheese Co., LLC*, 618 F. App'x 349, 354 (10th Cir. 2015) (holding that pre-filing period conduct was not sufficiently related to filing period conduct so as to be part of the same hostile work environment where it did not involve the same type of conduct, it occurred infrequently, and it involved different harassers), *and Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 727 (7th Cir. 2004) (holding that an incident that occurred within the charge-filing time period was not part of the same hostile work environment as the earlier incidents where there was a three-year gap and the last incident involved a chance encounter on a commuter train).

[176] *See Morgan*, 536 U.S. at 120-21 (affirming lower court's ruling that acts were part of the same actionable hostile environment claim where they involved "the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers"); *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (stating that "*Morgan* requires courts to make an individualized assessment of whether incidents and episodes are related" without limiting the relevant criteria or imposing particular factors, and stating that "[t]his

flexibility is useful in a context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment").

[177] *See Baird v. Gotbaum*, 662 F.3d 1246, 1251-52 (D.C. Cir. 2011) (holding that the district court erred in concluding that the plaintiff's hostile work environment claim could not include discrete acts that also were actionable on their own); *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007) (concluding that although a timely discrete act can provide a basis for considering untimely, non-discrete acts as part of the same hostile work environment claim, the timely failure to promote and retaliation were not sufficiently similar to untimely allegations so as to be part of the same hostile work environment claim); *Royal v. Potter*, 416 F. Supp. 2d 442, 453-54 (S.D. W. Va. 2006) (concluding that the plaintiff's actionable hostile work environment claim included termination of a temporary position and failure to promote). *But see Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 892-93 (9th Cir. 2005) (stating that timely acts offered in support of a hostile work environment claim must be non-discrete acts because basing a hostile work environment claim on timely discrete and untimely non-discrete acts would "blur to the point of oblivion the dichotomy between discrete acts and a hostile environment").

As discussed in the EEOC's Compliance Manual Section on *Threshold Issues*: "[A] discrete act of discrimination [an official act that is independently actionable] may be part of a hostile work environment only if it is related to abusive conduct or language, i.e., a pattern of discriminatory intimidation, ridicule, and insult. A discrete act that is unrelated to abusive conduct or language ordinarily would not support a hostile work environment claim." EEOC, *Compliance Manual Section 2: Threshold Issues* § 2-IV.C.1.b (2009), **https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b (https://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-b)** ; *see also Bearer v. Teva Pharms. USA, Inc.*, No. 19-5415, 2021 WL 4145053, at *24 (E.D. Pa. Sept. 8, 2021) (stating that "failure to be promoted, without any indication that it is connected to hostile or abusive behavior, is simply not a form of harassment that can contribute to a hostile work environment").

[178] This example is based on the facts in *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 385-87 (7th Cir. 2007).

[179] This example is based on the facts in *McGullam*, 609 F.3d at 72-74.

[180] *See* note 123 and accompanying text.

[181] *See Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 803, 811-12 (11th Cir. 2010) (en banc) (concluding that a jury could find that the conduct of a male sales floor employees that was gender-specific, derogatory, and humiliating—including vulgar sexual comments, pornographic images of women, and gender epithets—created a hostile work environment for the complainant, who was the only woman on the sales floor, even though the conduct was not specifically directed at her); *cf. Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (stating that pornography "sexualizes the work environment to the detriment of all female employees").

[182] *See, e.g.*, *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1144-46 (10th Cir. 2008) (holding that a reasonable jury could conclude that the plaintiff was subjected to a racially hostile work environment, which included anonymous bathroom graffiti and the display of a noose); *see also Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388-89 (2d Cir. 2020) (concluding that the complainant raised disputed issues of material fact as to whether a coworker's comments about religion and the complainant's national origin, which were not directed at the complainant but made to others in his presence, contributed to a hostile work environment).

[183] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that the district court erred in evaluating the plaintiffs' § 1981 and § 1983 racial harassment claims by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark but each plaintiff became aware of all of the conduct); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1257-58 (11th Cir. 2014) (stating that employees could base their racial harassment claims on conduct that they were aware of); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335-36 (6th Cir. 2008) (concluding that evidence of a hostile work environment may include acts of harassment that the plaintiff becomes aware of during her employment that were directed at others and occurred outside her presence).

[184] These facts are adapted from *Rodgers v. Western-Southern Life Insurance Co.*, 12 F.3d 668, 670-72 (7th Cir. 1993).

[185] *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011) (holding that Title VII does not merely authorize suit by someone who was allegedly discriminated against but instead more broadly authorizes suit by anyone who falls within the zone of interests protected by Title VII, meaning "any plaintiff with an interest 'arguably [sought] to be protected by the statute'" (quoting *Nat'l Credit*

Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 495 (1998)); and further holding that, pursuant to that test, Thompson could bring a lawsuit alleging North American Stainless (NAS) fired him to retaliate against his fiancée, who had filed a sex discrimination charge against NAS, because "the purpose of Title VII is to protect employees from their employers' unlawful actions[, and] injuring him was the employer's intended means of harming [his fiancée]"; *cf. Finn v. Kent Sec. Servs., Inc.*, 981 F. Supp. 2d 1293, 1300 (S.D. Fla. 2013) (concluding that a plaintiff might have standing to pursue a claim if the Defendant "required her, as part of her duties, to serve as the delivery vehicle of Defendant's discrimination against other employees based on their race, sex, or color").

[186] Sophie also could file an EEOC charge alleging that she was subjected to unlawful retaliation based on Christian's threats in response to her objection to the harassment. For more information on what constitutes unlawful retaliation, see EEOC, Enforcement Guidance on Retaliation and Related Issues § II.A.2 (2016), **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2._Opposition (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#2._Opposition)** .

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

[188] *See Lapka v. Chertoff*, 517 F.3d 974, 979, 983 (7th Cir. 2008) (concluding that Title VII covered sexual harassment that occurred while attending employer-mandated training at an out-of-state training center).

[189] *See Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 543 (N.J. 2000) (concluding that, although the electronic bulletin board did not have a physical location at the employee's worksite, evidence might show it was so closely related to the

workplace environment and beneficial to the employer that continuation of harassment on it should be regarded as occurring in the workplace).

[190] *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986) (noting that an employee had alleged harassment by her supervisor, which included both conduct inside and conduct outside the workplace and both conduct during and conduct after business hours).

[191] *See, e.g.*, *Lapka*, 517 F.3d at 983 (explaining that, to be actionable, harassment need only have consequences in the workplace); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (stating that the harasser's intimidating conduct outside the workplace helped show why the complainant feared him and why his presence around her at work created a hostile work environment); *Duggins v. Steak 'n Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001) (stating that an employee may reasonably perceive her work environment as hostile if forced to work for, or in close proximity to, someone who harassed her outside the workplace); *cf. Andersen v. Rochester City Sch. Dist.*, 481 F. App'x 628, 630 (2d Cir. 2012) (concluding that alleged harassment of a teacher by a student outside of school did not create a hostile work environment where the student was not in the teacher's class and they did not interact at school).

[192] *See, e.g., Strickland v. City of Detroit*, 995 F.3d 495, 506-07 (6th Cir. 2021) (considering social media posts by police department personnel referring to Detroit residents as "garbage" and characterizing Black Lives Matter supporters as "racist terrorists" in assessing whether the plaintiff's work environment was sufficiently racially hostile to be actionable); *Fisher v. Mermaid Manor Home for Adults, LLC*, 192 F. Supp. 3d 323, 326, 329 (E.D.N.Y. 2016) (determining that a reasonable jury could find that a coworker's Instagram post, brought to the plaintiff's attention by two other coworkers, which compared the plaintiff to a chimpanzee character in the Planet of the Apes movie, created a hostile work environment); *Tammy S. v. Dep't of Def.*, EEOC Appeal No. 0120084008, 2014 WL 2647178, at *12 (June 6, 2014) (concluding that the complainant was subjected to sex-based harassment creating a hostile work environment, including by way of postings on the harasser's personal website, which were announced during a training class at work and were viewed and discussed by many employees in the workplace); *Knowlton v. Dep't of Transp.,* EEOC Appeal No. 0120121642, 2012 WL 2356829, at *1-3 (June 15, 2012) (reversing dismissal of a harassment claim that included a race-related comment posted by a coworker on Facebook).

[193] This example is based on the facts in *Fisher*, 192 F. Supp. 3d at 326-27.

[194] *See, e.g.*, *EEOC v. Fairbrook Med. Clinic, P.A., 609 F.3d 320, 329 (4th Cir. 2010)* (stating that the severity of the harasser's conduct was exacerbated by his significant authority over the complainant).

[195] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-62 (1998) (noting "[a]s a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury").

[196] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("Negligence sets a minimum standard for employer liability under Title VII.").

[197] *Id.* at 758 (stating that negligence and vicarious liability, as set forth in provisions of the Restatement (Second) of Agency, "are possible grounds for imposing employer liability on account of a supervisor's acts and must be considered"); *see also id.*at 759 ("Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment."); *Debord v. Mercy Health Sys. of Kansas, Inc.*, 737 F.3d 642, 650-55 (10th Cir. 2013) (analyzing harassment by a supervisor under both negligence and vicarious liability standards); *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 421-22 (11th Cir. 1999) (same).

[198] *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) ("The concept of negligence thus imposes a minimum standard for employer liability—direct liability—under title VII, a standard that is supplemented by the agency-based standards for vicarious liability as articulated in *Faragher* and [*Ellerth*]." (internal quotation marks and citation omitted)); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 540 n.4 (10th Cir. 1998) ("The Supreme Court recognized in [Faragher] and Ellerth the continuing validity of negligence as a separate basis for employer liability.").

[199] *See* note 197 and accompanying text.

Although negligence and vicarious liability are distinct grounds for employer liability for unlawful harassment by a supervisor, both standards look at the reasonableness of the employer's actions. The D.C. Circuit has explained: "While the reasonableness of an employer's response to sexual harassment is at issue under both standards, the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence, than under the vicarious liability standard, where the burden shifts to the employer

to prove its own reasonableness and the plaintiff's negligence." *Curry v. D.C.*, 195 F.3d 654, 660 (D.C. Cir. 1999) (citing *Shaw v. AutoZone, Inc.*,180 F.3d 806, 812 n.2 (7th Cir. 1999)).

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

[201] *See Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562-63 (6th Cir. 1999); *O'Rourke v. City of Providence*, 235 F.3d 713, 736 (1st Cir. 2001).

[202] *See, e.g.*, *O'Brien v. Middle E. Forum*, 57 F.4th 110, 120 (3d Cir. 2023); *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 54 (2d Cir. 2012); *Helm v. Kansas*, 656 F.3d 1277, 1286 (10th Cir. 2011); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383 (5th Cir. 2003); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000).

[203] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 789-90 (1998) (citing circuit court decisions recognizing appropriateness of proxy liability for harassment by individuals occupying such positions); *Townsend*, 679 F.3d at 54 (recognizing that employer liability is appropriate for harassment by individuals occupying these positions); *Johnson*, 218 F.3d at 730 (same); *see also O'Brien*, 54 F.4th at 121 ("We recognize, of course, that 'only individuals with exceptional authority and control within an organization can meet' this standard." (quoting *Helm*, 656 F.3d at 1286)).

[204] *See Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) (stating that *Faragher* and *Ellerth* do not suggest that a supervisor can be considered the employer's alter ego merely because he possesses a high degree of control over a subordinate); *see also O'Brien*, 57 F.4th at 121 (stating that "merely serving as a supervisor with some amount of control over a subordinate does not establish proxy status"); *Townsend*, 679 F.3d at 55-56 (concluding that a jury instruction was erroneous because it gave the misleading impression that mere status as a supervisor with power to hire and fire is sufficient to render the harasser the employer's alter ego); *Johnson*, 218 F.3d at 730 (concluding that alter-ego liability did not apply where the supervisor was not a high-level manager whose actions spoke for the defendant).

[205] *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

As explained by the Supreme Court, an employer cannot shield itself from liability by concentrating decisionmaking authority in a few individuals with limited ability to make independent judgments about employment decisions. Under such

circumstances, the employer has effectively delegated the authority to take tangible employment actions to the lower-level employees on whose input formal decisionmakers will be required to rely. As a result, the lower-level employees will qualify as "supervisors." *Id.; see also Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 416 (6th Cir. 2021) (concluding that the plaintiff had presented sufficient facts to allow a jury to conclude that her formal supervisor had delegated supervisory authority to the harasser, a senior project manager, where the harasser was in her chain of command; she worked directly for him when she worked on his projects; and her formal supervisor was required to take the harasser's recommendations into account and he acceded to the harasser's requests, at least with respect to removing lower-level managers from his projects); *Velázquez-Pérez v. Developers Diversified Realty Corp*., 753 F.3d 265, 272 (1st Cir. 2014); *EEOC v. Autozone, Inc.*, 692 F. App'x 280, 283-84 (6th Cir. 2017) (per curiam).

[206] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998).

[207] *E.g.*, *id.* at 761; *Faragher*, 524 U.S. at 790.

[208] *See Vance*, 570 U.S. at 437 n.9.

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

[210] *Kramer v. Wasatch Cnty. Sheriff's Office*, 743 F.3d 726, 738 (10th Cir. 2014) (emphasis in original); *id.* at 741 ("Even if the [formal decision maker] undertook *some* independent analysis when considering employment decisions recommended by [the alleged harasser], [the alleged harasser] would qualify as a supervisor so long as his recommendations were among the proximate causes of the [formal decision maker's] decision-making." (emphasis in original)).

[211] *See Ellerth*, 524 U.S. at 759 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action."). *But see EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 685 (8th Cir. 2012) (stating that apparent authority is insufficient to establish supervisor status and the imposition of vicarious liability).

[212] *See Wilson v. Muckala*, 303 F.3d 1207, 1220-21 (10th Cir. 2002) (recognizing the apparent authority theory but finding insufficient support for the concept as to the chief of staff's conduct where the complainant received assurances from immediate supervisors that the chief of staff exercised no authority over the complainant's position and the complainant did not indicate that the chief of staff was in her chain of command). In *Kramer*, the Tenth Circuit concluded that apparent-authority principles also might apply where an employer has vested an employee with some limited authority over the complainant and the complainant reasonably but mistakenly believes that the employee also has related powers, which, in some circumstances, might include the power to undertake or substantially influence tangible employment actions. 743 F.3d at 742-43.

[213] *See generally Kramer, 743 F.3d at 742 ("*Apparent authority exists where an entity 'has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first [party].'" (quoting *Bridgeport Firemen's Sick & Death Benefits Ass'n v. Deseret Fed. Sav. & Loan Ass'n*, 735 F.2d 383, 388 (10th Cir. 1984))); *see also* Restatement (Third) of Agency § 2.03 (2006) (defining "apparent authority" as the "power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations"); *id.* § 3.03 ("Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.").

[214] *See, e.g.*, *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

[215] *See, e.g.*, *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

[216] *See, e.g.*, *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1017 (9th Cir. 2018).

[217] *See, e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 914-15 (7th Cir. 2010).

[218] *See, e.g.*, *EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 606-07 (4th Cir. 2011) (collecting cases in which circuit courts have held employers may be liable for acts of harassment committed against employees by non-employees).

[219] *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (noting that employer liability for a hostile work environment has not been disputed when the harasser was "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy"); *O'Brien v. Middle E. Forum*, 57 F.4th 110, 117 (3d Cir. 2023) (concluding that, pursuant to *Faragher* and *Ellerth*, the affirmative defense is unavailable when the individual who engaged in the alleged harassment was the employer's proxy or alter ego); *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 52-53 (2d Cir. 2012) (same); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 383-84 (5th Cir. 2003) (same); *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000) (same).

[220] As discussed in § IV.A, above, an employer also may be liable for harassment by a supervisor pursuant to negligence principles.

[221] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998). A "tangible employment action" means a "significant change in employment status" that requires an "official act" of the employer. *Id*.; *see also* § IV.B.2, above (discussing the definition of "tangible employment action").

[222] *Ellerth*, 524 U.S. at 761-62.

[223] *Id.* at 762; *see also id.* at 762-63 (explaining that requirements of the "aided in the agency" relation standard "will always be met when a supervisor takes a tangible employment action against a subordinate").

[224] As discussed above in § III.D.1, a discriminatory employment practice that occurred within the charge-filing period may be independently actionable regardless of whether it is also part of a hostile work environment claim.

[225] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding no affirmative defense is available where a supervisor's harassment culminates in a tangible employment action and providing examples of non-career-ending tangible employment actions to include demotion and undesirable reassignment); *Ellerth*, 524 U.S. at 761-63 (holding that vicarious liability will always be imputed to an employer when a supervisor takes a tangible employment action, which could include non-career-ending actions such as denial of raise or promotion); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) (stating an inference arises that there is a causal link between the harasser's discriminatory animus and the employment decision *any time* the harasser makes a tangible employment decision

that adversely affects the plaintiff, such as a demotion) (emphasis supplied); *see also Ferraro v. Kellwood Co.*, 440 F.3d 96, 101-02 (2d Cir. 2006) (stating that the affirmative defense is not available if a tangible employment action was taken against an employee as part of a supervisor's discriminatory harassment and that harassment culminates in a tangible employment action if the action is "linked" to the harassment); *cf. Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1232 (11th Cir. 2006) (stating that there must be a causal link between the tangible employment action, in this case an alleged reduction in hours, and the sexual harassment, which can be shown by temporal proximity). *But see Hall v. City of Chicago*, 713 F.3d 325, 335 (7th Cir. 2013) (concluding that an alleged work reassignment did not preclude the affirmative defense because it occurred at the beginning of the complainant's tenure in the division and therefore "could not have been the culmination of anything").

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

[227] *See Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (stating that the affirmative defense is not available where "discrimination the employee has suffered included a tangible employment action").

[228] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (analyzing Ellerth's claim as a hostile work environment claim because it involved only unfulfilled threats); *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1027 (8th Cir. 2004) (analyzing an unfulfilled implied threat as a factor in determining whether the plaintiff was subjected to a hostile work environment).

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

of Lakeland, 315 F. Supp. 2d 1217, 1224-26 (M.D. Fla. 2004) (rejecting the *Jin* analysis as inconsistent with Supreme Court and Eleventh Circuit precedent).

[230] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. at 765.

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

[232] *Id*. at 765 (emphasis added); *Faragher*, 524 U.S. at 807 (emphasis added); *see also, e.g.*, *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001) ("Both elements must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements.").

[233] *Ellerth*, 524 U.S. at 765.

[234] If the employer had been aware of previous harassment by the same supervisor, then the employer would not be able to establish the affirmative defense if it had failed to take appropriate corrective action in the past to address harassment by that supervisor. *See Minarsky v. Susquehanna Cnty*., 895 F.3d 303, 312-13 (3d Cir. 2018) (holding that a jury could find that the employer did not act reasonably to prevent harassment by the plaintiff's supervisor where county officials were aware that the supervisor's conduct "formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward [the supervisor's] harassment").

[235] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998) ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2003) ("The legal standard for evaluating an employer's efforts to prevent and correct harassment, however, is not whether any additional steps or measures would have been reasonable if employed, but whether the employer's actions as a whole established a reasonable mechanism for prevention and correction."); *see also* EEOC, *Promising Practices for Preventing Harassment* (2017), **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)** .

[236] For further guidance on what constitutes reasonable care to prevent harassment, refer to §IV.C.3.a, *infra*. An employer also may reduce the likelihood of

unlawful harassment by conducting climate surveys of employees to determine whether employees believe that harassment exists in the workplace and is tolerated, and by repeating the surveys to ensure that changes to address potential harassment have been implemented. Chai R. Feldblum & Victoria A. Lipnic, EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** (discussing steps an organization may take to convey a sense of urgency about preventing harassment).

[237] *See, e.g.*, *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010) (holding that a reasonable jury could conclude that the failure to disseminate the harassment policy and complaint procedure precluded the employer from establishing the first prong of the defense); *Ortiz v. School Bd.*, 780 F. App'x 780, 786 (11th Cir. 2019) (per curiam) (denying summary judgment to the employer on the *Faragher-Ellerth* affirmative defense where there was evidence that the employer had failed to take reasonable steps to disseminate its anti-harassment policy).

[238] *See EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007) (explaining that, although an employer need not tailor its complaint procedure to the competence of each employee, "the known vulnerability of a protected class has legal significance"). In *V & J Foods*, the victims of harassment were teenage girls working part-time, and often as their first job, in a small retail outlet. *Id.* The court criticized the defendant's complaint procedures as "likely to confuse even adult employees," and stated, "[k]nowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager." *Id.*

[239] *EEOC v. Spud Seller, Inc.*, 899 F. Supp. 2d 1081, 1095 (D. Colo. 2012) (determining a trial was required on the issue of whether the employer, which employed some individuals who spoke only Spanish, could satisfy the *Faragher-Ellerth* affirmative defense where the employer's handbook contained an anti-harassment policy in English, but there was no evidence that its provisions were translated into Spanish or that written translations were supplied to Spanish-speaking employees).

[240] *See Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) ("While there is no exact formula for what constitutes a 'reasonable' sexual harassment policy, an effective policy should at least . . . require supervisors to report incidents

of sexual harassment."); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (criticizing employer's putative sexual harassment policy where the policy, *inter alia*, failed to place any duty on supervisors to report incidents of sexual harassment to their superiors); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998) (criticizing employer policy for failing to "provide instruction on the responsibilities, if any, of a supervisor who learns of an incident of harassment through informal means"); *Varner v. Nat'l Super Mkts.*, 94 F.3d 1209, 1214 (8th Cir. 1996) (holding employer liable where the company's policy "in effect required [the plaintiff's] supervisor to remain silent notwithstanding his knowledge of the incidents"); *cf. Ridley v. Costco Wholesale Corp.*, 217 F. App'x 130, 138 (3d Cir. 2007) (declining to impose punitive damages where defendant provided new supervisors with detailed materials regarding supervisors' obligation to address discrimination issues).

[241] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding as a matter of law that the city did not exercise reasonable care to prevent the supervisors' harassment where, among other defects, the city's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (stating that it was "not altogether surprising" that the complainant did not follow a grievance procedure that apparently required her to complain first to her supervisor, who was the alleged harasser); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 596 (6th Cir. 2009) (reversing grant of summary judgment on a hostile work environment claim where the employer's policy failed to provide a mechanism for bypassing a harassing supervisor when making a complaint, *inter alia*); *Clark*, 400 F.3d at 349-50 (stating that a reasonable sexual harassment procedure should provide a mechanism for bypassing a harassing supervisor when making a complaint); *Green v. MOBIS Ala., LLC*, 995 F. Supp. 2d 1285, 1300 (M.D. Ala. 2014) (concluding that the employer acted reasonably to prevent sexual harassment where, among other things, its complaint procedures provided alternative avenues to report harassment in case the harasser was an employee's supervisor); *Stewart v. Trans-Acc, Inc.*, No. 1:09-cv-607, 2011 WL 1560623, at *11 (S.D. Ohio Apr. 25, 2011) (noting the employer's policy "[c]rucially . . . does not contain a reporting procedure, much less a mechanism for bypassing a harassing supervisor"); *see also* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/haras**

sment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) ("Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.").

[242] *See Wilson*, 164 F.3d at 541 (noting deficiencies with the employer's policy, including a supervisor-bypass option that "is located in a separate facility and is not accessible during the evening or weekend hours when many employees and students are on the various campuses"); *Lamarr–Arruz v. CVS Pharm., Inc.*, 271 F. Supp. 3d 646, 661 (S.D.N.Y. 2017) (the employee's testimony that complaints to the ethics hotline were ignored raises questions regarding the reasonableness of the employer's purported available corrective measures); *cf. Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (finding the employer's "open door" reporting policy deficient where the two points of contact were either always unavailable or refused to speak with the employee when the employee attempted to complain); *Spud Seller*, 899 F. Supp. 2d at 1095 (questioning whether the employer's anti-harassment policy was sufficient where employees who spoke only Spanish could not bring complaints directly to the individuals identified in the policy because the points of contact did not speak Spanish); *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1300 (M.D. Ala. 2010) (criticizing the employer's complaint reporting procedure where employees were directed to file complaints with one person at an address located in a different city, the point of contact never visited the location where the harassed employee worked, and the harassed employee was not provided with any other contact information for the point of contact); *Escalante v. IBP, Inc.*, 199 F. Supp. 2d 1093, 1103 (D. Kan. 2002) (determining the employer failed to show it exercised reasonable care by promulgating and implementing an anti-harassment policy where it "has a confusing number of contradicting policies, each stating a different reporting mechanism, the specific policy dealing with discrimination claims only provides the employee one person to report such claims to[, and [t]his person is located in another state, is only accessible by telephone, and the policy does not state the hours or days in which this person may be reached"); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1269 n.22 (M.D. Ala. 2001) (noting "mid-level supervisors may have blocked Plaintiffs' attempts to contact higher-ranking supervisors" thereby rendering the complaint process inaccessible and deficient). *Compare Madray v. Publix Supermarkets, Inc*., 208 F.3d 1290, 1298 (11th Cir. 2000) (noting the employer's policy designated several

additional company representatives to whom an employee could complain regarding harassment and that these individuals were accessible to employees). Accessibility of points of contact can also be relevant when addressing the second prong of the *Faragher-Ellerth* affirmative defense, which considers whether the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *See Derry v. EDM Enters., Inc.*, No. 09-CV-6187-TC, 2010 WL 3586739, at *3 (D. Or. Sept. 13, 2010) (concluding that the employee's failure to take advantage of the employer's corrective opportunities was not unreasonable where the only contact persons for reporting harassment were her supervisor, who was the alleged harasser, and the CEO, whose phone number was not readily available and whom the employee was discouraged from contacting without going through her supervisor).

[243] *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (stating "an employer's complaint mechanism must provide a clear path for reporting harassment" and criticizing the defendant for, *inter alia*, failing to provide any point of contact or contact information for employees to make harassment complaints); *Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011) (finding the employer's policy, which included "a complaint procedure and list of personnel to whom harassment may be reported" reasonable).

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

[245] *See Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 565-66 (D. Md. 2000) (stating that the failure to provide confidentiality or protection from retaliation where there is evidence of prevalent hostility can support a finding that the policy was defective and dysfunctional). An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf**

(https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) . Records relating to harassment complaints should be kept confidential on the same basis.

[246] *See Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th 2007) (holding that the employer demonstrated that it exercised reasonable care to prevent sexual harassment where the employer had and effectively deployed a facially valid anti-harassment policy, which included a non-retaliation provision and a flexible reporting procedure that listed four individuals who may be contacted in the case of harassment); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 102-03 (2d Cir. 2006) (concluding that the employer satisfied the first element of the affirmative defense to disability-based harassment where, among other things, it had an anti-harassment policy that prohibited harassment on account of disability, promised that complaints would be handled promptly and confidentially, and contained an anti-retaliation provision); *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1029 (N.D. Iowa 2000) (stating the gravamen of an effective anti-harassment policy includes three provisions: (1) training for supervisors, (2) an express anti-retaliation provision, and (3) multiple complaint channels for reporting the harassing conduct) (collecting cases supporting inclusion of each provision), *aff'd*, 248 F.3d 1165 (8th Cir. 2001)); *see also Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) (upholding a sexual harassment jury verdict for the plaintiff where she resigned instead of cooperating with her employer's investigation because, among other things, the Human Resources Director did nothing to assure her that she would not be subjected to retaliation).

[247] This is a non-exhaustive list. *See, e.g.*, Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 44-60 (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** ; EEOC, *Promising Practices for Preventing Harassment* (2017), **https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment (https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment)** .

[248] *See Ferraro v. Kellwood Co.*, 440 F.3d 96, 102 (2d Cir. 2006) ("An employer may demonstrate the exercise of reasonable care, required by the first element, by

showing the existence of an antiharassment policy during the period of the plaintiff's employment, although that fact alone is not always dispositive.").

[249] *See, e.g.*, *Wallace v. Performance Contractors, Inc*., 57 F.4th 209, 223 (5th Cir. 2023) (determining the "evidence indicates that [the defendant] had a policy in theory but not one in practice" where both the plaintiff and her husband tried to contact the human resources office several times to no avail and harassment occurred in front of other employees and was never reported, despite the defendant's policy requiring any person witnessing harassment to report it); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) ("While there is no exact formula for what constitutes a 'reasonable' sexual harassment policy, an effective policy should at least . . . provide for training regarding the policy.").

[250] *See Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("But where, as here, there is no evidence that an employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional, the existence of such a policy militates strongly in favor of a conclusion that the employer 'exercised reasonable care to prevent' and promptly correct sexual harassment."); *see also Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1299 (11th Cir. 2000) ("[B]ecause we find no inherent defect in the complaint procedures established by Publix's sexual harassment policy, nor any evidence that the policy was administered in bad faith, we conclude that Publix exercised reasonable care to prevent sexual harassment.").

[251] *MacCluskey v. Univ. of Conn. Health Ctr.*, 707 F. App'x 44, 47 (2d Cir. 2017) (citing *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009)).

[252] *Duch*, 588 F.3d at 764-66.

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

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

[255] *See Savino v. C.P. Hall Co.*, 199 F.3d 925, 935 (7th Cir. 1999) (stating that the employee's "unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability").

[256] *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *see also Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (second prong of affirmative defense satisfied where the plaintiff was aware that the anti-harassment policy required immediate reporting of sexual harassment, yet she failed to say anything for at least five months); *Taylor v. Solis*, 571 F.3d 1313, 1318 (D.C. Cir. 2009) (second prong of affirmative defense satisfied where a reasonable employee in the plaintiff's position would have used the employer's complaint procedure yet the plaintiff instead posted the sexual harassment policy on her office door and told her friend that she was being harassed).

[257] *Minarsky v. Susquehanna Cnty*., 895 F.3d 303, 314-16 (3d Cir. 2018) (concluding that a jury could find that the plaintiff's failure to report harassment by her supervisor was not unreasonable where, among other things, her working conditions worsened after she asserted herself in the past, the supervisor warned her that she could not trust the individuals to whom she was required to report the harassment, and the employer had known of the supervisor's prior misconduct but "merely slapped him on the wrist"); *Johnson v. West*, 218 F.3d 725, 732 (7th Cir. 2000) (holding that whether the plaintiff's failure to complain was unreasonable was a factual issue where evidence showed the harasser threatened the plaintiff, verbally abused her, and threw mail in her face); *Meza-Perez v. Sbarro LLC*, No. 2:19-cv-00373-APG-NJK, 2020 WL 12752817, at *8 (D. Nev. Dec. 16, 2020) (concluding a reasonable jury could find the plaintiff's delay in reporting was not unreasonable where the harasser repeatedly threatened the plaintiff and her family members with physical harm, termination, and deportation).

[258] The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c (1979); *see also Kramer v. Wasatch Cnty. Sheriff's Office*, 743 F.3d 726, 754 (10th Cir. 2014) (noting that the employee's response to harassment was not necessarily unreasonable even if "20/20 hindsight" suggests that other steps would have been more effective).

[259] *See Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) (stating that an employee should not necessarily be expected to complain after the first or second incident of relatively minor harassment and that an employee is not required to report "individual incidents that are revealed to be harassment only in the context of additional, later incidents, and that only in the aggregate come to constitute a pervasively hostile work environment"); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 36-37 (1st Cir. 2003) (noting that "sometimes inaction is reasonable"

and concluding that the failure to report relatively minor incidents of harassment was not unreasonable).

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

[261] *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) (stating that employers can establish a defense only if the plaintiff *unreasonably* failed to make use of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense").

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

[263] *See* note 242, *supra*.

[264] *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001).

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

[266] *See Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (stating evidence that the employer has ignored or resisted similar complaints could be sufficient to excuse an employee's failure to use the employer's complaint procedure); *Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789, 806 (D.N.J. 2002) (concluding jury could reasonably find that the plaintiff's failure to complain of harassment was not unreasonable where the plaintiff, repeatedly witnessed the employer's failure to

respond to coworkers' and her own complaints); *Sullivan v. Hanover Foods Corp.*, No. 18-803 (MN), 2020 WL 211216, at *17 (D. Del. Jan. 14, 2020) (evidence that human resources and management frequently ignored complaints regarding race discrimination raised a genuine issue of material fact as to whether the plaintiff was unreasonable in failing to take advantage of preventative or corrective opportunities provided by the defendant); *Baker v. Int'l Longshoremen's Ass'n, Local 1423*, No. CV205-162, 2009 WL 368650 at *8 (S.D. Ga. Feb. 13, 2009) (holding that the plaintiff could introduce evidence of ignored harassment complaints to show that her failure to use the union grievance process was reasonable); *see also Minarsky v. Susquehanna Cnty.,* 895 F.3d 303, 313 n.12 (3d Cir. 2018) ("While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it this way.").

[267] *Barrett*, 240 F.3d at 267.

[268] *See Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 416 (6th Cir. 2021) (denying summary judgment and concluding the plaintiff's proffered evidence demonstrated she "was under a credible threat of retaliation" that alleviated her duty to report the harassment); *Minarsky*, 895 F.3d at 314 ("If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law."); *EEOC v. U.S. Bell, Link Techs., Corp.*, No. 2:03-CV-237-PRC, 2005 WL 1683979, at *19 (N.D. Ind. July 19, 2005) (determining that female employees were not unreasonable when they failed to report harassment as a result of the harasser's threats of retaliation and intimidation).

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

unreasonable); *O'Brien v. Middle E. Forum*, No. 2:19-cv-06078-JMG, 2021 WL 2186434, at *9 (E.D. Pa. May 28, 2021) (concluding that a reasonable jury could find that the employee's fear of retaliation was objectively reasonable based on evidence that the harasser "frequently threatened female employees by telling them that he could hack their computers, view their communications, and that he had cameras throughout the office"; asked female employees to spy on one another and had his sister eavesdrop on them; and had told other female employees he would have them fired for being a "walking lawsuit"); *Kanish v. Crawford Area Transp. Auth.*, No. 1:19-cv-00338 (Erie), 2021 WL 1520516, at *8 (W.D. Pa. Mar. 26, 2021) (holding that there were material issues of fact regarding whether the plaintiff unreasonably failed to avail herself of preventive or corrective opportunities, where she feared being fired if she complained about her supervisor; the harasser viewed himself as "untouchable" because he was a supervisor and cop; and the human resources manager was already aware of the harassment but did not take any action, leading the plaintiff to believe that a complaint would be futile).

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

[271] *See, e.g.*, *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (explaining that imposing vicarious liability on an employer is a compromise requiring more than "ordinary fear or embarrassment" to justify delay in complaining (quoting *Reed*, 333 F.3d at 35)).

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

[273] *See EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 641-42 (9th Cir. 2019) (explaining that where a client was aware of discrimination and could have taken corrective action to stop it, the client may be liable); *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 686 (M.D.N.C. 1997) (holding a temporary agency may be liable for harassment at a client's workplace where the employee complained to the temporary agency and the temporary agency made no investigation into or attempt to remedy the situation). Depending upon the facts and specific nature of the employment relationship, the staffing firm, the client, or both may be legally responsible under the federal EEO laws for undertaking corrective action. *See generally* EEOC, Notice No. 515.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997), **http://www.eeoc.gov/policy/docs/conting.html (http://www.eeoc.gov/policy/docs/conting.html)** .

[274] As noted earlier in § IV.C.2.b, the principles discussed in this section (§ IV.3) also apply in determining whether the employer has satisfied the first prong of the *Faragher-Ellerth* affirmative defense.

[275] For further discussion of the general application of the negligence standard, see notes 196 to 199 and accompanying text.

[276] *See Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). The Court in *Vance* stressed that a complainant could "prevail simply by showing that the employer was negligent in permitting... harassment to occur." *Id.* at 445; *see also id.* at 448-49 (explaining that an employee can establish employer liability for nonsupervisory harassment "by showing that his or her employer was negligent in failing to prevent harassment from taking place").

[277] *See id.* at 449 (stating that evidence relevant in determining whether the employer unreasonably failed to prevent harassment would include evidence that the employer did not monitor the workplace, that it failed to respond to complaints, that it failed to provide a system for registering complaints, or that it effectively discouraged complaints from being filed); *see also Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006) (stating that the employer is liable for coworker harassment if "it failed to have and enforce a reasonable policy for preventing harassment, or in short only if it was negligent in failing to protect the plaintiff from predatory coworkers"); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (stating that implementation of a harassment policy training session was relevant to whether the employer exercised reasonable care to prevent harassment, but adding that "[t]he

mere existence of such a policy . . . does not necessarily establish that the employer acted reasonably in remedying the harassment after it has occurred or in preventing future misconduct"); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334-35 (4th Cir. 2003) (concluding that a jury could find that the employer had constructive knowledge of harassment where the employer failed to provide adequate avenues to complain about harassment); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279-80 (11th Cir. 2002) (concluding that an anti-harassment policy was not effective where it was not aggressively or thoroughly disseminated, it was not posted in the workplace, managers were not familiar with it, it was not in the complainant's personnel file, and the employer's actual practice indicated a tolerance of harassment or discrimination); *Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (stating that the employer's adoption of a harassment policy that encouraged employees to report harassment to a supervisor or the EEO Director was relevant in evaluating employer liability for coworker harassment).

[278] *Vance*, 570 U.S. at 445-46 (stating that the "nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent").

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

[280] *See* § IV.B.2 above addressing the definition of a "supervisor."

[281] *Vance*, 570 U.S. at 449.

[282] *See Freitag v. Ayers*, 468 F.3d 528, 539-40 (9th Cir. 2006) (rejecting the defendant's argument that prisons are uniquely exempt from liability for sexual harassment under Title VII and affirming that prisons must implement and enforce policies reasonably calculated to minimize the risk of inmates' harassing staff).

[283] Risk factors for harassment are identified and discussed in an EEOC report published by the Select Task Force on the Study of Harassment in the Workplace. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, at § E (2016), **https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf (https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf)** .

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

[285] *See, e.g.*, *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1186 (9th Cir. 2005).

[286] *See, e.g.*, *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (stating that an employer has "actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it"); *see also West v. Tyson Foods, Inc.*, 374 F. App'x 624, 634 (6th Cir. 2010) (determining it was reasonable for the jury to conclude that the employer had actual knowledge of harassment where the aggrieved employee reported harassment to her supervisor in compliance with the employer's anti-harassment policy); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1363-64 (11th Cir. 1999) (per curiam) (addressing the question of whether the employer had adequate notice of the harassment, the court stated, "[t]his inquiry is made easy by the fact that Sundor's own promulgated sexual harassment policy" that directs employees to report harassment to their line manager, personnel, or any other manager with whom the employee is comfortable and that "[w]ith this policy, Sundor itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998) ("Actual knowledge will be demonstrable in most cases where the plaintiff has reported harassment to management-level employees.").

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

[288] *See Swinton*, 270 F.3d at 804-05.

[289] *See Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 107-08 (3d Cir. 2009) (stating that an employee's knowledge of harassment is imputed to the employer if the employee is specifically charged with addressing harassment, such as a human resources manager designated to receive complaints); *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 932 (7th Cir. 2017) (concluding that because the employee handbook required any employee with supervisory or managerial responsibility to report any possible harassment he or she is aware of, the employer had notice if a low-level supervisor was aware of harassment directed at a coworker with the same low-level supervisor title); *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350-51 (6th Cir. 2005) (applying Title VII standards to hold that the employer could be liable for the failure to prevent and correct harassment where the company's policy imposed the duty on all supervisors to report harassment, and multiple supervisors allegedly witnessed harassment but failed to report it to management); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 403 (1st Cir. 2002) (concluding that a team leader's knowledge was imputed to the employer where it had a policy allowing employees to report sexual harassment to team leaders).

[290] *See Torres*, 116 F.3d at 636-37.

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

[292] *See Clark*, 400 F.3d at 350 (concluding that the employer had notice of harassment that was witnessed by supervisors with a duty to report it to management, where the employer's anti-harassment policy required "*all* supervisors and managers" to report such harassment to the appropriate management personnel) (emphasis in original).

[293] *See*, *e.g.*, *Okoli v. City of Baltimore*, 648 F.3d 216, 224 n.8 (4th Cir. 2011). *Id.* at 224 (determining the employer "surely should have known" that the plaintiff's two complaints, which contained the word harassment and addressed "unethical" and "degrading and dehumanizing" conduct, likely encompassed sexual harassment).

[294] *See Valentine v. City of Chicago*, 452 F.3d 670, 680-81 (7th Cir. 2006) (determining that a question of material fact existed as to whether the plaintiff's complaints about unwanted touching provided the employer with sufficient notice of harassment); *Burke v. Villa*, No. 19-CV-2957 (NGG) (RER), 2021 WL 5591711, at *9 (E.D.N.Y. Nov. 30, 2021) (concluding a rational juror could find the plaintiff's complaint of continuous touching by an assistant manager to the point of

aggravation was sufficiently clear to place the employer on notice of potential harassment).

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

[296] *See Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605-06 (7th Cir. 2006) (stating that Title VII's "'primary objective' . . . is 'not to provide redress but to avoid harm'" and that the duty to prevent unlawful harassment may require an employer to take reasonable steps to prevent harassment once informed of a reasonable probability that it will occur (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998))); *id.* at 606 ("[A]n employer who receives notice that some probability of sexual harassment exists must adequately respond to that information within a reasonable amount of time."); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013) (stating that the employer is liable for harassment if it failed to act reasonably to prevent the harassment); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (explaining that Title VII's deterrent purpose would be served by encouraging employees to report harassment at an early stage *before* it is severe or pervasive); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (discussing the *Faragher-Ellerth* affirmative defense and stating, "[t]he genius of the [defense] is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage that amounts to discrimination that violates Title VII"). *But see Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010) ("When an employee complains about inappropriate conduct that does not rise to the level of a violation of law, however, there is no liability for a failure to respond.").

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

[298] *See e.g.*, *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008) (quoting *Weger v. City of Ladue*, 500 F.3d 710, 721 (8th Cir. 2007)).

[299] *See, e.g.*, *id.*; *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (quoting *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003)); *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 n.4 (3d Cir. 2009) (quoting *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 294 (3d Cir. 1999)); *see also Ocheltree v. Scollon Prods, Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (stating that the employer cannot adopt a "see no evil, hear no evil" strategy and that notice of

harassment is imputed to the employer if a "'reasonable [person], intent on complying with Title VII,' would have known about the harassment" (quoting *Spicer v. Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995))).

[300] *Chapman v. Oakland Living Ctr.*, 48 F.4th 222, 232 (4th Cir. 2022) (concluding that a reasonable jury could find that the employer had constructive notice of harassment where the employer failed to produce evidence that it had a harassment reporting policy when the harassment occurred and, although the employer had an employee handbook, the only copy was kept in a desk where the plaintiff may never have seen it).

[301] This example is based on the facts in *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002).

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

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

[304] *See EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (stating that a two-month delay in initiating an investigation was not the type of response "'reasonably likely to prevent the harassment from recurring'" (quoting *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005))).

[305] *See Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) (denying the employer's motion for summary judgment where the employer failed to investigate racially abusive phone calls that were known to the employer, noting, "Earlier action may have discouraged the later calls and other conduct toward [the employee]. Prior to [the employee] identifying the callers little was done to determine their identity,

and after [the employee] identified the callers no investigation was made of the identified individuals.").

[306] *See Rockymore v. U.S. Postal Serv.*, EEOC Appeal No. 0120110311, 2012 WL 424237, at *5 (Jan. 31, 2012) (finding that the agency failed to take prompt corrective action where it did not provide any justification for its two-week delay in responding to the complainant's sexual harassment complaint, particularly considering the complainant's indication that the alleged harasser had touched her).

[307] *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007); *see also EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 465-66 (5th Cir. 2013) (en banc) (holding that a reasonable jury could conclude that the employer failed to take reasonable measures to prevent and correct harassment where, among other things, the harassment complaint resulted in a belated and cursory 20-minute investigation in which the investigator did not take any notes or ask any questions during his meeting with the complainant, and he never contacted the employer's EEO Officer or sought advice about how to handle the matter); *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x 473, 480 (6th Cir. 2012) (concluding that a jury could find that the employer might have uncovered evidence of harassment if it had conducted a thorough investigation); *Lightbody v. Wal-Mart Stores E., L.P.*, No. 13-cv-10984-DJC, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014) (concluding that a reasonable jury could find that the employer was liable for sexual harassment of the plaintiff because, in investigating the plaintiff's complaint, it failed to follow leads that bore on the alleged harasser's credibility); *Grimmett v. Ala. Dep't of Corr.*, No. CV-11-BE-3594-S, 2013 WL 3242751, at *13 (N.D. Ala. June 25, 2013) (concluding that the employer failed to show that it exercised reasonable care where it presented general evidence that it had initiated an investigation but no specific evidence that would enable the court to evaluate the adequacy of the investigation and the employer's conclusory finding that the harassment complaint was unfounded).

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

[309] This example is based on the facts in *EEOC v. Boh Brothers Construction Company, L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (en banc).

[310] In the context of federal sector employment, to address potential Privacy Act concerns related to sharing corrective or disciplinary action with complainants, federal agencies may either: (1) maintain harassment complaint records that include information about corrective or disciplinary action by complainants' names; or (2) ensure that the agency's complaint records system includes a routine use permitting disclosure of corrective or disciplinary action to complainants. *See generally* EEOC Federal Sector Management Directive 715, EEOC MD-715 at Model Agency Title VII and Rehabilitation Acts Programs Part II.E. (2003), *available at* **https://www.eeoc.gov/federal-sector/management-directive/section-717-title-vii (https://www.eeoc.gov/federal-sector/management-directive/section-717-title-vii)** .

[311] At a minimum, pursuant to EEOC regulation, employers are required to keep records for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. If an EEOC charge is filed, the employer is required to preserve all records relevant to the charge until its final disposition. The date of final disposition is when the statutory period for filing a lawsuit expires or, where a lawsuit has been filed by an aggrieved person, the EEOC, or the Department of Justice, the date when the litigation is terminated. 29 C.F.R. § 1602.14.

[312] *See Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001) (stating the obligation to take prompt corrective action is comprised of two parts, of which "[t]he first part consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified").

[313] *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues at § II.C (2016),* **https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#C._Causal (https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#C._Causal)** ; *id.* at Example 30 (providing example of preliminary relief granted to prohibit retaliatory transfer (citing *Garcia v. Lawn*, 805 F.2d 1400, 1405-06 (9th Cir. 1986))).

[314] *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004) (quoting *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001)).

[315] *See, e.g.*, *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013) (stating that the employer's response is generally adequate "'if it is reasonably

calculated to end the harassment'" (quoting *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999))); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335 (4th Cir. 2011) (holding that a reasonable jury could find that the employer was liable for harassment where it failed to promptly and effectively enforce its anti-harassment policies, which called for a "firm response designed to end the harassment"); *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011) (explaining that the reasonableness of a remedy depends on its ability to stop the harasser from continuing his conduct and to persuade potential harassers to refrain from engaging in unlawful conduct); *cf. Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011) (concluding that the employer was not liable where it took reasonable steps to prevent the harassment from continuing), *aff'd*, 570 U.S. 421 (2013).

[316] *See, e.g.*, *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1018 (9th Cir. 2018) (stating that the reasonableness of corrective action is evaluated from the perspective of what the employer knew or should have known when it took the action); *McCombs v. Meijer, Inc.*, 395 F.3d 346, 358 (6th Cir. 2005) (concluding that the jury was properly instructed to consider the reasonableness of the employer's response to harassment in light of what it knew at the time that the harassment occurred); *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (stating that the reasonableness of the employer's response turns on the facts and circumstances when harassment is alleged).

[317] *See, e.g.*, *Scarberry v. Exxonmobil Oil Corp., 328 F.3d 1255, 1259-60 (10th Cir. 2003) (stating that the* "test is whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior"). *But seeTutman v. WBBM–TV, Inc./CBS, Inc.*,209 F.3d 1044, 1049 (7th Cir. 2000) ("[T]he question is not whether the punishment wasproportionateto [the] offensebut whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring.").

[318] *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 342 (6th Cir. 2008) (concluding that, although separating the harasser and complainant may be adequate in some cases, it was not sufficient in this case where the wrongdoer was a serial harasser and management repeatedly transferred the harasser's victims instead of taking other corrective action aimed at stopping the harasser's misconduct, such as training, warning, or monitoring the harasser).

[319] *See Vance*, 570 U.S. at 445-46; *Doe v. Oberweis Dairy*, 456 F.3d 704, 717 (7th Cir. 2006). For a discussion of when vicarious liability applies, refer to § IV.B.2, *supra*.

[320] *See Vance*, 570 U.S. at 445-46.

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

[322] *See Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) ("Just as an employer may escape liability even if harassment recurs despite its best efforts, so it can also be liable if the harassment fortuitously stops, but a jury deems its response to have fallen below the level of due care."); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (stating that an employer that fails to take any corrective action is liable for ratifying unlawful harassment even if the harasser voluntarily stops); *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123-24 (8th Cir. 2007) (stating that an employer that fails to take proper remedial action in response to harassment is liable because the "combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy" (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998))).

[323] *See* discussion of prompt and adequate investigation at § IV.C.3.b.ii(a).

[324] *See* note 313 and accompanying text.

[325] *See Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (enumerating factors to be assessed in evaluating the reasonableness of remedial measures and listing potential corrective actions).

[326] *See, e.g.*, *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (stating that the determination of whether the employer is liable for harassment by non-employees requires consideration of "'the extent of the employer's control and any

other legal responsibility which the employer may have with respect to the conduct of such non-employees'" (quoting 29 C.F.R. §1604.11(e))).

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

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

[329] *Shields v. Fed. Express Customer Info. Servs. Inc.*, 499 F. App'x 473, 479-80 (6th Cir. 2012) (explaining that, even if the employer's investigation did not substantiate sexual harassment claim, the employer still had the responsibility to ensure that the accused harasser did not engage in harassment in the future, such as by monitoring the accused harasser's conduct); *cf. Christian v. AHS Tulsa Reg'l Med. Ctr., LLC*, 430 F. App'x 694, 698-99 (10th Cir. 2011) (affirming lower court conclusion that the employer took reasonable corrective action where, despite a "reasonably thorough investigation," its findings were inconclusive but it nevertheless counseled the alleged harasser as to its anti-discrimination policy, and he remained subject to more serious sanctions if he was again accused of misconduct).

[330] *See, e.g.*, *Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 617-18 (7th Cir. 2014) (concluding that the employer was not required to accommodate an employee by allowing her to distribute pamphlets that were offensive to coworkers, including material that negatively depicted Muslims and Catholics and stated that they would go to hell); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006) (concluding that the employer was not liable for religious harassment of the plaintiff because it took prompt and appropriate remedial action after learning of the plaintiff's objections to her coworker's proselytizing).

[331] For more information on balancing religious expression with anti-harassment measures, refer to EEOC Compliance Manual Section 12: Religious Discrimination, No. 915.063, at 12-IV C.6.a (2021), **https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98 (https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_481760063453916107500588 98)** .

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

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

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

[335] Employers may hesitate to set up such a mechanism due to concern that it may create a duty to investigate anonymous complaints, even if based on mere rumor. To avoid any confusion as to whether a complaint through such a phone line or website triggers an investigation, the employer should make it clear that the person who receives the inquiry is not a management official and can only answer questions and provide information. An investigation will proceed only if a complaint is made through the internal complaint process or if management otherwise learns about potential harassment.

[336] For a discussion of how to determine whether an individual is an employee of the temporary employment agency, the client, or both, refer to EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997), 1997 WL

33159161, at *5-6, **http://www.eeoc.gov/policy/docs/conting.html (http://www.eeoc.gov/policy/docs/conting.html)** .

[337] *See, e.g.*, *EEOC v. Glob. Horizons*, *Inc.*, 915 F.3d 631, 642 (9th Cir. 2019) (stating that a defendant joint employer may be liable for a co-employer's conduct but only if the defendant knew or should have known about the other employer's conduct and "'failed to undertake prompt corrective measures within its control'" (quoting EEOC,Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (1997), 1997 WL 33159161, at *11, **http://www.eeoc.gov/policy/docs/conting.html (http://www.eeoc.gov/policy/docs/conting.html)**)); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 414-16 (4th Cir. 2015) (holding that the defendant, an auto parts manufacturer, exercised sufficient control over a temporary worker to be considered her joint employer and therefore the defendant could be held liable for sexual harassment and retaliation experienced by the plaintiff while working at the defendant's facility).

[338] *Glob. Horizons, Inc.*, 915 F.3d at 641-42 (explaining that where a client was aware of discrimination and could have taken corrective action to stop it, the client may be liable).

[339] *Cf. Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015) ("A staffing agency is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or if it knows or should have known of the client's discrimination but fails to take corrective measures within its control.") (ADA discriminatory termination case); *Whitaker v. Milwaukee Cnty.*, 772 F.3d 802, 811-12 (7th Cir. 2014) ("The firm also is liable if it *knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control*." (quoting EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment A*gencies *and Other Staffing Firms* (1997))) (emphasis in original); *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500, 511-14 (E.D. Va. 1992) (where the plaintiff was subjected to sexual harassment by her supervisor during a job assignment, three entities could be found liable: the staffing firm that paid her salary and benefits, the automobile company that contracted for her services, and the retail car dealership to which she was assigned; the staffing firm and automobile company were held to the standard for harassment by non-employees, under which an entity is liable if it had actual or

constructive knowledge of the harassment and failed to take immediate and appropriate corrective action within its control).

[340] *See Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 686 (M.D.N.C. 1997) (holding a temporary agency may be liable for harassment at a client's workplace where the employee complained to the temporary agency and the temporary agency made no investigation into or attempt to remedy the situation).

[341] As discussed *supra* at § IV.C.3.b.ii(a). and § IV.C.3.b.ii(b), reassigning an employee who complains about harassment will generally not be an appropriate remedial measure and could possibly constitute retaliation. However, reassignment may be the only feasible option in circumstances where a temporary agency lacks control over the alleged harasser or workplace.

[342] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307, 318, 320-22 (8th Cir. 2014) (observing that harassment of Black correctional officers working on the same shift was directed at them as a group and that each of the officers became aware of any harassment experienced by the others).

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

[344] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (stating that a pattern-or-practice claim required the government to establish that "racial discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice"); *see also EEOC v. Pitre Inc.*, 908 F. Supp. 2d 1165, 1178-79 (D.N.M. 2012) (denying the defendant's motion to dismiss and permitting EEOC to proceed to jury trial under pattern-or-practice method of proof); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1069-70 (C.D. Ill. 1998) (concluding that a pattern or practice of sexual harassment could be established by evidence that the employer tolerated unlawful sexual harassment at its auto assembly plant); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 888 (D. Minn. 1993) (concluding that the employer's tolerance of a sexually hostile environment at a mine and processing plant made sexual harassment of women the "standard operating procedure").

[345] *Mitsubishi*, 990 F. Supp. at 1074; *see also EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 946-47 (N.D. Ill. 2001) (stating that pattern-or-practice liability turns not on the

particularized experiences of individual claimants but on the landscape of the total work environment).

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

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

[348] Press Release, EEOC, Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), https://www.eeoc.gov/newsroom/jury-awards-240-million-long-term-abuse-workers-intellectual-disabilities; *see also* Dan Barry, *The 'Boys' in the Bunkhouse*, N.Y. TIMES, Mar. 9, 2014, https://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html.

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

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

shifted back to the EEOC to show that the employer's steps were inadequate. 2007 WL 3120069, at *17.

[350] This example is based on the facts in *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926 (N.D. Ill. 2001).