

SEXUAL HARASSMENT CLAIMS AND DEFENSES IN FEDERAL COURTS

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I. The Development of the Law of Sexual Harassment

The Supreme Court first recognized the validity of “hostile or abusive work environment” claims under Title VII in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). The *Meritor* Court held “that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.” *Meritor*, 477 U.S. at 66. However, the Court recognized that “not all workplace conduct that may be described as harassment ‘affects a term, condition, or privilege’ of employment within the meaning of Title VII.” *Id.* at 67. Therefore, the Court required that for sexual harassment to be actionable, it must be unwelcome and “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’” *Id.* at 67-68.

Seven years later, the Supreme Court addressed the issue of whether the conduct “must seriously affect an employee’s psychological well-being or lead the plaintiff to suffer injury” in order for the plaintiff to prove hostile environment harassment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (internal quotation marks and brackets deleted). The Supreme Court rejected the approach taken by three circuits which had required such a serious effect, since “concrete psychological harm [is] an element Title VII does *not* require.” *Id.* at 22 (emphasis added). Instead, the *Harris* Court adopted a requirement that the plaintiff must show a defendant’s conduct to be both objectively and subjectively hostile or abusive:

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.

Id. at 21-22 (emphasis added). The *Harris* Court recognized that this determination “is not, and by its nature cannot be, a mathematically precise test.” *Id.* at 22. Nonetheless, the Court set forth various analytical factors:

whether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Id. at 23. The Court further recognized that “no single factor is required.” *Id.*

During the 1990s, the courts and legal commentators differentiated between “quid pro quo” sexual harassment and “hostile work environment” sexual harassment. This distinction was “between cases in which threats are carried out and those where they are not or are absent altogether.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). The case law had developed to recognize that “both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive.” *Id.* (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). However, the Court recognized that this dichotomy was of “limited utility” other than in differentiating between the presence and absence of implemented threats. *Id.* at 752. Therefore, the Court decided that, to determine whether the employer should be held vicariously liable, as opposed to “liability limited to its own negligence,” for the actions of its supervisors, the key issue is whether there was a tangible employment action. *Id.* at 753.

The result is that practitioners should focus on the presence or absence of a tangible employment action, and not the categories of “quid pro quo” and “hostile work environment” which distinction the Supreme Court effectively abandoned. *See also Schiano v. Quality Control Payroll Sys., Inc.*, 445 F.3d 597, 605 (2d Cir. 2006) (“Because these terms are judicially created for analytical purposes, not distinctions in the statute itself, we think it most appropriate ... to look at the substance of the alleged misconduct of which the plaintiff complains rather than the terms used to describe it. If, for example, a plaintiff were to argue that she had been demoted for refusing to respond positively to her supervisor’s sexual overtures, we would think that the assertion would preserve her quid pro quo claim even if she never used the phrase “quid pro quo” in the district court to describe it”); *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 120 (3d Cir. 1999) (these cases “largely eliminated the distinction between hostile work environment claims and quid pro quo claims, focusing instead on the presence or absence of tangible adverse employment actions.”); *Vonderohe v. B&S of Fort Wayne, Inc.*, 36 F. Supp. 2d 1079, 1083 (N.D. Ind. 1999) (“the distinction between the two kinds of harassment is analytical, not statutory”).

One remaining difference between quid pro quo and hostile work environment cases is that for quid pro quo-type cases – those in which there was a carried-out threat and a tangible employment action taken – a plaintiff does not need to prove that the conduct was severe or pervasive, because the tangible employment action itself is actionable. *See, e.g., Okoli v. City of Baltimore*, 648 F.3d 216, 225 (4th Cir. 2011) (Wynn, J., concurring) (discussing differences between hostile work environment and *quid pro quo* claims); *Lutkewitte v. Gonzales*, 436 F.3d 248, 260 (D.C. Cir. 2006) (in a quid pro quo case, once the plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, the employment decision itself constitutes a change in the terms and conditions of employment that is actionable, whereas in a hostile work environment case, including cases where a supervisor’s threats are unfulfilled, the plaintiff must show severe or pervasive conduct).

II. Unwelcomeness Requirement

For conduct to constitute sexual harassment, it must be unwelcomed by the victim. *See Meritor*, 477 U.S. at 69. Conduct is unwelcome if the employee did not solicit or incite it *and* if the employee regarded the conduct as undesirable or offensive. *See Burnes v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962 (8th Cir. 1993); *Henson v. City of Dundee*, 682,

903 (11th Cir. 1982). Courts have held that certain severe conduct, particularly rape, is fundamentally unwelcome. *See e.g., Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008) (“It goes without saying that forcible rape is ‘unwelcome physical conduct of a sexual nature.’”); accord *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002).

As to whether a plaintiff solicited or incited the harassing conduct, a plaintiff’s words, deeds, and deportment can be examined to determine whether the objected to conduct was unwelcome and should have been perceived as such by the harasser. *See Meritor*, 477 U.S. at 69. However, the context of the plaintiff’s conduct must always be examined. For example, in *Perez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19 (1st Cir. 2011), the First Circuit recently held that the plaintiff’s “acquiescence to the customary greeting” among employees at a Puerto Rican Wal-mart of a kiss on the cheek was not “in any way probative of his receptiveness” to an incident in which the harasser “forcefully sucked on his neck.” *Id.* at 28.

The Seventh Circuit has held that a plaintiff did not welcome her coworkers’ harassing conduct despite her use of invective and “unladylike” behavior because when the circumstances were viewed in context, it was clear that her use of vulgar language was an effort to be “one of the boys” and that it was clear that she did not incite or solicit her coworkers’ harassing behavior. *See Carr v. Allison Gas Turbines Div., General Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994). In contrast, the Seventh Circuit also found that a plaintiff welcomed the sexual conduct at issue because the evidence showed she was enthusiastically receptive to sexually suggestive jokes and activities and frequently initiated sex-based conversations herself. *See Reed v. Shepard*, 939 F.2d 484, 491-92 (7th Cir. 1991).

It is important to look at the context also in cases where a male plaintiff is subject to the advances of a woman. While stereotypically men may always welcome a woman’s advances, the courts have held this not to be true, and that, looking at the context, it is possible to determine that a given man did not welcome the advances of a woman. The Ninth Circuit examined the full context of the situation in *EEOC v. Prospect Airport Servs., Inc.*, 621 F. 3d 991, 997-98 (9th Cir. 2010), and held that the conduct was unwelcome. The court’s explanation of its rationale is illustrative:

It cannot be assumed that because a man receives sexual advances from a woman that those advances are welcome. Lamas [the employee] suggested this might be true of other men (the district court decision noted that Lamas “admits that most men in his circumstances would have ‘welcomed’ ” her advances). But that is a stereotype and welcomeness is inherently subjective, since the interest two individuals might have in a romantic relationship is inherently individual to them, so it does not matter to welcomeness whether other men might have welcomed Munoz’s sexual propositions.

It would not make sense to try to treat welcomeness as objective, because whether one person welcomes another’s sexual proposition depends on the invitee’s individual circumstances and feelings. Title VII is not a beauty contest, and even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her, for all sorts of possible reasons. He might feel that fornication is wrong, and that adultery is wrong as is supported by his remark about being a Christian. He might fear her husband. He might

fear a sexual harassment complaint or other accusation if her feelings about him changed. He might fear complication in his workday. He might fear that his preoccupation with his deceased wife would take any pleasure out of it. He might just not be attracted to her. He may fear eighteen years of child support payments. He might feel that something was mentally off about a woman that sexually aggressive toward him. Some men might feel that chivalry obligates a man to say yes, but the law does not...

But here Lamas unquestionably established a genuine issue of fact regarding whether the conduct was welcome. Lamas swore under oath that it was not. It made him cry, both at the time and repeatedly in the deposition. He sought medical services to deal with the anxiety it caused him. Lamas had no prior romantic or sexual relationship with Munoz. He did not approach her. He told her expressly and plainly that he did not want a relationship with her. He explained his troubled response plausibly, as stemming from his Christian beliefs and his recent widowhood. Some recipients of sexual advances doubtless have difficulty coming up with a tactful way to refuse them without damaging their ability to get along at work, so unwelcomeness may in some cases be unclear. Here, though, Lamas repeatedly told Munoz "I'm not interested" and that he was "just not looking for any kind of thing like that" yet she kept making the sexual overtures she knew were unwelcome.

Id. at 997-98.

A plaintiff's sexual conduct unconnected to the workplace does not solicit or incite sexual harassment. The fact that a plaintiff posed naked for a magazine that was distributed nationally did not constitute inviting or soliciting sexual advances. *See Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 963 (8th Cir. 1993). A plaintiff's use of foul language or sexual innuendo in a consensual setting outside the workplace "does not waive her legal protections against unwelcome harassment." *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987). Whether the plaintiff welcomed sexual conduct is an inherently subjective question, a question of fact best decided by a jury. In *Clegg v. Falcon Plastics, Inc.*, No. 05-1826, 2006 WL 887937 (3d Cir. April 6, 2006), the plaintiff had sent an email to the alleged harasser requesting that he "talk dirty" to her. Because she maintained that the purpose of that email had been to make a joke, the court held that while her email may *raise a question* about whether the conduct was unwelcome, it did not *prove as a matter of law* that she invited what ultimately followed and the unwelcomeness of the conduct should be decided by a jury. *Id.* at *5 n.7.

Welcomeness is not synonymous with voluntariness. An employee who voluntarily participates in the sexual conduct at issue may still not welcome the conduct. As the *Meritor* Court stated: "The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* Thus, if an employee voluntarily engages in sexual relations with a harasser out of fear of losing her job, the harasser's sexual advances are unwelcome.

If the plaintiff did not perceive the alleged harassment as abusive, then there can be no violation of Title VII. It is not necessary, however, for a plaintiff to verbally reject or object to the alleged harassment. A plaintiff's consistent resistance to all sexual advances is enough to

establish that she perceived the conduct to be abusive and that it was unwelcome. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990). The *Chamberlin* Court held that there was sufficient evidence that the plaintiff perceived her supervisor's sexual advances as unwelcome based upon the plaintiff withdrawing her hands from the clasp of her supervisor, changing the topic of conversation when he made sexual advances, and leaving his presence. *Id.* Similarly, in *EEOC v. SDI Athens East, LLC*, 690 F. Supp. 2d 1370, 1378 (M.D. Ga. 2010), the court held that a reasonable fact-finder could find unwelcomeness where the plaintiff walked away from the harasser, gave him looks of disapproval, and told him not to touch her.

III. Harassment was “Because of Sex”

The Supreme Court has emphasized the “but for” pleading requirement for harassment claims: “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discriminat[ion] . . . because of . . . sex.’” *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998). The harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. *Id.* The *Oncale* court made clear that a harasser motivated by general hostility to the presence of a certain sex in the workplace would violate Title VII. *Id.*

The *Oncale* Court expressly held “that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.” *Oncale*, 523 U.S. at 79. Therefore, Title VII, and state anti-discrimination statutes modeled after Title VII, reach same-sex harassment, regardless of whether the harassment arose from “proposals of sexual activity” or from “general hostility to the presence of women in the workplace.” *Id.* at 80.

A. Spectrum of Harassment Found To Be “Because of Sex”

1. Spurned Lover

A prior romantic relationship does not preclude a plaintiff from bringing a sexual harassment claim based on conduct by the former romantic partner, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986), but in cases where the plaintiff and harasser had a previous romantic or sexual relationship, the plaintiff must still show that the harassment was because of sex and not simply because of personal animosity. *See, e.g., Succar v. Dade Co. Sch. Bd.*, 229 F.3d 1343, 1345 (11th Cir.2000); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996); *Huenschel v. Dept. of Health & Soc. Servs.*, 716 F.2d 1167, 1171 (7th Cir.1983). In *Galloway*, the plaintiff alleged that a co-employee, with whom she had a prior romantic relationship, sexually harassed her by repeatedly calling her a “sex bitch.” *Id.* at 1168. The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the employer, holding that the facts showed that the co-employee did not harass the plaintiff “on the basis of her sex”, *id.*, but that the inappropriate conduct occurred “in the context of a failed sexual relationship,” and the conduct “reflected . . . a personal animosity arising out of the failed relationship rather than anything to do with” the plaintiff being a woman. *Id.*

But in *Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225 (1st Cir. 2007), a case involving a plaintiff who claimed a coworker with whom she had an on-again, off-again romantic relationship, created a hostile work environment, the First Circuit reversed the district court's finding that the plaintiff offered evidence only of personal animosity and was insufficient to survive summary judgment. *Id.* at 229. The First Circuit stressed that what has been held to be gender-based harassment in other cases may just as well constitute gender-based harassment when the parties had a previous romantic relationship. In this case, the *Forrest* court concluded that the use of sexually degrading, gender-specific epithets with which the former boyfriend barraged Ms. Forrest at work constituted harassment based on sex. *Id.* at 230.

In *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 656 (5th Cir. 2002), the court held that if a supervisor and an employee previously had a consensual relationship, which was broken off by the employee, and the employee rejected the supervisor's attempt to renew the relationship, upon which the supervisor commenced harassing the employee, the employee can maintain a hostile work environment claim notwithstanding their prior relationship. The Fifth Circuit agreed with the district court's application of *Oncale* to find that since "it was only after the relationship ended that Richardson began to harass her. This fact alone supports a jury's inference that he harassed her because she refused to continue to have a casual sexual relationship with him." *Id.* at 657.

2. Same-Sex Harassment

In *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474 (5th Cir. 2002), the Fifth Circuit applied *Oncale* to hold that same-sex harassment could be actionable under Title VII where the conduct constituted discrimination because of sex, where the harasser was gay and made advances upon the plaintiff. Critically, the plaintiff was able to show that the harasser made sexual advances to both the victim and to other employees. *Id.* at 480. Further, the harassment was not in the nature of "male-on-male horseplay," but was so severe and pervasive as to constitute a hostile work environment. *Id.* at 483.

In *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001), Antonio Sanchez, one of the three plaintiffs, alleged that he was repeatedly taunted by his male coworkers and a supervisor because, in essence, he did not act like a man. Specifically, his coworkers and a supervisor: (1) "repeatedly referred to Sanchez in Spanish and English as 'she' and 'her;'" (2) "mocked Sanchez for walking and carrying his serving tray 'like a woman;'" (3) "taunted him in Spanish and English, as, among other things, a 'faggot' and a 'fucking female whore;'" and (4) "derided [him] for not having sexual intercourse with a waitress who was his friend." *Id.* at 870, 874. Critically, "no witness — including the supervisor accused of participating in the harassment — testified to the contrary." *Id.* at 872. The Ninth Circuit agreed that Mr. Sanchez was discriminated against on the basis of his sex, because he failed to conform to a male stereotype. The Ninth Circuit applied *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII was violated where the employer discriminated against a female employee who did not conform to sexual stereotypes of how women should behave, to hold that Title VII is similarly violated where a male employee is discriminated against for not conforming to stereotypes of how men should behave. *Azteca Restaurant*, 256 F.3d at 874-75.

The Ninth Circuit, in an *en banc* decision, held that essentially all same-sex harassment can be actionable under Title VII if it involves physical assault. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*), *cert. denied*, 538 U.S. 922 (2003). It should be noted that there was a concurring opinion based on a different rationale, two other concurring opinions, and a strongly stated dissenting opinion; it has not been an influential opinion for other circuits. *Cf. Vickers v. Fairfield Medical Ctr.*, 453 F. 3d 757 (6th Cir. 2006) (distinguishing *Smith* and holding that the harassment about which the plaintiff complained was “more properly viewed as based on Vickers’ perceived homosexuality, than on his gender non-conformity” because he “failed to allege that he did not conform to gender stereotypes *in an observable way at work.*”) (emphasis added). In *Rene*, the plaintiff was an openly gay butler at a Los Vegas hotel, who alleged that he was constantly harassed by his supervisor and several co-workers (all male), because he was gay. *Rene*, 305 F.3d at 1064. The district court granted summary judgment on the grounds that Title VII did not cover discrimination based on sexual preference. *Id.* A panel of the Ninth Circuit affirmed, but the *en banc* court reversed, on the grounds that the plaintiff “has alleged physical conduct that was so severe or pervasive as to constitute an objectively abusive working environment,” reaching the level of physical assault, *i.e.*, the supervisor and co-workers “grabbed [the plaintiff’s] crotch and poked their fingers in his anus.” *Id.* at 1065. The Ninth Circuit cited a variety of appellate cases in which “physical sexual assault has routinely been prohibited as sexual harassment under Title VII,” because “such harassment -- grabbing, poking, rubbing or mouthing areas of the body linked to sexuality -- is inescapably ‘because of sex.’” *Id.* at 1065-66 (collecting cases). Thus, his sexual orientation was not relevant, since in traditional male-on-female harassment cases, the victim was not denied relief because she “was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.” *Id.* at 1066; *see also* M. Talbot, “Men Behaving Badly,” N.Y. TIMES SUNDAY MAGAZINE, Oct. 13, 2002, at 52. *But see Dawson v. Entek Int’l*, --- F.3d ---, 2011 WL 61645 (9th Cir. 2011) (verbal same-sex harassment not actionable where not based on the plaintiff’s failure to conform with male stereotypes).

In *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088 (10th Cir. 2005), the Tenth Circuit upheld plaintiff’s same-sex sexual harassment award. The court found a female supervisor’s humiliating comments and behavior toward female employees and her physical assaults against plaintiff demonstrated, “a very hostile and bitter attitude toward women in general.” The supervisor referred to female employees as “bitches” commented on plaintiff’s body parts, encouraged male employees to sexually harass her, asked plaintiff who she had sex with, and “what kind of toys” she used, and inquired about her underwear, bra, and the color of her pubic hair in front of male co-workers. The supervisor also assaulted plaintiff on two occasions, opening her shirt to expose her bra to co-workers and pulling down plaintiff’s pants to expose her underwear. The supervisor did not treat men in a similar fashion, but rather had a more “congenial” attitude toward male employees. Relying on *Oncale*, the court found that the harasser’s conduct constituted discrimination “because of sex”. *Id.*

In *Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005), the Tenth Circuit found that plaintiff, a female sales representative, could proceed with her sexual harassment claim after presenting evidence that the court found sufficient to assert that the improper conduct she alleged was “based on sexual desire” without a showing that the female alleged harassers

were homosexual. The court outlined the three theories of actionable same sex harassment outlined in *Oncale*, but held that the plaintiff met her burden for summary judgment purposes through the first route, by alleging harassment motivated by sexual desire regardless of sexual orientation. *Id.*

However, in *Smith v. Hy-Vee, Inc.*, 622 F.3d 904 (8th Cir. 2010), a same-sex harassment case involving quite a bit of touching, the Eighth Circuit held that there was no actionable sexual harassment because the alleged harasser engaged in the same conduct with other male and female employees. In *Smith*, the court held that in a same-sex harassment claim, a plaintiff can show that the conduct was motivated by gender in three ways: by showing (1) that the conduct was motivated by sexual desire; (2) that it was motivated by general hostility to the presence of the same gender in the workplace; and (3) by offering direct evidence about how a harasser treated both males and females differently within a mixed-sex workplace. *Id.* at 907-08. In *Smith*, the alleged harasser, a woman, engaged in a variety of crude, vulgar, sexually-charged conduct towards the female plaintiff, including rubbing her fingers against the plaintiff and saying “that’s what a penis feels like,” molding genitalia out of dough, and pushing the plaintiff up against a wall for ten to fifteen seconds while rubbing her hands and body up against the plaintiff after saying “If I were going to rape someone, it would be like this.” The alleged harasser also engaged in sexually charged conduct toward other women, including kissing and “dry-humping” other female employees. She also engaged in similar physical conduct with male employees. The court found that there was no evidence that the alleged harasser’s conduct was motivated by sexual desire for the plaintiff or by general hostility towards women in the workplace, and that there was no evidence that she treated women differently from men. *Id.* at 906. It therefore held that the district court did not err in granting summary judgment to Hy-Vee on Smith’s hostile work environment claim.

In *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept.30, 2004), a district court in New York held that a gay employee (Sabo) who was repeatedly taunted and harassed by his co-workers who did *not* believe or know that he was gay could, in fact, state a Title VII sexually hostile work environment claim. Critical to the resolution of the Title VII harassment claim was the deposition testimony of the harassing co-workers, who testified that they “did not know that he was a homosexual, nor did they believe that he was.” *Id.* at *10. As a result, the court denied the defendant’s motion for summary judgment, because “there is sufficient evidence in the record from which a jury could find that Sabo was not harassed because he is a homosexual, but rather, was harassed because he is a male.” *Id.* at *11. Under *Price Waterhouse* and *Oncale*, Sabo’s “nonconformance with gender stereotypes” meant that the resulting harassment of him was actionable under Title VII. *Id.* at *12-*13.

3. Transgender Harassment and Sexual Orientation Harassment

Courts have generally found that the category of “transgender” is not a protected category under Title VII in and of itself. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1214, 1221 (10th Cir. 2007) (“This court agrees with... the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”). *But see Schroer v. Billington*,

577 F. Supp. 2d 293, 307-08 (D.D.C. 2008) (holding that discrimination because of a “change” in sex is discrimination “because of sex” and, therefore, prohibited by Title VII). Nevertheless, discrimination and harassment based on the plaintiff’s failure to fit into gender stereotypes or norms is actionable under Title VII.

In *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit held that an employee who alleged that discrimination occurred because the employee was undergoing treatment for “gender identity disorder” which resulted in the employee’s appearance becoming more feminine, could state a Title VII claim for gender discrimination. Here, the co-workers “began questioning him about his appearance and commenting that his appearance and mannerisms were not ‘masculine enough,’” and a supervisor met with the city’s attorney “with the intention of using Smith’s transsexualism and its manifestations as a basis for terminating his employment” through requiring the plaintiff “to undergo three separate psychological evaluations” which they hoped would lead to his resignation or refusal to comply, the latter of which would be grounds for terminating his employment for insubordination. *Id.* at 568, 569. The Sixth Circuit agreed that, under *Price Waterhouse, Azteca Restaurants* and similar gender stereotyping cases, Mr. Smith had stated a case for sex stereotyping and gender discrimination based on “his failure to conform to sex stereotypes concerning how a man should look and behave.” *Id.* at 572. The defendants’ petition for rehearing *en banc* was denied on October 18, 2004.

In another case, *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), the Sixth Circuit drew upon *Smith* and held that a pre-operative male to female transsexual who failed the probationary period required to become a police sergeant was a member of a protected class when he alleged discrimination on the basis of a failure to conform to gender stereotypes. The court stated, “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination irrespective of the cause of that behavior; a label, such as “transsexual” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his gender non-conformity.” *Id.* at 737. Although *Smith* and *Barnes* did not involve harassment claims, the conduct may have been sufficient to bring such claims, based on the co-workers’ verbal and physical conduct.

In *Dawson v. Entek Intern.*, --- F.3d ---, 2011 WL 61645 (9th Cir. 2011), the court upheld the district court’s grant of summary judgment for the employer, holding that there was no hostile work environment in a case where a gay male employee was subjected to a barrage of anti-gay comments because the plaintiff had not presented evidence that he failed to conform to a gender stereotype or exhibited feminine traits. *Id.* at *7. Coworkers had made repeated comments that the plaintiff was a “worthless queer,” that he liked to “suck dick” and “take it up the ass,” and referred to him as “Tinker Bell,” “a homo, a fag, and a queer” daily for over a week, and acted in a physically intimidating manner. Because based on the plaintiff’s own testimony that he was not being verbally harassed for appearing non-masculine or otherwise not fitting the male stereotype, the court held that there were not sufficient facts to support a finding that a reasonable trier of fact could conclude he experienced a hostile work environment based on his gender. *Id.*

In *Bianchi v. Philadelphia*, 183 F. Supp. 2d 726, 737-38 (E.D. Pa. 2002), the court granted summary judgment for the employer stating that the plaintiff's "unwavering persistence in presenting his complaint as one concerning his alleged sexuality, rather than one concerning his alleged failure to meet a masculine ideal, defeats his Title VII harassment claim." See generally S. Duffy, "Gay Bias Case Fails, but Judge Approves 'Stereotype' Theory," LEGAL INTELLIGENCER (Philadelphia), May 28, 2003.

4. Equal Opportunity Harasser

In a workplace where both a husband and wife were harassed – but by different supervisors – the Seventh Circuit overturned the district court's grant of the defendant's motion to dismiss because the idea of the "equal opportunity harasser" could not be extended from the individual harasser to the entire entity of the employer. See *Venezia v. Gottlieb Mem. Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005).

If women suffer more severely from the harassment directed at both men and women, a Title VII claim may still survive. In *EEOC/Christopher v. Nat'l Educ. Assn.*, 422 F.3d 840 (9th Cir. 2005), the court found in favor of three female union members who brought a sexual harassment case against their Union Executive Director. The Director was alleged to have severely verbally harassed both male and female Union members, shouting, screaming, and using foul language and making threatening physical gestures. The women reported feeling physically threatened, fearful, and "in jeopardy", and experienced crying, panic attacks, and resignation, as a result of the Director's conduct. The District Court granted summary judgment on the grounds that the alleged harassment was not "because of sex". The Ninth Circuit reversed holding that the ultimate question for the jury was whether the women were treated worse and subjected to "more severe and frequent physically threatening abuse." See also *Kampier v. Emeritus Corp.*, 472 F.3d 930, 940-41 (7th Cir. 2007) (holding that plaintiff raised a genuine issue of material fact as to whether the harassment was because of her sex, where the harasser acted inappropriately towards both men and women: she propositioned a male employee and grabbed male employees' buttocks, but made frequent references to female employees' "boobs" and stated repeatedly that she could "turn any woman gay"); *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2nd Cir. 2004) (reviving a female telephone technician's sexual harassment claim where both male and female employees were exposed to sexually offensive material, finding that a jury could reasonably conclude that the sexual remarks and graffiti were more demeaning of women than of men).

In *Sacramento v. City of Chicago*, No. 07-C-4267, 2010 WL 2740305 *5-6 (N.D. Ill. July 12, 2010), although a male supervisor had also kissed a male employee on the forehead, hugged him, and playfully slapped his face on one occasion, the supervisor's conduct raised a genuine issue of material fact as to whether it was based on the plaintiff's gender: he referred to her as "bonita," a feminine word for "pretty" in Spanish, which the court found "seems gender-based since there is no evidence in the record that [he] called male employees similar names," and he hugged the plaintiff tightly in a way with sexual overtones. The fact that he had a cardboard cut-out of a woman in a bikini in his office was further evidence of the sexual basis for his actions.

In *Reine v. Honeywell Intern. Inc.*, No. 09-30030, 2010 WL 271352 (5th Cir. Jan. 21, 2010), the alleged harasser was insulting and demeaning to both male and female employees. Because he was an “equal opportunity harasser,” the court held that the plaintiff did not meet her burden of proving that his behavior towards female employees was more severe than his treatment of males in the same position.

5. Sexual Favoritism

The EEOC issued guidelines that stated that sexual favoritism could constitute sexual harassment if favoritism was based upon coerced sexual conduct. See E.E.O.C., Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, No. 915.048 (Jan. 12, 1990). The policy guidelines state that favoritism based on a supervisor coercing a female employee by providing a benefit could be grounds for other employees to claim sexual harassment, if other employees who were qualified for the benefit but were denied the benefit can establish that sex was generally made a condition for receiving the benefit. The guidelines also state that if favoritism based upon the granting of sexual favors is widespread in a workplace, employees may have a hostile work environment claim.

Generally, federal courts have held there is no claim for sexual harassment or hostile work environment based on a “paramour” theory unless there is coerced sexual conduct – i.e. an employee is given special treatment in exchange for sexual favors. In *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 909-10 (8th Cir. 2006), the Eighth Circuit upheld the dismissal of the plaintiff’s sexual harassment claim that her employer terminated her because his wife believed the plaintiff and employer were having an affair. The plaintiff attempted to argue that the employer’s “sexual favoritism” of his wife over the plaintiff constituted sexual harassment. The Eighth Circuit followed the lead of the Second and Seventh Circuits holding that the plaintiff’s dismissal was not because of her sex, but because of the employer’s desire to allay his wife’s concerns over the plaintiff’s admitted sexual behavior with him. *Id.* at 910. See also *Ackel v. Nat’l Commc’ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (“When an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender); *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (Title VII does not prevent employers from favoring employees because of personal relationships); *Nielsen v. Trofholz Tech., Inc.*, --- F. Supp. 2d --- , 2010 WL 4514227 *7 (E.D. Cal. 2010) (collecting cases rejecting the propriety of the “paramour” theory as a Title VII cause of action); *Foster v. Humane Society of Rochester & Monroe County, Inc.*, 724 F. Supp. 2d 382, 393 (W.D.N.Y. 2010) (no sexual harassment in a favoritism case where no allegation that anyone asked the plaintiff for sexual favors in exchange for preferential treatment).

IV. Conduct Sufficiently Pervasive or Severe

An employee has suffered sufficiently severe or pervasive harassment to be actionable if the conduct altered the conditions of the victim's employment and created an abusive working environment. See *Clark Cty School Dist. v. Breeden*, 532 U.S. 268, 270 (2001). A court looks at the totality of the circumstances to determine if the harassment was sufficiently severe or pervasive to alter the conditions of employment, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* This element is not one of mathematical precision, but represents the reality that a line must be drawn along the spectrum between the extremes of a few isolated stray remarks and an ongoing, pervasive barrage of harassing conduct. The Supreme Court has differentiated between the workplace (1) that is "permeated with 'discriminatory intimidation, ridicule, and insult,'" and (2) where there is the "mere utterance of an . . . epithet which engenders offensive feelings in an employee' [that] does not sufficiently affect the conditions of employment to implicate Title VII." *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 65, 67).

A. Objective and Subjective Criteria

This element must be judged under the objective and subjective criteria of *Harris*, which are based on a standard of reasonableness. Although the conduct must be severe or pervasive, it is not necessary for there to be "concrete psychological harm" provided that "the environment would *reasonably* be perceived, and is perceived, as hostile or abusive." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (emphasis added). As the *Harris* Court noted, "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* The Second Circuit aptly remarked that: "Harassed employees do not have to be Jackie Robinson, nobly turning the other cheek and remaining unaffected in the face of constant degradation. They are held only to a standard of reasonableness." *Torres v. Pisano*, 116 F.3d 625, 632-33 (2d Cir. 1997) (footnote omitted).

Courts have struggled with the question of whether the "reasonable person" standard refers to *any* reasonable person, or, more contextually, to a reasonable person of the same gender as the harassed employee. Compare *Watkins v. Bowden*, 105 F.3d 1344, 1356 (11th Cir. 1997) (*per curiam*) (upholding "reasonable person" jury instruction instead of "reasonable African American or woman" jury instruction) with *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) ("reasonable person of the same protected class in that position"). The Eleventh Circuit noted the divergent approaches taken by the courts on this issue. See *Watkins*, 105 F.3d at 1356 n.22 (collecting cases). Courts which have adopted the generic "reasonable person" standard have taken a literal reading of *Harris*, which referred to "a reasonable person" and *not* to "a reasonable woman." *Harris*, 510 U.S. at 21.

However, the Supreme Court's 1998 *Oncale* decision may be construed to have recast this issue by emphasizing "that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position." *Oncale v. Sundowner Offshore*

Serv., Inc., 523 U.S. 75, 81 (1998). Although *Oncale* did not discuss the split in the courts between “reasonable person” and “reasonable person of plaintiff’s (race/gender),” the Supreme Court has set forth an analysis based upon the objective reasonable person standard, looking at “the social context in which particular behavior occurs and is experienced by its target” which inevitably “depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” *Id.* at 81-82. It is difficult to conceive of a “social context” under which sexual harassment would *not* be found offensive, but *Oncale* may permit the harassed employee to argue that the harassment should be judged from the perspective of a person of her own gender and not that of society at large.

Some courts, most frequently those in the Ninth Circuit, have continued to use the “reasonable woman” standard. *See, e.g., Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (stating that “the objective measure of an abusive working environment is set by what a reasonable woman would consider abusive,” and holding that because a reasonable woman could have had a reaction similar to the plaintiff’s, that summary judgment was not appropriate on the *prima facie* case); *Panelli v. First American Title Ins. Co.*, 704 F. Supp.2d 1016, 1032 (D. Nev. 2010) (“Although Panelli alleges that she subjectively found it difficult to do her job, the environment to which she was subject must also be considered abusive by an objective reasonable women”). *See also McDonough v. Cooksey*, No. 05-cv-00135, 2007 WL 1456202 (D.N.J. May 15, 2007) (for a plaintiff to state a claim for hostile work environment due to sexual harassment, she must allege that a reasonable woman would consider the conduct sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment).”

The Second Circuit, in *Richardson*, rejected the narrow “reasonable person of the plaintiff’s group” approach in favor of determining “whether a reasonable person who is the target of discrimination would find the working conditions so severe or pervasive as to alter the terms and conditions of employment for the worse.” *Richardson v. New York State Dep’t of Correctional Serv.*, 180 F.3d 426, 436 (2d Cir. 2000). The Second Circuit concluded that the narrower approach would be misleading and incongruent with the goals of Title VII:

In adopting this standard as the proper one under Title VII, we reject the view of those courts that look to the perspective of the particular ethnic or gender group, *e.g.*, a “reasonable African-American” or a “reasonable Jew.” . . . we believe that examining hostile environment claims from the perspective of a “reasonable person who is the target of racially or ethnically oriented remarks” is the proper approach. First, Title VII seeks to protect those who are the targets of such conduct, and it is their perspective, not that of bystanders or the speaker, that is pertinent. Second, this standard makes clear that triers of fact are not to determine whether some ethnic or gender groups are more thin-skinned than others. Such an inquiry would at best concern largely indeterminate and fluid matters varying according to location, time, and current events. It might also lead to evidence, argument, and deliberations regarding supposed group characteristics and to undesirable, even ugly, jury and courtroom scenes.

Id. at 436 n.3 (internal citations omitted).

The standards of what might be acceptable in society at large do not always correspond to what is legally acceptable in the workplace. See *Torres*, 116 F.3d at 633 n.7 (“What *is*, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable.”). As the Federal Circuit, in discussing sexual harassment, remarked: “The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.” *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

However, a Georgia district court took a somewhat jaundiced view of sexual harassment claims, stating that because public sexual conduct was pervasive in modern society, the threshold for workplace claims was somehow higher:

The question of what is “sufficiently severe” sexual harassment is complicated because: (a) courts routinely remind plaintiffs that “Title VII is not a federal civility code,” . . . ; (b) the modern notion of acceptable behavior – as corroded by instant-gratification driven, cultural influences (*e.g.* lewd music, videos, and computer games, “perversity-programming” broadcast standards, White House “internal affairs” and perjurious coverups of same, etc.) has been coarsening over time; therefore, (c) what courts implicitly ask the “Title VII victim” to tolerate as mere “boorish behavior” or “workplace vulgarity” must, once placed in the contemporary context, account for any “Slouch Toward Gomorrah” societal norms might take.

Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1375-76 (S.D. Ga. 2001). Indeed, this court somewhat cynically claimed that the divergent approaches taken in the case law merely reflected a distinction between “sensitive judges” and “judges desensitized by contemporaneous, ‘Vulgarians-at-the-Gate’ cultural standards.” *Id.* at 1377. The court, after granting summary judgment to the employer, notwithstanding plaintiff’s exhaustive list of sexually harassing conduct in the workplace, admitted that: “Concededly, a judge with sensitivities less dulled by contemporary vulgarism might conclude otherwise here.” *Id.* at 1381; see generally R.R. McDonald, “Modern ‘Vulgarism’ May Doom Sex Harassment Laws, Says Federal Judge,” FULTON COUNTY DAILY REPORT, July 10, 2001.

B. Single Incident Hostile Work Environment

Most plaintiffs who allege a hostile work environment claim will base their claim on a series of incidents which they allege were sufficiently severe or pervasive that they adversely affect the terms and conditions of their employment. However, some plaintiffs will base their hostile work environment claim on a *single* incident. The courts have generally been reluctant to allow the latter category of claims, except where that single incident was so severe, such as an extreme physical assault or truly egregious verbal threats, that the incident materially altered the conditions of their employment.

In 2001, the Supreme Court held that, based upon the underlying facts alleged by the plaintiff, that a single incident of sexual harassment was not actionable in that case. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*). The plaintiff, during a meeting with her supervisor and another male employee, alleged that her supervisor read a psychological evaluation report in which one applicant said “I hear making love to you is like making love to the Grand Canyon.” *Id.* at 269. The supervisor “read the comment aloud, looked at [plaintiff] and stated, ‘I don’t know what that means.’ The other male employee then said, ‘Well, I’ll tell you later,’ and both men chuckled.” *Id.* The Supreme Court, without oral argument, reversed the Ninth Circuit and held that this single incident of alleged sexual harassment was not so severe or pervasive as to violate Title VII. *Id.* at 271. However, it must be emphasized that the Supreme Court did not hold that a single incident could never be actionable, merely that the incident alleged in this case was not actionable.

The courts have recognized that single incidents that are sufficiently severe can constitute a hostile work environment. *See, e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000) (“the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were ‘sufficiently continuous and concerted’ to have altered the conditions of her working environment”); *Richardson v. New York State Dep’t of Correctional Serv.*, 180 F.3d 426, 439 (2d Cir. 2000) (“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.”) (quoting *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993)); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999) (the *Ellerth/Faragher* “defense, adopted in cases that involved ongoing sexually harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipated sexual harassment”); *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (2d Cir. 1997) (“Of course, even a single episode of harassment, if severe enough, can constitute a hostile work environment.”); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (“we agree with the district court that even a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability”).

In *Little*, a female employee was raped by a client following a business dinner. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002). Ms. Little’s position required her to develop and maintain client contacts for a Seattle real estate corporation. She was assigned to Starbucks, a potentially lucrative client. *Id.* at 964. During a client dinner with the Starbucks Human Resources Director, Dan Guerrero, after having several drinks, she “suddenly became ill and passed out,” and then “awoke to find herself being raped by Guerrero in his car. She fought him off and jumped out of the car, but again she became violently ill. Guerrero put her back in the car and took her to his apartment, where he raped her again. Little fell asleep, and when she awoke he was raping her again. Afterward, he showered and drove her to her car.” *Id.* (although the court opinion does not say so, one wonders if she was exposed to a date rape drug). Ms. Little was initially reluctant to report this rape, because “I knew how important the Starbucks account was to Mr. Glew [Windermere’s President].” *Id.* When she did report the rape to another manager, that person “advised her not to tell anyone in management.” *Id.* When she told a second manager, a person who was designated by Windermere as a “complaint receiving

manager,” that person told Ms. Little that “she wouldn’t say anything to Glew unless I proceeded to seek legal action against Dan Guerrero.” *Id.* at 965. Finally, Ms. Little told Mr. Glew of the rape, and he responded “that he did not want to hear anything about it,” that she would have to discuss it with counsel, and that her salary was being reduced immediately by one-third. *Id.* When Ms. Little challenged this pay cut, she was terminated two days later. *Id.*

The Ninth Circuit reversed the district court’s grant of summary judgment, holding that the alleged conduct was sufficiently severe and pervasive to create a sexually hostile work environment. *Id.* at 966-69. Even if the three rapes in one evening were viewed as a single incident, that could suffice to “support a claim of hostile work environment because the ‘frequency of the discriminatory conduct’ is only one factor in the analysis.” *Id.* at 967 (citing *Breedon*, 532 U.S. at 271). Thus, the Ninth Circuit held that Ms. Little’s hostile work environment claim should be submitted to the jury to determine whether Windermere will be liable for Guerrero’s conduct, which would occur “if a jury finds that it ratified or acquiesced in the rape by failing to take immediate corrective action once it knew or should have known of the rape.” *Id.* at 969. Upon remand, after conducting discovery, the parties settled and the case was dismissed. *Little v. Windermere Relocation, Inc.*, No. CV-98-01184, Order (W.D. Wash. Oct. 1, 2002).

In *Turnbull*, the plaintiff alleged that she was assaulted by a patient. *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001). The plaintiff, a psychologist at a state-run mental hospital, alleged sexual harassment based on a single sexual assault by a patient that occurred while the plaintiff and the patient were walking in the hospital grounds during an outdoors therapy session. *Id.* at 1242-43. The Tenth Circuit held that “an isolated incident may suffice if the conduct is severe and distressing.” *Id.* at 1243. Indeed, this one incident “was objectively abusive, dangerous, and humiliating, and Dr. Turnbull was so traumatized she was unable to return to work thereafter.” *Id.* at 1243-44. The Tenth Circuit rejected the defendant’s arguments that because male staff members “were also subject to sexual comments or physical arguments by patients,” such events could not constitute sexual harassment, because “conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff.” *Id.* at 1244. Here, the male staff “were not subject to the fear or the reality of sexual assault in the same manner as the female staff.” *Id.*

In *Howley*, the sole female firefighter in a municipal fire department was subjected to verbal assault during and after a meeting of the firefighters’ benevolent association. *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000). During this meeting, a male firefighter (1) publicly shouted at her “to ‘shut the fuck up, you fucking whining cunt;” (2) “made further inappropriate remarks concerning [her] menstrual cycle;” (3) refused to apologize, yelling in her “direction that ‘there is no fucking way that I will fucking apologize to the fucking cunt down there;” and (4) telling plaintiff “to the effect that the reason she did not make assistant chief was because she did not ‘suck cock good enough and only made lieutenant.”” *Id.* at 148. The Second Circuit reversed the dismissal of the hostile work environment claim, holding that this single incident was sufficiently severe to allow her hostile work environment claim to proceed:

Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a

large group in which Howley was the only female and many of the men were her subordinates. . . . It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley's working conditions . . .

Id. at 154. The hostile work environment claim was remanded for trial. *Id.* at 156. However, the parties then settled and dismissed the case. *Howley v. Town of Stratford*, No. 3:97-CV-532 (AVC), Stipulation of Dismissal (D. Conn. Mar. 26, 2001).

In *Lockard*, a waitress was sexually harassed by two male customers who twice "grabbed her by the hair" and one customer "then grabbed her breast and placed his mouth on it." *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir. 1998). The Tenth Circuit found that this single incident was "physically threatening and humiliating behavior which unreasonably interfered with Ms. Lockard's ability to perform her duties as a waitress," *id.*, so that:

We therefore disagree with defendants' assertions that a single incident can never be sufficient to create an abusive environment. "Looking at all the circumstances," as we must, we are persuaded that the record contains sufficient evidence to support the jury's conclusion that the harassing conduct of the customers was severe enough to create an actionable hostile work environment.

Id. (quoting *Harris*, 510 U.S. at 23) (upholding jury verdict in favor of plaintiff on her hostile work environment claim).

In *Smith*, a female prison guard was assaulted by a fellow guard [Gamble] on a single occasion: there was a dispute between the two guards, "during which Gamble called Smith a 'bitch,' threatened to 'fuck [her] up,' pinned her against a wall, and twisted her wrist severely enough to damage her ligaments, draw blood, and eventually require surgical correction." *Smith v. Sheahan*, 189 F.3d 529, 531 (7th Cir. 1999). Ms. Smith promptly complained to her supervisor, but the subsequent investigation "was an institutional shrug of the shoulders," during which "Investigator Sullivan made light of the incident and jokingly suggested that Smith should 'kiss and make up' with Gamble." *Id.* The Seventh Circuit held that:

A jury would also be entitled to conclude that the assault Smith suffered was severe enough to alter the terms of her employment, even though it was a single incident. The district court held to the contrary; it opined that sex-based harassment can never be actionable unless it is repeated. This was error: the Supreme Court has repeatedly said, using the disjunctive "or," that a claim of discrimination based on the infliction of a hostile working environment exists if the conduct is "severe or pervasive." In any case, the ultimate question is thus whether the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Id. at 533 (citations omitted). Therefore, the Seventh Circuit reversed the district court’s grant of summary judgment on the hostile work environment claim. *Id.* at 535.

The district courts, in a variety of circumstances, have similarly held that a single incident of harassment can constitute a hostile work environment claim. *See, e.g., Flower v. Mayfair Joint Venture*, 2000 WL 272187 (S.D.N.Y. Mar. 13, 2000) (“Plaintiff has demonstrated that DiPalma’s physical attack on her was sufficiently severe to constitute a hostile work environment”); *Dunegan v. City of Council Grove*, 77 F. Supp. 2d 1192, 1197-98 (D. Kan. 1999) (single incident where the supervisor “put his arms around plaintiff from behind . . . squeezed her, grabbed her right breast, and kissed her on both sides of the neck . . . he was sexually aroused during this encounter” was “sufficiently severe to create a hostile work environment”); *Keefer v. Universal Forest Prods.*, 73 F. Supp. 2d 1053, 1055 (W.D. Mo. 1999) (“under proper circumstances a single incident of harassment can be actionable”); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 879-80 (N.D. Ind. 1998) (single incident, where the supervisor “in his office with the door closed, forcibly grabbed and kissed the Plaintiff while forcing his hand inside her blouse to grope her breasts” was sufficiently severe to sustain a Title VII hostile work environment claim); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 969-70 (D. Minn. 1998) (“A single sexual assault has a far greater potential to adversely alter the work environment, and with greater permanence, than would an offensive verbal remark, or a series of such remarks.”).

In contrast, the courts have generally held that single incidents (or a small number of incidents) that do not rise to the level of severity as those above fail to satisfy the requirements for a hostile work environment claim.

For example, in *Brooks*, a telephone dispatcher was approached by a coworker who placed his hand on plaintiff’s stomach, forced his hand under plaintiff’s clothing to fondle her breast, and told her that she didn’t “have to worry about cheating” on her husband. *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000). The Ninth Circuit recognized that “if a single incident can ever suffice to support a hostile work environment, the incident must be extremely severe,” *id.* at 926, but that threshold was not met here, since “Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term, especially given that the city took prompt steps to remove [the harasser] from the workplace.” *Id.* However, the court did recognize that the outcome could be different if the harasser was the plaintiff’s supervisor:

A different question would arise if [the harasser] were Brooks’ supervisor, rather than her co-worker. Because the employer cloaks the supervisor with authority, we ordinarily attribute the supervisor’s conduct directly to the employer. Thus, a sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.

Id. at 927 n.9 (citing *Ellerth*).

See also, Rivera Martinez v. Commonwealth of Puerto Rico, 2007 WL 16069, (1st Cir. 2007) (holding that one incident of inappropriate touching, and another occasion of being pushed by her supervisor out of his office was too infrequent and not severe enough to constitute a hostile work environment); *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79 (1st Cir. 2006) (single incident insufficient to create hostile work environment where female telephone company consultant invited her supervisor to accompany her on a sales call and he allegedly responded by grabbing his crotch and stating, “it would be great to come with you.”).

The district courts, in a variety of circumstances, have held that either (1) single incidents never constitute a hostile work environment or (2) the single incident at issue in a particular case was not sufficiently severe to constitute a hostile work environment. *See, e.g., Carattini v. Woods Servs. Inc.*, No. 08-5201, 2010 WL 447453, *3 (E.D. Pa. Feb. 4, 2010) (holding that a single incident wherein a coworker grabbed the plaintiff’s vagina and breasts, albeit inappropriate, did not rise to the level of severity required to support a claim for hostile work environment); *Demmons v. Fulton County*, No. 09-cv-2312, 2010 WL 3418325, *12 (N.D. Ga. Aug. 2, 2010) (single incident of breast-touching not sufficiently severe to constitute a hostile work environment); *Sedotto v. Borg-Warner Prot. Servs. Corp.*, 94 F. Supp. 2d 251 (D. Conn. 2000) (an “isolated remark by a co-worker does not meet the requirements of a hostile work environment”); *Curtis v. Airborne Freight Corp.*, 87 F. Supp. 2d 234, 249 (S.D.N.Y. 2000) (“nor do plaintiffs allege a single severe incident of racial harassment sufficient in and of itself to alter the conditions of plaintiffs’ employment”); *Dunegan v. City of Council Grove*, 77 F. Supp. 2d 1192, 1198-99 (D. Kan. 1999) (a single incident where a teenage co-worker made “two [unsuccessful] attempts to kiss the plaintiff”); *Adenji v. Administration for Children Serv.*, 43 F. Supp. 2d 407, 422 (S.D.N.Y. 1999) (“A single incident of discriminatory comments is not sufficient to establish a hostile work environment.”); *Hanover v. Sheridan*, No. C-3-96-122, 1999 WL 33117272, at *7 (S.D. Ohio Sept. 21, 1999) (“no reasonable jury could find that the kiss on the cheek incident was sufficiently severe that it caused the Plaintiff’s work environment to be objectively hostile”); *Jones v. Clinton*, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (“This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment”).

C. The Continuing Violation Doctrine

The courts have recognized that the “continuing violation” doctrine may be used to show that there is “an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action.” *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998) (internal citation omitted). This allows the harassment plaintiff to include conduct occurring prior to Title VII’s statutory 300-day statute of limitations period. *Id.* at 238. The Supreme Court, in 2002, held that the continuing violation doctrine could be applied to harassment claims, but *not* to other kinds of discrete discrimination claims. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). The *Morgan* Court reasoned that discrete discrimination claims, based on acts “such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify,” *id.* at 114, and each such act “starts a new clock for filing charges alleging that act.” *Id.* at 113. On

the other hand, harassment claims are fundamentally different from those based on discrete employment acts:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conducts. The “unlawful employment practice” therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.

Id. at 115 (internal citations omitted). For this reason, the Supreme Court rejected the reasoning of several circuits that a plaintiff could not include harassing conduct that occurred prior to the statute of limitations:

Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 117. Therefore, the harassment plaintiff can recover damages for the entire course of harassment, in contrast to the plaintiff who alleges discrete acts of discrimination. The Supreme Court did recognize that employers can raise defenses based on laches if the employee waits too long before filing a lawsuit. *Id.* at 121-22.

In order to use the continuing violation doctrine, the plaintiff must first show “that at least one act occurred within the filing period.” *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754 (3d Cir. 1995) (citing *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)); see also *Stewart v. Mississippi Transp. Co.*, 586 F.3d 321 (5th Cir. 2009); *Vickers v. Powell*, 493 F.3d 186 (D.C. Cir. 2007); *Gilliam v. South Carolina Dept. of Juvenile Justice*, 474 F.3d 134 (4th Cir. 2007). Then, the plaintiff must prove the requisite nexus among the individual incidents of discrimination or harassment. *West* at 755. The second determination can be made by considering the following three factors, which are non-exhaustive:

(i) subject matter — whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence — whether the nature of the violations should trigger the employee’s awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id. at 755 n.9 (citing *Martin v. Nannie and Newborns, Inc.*, 3 F.3d 1410 (10th Cir. 1993)). This determination must be made in “the particular context of individual employment situations [which] requires a fact-specific inquiry that cannot easily be reduced to a formula.” *Huckabay*, 142 F.3d at 239 (citing *Berry v Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983)). For a plaintiff who satisfies the requirements of the continuing violation doctrine, she can incorporate a much broader range of harassing conduct and can more readily meet the pervasive or severe

conduct element. Yet, even those plaintiffs who cannot satisfy this doctrine may still be able to use untimely events as background evidence to support her claims based on the timely events. *See Morgan*, 536 U.S. 101.

V. The Spectrum of Sexual Harassment

This section describes a variety of examples of what the Courts of Appeals have and have not found constituted a sexually hostile work environment. It must be emphasized that this determination is contextual and fact-specific, since there is no bright line that can be drawn along the spectrum of workplace activities. These cases are arranged by circuit. The cases finding hostile environment harassment are listed first, followed by those cases not making such a finding. The reader should bear in mind that this is a sampling of published cases, and is by no means a comprehensive analysis of every sexual harassment case filed under Title VII.

District of Columbia Circuit: Hostile Environment Present.

There was hostile environment sexual harassment of an apprentice, by a supervisor, where the supervisor (1) “made lewd comments and gestures concerning Peyton’s breasts on more than one occasion; (2) “engaged in a pattern of harassment, including threats communicated directly and through co-workers” after learning that the apprentice had filed an informal complaint; and (3) other supervisors “told [plaintiff] that she should drop her complaint.” *Peyton v. DiMario*, 287 F.3d 1121, 1123 (D.C. Cir. 2002).

District of Columbia Circuit: No Hostile Environment.

There was no hostile environment sexual harassment of an employee for alleged actions by his male co-workers, including tire-slashing, taunting, and several incidents where a co-worker “approached [plaintiff] at his work station and grabbed his crotch, made kissing gestures, and used a phrase describing oral sex,” where the plaintiff could not show that these actions were anything but a workplace grudge match, and did not occur because of sex. *Davis v. Coastal Int’l Sec., Inc.*, 275 F.3d 119 (D.C. Cir. 2002).

First Circuit: Hostile Environment Present.

There was hostile work environment sexual harassment where the employee’s supervisor, who shared a small office with her, stared at her daily in a sexual way, came so close to her that she could feel his breath, pulled his chair so close to her that their legs touched, laughed at her discomfort, blocked her escape from the small office by closing the door, and on one occasion called her “babe.” The supervisor resumed this conduct after the plaintiff returned from an extended leave, and the plaintiff suffered constant psychological and emotional distress. *See Vera v. McHugh*, 622 F.3d 17, 27-28 (1st Cir. 2010) (vacating district court’s grant of summary judgment for defendant employer and remanding for further proceedings).

There was hostile work environment sexual harassment where the employee’s supervisor complained about the plaintiff’s clothing on a daily basis (where there was testimony from other employees that her clothing was not overly revealing), regularly drew the attention of her co-

workers to her body and undergarments, shadowed her more closely than other employees when she interacted with patients, challenged her decisions, mocked her, described her as a “woman of the streets” to other employees, and criticized her to doctors and patients. This was true even where male employees experienced some of the same mistreatment, because they did not experience it so frequently or for so long and because some of the comments evidenced sex-based motivation. *See Rosario v. United States Department of the Army*, 607 F.3d 241, 249 (1st Cir. 2010) (vacating district court’s grant of summary judgment for defendant employer and remanding for further proceedings).

There was hostile environment sexual harassment where the employee’s supervisor initially (1) made “sexual comments, often accompanied by lascivious looks and offensive gestures;” (2) “also would contrive to ‘bump into’ Marrero in the narrow hallway between their work spaces, and on several occasions rubbed his body against hers as she used the photocopier machine.” *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 14 (1st Cir. 2002). After the employee complained to her supervisor about his harassment, the harassment resumed, “now accompanied by more ‘vulgar’ comments made ‘with a gross tone.’” *Id.* The supervisor also began to harass her in petty, non-sexual ways. *Id.* at 14-15, 20 (“He criticized her work unfairly, sometimes embarrassing her by yelling at her in front of her co-workers.”). The sexual harassment continued on an almost daily basis. “For example, Cardenas constantly referred to Marrero as ‘the redhead’ and frequently made comments such as ‘the redhead is really hot,’ ‘the redhead is on fire,’ or ‘if this is what hell is like then the devil can take me with him.’ Cardenas also made repeated comments about Marrero’s lips, legs and clothing.” *Id.* at 19. “At other times, Cardenas was more explicit: he once asked Marrero ‘what are you going to do with the thing you have between your legs?’” *Id.* Cardenas “also discussed Marrero’s appearance with other employees. For example, he told Marrero’s co-workers that she ‘would be the model that would be used for any future female employees that Goya would hire.’ Another time, Cardenas invited a male employee to assess what sort of underwear Marrero was wearing under her skirt.” *Id.* Finally, on Halloween, “Cardenas told Marrero that he was going out to buy Halloween presents. He gave her ‘a direct penetrating look with lust,’ and said: ‘I have a little present for you that you’re never going to forget and if you don’t do the things I tell you and order you to do I am going to fire you.’ Marrero interpreted that comment as a sexual invitation, and a threat that if she did not submit, she would be fired.” *Id.* at 15.

There was hostile environment sexual harassment, by a co-worker, where the plaintiff was subjected to “disturbing and sometimes peculiar behavior,” including (1) “grabbing her foot and massaging it against her will at an L.L. Bean pool party;” (2) “continually following her to work;” (3) “physically blocking her path and thereby forcing her to squeeze by him;” (4) “giving her gifts designed to let her know that he was watching her;” (5) dancing in the aisles near her;” (6) “waiting in the dark for her to come upon him, following her home, and even breaking into her house.” *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 391 (1st Cir. 2002). Indeed, not until the plaintiff obtained a court protection order against the co-worker did the employer take decisive steps to stop the escalating harassment. *Id.* at 400. The First Circuit held that even harassment that took place off the worksite, presumably beyond the employer’s control, could be used by the plaintiff as evidence, since “Courts, however, do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace as well as to establish that the conduct was motivated by gender.” *Id.* at 409. Here, the co-worker’s

“intimidating behavior and hostile interactions with Crowley outside of work help explain why she was so frightened of [him] and why his constant presence around her at work created a hostile work environment.” *Id.* at 409-10.

First Circuit: No Hostile Environment.

There was no hostile work environment sexual harassment where female Treasury Department employee alleged her supervisor “gently caressed her forearm in an up and down motion” and more than a year later, after a heated exchange, placed his hands on her upper back and touched her on her hip and buttocks as he pushed her out of his office. *Rivera Martinez v. Commonwealth of Puerto Rico*, No. 05-2605, 2007 WL 16069 (1st Cir. Jan. 4, 2007).

The court in *Pomales v. Celulares Telefonica Inc.*, 447 F.3d 79 (1st Cir. 2006) held that a single incident in which the plaintiff’s male supervisor had grabbed his crotch and stated “it would be great to come with you” with obvious sexual innuendo was insufficiently severe or pervasive to establish a hostile work environment claim, and affirmed the district court’s grant of summary judgment. *Id.* at 84.

Second Circuit: Hostile Environment Present.

In *Pucino v. Verizon Wireless Comm., Inc.*, 618 F.3d 112 (2d Cir. 2010), the court held that a rational juror could find the treatment of the plaintiff, Pucino, to be sufficiently severe or sufficiently pervasive to alter the conditions of her employment. *Id.* at 120. Pucino worked for Verizon as a field technician installing and repairing telecommunications cable. Her foremen routinely assigned her to less-desirable work than that assigned to male workers, including frequently assigning her to work alone in parts of the county considered unsafe (to which men were never assigned to work alone). Foremen often refused her requests for help, but then, in her presence, would grant male workers’ requests for help. One foreman told her to “get lost” and to “go kill herself” on occasions when she pointed out this inconsistency in treatment. A foreman often changed her work location, even though common practice for male workers was to allow them to work continuously in one area of the city to become familiar with it, and skipped over her turn to receive overtime work. He would grant her male coworkers access to tools or vehicles he had just told her were unavailable. She was often reprimanded for behavior that was commonplace among men, and singled out for intense public criticism. Finally, she was “constantly” called a “bitch” and “stupid,” and told to “go fuck yourself.” The court concluded that the combination of disparate treatment and gender-based verbal abuse could support further inference that the other abuse was also gender-based, and that a trier of fact could easily find that the abuse was sufficiently severe or pervasive to alter Pucino’s working conditions.

There was hostile environment sexual harassment, by the plaintiff’s manager, based on an escalating series of events: “From May 1993 to June 1994, Morabito engaged in a pattern of egregious conduct towards Jin [plaintiff] that included (a) making numerous crude sexual remarks to her, both in the office and by calling her at home; (b) offensively touching Jin’s buttocks, breasts, and legs on numerous occasions at the office, including when she was making sales calls at her desk and walking clients to the elevator; (c) requiring Jin, beginning in the summer of 1993, to attend weekly Thursday night private meetings in his locked office during

which he would threaten her with a baseball bat, kiss, lick, bite and fondle her, attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her; and (d) repeatedly threatening to fire Jin if she did not accede to his sexual demands, as well as threatening her with physical harm. In February 1994, after months of submitting to the weekly sexual abuse out of fear of losing her job, Jin refused to attend another Thursday evening meeting with Morabito. Jin began working in the evenings and on weekends to avoid Morabito, but he continued to fondle and harass Jin when he saw her.” *Jin v. Metropolitan Life Ins. Co.*, 295 F.3d 335, 339 (2d Cir. 2002). The Second Circuit concluded that “requiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace.” *Id.* at 344. Thus, this case was unlike *Ellerth*, since Ms. Jin suffered adverse employment actions when the supervisor withheld her paychecks: “[Ms.] Ellerth, unlike Jin, was able to resist her supervisor’s advances, and the threat to deny her tangible job benefits in lieu of her submission was never carried out. In fact, she was promoted despite the alleged harassment and later quit.” *Id.* at 347. Hence, “the key difference in this case is the claim that Jin was required to submit to sexual acts and that Morabito used that submission as a basis for granting her a job benefit (her continued employment). This is substantially different from the type of unfulfilled threat alleged in *Ellerth*, where no job benefit was granted or denied based on the plaintiff’s acceptance or rejection of her supervisor’s advances.” *Id.*

There was hostile environment sexual harassment, by a co-worker, based upon a series of incidents, where the co-worker (1) made a series of unwanted touchings; (2) “propositioned her to have sex with him and said, ‘Mary, what do you say, it’s going to be good;’” (3) exposed himself, on three occasions, to the plaintiff; and (4) taunted plaintiff with sexist names, including calling her a virgin. *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59-60 (2d Cir. 1998).

Second Circuit: No Hostile Environment.

In *Marshall v. New York City Bd. of Elections*, No. 07-4561cv, 2009 WL 928083 (2d Cir. April 7, 2009) the plaintiff’s claims did not rise to the level of severity necessary to constitute a sexually hostile work environment under Title VII. *Id.* at *1. The supervisor’s alleged offensive and harassing conduct included references to lunch dates and weekend outings with his same-sex partner; showing the employee a sexual device he had purchased for his partner; on several occasions, standing over the the employee with clenched fists; and disparaging the employee’s educational background. This conduct, while crass, did not approach the level of severity needed to maintain a claim for sexual harassment.

There was no hostile environment sexual harassment present where the plaintiff alleged that her supervisor would not approve her vacation requests “if she did not have sex with him,” that he offered to punch her time-card late at night so she could get overtime pay, and upon her return from vacation, he gave her a note that “if she had sex with him, [he] would give her money, make her a full time employee but permit her to work part-time and simply punch her card as if she were working full time, and take her on vacations and to a fitness club.” *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 55 (2d Cir. 2004). The plaintiff promptly reported this conduct to the employer, who terminated the supervisor within a few weeks. *Id.* at 56. The court found that the few threats, none of which were implemented, were not sufficiently severe or

pervasive; “nor does plaintiff claim that the incidents were physically threatening or humiliating, or that they interfered with her ability to do her job.” *Id.* at 59.

There was no hostile environment sexual harassment based on four incidents over a five year period, where the incidents were “infrequent and episodic,” “were difficult for the employer to remedy because they were largely anonymous,” and “were too few, too separate and time, and too mild . . . to create an abusive working environment.” *Alfano v. Costello*, 294 F.3d 365, 380 (2d Cir. 2002). Here, the four “overtly sexual” incidents were (1) a Captain told the plaintiff, a female corrections officer, “that she should not eat carrots, bananas, hot dogs or ice cream on the job because she did so in a ‘seductive’ manner;” (2) plaintiff “discovered in her workplace mailbox a carrot and two potatoes put there by someone who had the idea of arranging them to suggest male genitalia;” (3) “a spurious notice was posted in the visiting room . . . purporting to be signed by [the] Superintendent, stating that ‘carrots will not be allowed in the visiting area due to Sgt. Alfano’s strong liking for them. If they are diced up, it will be okay. Supt.’;” and (4) “Alfano found in her mail box a hand-drawn cartoon depicting an officer under her supervision [] making vulgar sexual remarks.” *Id.* at 370.

Third Circuit: Hostile Environment Present.

Hostile environment sexual harassment was present when the supervisors and fellow officers of a female police officer (1) “harassed her by making sexually derogatory comments about her hygiene during roll call, disturbed her while she was changing in the drill room;” (2) referred to plaintiff “as ‘the cunt’ and placed a tampon and a copy of Hustler magazine in her squad car;” (3) “told plaintiff that upper management sent a woman to his unit to ‘break his balls;” (4) “officers placed a sanitary napkin with sergeant’s stripes over the roll call podium and affixed a dildo either to the wall or the podium in the roll call room;” (5) plaintiff “was the subject of sexually explicit graffiti and drawings of herself at three locations on city property: the roll call room, the roll call bathroom, and the bathroom of the Masonic Temple, a building used by both employees and the public;” (6) the supervisor “reacted to the latest sexually explicit graffiti by rushing to see it and laughingly informing [plaintiff], in front of her colleagues, that ‘it’s really bad,’ but he took no action to remove or prevent the appearance of the graffiti;” (7) when the plaintiff complained to her supervisor, “he replied that women in the private sector are protected against such harassment because they ‘sleep with their bosses;” (8) the supervisor told plaintiff “that he lost weight by ‘having sex a few times a day,’ and that women came to him ‘when they’re ready;” and (9) when the plaintiff “was unable to locate her coffee mug, [supervisor] asked her if she wanted to drink out of his jock cup.” *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 103-05 (3d Cir. 1999).

Third Circuit: No Hostile Environment

The court in *Grassmyer v. Shred-It USA, Inc.*, No. 09-3876, 2010 WL 3330102 (3d Cir. Aug. 25, 2010) held that a supervisor’s comments were not sufficiently severe or pervasive to constitute a hostile work environment. The supervisor regularly made comments about the size of his genitalia and talked about the intimate details of his sexual relationships; referred to women as “bitches,” told them of a colleague frequenting “titty bars,” used the word “fuck” in the office and on one occasion played a CD on his computer that contained sexually explicit

language; and once asked a male sales representative in their presences if he had a pubic hair stuck in his throat after he coughed. The court held that this evidence – while sophomoric and “no doubt offensive” – was not so “severe or pervasive” to support a hostile work environment claim. *Id.* at *12.

No hostile work environment was present where female police officer alleged she was harassed because of her need to express breast milk during work hours. Plaintiff alleged that she was repeatedly interrupted while taking approved breaks to express breast milk, and that she was excessively monitored during lunch and personal breaks. Plaintiff also alleged that she was assigned insignificant tasks, such as counting bicycles, arranging for other officers' shoes to be shined, and was singled out for unfair criticism. The court found that while the plaintiff had established the environment was subjectively hostile, she had not established that the work environment was objectively hostile. The court found that the defendant had established that other officers assigned to light duty, as the plaintiff was, were given the same apparently menial tasks, and were forced to run errands for more senior officers. The court noted also that officers testified that personal time was not guaranteed and could be interrupted, and that protocol required that sergeants locate officers who could not be contacted via radio after three attempts. *Page v. Trustees of the Univ. of Pennsylvania*, No. 06-1008, 2006 WL 844280 (3rd Cir. Pa. March 21, 2007).

Fourth Circuit: Hostile Environment Present.

There was hostile environment sexual harassment where the employee was constantly “barraged with comments of a sexual nature.” In particular, the plaintiff’s supervisor was the “worst perpetrator,” since he “made vulgar comments regarding Anderson’s breasts and buttocks on a daily basis and who repeatedly stated that he ‘heard black women had the best p***y’ and that ‘you hadn’t f***ed until you have been with a black woman.’ Cooper also told Anderson that if he ever caught her driving on a certain road, he ‘would f*** [her] in the a**,’ and that ‘all [Anderson] needed was a good f*** and [she] wouldn’t be so mean.’ Twice, Cooper touched Anderson’s hand in a suggestive manner when she handed him her paper-work. On one occasion, Cooper paged Anderson and inputted a telephone sex line as the response number. Anderson called the number believing it to be her son’s day-care; when she returned to the dispatch trailer, she found Cooper and several drivers laughing at her.” *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 456 (4th Cir. 2002).

In *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003), the *en banc* court held that even though the sexual atmosphere predated Ocheltree’s arrival, the remarks and conduct escalated significantly after her arrival, particularly after she complained during a shop meeting. Moreover, several of the acts were directed specifically towards her. In contrast, the remarks and conduct were never directed towards her male co-workers, even if they had the incidental effect of embarrassing some of them. *See id.* at 331-33; *see generally* D. Katz & A. Kabat, “Sex Harassment Suit: No Windfall After All,” NAT’L L.J., Nov. 10, 2003, at 30.

In *Ziskie v. Mineta*, 547 F.3d 220 (4th Cir. 2008), the court held that genuine issues of fact existed as to whether the plaintiff was subject to a hostile work environment. The Court express stated that harassing conduct does not have to be directed at the plaintiff, but “[r]ather

the inquiry was the nature of the workplace environment, and ...they surely may exceed the individual dynamic between the complainant and his supervisor.” *Id.* at 224.

The Fourth Circuit upheld a jury verdict finding for the plaintiff on a sexual harassment and battery claims where the Sheriff, who was the plaintiff’s supervisor, over the course of four years repeatedly touched her sexually, made sexual comments to her, offered her a promotion if she “choose him over her boyfriend,” and forced a kiss on her. The plaintiff resigned after the Sheriff’s forced kiss. *King v. McMillan*, 594 F.3d 301 (4th Cir. 2010).

The Fourth Circuit held that there was a hostile work environment based on sex even though the owner made sexually explicit comments in front of both male and female audiences because his comments were sex-specific and derogatory terms. In addition, several of the statements a reasonable jury could infer would not have been made to the plaintiff if she had been of the same sex as the owner. *See E.E.O.C. v. Fairbrook Medical Clinic, P.A.*, 609 F.3d 320 (4th Cir. 2010).

In *Hoyle v. Freightliner, LLC*, 650 F.3d 321 (4th Cir. 2011), the court reversed a grant of summary judgment to the employer where co-workers repeatedly placed photographs of “nude women” and women “in sexually provocative dress and poses in common areas;” a co-worker placed a tampon on a truck in the plaintiff’s work area; and the company re-assigned plaintiff to a position consisting of “janitorial tasks.” *Id.* at 334-35.

In *Okoli v. City of Baltimore*, 648 F.3d 216 (4th Cir. 2011), the court reversed a grant of summary judgment to the employer, holding that the plaintiff had presented sufficient evidence for a reasonable juror to conclude that the plaintiff suffered “severe or pervasive” harassment. *Id.* at 225. The court noted that the plaintiff suffered twelve incidents in four months that included disparaging jokes about gays and lesbians, comments by the harasser about his jacuzzi fantasy and group sex fantasies involving the plaintiff, questions about the plaintiff’s underwear, comments about the harasser’s sexual relations with another woman, three incidents of the harasser fondling the plaintiff’s leg under a table, and forcible kissing. *Id.* at 220. The court noted, “Some of the incidents may have been severe enough to be actionable in and of themselves.” *Id.* The court also noted that there was a “significant disparity of power” since the harasser was a political appointee in the Mayor’s cabinet who headed a municipal agency. *Id.* at 221.

Fourth Circuit: No Hostile Environment.

The Fourth Circuit held that a male plaintiff had not been subjected to a hostile work environment despite the presence of multiple forms of pornography and at least fifteen faxes, cartoons, or emails that had jokes that played on gender stereotypes in a form negative to women. The Court held that such conduct did not raise to the level necessary to create an abusive environment. *Greene v. A. Duie Pyle, Inc.*, No. 05-1714, 2006 WL 694377 (4th Cir. Mar. 20, 2006).

Conduct by a supervisor, which included reprimands regarding work performance and harsh communication, did not rise to an actionable hostile work environment because she was

able to discuss work-related issues with her supervisor and continue to perform at a high level despite the supervisor's conduct. *Graham v. Prince George's Cty*, No. 05-1946, 2006 WL 2062879 (4th Cir. July 25, 2006).

No hostile work environment was found because all the abuse that the plaintiff plead happened after she left the workplace. All the harassing conduct that the plaintiff had plead took place while she was on leave without pay, leave from which the plaintiff never returned because the defendant terminated her for medical inability to perform her duties. See *Pueschel v. Peters*, 577 F.3d 558 (4th Cir. 2009).

Fifth Circuit: Hostile Environment Present.

There was hostile environment sexual harassment where the plaintiff, who previously had a consensual sexual relationship with her supervisor, suffered from a hostile work environment after the termination of their relationship. *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002). Although the exact nature of the incidents is not specified, the "evidence supports a finding that Richardson's actions interfered with Green's work performance, that he reprimanded and demoted her, and that he cursed at and humiliated her." *Id.* at 656. Critically, "it was only after the relationship ended that Richardson began to harass her. This fact alone supports a jury's inference that he harassed her because she refused to continue to have a casual sexual relationship with him." *Id.* at 657.

There was hostile environment sexual harassment where plaintiff's two supervisors harassed her. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405 (5th Cir. 2002). The first-level supervisor, Thompson, started harassing the plaintiff almost from the first day: he "commenced harassing her sexually, referring to her in vulgar terms and continually asking her to have sex with him." *Id.* at 407. After Ms. Wyatt complained to her second-level supervisor (Gorum), the harassment by Thompson persisted. Then, "Gorum himself eventually subjected Wyatt to sexual advances and harassment." *Id.* Finally, "Thompson's harassment of Wyatt reached its zenith . . . when he sneaked up behind her and pulled down her sweat pants while she was actively working on the line, and in the plain view of other employees." *Id.* Even after Ms. Wyatt reported this to Gorum, "in an effort to down-play Thompson's actions, Gorum declined to indicate in the [incident] report that Thompson had pulled Wyatt's pants down." *Id.* at 407-08.

There was hostile environment harassment where the supervisor (1) "made inappropriate jokes both to and about [plaintiff];" (2) "continually made sexual innuendos to [plaintiff];" (3) "once grabbed her buttocks as well as touched her in other ways on several other occasions;" and (4) "began following her through the store calling her a 'homewrecker' and saying that she was 'homeless' in front of other employees, vendors, and customers," referring to her extramarital affair with another supervisor. *Watts v. Kroger*, 170 F.3d 505, 507-08 (5th Cir. 1999).

There was hostile environment sexual harassment of a police officer by her supervisors, based on a series of incidents, where the sergeants (1) "announced in front of over one hundred officers and police cadets that Sharp 'needs to be in a wet T-shirt contest;'" (2) "often referred to Sharp's breasts as 'headlights' and, on one occasion, as Sharp walked toward him and several other officers, he yelled, 'I see those headlights coming!'" (3) "When Sharp would bend over to

pick up equipment, Bice, while swiveling his hips, would shout out, ‘hold that position, gal!’” (4) “When Sharp requested time off, Bice often joked that he had keys to a motel room where they could go to ‘discuss the matter;’” (5) “He often commented that the couch in his office folded out into a bed, and invited her to come in and close the door;” (6) “He once told Sharp that he would approve her vacation request if she brought back pictures of herself on a nude beach;” (7) “during roll call, Hankins walked up to Sharp and unzipped his pants, placing his crotch inches from her face [and] capped off the ‘joke’ by making a reference to oral sex;” (8) “When Sharp asked job-related questions, on several occasions Hankins grabbed his crotch and shook it, inviting her to ‘chew on this.’” *Sharp v. City of Houston*, 164 F.3d 923, 926-27 (5th Cir. 1999).

There was hostile environment racial harassment, by a black elected official against a white public employee, where the official (1) “stated that ‘blacks had suffered for two hundred years, and now it was the whites’ turn;” (2) demoted experienced whites, forcing them to work under less experienced blacks; (3) “refused to allow whites who had been injured on the job to perform ‘light duty’ — as he did for blacks — but insisted that they perform heavy duty or stay home;” (4) “allowed black employees to take frequent breaks on the job, but chastised whites who did the same;” and (5) “tolerated and helped to foster an atmosphere in which whites were called ‘honkeys’ and were made the subject of ridicule and harassment on account of race.” *Huckabay v. Moore*, 142 F.3d 233, 237 (5th Cir. 1998). The court recognized yet other incidents, which allowed the plaintiff to plead under the continuing violation theory. *Id.* at 240.

Fifth Circuit: No Hostile Environment.

In *Roberts v. Unitrin Specialty Lines Ins. Co.*, No. 09-10350, 2010 WL 5186773 (5th Cir. Dec. 21, 2010), the court held that Roberts failed to establish any harassment was based on her sex, and in fact that she had established nothing more than teasing, offhanded comments, and other isolated incidents that did not give rise to the level of actionable harassment. The conduct in question was a supervisor’s remark that the marketing department would be better off without females; the fact that supervisor transferred many of Roberts’ work duties to a male; a male sales manager’s having “verbally attacked” Roberts twice and acted violently towards other females; the fact that two male sales managers referred to her as “poor Traci,” her supervisor’s assignment to her of physically demanding work, and her supervisor’s threats to fire her.

There was no hostile environment sexual harassment where plaintiff’s supervisor’s acts, while “boorish and offensive,” were not severe, did not physically threaten plaintiff, and did not “interfere unreasonably with a reasonable person’s work performance.” *Shepherd v. Comptroller of Pub. Accounts of State of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999). The supervisor (1) “stood in front of [plaintiff’s] desk and remarked ‘your elbows are the same color as your nipples;’” (2) “remarked once ‘you have big thighs’ while he simulated looking under her dress;” (3) “stood over her desk on several occasions and attempted to look down her clothing;” (4) “on two occasions, when [plaintiff] looked for a seat after coming in late to an office meeting, [he] patted his lap and remarked ‘here’s your seat.’” *Id.* at 872.

There was no hostile environment sexual harassment when the plaintiff’s supervisor sent anonymous notes and postcards of a sexist nature, as well as anonymous prank calls, since these incidents occurred infrequently, did not occur in the workplace, were not publicly displayed or

manifested, did not contain threatening statements, and “would not interfere unreasonably with a reasonable person’s work performance.” *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 269-70 (5th Cir. 1998).

Sixth Circuit: Hostile Environment Present.

There was a sexually hostile work environment in *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263 (6th Cir. 2009), where there were many instances of inappropriate conduct – some directed at the plaintiff, and some not. There were instances where the plaintiff was called a “bitch” by another coworker, was referred to as a “heifer” with “milking udders,” and was taunted by a male coworker wearing nothing but a towel. There was also much other highly offensive conduct not directed at the plaintiff: among the common offensive occurrences she complained of were: “co-workers' vulgar descriptions of female customers, associates and even friends as ‘bitches,’ ‘whores,’ ‘sluts,’ ‘dykes,’ and ‘cunts;’ co-workers' joint ogling and discussions of obscene photographs and pornographic magazines; and co-workers' explicit conversations about their own sexual practices and strip club exploits.” *Id.* at 276. The plaintiff was not able to escape these comments because they occurred near her work station. The court found that this conduct – both that directed at her and the general comments – to be explicitly sexual and patently degrading of women, causing embarrassment, humiliation, and degradation irrespective of the harasser’s motivation. The court held that it was obvious that the conduct evidenced anti-female animus, *id.*, and held that even though members of both sexes were exposed to the conduct, women would suffer greater disadvantage in the terms and conditions of their employment than men. *Id.* The harassment was both based on sex and severe or pervasive.

There was hostile environment sexual harassment where female employee testified that she was subjected to daily threats, derogatory comments, verbal harassment, foul language, several serious physical assaults to which members of the opposite sex were not exposed, and where the alleged conduct caused her to become suicidal and necessitated hospitalization and counseling. *Randolph v. Ohio Dept. of Youth Services*, 453 F.3d 724 (6th Cir. 2006).

There was hostile environment sexual harassment based on a series of remarks made by plaintiff’s supervisor, even though only one was made about plaintiff herself. *Abeita v. Transamerica Mailings, Inc.*, 159 F.3d 246, 248 (6th Cir. 1998). The incident involving the plaintiff was when the supervisor stated, regarding her clothing, “oh, yellow dress and yellow shoes, yellow underwear, too?” *Id.* The comments involving other females, mostly fashion models used by the defendant in its catalogs, included (1) “I’d really like to lay the pipe to her” or “I’d really like to lay her;” (2) when plaintiff asked the supervisor what to do with a new model, he replied “Well, that doesn’t matter. It’s what I’d like to do with her that’s important;” and (3) the supervisor “made sexual comments about a model found in a Frederick’s of Hollywood catalog.” *Id.* at 248-49.

Sixth Circuit: No Hostile Environment.

In *Simpson v. Vanderbilt Univ.*, No. 08-6548, 2009 WL 4981684 (6th Cir. Dec. 22, 2009), the court held that the district court properly rejected the plaintiff’s claim for sexual harassment based on hostile work environment because he could not establish that the conduct in

question was motivated by any sexual bias or animus. *Id.* at *9. In this case, the male plaintiff's female supervisor took a female employee's side in an argument before hearing the plaintiff's side of the story, later sending her flowers and reprimanding him; clashed with him about who was responsible for covering for an employee who had gone home sick; grabbed his arm and shoved him into a patient's room to make a report; told him that he intimidated other nurses with his "deep, male voice and the way he stood with his arms crossed or with his hands on his hips," did not choose him to attend an educational program although he had more seniority than the two women chosen to attend; permitted a woman in his shift to work weekends only, depriving him of the extra pay the weekend hours offered; and again sided with female employee about whom he had complained. Because he did not demonstrate that these actions stemmed from a sexual bias or animus, the court affirmed the district court's grant of summary judgment to the employer. *Id.* at *10.

In *Hensmen v. City of Riverview*, No. 08-1454, 2009 WL 605339 (6th Cir. March 10, 2009), the court held that the plaintiff failed to establish a *prima facie* case that she suffered from a hostile work environment where she alleged that her supervisor "1) hugged her three times; 2) twice made comments to her about being "voluptuous"; 3) said he was not listening to her because he was distracted by her beauty; 4) walked too closely behind her; 5) closed the door when he met with her in his office; 6) told her she looked cute in her pajamas; 7) brought her flowers and bagels to apologize for disturbing her the previous night; 8) complimented her perfume; 9) called her by the wrong name; and 10) grabbed her by the arm when she tried to leave." *Id.* at 4.

There was no hostile environment sexual harassment sufficient to establish an objectively hostile work environment in violation of Title VII where co-employees allegedly used the "F-word" took "the Lord's name in vain," and made sex-related comments towards a group which included the plaintiff and where there was no touching or physical harassment and the comments "[d]idn't get in [her] way of actually doing [her] job." *Knox v. Neaton Auto Products Mfg., Inc.*, 375 F.3d 451 (6th Cir. 2004).

There was no hostile environment sexual or racial harassment, where there was no evidence that the alleged series of actions were based on the plaintiff's race or gender. *Farmer v. Cleveland Public Power*, 295 F.3d 593, 604-05 (6th Cir. 2002). Although the plaintiff alleged that "defendants restricted her access to necessary information, gave her conflicting and vague performance objectives, ignored her requests for clarification of her targeted goals, and prepared performance evaluations based upon expectations that had not been discussed with her," and that she was "physically isolated from her co-workers" and "disciplined for actions she did not take," none of these were based on her race or gender. *Id.* at 604.

Seventh Circuit: Hostile Environment Present.

In *Berry v. Chicago Transit Auth.*, 618 F.3d 688 (7th Cir. 2010), the court reversed the district court's grant of summary judgment for the employer on the plaintiff's hostile work environment claim. In *Berry*, on one instance, a male coworker had come behind the plaintiff as she was seated, grabbed her breasts, lifted her in the air, and rubbed her buttocks against the front of his body, from his chest to his penis, three times before dropping her harshly. She landed on

one leg, off-balance, and then pushed her into a fence. The court held that these actions, although on one occasion only, “qualify undeniably as unwelcome sexual conduct that established a hostile environment.” *Id.* at 692.

In *Turner v. The Saloon, Ltd.*, 595 F.3d 679 (7th Cir. 2010), the court reversed and remanded the district court’s grant of summary judgment for the employer, finding that the plaintiff’s allegations created a genuine issue of material fact on the plaintiff’s hostile work environment claim. *Id.* at 685-86. The male plaintiff alleged that his female supervisor, with whom he had had a previous nine-month romantic relationship, grabbed his penis through his pants pocket, pressed her chest against him while making a sexually suggestive comment, grabbed his buttocks, made suggestive comments while watching him change into his uniform, and punished him for refusing her sexual advances by assigning him to less profitable work and reprimanding him in front of other employees.

Plaintiff established a *prima facie* case of hostile work environment sexual harassment where plaintiff was an employee of an ice cream parlor who was harassed by her 25 year old supervisor. Plaintiff alleged that the supervisor groped, kissed, grabbed, gave “tittie twisters” to the teenage female employees, and had sexual intercourse in his apartment with the plaintiff and other female employees. The plaintiff did not allege that the sexual intercourse was non-consensual. The district court found for the Defendant on the grounds that the conduct was not unwelcome. The Seventh Circuit reversed the district court’s grant of summary judgment and remanded for further proceedings noting, “the judge stepped out of the proper role of a judge asked to decide a motion for summary judgment and made findings on contested factual issues relating to the plaintiff’s dealings with [Defendant]. The court also found that whether a particular Title VII minor plaintiff was capable of welcoming the sexual advances of an older man, should be determined based upon the age of consent in the state in which the plaintiff is employed. *Doe v. Oberweiss Dairy*, 456 F.3d 704, 713 (7th Cir. 2006).

There was hostile environment sexual harassment of plaintiff, an assembly plant worker, mostly from the conduct of her co-workers, who (1) “at least twice a week” prepared fake penises from rubber sealant, which “were sent down the assembly line past her work station;” (2) “accused [plaintiff] of ‘sucking a white boy’s dick on the roof;” (3) “commented, ‘I can make your pussy bloom;” (4) “was taunted with offensive literature” including a sheet “that pontificated on why beer is better than women,” was shown photos of nude persons, given “sexually explicit cartoons” and (5) “while on medical leave, [plaintiff] received a lewd greeting card which had been signed by approximately 38 Chrysler employees including a supervisor [] and three foremen.” *Wilson v. Chrysler Corp.*, 172 F.3d 500, 508 (7th Cir. 1999).

Seventh Circuit: No Hostile Environment.

In *Overly v. KeyBank Nat’l Ass’n*, 662 F.3d 856 (7th Cir. 2011), the court affirmed a grant of summary judgment to the employer. The plaintiff’s sexual harassment claim was based in large part on her evidence that upon receiving her resignation letter, her supervisor pushed her out the door and yelled, “Good Riddance Bitch.” *Id.* at 862. The court held that this evidence while “disturbing” could not be used to substantiate a hostile work environment during employment because it came after the plaintiff’s resignation. *Id.* at 864.

There was no objectively hostile work environment where two male co-workers used vulgar language to describe a female employee's presence, cursed and yelled at her and made negative comments about older women in the workforce. *Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675 (7th Cir. 2005).

There was no hostile environment sexual harassment where the plaintiff, a probationary supervisor at a factory, alleged that the union floor supervisor made sexist remarks to her. *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965 (7th Cir. 2004). Here, the Court found that much of the vulgar language was indiscriminately expressed in the workplace, so it was not based on the plaintiff's gender. *Id.* at 976. Even that which was motivated by her gender was resolved by the employer's prompt remedial action which resulted in no further harassment of the plaintiff before her termination for performance-based reasons. *Id.* at 977-78.

There was no hostile environment sexual harassment where the plaintiff, a female surgeon, suffered only two derogatory remarks, one of which was "the only valuable thing to a woman is that she has breasts and a vagina," because those "comments were too isolated and sporadic to constitute severe or pervasive harassment." *Patt v. Family Health Sys.*, 280 F.3d 749, 754 (7th Cir. 2002). Further, remarks made to other employees outside the plaintiff's presence were just "second-hand harassment" which do not have as great an impact "as harassment directed toward Patt herself." *Id.*

Eighth Circuit: Hostile Environment Present.

In *Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923 (8th Cir. 2010), a licensed physical therapist at a chiropractic practice alleged that a chiropractor at the practice embraced her on various occasions, including pulling her against his body and brushing his hand against her breast. On one occasion he kissed her on the forehead. Once she complained, he then began to behave in intimidating ways, mocking her by holding his hands in the air around patients to show that he was not touching anyone, sitting beside her at meetings despite the availability of other seats, and on one occasion blocking a doorway while telling her to "put [her] problems aside." Although the chiropractor also patted men on the buttocks, the court found no evidence that he pulled men into his body as he had the plaintiff. The court held that the district court did not err by denying the defendant employer's post-trial motion for judgment as a matter of law, holding that a reasonable jury could have found a hostile work environment. *Id.* at 931.

There was hostile environment sexual harassment where the plaintiff's co-workers subjected her to a "long series of incidents," including (1) "brush[ing] up against her breasts;" (2) frequently ran his fingers through her hair, rubbed her shoulders, and ran his finger up her spine;" (3) "stood behind [plaintiff] and simulated a sexual act while [plaintiff] was bent over during handcuff training sessions;" (4) "simulated sexual acts with a nightstick;" and another co-worker (5) "rubbed his hand up and down her leg, brushed up against her when they spoke, and pressed his groin into her shoulder while standing behind her." *Eich v. Board of Regents for Ctrl. Mo. State Univ.*, 350 F.3d 752, 761 (8th Cir. 2003) (reversible error to grant judgment for defendant after jury verdict in plaintiff's favor).

There was hostile environment sexual harassment where the supervisor began harassing the plaintiff soon after she was hired, “boasted about his sexual abilities, commented frequently on her body type and appearance, and suggested that they watch pornographic movies and engage in sex with one another. She also testified that he made explicit speculations about her sex life and that he once tried to unzip her sweater.” *Jaros v. Lodgenet Entertainment Corp.*, 294 F.3d 960, 963 (8th Cir. 2002).

There was hostile environment sexual harassment, where the supervisor (1) “made an offensive comment to her [plaintiff] that she considered sexual harassment;” (2) belittled her and criticized her work performance because she had rebuffed his advances;” and (3) “sexually assaulted her.” *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1030 (8th Cir. 2002).

There was hostile environment sexual harassment where the supervisor “repeatedly propositioned [plaintiff], physically accosted her on numerous occasions and made increasingly serious threats of retaliation” for more than five years. *Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999). The incidents occurred when the supervisor (1) “repeatedly confronted [plaintiff] in private and proposed that she engage in a romantic relationship with him;” (2) “touched [plaintiff] on numerous occasions;” (3) “entered her office, put his arms around her, and told her that he wished he could take her away from her husband;” (4) “put one arm around her, and put one hand on her breast, [and] said he would stop harassing her if he could just touch (her) down there;” and (5) frequently “stared at [plaintiff], entered her office uninvited, and repeatedly asked her to have an affair with him.” *Id.* at 1157-58.

Eighth Circuit: No Hostile Environment.

The court held in *Cross v. Prairie Meadows Racetrack and Casino, Inc.*, 615 F.3d 977 (8th Cir. 2010) that the alleged incidents of harassment, taken together, were insufficient to establish that the work environment was so permeated with discriminatory conduct that it altered a term, condition, or privilege of the plaintiff’s employment. *Id.* at 981-82. The plaintiff reported four discrete incidents over a period of two years: first that a male coworker had grabbed her hair and pulled her; second, that he had brushed the back of his hand across her breast in a purported effort to wipe something off her shirt; third, that he had responded in an angry and physically threatening manner when she rebuffed his request they be “more than friends,” and finally, that he spread a rumor she had performed oral sex on him. *Id.* at 981.

In *Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858 (8th Cir. 2009), the court held that the plaintiff’s supervisor’s conduct of rubbing her shoulders or back during her training, calling her “baby doll” during a telephone conversation, accusing her of not wanting to be “one of my girls,” suggesting once that she should be in bed with him and a Mai Tai in Florida, and the insinuation that she could go farther in the company if she got along with him, taken together, were not severe or pervasive enough to constitute a hostile work environment. *Id.* at 862.

There was no hostile work environment where a female employee’s co-workers talked about sexual exploits outside the office while at work, described sexual fantasies about their co-

workers, and propositioned female employee for sex. *Powell v. Yellow Books USA, Inc.*, 445 F.3d 1074 (8th Cir. 2006).

There was no hostile work environment where a female employee failed to establish alleged harassment was based on sex or amounted to a change in the terms and conditions of employment. Plaintiff had alleged that her co-worker yelled at her about getting more boxes for his work area and used offensive language. The court noted that the record indicated that the offending co-worker visited plaintiff's work area for only a few minutes a day, did not physically threaten her, and providing boxes was employee's job. *Jones v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004).

There was no hostile environment sexual harassment of the plaintiff, a news reporter for a television station, where the plaintiff's supervisor "asked her out every day," "made comments to other employees outside of her presence that she was 'hot,'" made late-night telephone calls, and told her that he would destroy a negative performance evaluation if she "would have a drink with him." *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1025 (8th Cir. 2004). The court found that while these "comments and actions were inappropriate, immature, and unprofessional, they did not cross the high threshold required to support a claim of sexual harassment." *Id.* at 1027-28.

There was no hostile environment sexual harassment where the alleged actions "were boorish, chauvinistic, and decidedly immature," but were not sufficiently severe or pervasive. *Duncan v. General Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002). The manager's actions included propositions; directing the plaintiff to work on the manager's computer, which had a screen saver with a picture of a naked woman; having sexually suggestive objects in his office; posting a "recruitment" poster on a company bulletin board, which depicted plaintiff as the "president and CEO of the Man Hater's Club of America" and itemizing five membership criteria; and asking plaintiff "to type a draft of the beliefs of the 'He-Men Women Hater's Club,'" which had numerous sexually derogatory statements about women. *Id.* at 931-32. The dissenting opinion strongly took task with the majority, arguing that these sexual incidents were not isolated incidents, but represented "a string of degrading actions that Mr. Booth directed toward Ms. Duncan based on her sex." *Id.* at 937 (R.S. Arnold, J., dissenting).

Ninth Circuit: Hostile Environment Present

In *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991 (9th Cir. 2010), the court reversed the district court's grant of summary judgment for the employer, holding that the male plaintiff reasonably perceived the harassment as sufficiently severe and pervasive, and there were genuine issue of material fact as to whether the conduct was welcome, the objective severity and pervasiveness of the harassment, that the plaintiff's work was impaired by the harassment. *Id.* at 1000-01. The underlying facts included over six months of daily sexual comments, including that the female supervisor wrote to the plaintiff that she dreamed of him in a bath, that she gave good "body wash" and that she "wanted him sexually." She performed gestures simulating fellatio, and gave him a photograph of herself that emphasized her breasts in which it was not clear whether she was clothed. On one occasions she kissed him on the cheek. After she recruited coworkers to pressure the plaintiff, they mocked him by suggesting he was a

homosexual. These advances made him cry, both at the time and during his deposition, and he sought medical services to deal with the anxiety it caused him. Eventually his work deteriorated and he was fired. *Id.* at 1000.

There was hostile environment sexual harassment of the plaintiff, a female police officer, where the Deputy Chief of Police constantly harassed her and raped her on three occasions, the third time at her home, in front of her daughter. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1096 (9th Cir. 2002). Further, “pornographic magazines were displayed as part of a normal routine at the police stations, along with pornographic films;” the plaintiff “would be compared by the male officers to the pictures in the magazines or asked if she could perform the acts depicted in the films.” *Id.* Other officers and supervisors also retaliated against the plaintiff after she reported her complaints, by calling her “a fucking cunt or fucking bitch” and subjecting her “to sexual comments on an average of two out of three days.” *Id.* at 1096-97. On at least three occasions, the male officers refused to provide her with backup assistance in response to her emergency calls. *Id.* at 1097. Several other female co-workers testified as to the pervasive sexual harassment that they had suffered on the job. *Id.* at 1097 n.4. This decision also has an extensive discussion about evidentiary issues under Rule 412, Fed. R. Evid., relating to the plaintiff’s own sexual conduct. *Id.* at 1103-06.

There was hostile environment sexual harassment based on repeated sexual incidents by the supervisor against both plaintiffs. *Vandermeer v. Douglas County*, 15 F. Supp. 2d 970, 979 (D. Nev. 1998). These incidents occurred where the supervisor (1) “had a habit of periodically brushing up against their breasts with his arms, as well as occasionally touching their hips and buttocks;” (2) “expressed a desire to ‘consummate’ the building;” (3) “often complained about the state of his sex life, and expressed a desire to have an extramarital affair with another coworker;” (4) “behaved strangely on a business trip they took to Las Vegas, including: insisting that he have an adjoining room to the one plaintiffs were sharing, and showing up twice at the door to their room without being fully dressed; (5) “signed her birthday card with the inscription, ‘I hope you’re not too old for the stable;” (6) told plaintiff “that his son had gone to the doctor after performing oral sex on a stripper at a bachelor party;” and (7) “discussed with her and another female employee the existence of a new female contraceptive, which he likened to Saran Wrap, and then either asked the women to bring a roll of Saran Wrap to work or said that he would bring one himself.” *Id.* at 979-80.

Ninth Circuit: No Hostile Environment.

In *Dawson v. Entek Intern.*, --- F.3d ---, 2011 WL 61645 (9th Cir. 2011), the court upheld the district court’s grant of summary judgment for the employer, holding that there was no hostile work environment in a case where a male homosexual was subjected to a barrage of anti-gay comments because the plaintiff had not presented evidence that he failed to conform to a gender stereotype or exhibited feminine traits. *Id.* at *7. Coworkers had made repeated comments that the plaintiff was a “worthless queer,” that he liked to “suck dick” and “take it up the ass,” and referred to him as “Tinker Bell,” “a homo, a fag, and a queer” daily for over a week, and acted in a physically intimidating manner. Because based on his own testimony the plaintiff was not being verbally harassed for appearing non-masculine or otherwise not fitting the male stereotype, the court held that there were not sufficient facts to support a finding that a

reasonable trier of fact could conclude he experienced a hostile work environment based on his gender. *Id.*

Tenth Circuit: Hostile Environment Present.

In *Chapman v. Carmike Cinemas*, No 08-4043, 2009 WL 57504 (10th Cir. Jan. 12, 2009), the court found that a reasonable jury could find that a *prima facie* case of hostile work environment sexual harassment had been established where there was only one incident of harassment, but where it was particularly severe: a sexual assault, which led to a conviction and prison time on the part of the harasser. *Id.* at *4. It overturned the district court's grant of summary judgment for the employer. *Id.* at *5.

In *EEOC v. PVNF, LLC*, 487 F.3d 790 (10th Cir. 2007), on an appeal from an entry of judgment as a matter of law, the court held that evidence at trial could reasonably establish a sexually hostile work environment. The plaintiff's supervisor made numerous gender-based remarks both to the plaintiff and to other female employees. His remarks to other employees included that women should not seek promotions, that women "take too much time off of work for medical reasons. They belong at home barefoot and pregnant," and that women did not belong in the workplace because of their childcare issues. In a four-month period, he also subjected the plaintiff to similar sex-based remarks. He reprimanded her by saying, "I don't want a whole bunch of damn women working here. Men don't like to work with women. Men like to dicker with men" and, "women [bring] their emotional baggage and problems to the dealership." He told her that with regard to management, "[t]he difference between men and women is that the women have to take more of a bitch approach." He also commented to the plaintiff and two other women that "Mexican women's nipples turn black-brown after they had babies." Finally, when the plaintiff's husband came into the dealership to buy a car, Mr. Carter told him that he "was getting a good deal ... because he was sleeping with her." Other employees also subjected the plaintiff to arguably sex-based remarks, including calling her a "bitch" on several occasions (one of which was accompanied by the coworker throwing a plate against the wall).

Tenth Circuit: No Hostile Environment.

The district court noted the evidence of overtly racial or sexual conduct qualified as, at most, a few isolated incidents. Ms. Juarez alleged that the general harassment she experienced was both in retaliation for her sexual-harassment complaint against Dr. S, and based upon race and gender animus. But the district court concluded that "it is not reasonable to infer the sex- and race-related conduct of [Dr. S.] so poisoned Family Dental or its other employees toward Juarez that their conduct arose out of gender- or race-related hostility."

There was no hostile environment sexual harassment based upon numerous incidents where a grocery store supervisor anonymously sent flowers and messages to a female employee, where only a few incidents were expressly based on the plaintiff's gender, and there was no evidence that the supervisor treated women differently from men. *Riske v. King Soopers*, 366 F.3d 1085, 1091-03 (10th Cir. 2004). Thus, the Tenth Circuit reversed the jury verdict in favor of the plaintiff on her Title VII claim. At the same time, however, the Tenth Circuit held that

this conduct was sufficient to allow the plaintiff's state law "outrageous conduct" tort claim against the supervisor. *Id.* at 1088-1090.

Eleventh Circuit: Hostile Environment Present.

In *Bruno v. Monroe County*, No. 09-14687, 2010 WL 2428750 (11th Cir. June 16, 2010), the court affirmed the district court's denial of the defendant's motion for judgment as a matter of law with respect to the jury's finding that the plaintiff was subjected to a hostile work environment based on sexual harassment. *Id.* at *3. It found that a reasonable person could conclude that the plaintiff's supervisor's conduct – cycling through a series of sexually-themed stories virtually daily when he was alone with the plaintiff and making various sexual comments about her – was sufficiently severe or pervasive enough to constitute a hostile work environment based on sexual harassment. *Id.* at *2.

In *Beckford v. Department of Corrections*, 605 F.3d 951, 955-57 (11th Cir. 2010), female employees of a particular prison ward were harassed by the male inmates in ways that differed from the ways the inmates mistreated male employees. The inmates called them a variety of sexually-derogatory names, and "gunned" them (masturbated openly towards them) each time they entered the ward. Male employees resisted remedying the problem. One male employee told a female employee that he had not come to her aid when requested because she was "looking for it," and others encouraged the female employees to accept the gunning "as a compliment." Supervisors discouraged the female nursing staff from filing disciplinary reports, and stated that the inmates were "in their living room and they could do whatever they wanted." The court held that exhibitionist masturbation is sex-based and highly offensive conduct that led to a hostile work environment, for which Title VII required the Department to adopt reasonable remedial measures to protect its female employees.

In *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010), the court reversed the district court's grant of summary judgment for the employer, holding that a jury could reasonably find on the record that a meaningful portion of the allegedly offensive conduct in the office contributed to conditions that were humiliating and degrading to women because of their gender, and thus may have created a sexually hostile work environment. *Id.* at 811. In *Reeves*, the work environment was full of profanity, with coworkers using variations of "fuck" and "asshole" many times per day to voice their displeasure at various work-related events. This language, while vulgar, was not gender-specific. However, the plaintiff also identified a "substantial corpus" of gender-derogatory language, addressed specifically to females the men interacted with in the workplace. The men addressed individual women in the workplace as "bitch," "fucking bitch," "fucking whore," "crack whore," and "cunt." In addition, the male coworkers listened to a crude radio show each day that included discussions of women's anatomy, a "graphic discussion of how women's nipples harden in the cold," conversations about the size of women's breasts, and which advertised a "perverse" bikini contest. On one occasion, a male coworker displayed a graphic pornographic image on his computer screen. The coworkers also regularly sang songs about gender-derogatory topics, and commented on the buttocks of another female coworker in the plaintiff's presence. *Id.* at 804. Because a substantial portion of the vulgar workplace conduct could be reasonably read as "gender-specific, derogatory, and humiliating," the evidence was sufficient to support the inference that

the offensive conduct was based on the plaintiff's sex, even though the workplace was otherwise rife with indiscriminate vulgar conduct. *Id.* at 811.

Eleventh Circuit: No Hostile Environment.

In *Garriga v. Novo Nordisk Inc.*, No. 09-14232, 2010 WL 3037788 (11th Cir. Aug. 5, 2010), the court held that the plaintiff's former supervisor's boorish conduct was insufficient to establish objectively severe and pervasive harassment as required to establish a *prima facie* claim of hostile work environment. *Id.* at *2. This conduct included his putting his arm around the plaintiff in the parking lot of a restaurant during a two-day "ride-along" in which supervisor accompanied employee to her meetings, and "constant [ly]" leering at her breasts and backside that same day, as well as doing the same during a meeting a month later and another ride-along two months later. The harassment was alleged to have occurred on nine days over a period of five months. *Id.*

In *Murphy v. City of Aventura*, No. 09-13419, 2010 WL 2490932 (11th Cir. June 18, 2010), the court held that the district court correctly granted summary judgment in favor of the employer. The plaintiff's supervisor made nine offensive remarks, including stating that the plaintiff was a "dumb shit," a "stupid fuck," and a "dumb fuck," as well as use of terms like "slut," "whore," "bitch," and "hooker," and one remark about a young student's bust size. The supervisor also used vulgarities to criticize male employees. Although many of his profanities were "no doubt degrading and sex based," because there were only nine remarks over three years, the court held that they were neither severe nor pervasive. *Id.* at *3.

There was no hostile environment sexual harassment where female County Sheriff alleged 16 instances of harassment over a four year period. The Eleventh Circuit found that the harassment by a Major in the Sheriff's Department was too infrequent to rise to the level of a hostile work environment stating, "Of these instances, most involved 'offensive utterances.' Only three times did [harasser] touch her or attempt to touch her: when he tried to kiss her, when he lifted her over his head, and when he rubbed up against her and reached across her chest. And Plaintiff did not assert that she felt threatened by [harassers] conduct. In addition, much of [harasser's] conduct involved horseplay; and some was not sex-based. The court characterized defendant's behavior as "reprehensible" and "crass and juvenile" but found that its relative infrequency prevented liability from attaching under Title VII. *Mitchell v. Pope*, No. 05-14927, 2006 WL 1976011 (11th Cir. July 14, 2006).

VI. Existence of Employer Liability

In 1998, the Supreme Court significantly clarified and revised the framework for imposing employer liability (respondeat superior) in two sexual harassment cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The critical issue was under what circumstances the defendant employer can be held liable under Title VII for the discriminatory or harassing conduct of its agents or supervisors. The Supreme Court turned to the Restatement (Second) of Agency, § 219(2)(d), which provides for liability under certain circumstances:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

Ellerth, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY, § 219(2)).³ It is the second element, aided in the agency relationship, that governs most employment cases, since it is unlikely that the employee will erroneously believe that the harasser or discriminating person was her supervisor. *Id.* at 759.

The “apparent authority” component applies when the alleged harasser is not the titular supervisor of the plaintiff, but has supervisory authority nonetheless. *See, e.g., Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998) (“We have consistently distinguished employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers.”). As the Seventh Circuit concluded, “it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim’s employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.” *Id.* at 1034. In contrast, the Eleventh Circuit abandoned the distinction between supervisor and non-supervisors, holding that “If an employee takes a tangible employment action against the plaintiff, the employer will be held liable under Title VII for that action (if the action otherwise violates the statute), regardless of whether the employee taking the action is labeled the plaintiff’s ‘supervisor.’” *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1247 n.29 (11th Cir. 1998). For that reason, “a Title VII plaintiff, therefore, may establish her entire case simply by showing that she was sexually harassed by a fellow employee, and that the harasser took a tangible employment action against her.” *Id.* at 1247.

Where there is a “tangible employment action [which] constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,” *Ellerth*, 524 U.S. at 761, then the employer is strictly liable for the conduct of its supervisor or agent. *Id.* at 763; *accord Faragher*, 524 U.S. at 790 (discussing “this apparently unanimous rule”). The rationale for applying strict liability is that only a supervisor or agent of the employer could cause a tangible employment action, through “an official act of the enterprise.” *Ellerth*, 524 U.S. at 762. Under agency law, the challenged actions were aided by the agency relationship; such “requirements will always be met when a supervisor takes a tangible employment action against a subordinate.” *Id.* at 762-63.

However, when there is no such tangible employment action (*i.e.*, the employee is still employed with no adverse change in her status), then the Supreme Court turned to principles of vicarious liability to determine whether the employer should be held liable. The Court was

³ Some courts have short-cited this case as “*Ellerth*” (the plaintiff-respondent) and others as “*Burlington*” (the defendant-petitioner).

reluctant to impose “automatic liability” for all occurrences of harassment which did not lead to a tangible employment action, given Title VII’s statutory goals of “promot[ing] conciliation rather than litigation” and “encouraging employees to report harassing conduct before it becomes severe or pervasive.” *Id.* at 764. Therefore, the Court held that the “employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Id.* at 765. Unlike the strict liability when a tangible employment action has occurred, the employer can raise an affirmative defense to vicarious liability:

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id.; accord *Faragher*, 524 U.S. at 807 (citing *Ellerth*). The first element can be satisfied by showing that the employer had an effective or reasonable mechanism for deterring and remedying workplace discrimination and harassment; the second element can be satisfied by showing that the plaintiff did not proceed with or exhaust the internal processes before proceeding to litigation. It is probable that the determination of (1) whether the employer’s anti-discrimination and anti-harassment policies were “reasonable” and (2) whether the plaintiff was “unreasonable” in failing to invoke these policies will require considerable judicial analysis of the underlying facts. In some cases, it will be obvious that the affirmative defense will fail, *e.g.*, as in *Faragher* itself, where the employer had “entirely failed to disseminate its policy against sexual harassment among the beach employees” and this “policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints.” *Faragher*, 524 U.S. at 808 (“we hold as a matter of law that the [defendant] could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct”).

A key issue regarding the second prong of the affirmative defense, *i.e.* whether the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, is whether plaintiff’s delay in reporting the harassing conduct was reasonable. If the court finds that the plaintiff had unreasonably delayed in reporting the conduct, the employer will be able to satisfy the second prong. See *Crawford v. BNSF Railway Co.*, No. 11-1953, 2012 WL 75256, at *5 (8th Cir. Jan. 11, 2012) (holding that a generalized fear of retaliation did not make it reasonable for harassment victims to wait eight months to invoke complaint procedure); *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009) (affirming summary judgment for the employer and holding that absent credible threat of retaliation, no reasonable jury could find the plaintiff reasonably waited five or six months before reporting what she believed was sexual harassment); *Adams v. O’Reilly Automotive, Inc.*, 538 F.3d 926 (8th Cir. 2008) (delay of two and a half years caused by plaintiff’s search for a corroborating witness was unreasonable, particularly when company responded within two days of receiving the complaint. *Faragher* and *Ellerth* do not require the employee in question to investigate the situation and find witnesses, but simply to report the harassment); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1306-07 (11th Cir. 2007) (three months and two weeks

held to be an unreasonable delay); *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir.2001) (finding seven-month delay unreasonable).

However, some courts have recognized that the plaintiff need not report harassing when they are first made, but that it could be reasonable to wait until they intensify. See *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (“Watts alleges that her supervisor’s harassment intensified in the spring of 1994. A jury could find that waiting until July of that same year before complaining is not unreasonable.”); *Corcoran v. Shoney’s Colonial, Inc.*, 24 F. Supp. 2d 601, 607-08 (W.D. Va. 1998) (plaintiff did not complain at time of the first remark, and waited seven months, during which the harassment escalated, before complaining); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 885 (N.D. Ind. 1998) (“the Court cannot say as a matter of law that a sexual assault victim who waits three months to report the incident, under these circumstances, unreasonably failed to take advantage of the University’s anti-harassment procedures.”). The burden of proof is on the defendant to show that “a reasonable person in [plaintiff’s] position would have come forward early enough to prevent [her supervisor’s] harassment from becoming ‘severe or pervasive.’” *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

A second key issue is whether plaintiff’s fear of reprisal for complaining about harassment would excuse delays in reporting, or not reporting at all. If the fear of retaliation is genuine and reasonable, that may in some cases make it reasonable for a plaintiff to delay in reporting. See *Adams*, 538 F.3d at 932-33 (although holding that in that case the plaintiff’s delay was unreasonable, noting that in unusual circumstances such as “genuine [and] reasonable ... fear of retaliation” a delay in complaining may be reasonable; see also *Roebuck v. Washington*, 408 F.3d 790, 795 (D.C. Cir. 2005) (“fear and uncertainty” about the scope of the employer’s policy may in certain circumstances make an employee’s delay reasonable). *Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (plaintiff “presented abundant evidence that to lodge such a complaint against a fellow officer was effectively forbidden by the code of silence”) and *Booker*, 17 F. Supp. 2d at 747-48 (evidence showed an “atmosphere” where employees feared “retaliation” and “retribution” for complaining; hence it was reasonable for plaintiff not to report the harassment). As the Fifth Circuit remarked, a plaintiff may be faced with “an unfortunate dilemma: report the harassment and lose her career, or endure the harassment and lose her dignity.” *Sharp*, 164 F.3d at 931. However, courts rarely find a plaintiff’s fear of reprisal to be reasonable. See, e.g., *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272, 1290-91 (11th Cir.2003) (absent credible threat of retaliation, subjective fear of reprisal not an excuse for failure to report); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (rejecting as “speculative” and “generalized” the employee’s fear of retaliation based upon alleged friendship between president of corporation and alleged harasser).

Related to this issue is the employer’s designation of the appropriate person(s) with whom complaints can be raised. District courts have held that where the employer had designated only one person “as the individual to receive and investigate complaints” yet it was that very individual who had allegedly harassed the plaintiff, then it was a question of fact, inappropriate for summary judgment resolution, as to whether defendant had “exercised reasonable care” in implementing its anti-harassment policy. *Ponticelli v. Zurich Am. Ins. Group*, 16 F. Supp. 2d 414, 431 (S.D.N.Y.1998); see also *Brandrup v. Starkey*, 30 F. Supp. 2d

1279, 1289 (D.Or. 1998) (“Instructing an employee to voice complaints directly to the supervisor that is allegedly responsible for the harassing behavior would not be a reasonable response to an employee’s concerns and would contravene the spirit, if not the terms of [defendant’s] own sexual harassment policy.”). It can also be acceptable for the employee to pursue grievance channels other than those set forth by the employer, such as filing a union grievance. *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (“Taking advantage of the union grievance procedure falls within this language [*Ellerth*] because both the employer and union procedures are corrective mechanisms designed to avoid harm.”). Courts take the words of a company’s sexual harassment policy seriously. In *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341 (6th Cir. 2005), the court rejected the employer’s argument that, as a matter of law, supervisors who “were not high enough in the company hierarchy and had no authority to control [the harasser]” had no duty to convey their knowledge of harassment to higher management. *Id.* at 350. The court observed that “[t]his argument might have merit but for the fact that UPS itself has, through its sexual harassment policy, placed a duty on *all* supervisors and managers to ‘report [] incidents of sexual harassment to the appropriate management people.’” *Id.* (emphasis original).

A third key issue is whether the existence of an anti-harassment policy, including written procedures for processing complaints, is sufficient to satisfy the first prong of the affirmative defense, *i.e.*, the employer’s duty of reasonable care. The Supreme Court recognized that: “While proof that an employer had promulgated an anti-harassment 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.” *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807 (citing *Ellerth*); *see also Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 491 (S.D.N.Y. 1998) (“the employer’s promulgation of ‘an antiharassment policy with complaint procedure’ is an important, if not dispositive, consideration”); *Landrau-Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185, 192 (D. Puerto Rico 1998) (“The Supreme Court in *Faragher* implied that issuance of an explicit antiharassment policy with a complaint procedure would satisfy the first prong In fact, the Court specified that such a policy is not necessary as a matter of law and that even a less obvious policy may sometimes suffice.”).

However, a company-mandated sexual harassment policy may indicate that a company took reasonable care to prevent harassing behavior only if it is “both reasonably designed and reasonably effectual.” *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999). A policy that is “defective or dysfunctional” will not support the employer’s contention that it exercised reasonable care. *Id.* Moreover, courts have held that even anti-harassment policies that contain complaint procedures are do not constitute reasonable care on the part of the employer, where the policies do not specify complaint procedures that encouraged employees to make complaints. *See, e.g., Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1998) (holding that merely adopting and distributing a sexual harassment policy is insufficient if the policy is deficient by not specifying a realistic complaint procedure and not indicating the responsibilities of a supervisor who learned of harassment through informal means). Merely having a policy alone, without any further reasonable steps to implement the policy, is legally insufficient to satisfy the employer’s duty of reasonable care. *See, e.g., Hollis*, 28 F. Supp. 2d 812, 823 (W.D.N.Y. 1998) (“the policy does not contain any procedures for reporting or investigating complaints of sexual harassment”); *Lancaster v. Sheffler Enterp.*, 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998)

(“McDonald’s had a sexual harassment policy, but there appears to be no evidence of the employer exercising reasonable care to prevent sexual harassment. Simply forcing all new employees to sign a policy does not constitute ‘reasonable care.’ The employer must take reasonable steps in preventing, correcting and enforcing the policy. Reasonableness requires more than issuing a policy.”) (internal citations to *Ellerth* omitted).

A. When is a Supervisor not a Supervisor?

An employer is vicariously liable under Title VII for harassing conduct taken by its supervisor(s) that leads to a tangible employment action against the employee. *Ellerth*, 524 U.S. at 760-62. As the Court recognized:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. . . . Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

Id. at 761-62; *accord Faragher*, 524 U.S. at 803 (“an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor.”). Therefore, the Supreme Court held that vicarious liability attaches to harassing actions taken by supervisors:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

Ellerth, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807 (quoting *Ellerth*). Thus, a threshold issue in determining the scope of the employer’s liability is whether the alleged harasser was the plaintiff’s supervisor, which requires a fact-specific analysis into the alleged harasser’s authority over the plaintiff.

The Supreme Court has not adopted an express definition of who is a supervisor, although the *Faragher* Court did allude to several criteria. *See Faragher*, 524 U.S. at 803 (noting that a supervisor has the power “to hire and fire, and to set work schedules and pay rates”) (quoting S. Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)).

The EEOC, in response to *Ellerth* and *Faragher*, issued an Enforcement Guidance, “Vicarious Liability for Unlawful Harassment by Supervisors” (June 18, 1999) (reprinted in FEP

Manual, at 405:7651-7672 and online at <<http://www.eeoc.gov/policy/docs/harassment.html>>). The EEOC applied agency principles to conclude that:

- An individual qualifies as an employee's "supervisor" if:
- a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
 - b. the individual has authority to direct the employee's daily work activities.

Id. at 405:7654. The EEOC also recognized that even harassment by those who were outside the victim's supervisory chain of command could result in vicarious liability to the employer:

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power. The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

Id. at 405:7655.

The lower courts have looked to the supervisor's authority over the terms and conditions of the plaintiff's employment. The Seventh Circuit's framework has been adopted by several district courts. *See Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1033-34 (7th Cir. 1998). In *Parkins*, a Title VII sexual harassment and retaliation case, the Seventh Circuit commenced its analysis by noting that "Title VII provides no definition of the term 'supervisor.'" *Id.* at 1033. The court turned to "the common law of agency and the purposes of Title VII." *Id.* Under *Faragher*, "because liability is predicated on misuse of supervisory authority, the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor." *Id.* Thus, a distinction has to be made: "We have consistently distinguished employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory powers." *Id.* In other words, "low-level supervisors . . . are equivalent to co-employees for purposes of Title VII." *Id.* The court concluded that:

Hence, it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.

Id. at 1034. The Seventh Circuit found that Ms. Parkins' alleged harassers were not supervisors, since both "were laborers who were required to account for their time on a time card, were paid an hourly wage, and received overtime pay. Neither ever substituted for a superintendent." Although the two occasionally served as foremen, "any authority they had over Parkins was tenuous at best" because "she worked with approximately ten foremen at various sites." *Id.* Therefore, the Seventh Circuit concluded that since "there is no evidence that either [harasser] enjoyed more than minimal authority, and exercised almost no control over truck drivers, they clearly were not supervisors with immediate or successively higher authority." *Id.* at 1035.

The Second Circuit has expressly rejected the Seventh Circuit's *Parkins* decision, on the grounds that its approach conflicted with *Ellerth* and *Faragher*:

Ellerth and *Faragher* hold that an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims. The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates. We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test.

Mack v. Otis Elevator Co., 326 F.3d 116, 127 (2d Cir. 2003). The Second Circuit noted that its position was consistent with the aforementioned EEOC's enforcement guidelines. *Id.*; *see also* T. Loomis, *Who's the Boss?*, N.Y. L.J., May 22, 2003.

The Fourth Circuit, in a Title VII sexual harassment case brought by a police officer, looked at the employee's response to the alleged harassment as a reliable indicator of the relationship between the victim and her harasser. *Mikels v. City of Durham*, 183 F.3d 323 (4th Cir. 1999). The Fourth Circuit expanded upon the aforementioned language from *Faragher* regarding the employee's reaction to the harasser:

The determinant is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not. . . . The most powerful indicator of such a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority, though not exercised in the particular situation, to take tangible employment actions against the victim . . .

Id. (internal citation and quotation from *Faragher* omitted). For that reason, “where the level of authority had by a harasser over a victim — hence her special vulnerability to his harassment — is ambiguous, the tip-off may well be in her response to it.” *Id.* at 334. More colloquially, “Does she feel free to ‘walk away and tell the offender where to go,’ or does she suffer the insufferable longer than she otherwise might?” *Id.* The Fourth Circuit found that the alleged harasser had “at best minimal” authority over the plaintiff which power “at most would involve the occasional authority to direct her operational conduct while on duty.” *Id.* Furthermore, the plaintiff’s own conduct in response to the harassment was telling: she “rebuffed him in an obscenity and profanity-laced outburst, rejected his immediately proffered apology, and the next day filed a formal grievance against him.” *Id.* Her behavior was not congruent with what one might expect in response to harassment by a supervisor. Thus, the Fourth Circuit affirmed the grant of summary judgment for the defendant employer.

In *Whitten v. Fred’s*, 601 F.3d 231 (4th Cir. 2010), the Fourth Circuit relied on *Miken*. It first noted that “The existence of authority to take tangible employment action would establish that Green was Whitten’s supervisor, but the absence of that authority does not establish that Green was merely her coworker.” *Id.* at 245. The court therefore looked at “other features of the employment relations” to make its determination. *Id.* It noted that Green’s title (store manager) strongly suggested he had significant authority over Whitten, an assistant store manager; Green was usually the highest-ranking employee in the store, and was the highest ranking employee there the days that Whitten worked; Green directed Whitten’s activities, controlled her schedule, and possessed and exercised the authority to discipline Whitten. In addition, both Green and Whitten believed he was her supervisor. Based on these facts, the court concluded Green was Whitten’s supervisor. *Id.* at 246.

The Eighth Circuit has also adopted the standard set forth in *Mikels*, expressly rejecting the standard set forth in *Mack*. See *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004) (adopting the *Mikels* standard); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (following *Joens* in adopting *Mikels*. Although the alleged harasser had the authority as team leader to assign employees to particular tasks, he could not reassign them to significantly different duties; although he signed at least three of the plaintiff’s performance evaluations he did not himself have the authority to take tangible employment actions against the plaintiff (hiring, firing, promoting, or disciplining). Accordingly, the court concluded that the evidence did not support the district court’s finding that the alleged harasser was in fact the plaintiff’s supervisor.)

In the context of a case applying an Oregon anti-discrimination statute, the Ninth Circuit recently discussed the principles it follows in identifying a supervisor. See *Dawson v. Entek Int’l*, 630 F.3d 928 (9th Cir. 2011). The Court noted that the Ninth Circuit “distinguishes between a situation in which a harasser supervises the plaintiff, where vicarious liability is available, versus a situation in which a harasser is a supervisor and yet does not supervise the plaintiff.” *Id.* at 940. The determining factor is whether, as a matter of reality (not title), the supervisor “has the authority to demand obedience from an employee” (quoting *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004)). In *Dawson*, the Court reversed a grant of summary judgment to the employer, holding that a reasonable fact-finder could conclude

that a colleague who trained the plaintiff was his supervisor “even if the company did not define his role that way.” *Dawson*, 630 F.3d at 940.

B. Employer Liability for Co-Worker and Customer Harassment

Ellerth and *Faragher* concerned harassment of employees by their supervisors. The lower federal courts have also found, in some circumstances, that harassment by co-workers and third parties in the workplace (clients or customers), can also result in employer liability.

For example, the Ninth Circuit found that there was hostile work environment sexual harassment of the plaintiff, a female prison guard, where prison officials were aware of and failed to correct a hostile work environment created by male prisoner’s harassment of female guards. *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). Plaintiff was regularly subjected to male prisoner’s use of obscenities, their masturbation in front of her and another female prison guard, and on one occasion plaintiff was subjected to a male prison guard ejaculating into a meal tray she was clearing. Despite her repeated complaints, prison officials failed to take any action to prevent or correct the behavior stating, “its only sex.” Instead, officials retaliated against her by referring her to a psychologist, and threatening her job, and eventually terminating her after alleging that she made false claims against co-workers. The Ninth Circuit held that employers are liable for harassing conduct by non-employees where “the employer either ratifies or acquiesces by not taking immediate and/or corrective action.” *Id.* at 538.

Many other courts have held similarly. See *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009) (holding that a plaintiff may prevail by showing that the employer did not provide a “reasonable avenue of complaint” or that the employer knew or should have known about the harassment but failed to take “appropriate remedial action”); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003) (“An employer may be found liable for the harassing conduct of its customers if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or should have known.”); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (*per curiam*) (“When an employee’s ability to perform his or her job is compromised by discriminatory acts including sexual harassment and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate.”); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998) (“other circuits, interpreting Title VII, have said that employers can be liable for a customer’s unwanted sexual advances, if the employer ratifies or acquiesces in the customer’s demands”); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir. 1998) (“We agree with our sister circuits that an employer may be found liable for the harassing conduct of its customers.”); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997) (“In light of these allegations, a fact finder could characterize Focus Homes’ response as implicitly or even explicitly requiring the appellants to endure repeated sexual assaults [by patients] as an essential part of their job.”); *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1077-84 (3d Cir.

1996) (regular and pervasive racial harassment by co-workers and supervisors established hostile environment claim); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755-56 (3d Cir. 1995) (same).

The following federal appellate decisions are representative of those involving co-worker or customer harassment. See *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir. 2006) (An employer is liable for a coworker's sexual harassment only if it knew or should have known of the harassment and failed to take effective remedial action); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002) (same).

In *EEOC v. Prospect Airport Servs. Inc.*, 621 F.3d 991 (9th Cir. 2010), the court held that the employer failed to establish the *Faragher/Ellerth* defense and the jury could reasonably find that Prospect knew about the harassment and its response was inadequate. The employee complained to his immediate supervisor, who failed to tell the harasser to stop; he complained repeatedly to others in management, and, while one told the harasser to stop, management did nothing when the harasser did not stop even though management knew she did not stop. *Id.* at 1001.

In *Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999), the D.C. Circuit held that “[a]n employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action.” *Id.* at 660. The Court held that the employer was not liable for the harassment of the plaintiff by a co-worker that took place before she complained to the employer, since the employer had in place a policy against harassment that it had made known and had established an effective complaint procedure. The Court, however, did hold that the employer could be liable under the negligence standards for the co-worker’s subsequent harassing conduct because it failed to take suitable action against a “repeat offender.”

In *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2d Cir. 2001), the Second Circuit held that where the plaintiff, a female flight attendant, was raped by a male co-worker [Young] during a layover in Rome, she could bring a Title VII sexually hostile work environment claim against her employer. Although the rape did not occur in a traditional workplace environment, the court recognized that because the plaintiff had to stay in a hotel room paid by the airline, along with other flight attendants, it was de facto part of the workplace. *Id.* at 135. Here, Delta “had notice of Young’s proclivity to rape co-workers,” so it did “not escape responsibility to warn or protect likely future victims.” *Id.* at 136. Indeed, “not only did Delta do nothing about it, but a Delta supervisor took affirmative steps to prevent the filing of a formal complaint that might have resulted in protective steps and even to prevent a prior victim from informally spreading cautionary words among the flight attendants about Young.” *Id.* Thus, the Second Circuit reversed the district court’s grant of summary judgment on the hostile work environment claim.

More recently, the Second Circuit held that an employer can be liable for sexual harassment when it fails to take appropriate remedial action after receiving a “nonspecific” complaint of co-worker harassment. See *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009). In *Duch*, the plaintiff did not specifically complain of sexual harassment by a co-worker but the supervisor knew that the plaintiff had requested a change of schedule to avoid working alone with the co-worker, who (the supervisor knew) had engaged in sex-related misconduct in the past

and the plaintiff became emotional when the supervisor asked her about the reason for the schedule request. *Id.* at 765. The Court reversed a grant of summary judgment on the issue of employer liability, holding that “when an employee’s complaint raises the specter of sexual harassment, a supervisor’s purposeful ignorance of the nature of the problems . . . will not shield an employer from liability under Title VII.” *Id.* at 766.

In *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003), the Fourth Circuit held that an employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it. *Id.* at 333-34. It further stated that “[a]n employer cannot avoid Title VII liability of coworker harassment by adopting a “see no evil, hear no evil” strategy. Knowledge of harassment can be imputed to an employer if a reasonable person, intent on complying with Title VII, would have known about the harassment.” *Id.* at 334 (internal quotations excluded).

In *Cherry v. Shaw Coastal, Inc.*, No. 11-30403, 2012 WL 147867 (5th Cir. Jan. 19, 2012), the Fifth Circuit, an employer can avoid liability for co-worker harassment “if it takes remedial action calculated to end co-worker harassment as soon as it knows or should know of the harassment.” *Id.* at *5. In *Cherry*, the plaintiff and his first-level supervisor made ten complaints about sexual harassment in a two-month timeframe to the plaintiff’s third-level supervisor and despite a company policy requiring the third-level supervisor to report the complaint to Human Resources, the supervisor did not do so. *Id.* Rather, the supervisor intimated to the plaintiff that the harasser was just “horsing around.” *Id.* When the company did initiate an investigation, the company found “insufficient evidence” of harassment despite documents, text messages, and eyewitness testimony supporting plaintiff’s allegations. *Id.* Reversing the district court’s entry of judgment as a matter of law, the Fifth Circuit held that the employer had failed to take prompt remedial action to address the harassment and could not escape liability for the harassment. *Id.* (Interestingly, although the harasser was plaintiff’s second-level supervisor, the Court for no apparent reason applied the law of co-worker harassment in its analysis, rather than the more plaintiff-friendly *Faragher / Ellerth* framework.)

In *Sutherland v. Wal-Mart Stores, Inc.*, 632 F.3d 990 (7th Cir. 2011), the court affirmed a grant of summary judgment for the employer. The court rejected the plaintiff’s argument that the company should have been aware that the co-worker harasser was dangerous because of a prior complaint of harassment at least two years earlier. *Id.* at 994. The court relied on the fact that the prior complaint involved an allegation of “leering” and inappropriate gift giving – conduct that did not rise to the level of actionable harassment – whereas the harasser had assaulted the current plaintiff. *Id.* Additionally, the court held that the company’s reprimand of the harasser, adjustment of the harasser’s schedule to keep him away from the plaintiff, and physical separation of their work duties were “reasonably likely to end” the harassment. *Id.* at 995.

In *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001), the Seventh Circuit reversed the grant of summary judgment to the employer on her Title VII hostile work environment claim. The plaintiff, a school custodian, alleged numerous incidents of disparate treatment in which she and other female custodians were forced to do tasks that male custodians were not required to do, and that the male custodians made derogatory remarks in the presence of their supervisors, including that women “were not qualified to do their job because they were

women and that they should not be paid as much as men,” and that the plaintiff was “nothing more than a fat-ass bitch.” *Id.* at 685-88. The Seventh Circuit recognized that while “none of these incidents were particularly severe, they are sufficiently pervasive, and they seem to have unreasonably interfered with her ability to do her job.” *Id.* at 694. Critically, the defendant failed to deny or explain “plaintiff’s most damaging allegation: that the male custodians were told not to help the female custodians.” *Id.* at 696. The Seventh Circuit concluded that the school district was liable for co-worker harassment and supervisor harassment because after the plaintiff reported her complaints, the employer “did nothing — no internal investigation was pursued and no remedial action was taken.” *Id.* at 699, 700.

EEOC v. Indiana Bell Tel. Co., 256 F.3d 516 (7th Cir. 2001) (*en banc*). The EEOC brought Title VII sexual harassment claims on behalf of numerous women who had been harassed by a single co-worker (Amos) over a nearly twenty-year period. His harassment included “telling female co-workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks (some times with his hands, sometimes with his erect penis), and allowing him to be seen masturbating at his desk.” *Id.* at 519. Despite repeated complaints, the employer took essentially no action to discipline the harasser; the one time that his termination was recommended, it was not implemented because the company failed to act within 30 days of the recommendation, as required by the Collective Bargaining Agreement (“CBA”). *Id.* at 520. Not until another “public masturbation incident” was Amos finally terminated. *Id.* The Seventh Circuit concluded that “‘do nothing’ was the employer’s only strategy,” particularly where the employer knew about Amos’ conduct and his unwillingness to change for over a decade. *Id.* at 525.

The *en banc* Seventh Circuit rejected the employer’s attempt to claim that the CBA precluded it from taking disciplinary actions against Amos, where the employer speculated that Amos would request arbitration, and the arbitrator might find that Amos was not discharged for cause and would have to be reinstated. The Seventh Circuit tartly noted that employers cannot use a CBA to “avoid duties under federal law.” *Id.* Even if an arbitrator were to order reinstatement, the employer could place the harasser in an office by himself, isolated from female co-workers, and given make-work tasks. *Id.* at 524. More generally, the employer could challenge any such order by the arbitrator, since “no award that required an employer to tolerate an ongoing violation of this statute could be enforced.” *Id.* Under Supreme Court precedent, “an award that requires conduct ‘contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law’ must be set aside.” *Id.* (quoting *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000)).

In *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410 (8th Cir. 2010), the Eighth Circuit held that an employer can be held liable for sexual harassment by coworkers where the employer knew or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action. *Id.* at 419. In *Alvarez*, the Court affirmed summary judgment on the plaintiff’s claim of sexual harassment against a co-worker where the employer responded to her complaint, investigated the matter, suspended both the co-worker (and the plaintiff for engaging in inappropriate conduct), and transferred the co-worker to another department, thus ending his harassment of the plaintiff. *Id.* at 420-21. The Court also affirmed summary judgment on the plaintiff’s claim for sexual harassment by other co-workers following

the transfer of the first co-worker since the plaintiff did not report this subsequent harassment to the employer. *Id.* at 421. The Court rejected the plaintiff's claim that her fear of retaliation based on the company's response to her first complaint justified her failure to report the subsequent retaliation, thus giving the employer constructive knowledge of the harassment. *Id.* at 421-22. The Court held that this scenario did not represent a "truly credible threat of retaliation," which is necessary to justify a failure to report. *Id.* at 422.

C. When Constructive Discharge is a Tangible Employment Action

A key issue arising under the *Ellerth/Faragher* affirmative defense is whether a constructive discharge constitutes a "tangible employment action" (or "tangible adverse employment action") that would preclude the availability of this defense to the defendant employer. Through early 2004, the lower federal courts were badly split on this issue, with the view adopted by the majority of the courts being that a constructive discharge falls within the scope of tangible employment actions under *Ellerth* and *Faragher*. In such circumstances, the *Ellerth/Faragher* affirmative defense is not available when the employee suffered from an adverse employment action. The *Ellerth* Court stated that:

No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action *such as discharge, demotion, or undesirable reassignment.*

Ellerth, 524 U.S. at 765 (emphasis added); *accord Faragher*, 524 U.S. at 808 (citing *Ellerth*). The key operative phrase is "such as" which probably should be read as descriptive or illustrative and not read as prescriptive or mandatory.

The Supreme Court entered this controversy, and held that a constructive discharge arising from a harassment case would only be a tangible employment action if it was precipitated or accompanied by an "official act" of the employer. In other words, racist and sexist remarks or sexual contact alone would not suffice to foreclose the affirmative defense; the employee must show some "official act" that caused the constructive discharge. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). There must be some "employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Id.* at 2347. The Supreme Court rejected the Third Circuit's approach, under which "the affirmative defense would be eliminated in all hostile-environment constructive discharge cases, but retained the defense, as *Ellerth* and *Faragher* require, in 'ordinary' hostile work environment cases, *i.e.*, cases involving no tangible employment action." *Id.* at 2355.

Therefore, unless a harassment plaintiff who alleges a constructive discharge arising from the harassment can prove that some "official act" was connected with the constructive discharge, the defendant will be able to assert the *Faragher/Ellerth* affirmative defense. *Suders*, 542 U.S. at 148-49; *see generally* L. Banks & D. Katz, "Constructive Discharge," NAT'L L.J., Aug. 2, 2004, at S9, S11; M. Coyle, "More Suits Seen After Ruling on Sex Harassment," NAT'L L.J., June 21,

2004, at 1, 18. The High Court cited to cases as examples of what did and did not qualified as an official act. In *Reed v. MBNA Marketing Syst., Inc.*, 333 F.3d 27 (1st Cir. 2003), the plaintiff claimed that she was constructively discharged based on an repeated sexual comments and a sexual assault. The High Court pointed out that these acts were unofficial and that they involved no direct exercise of company authority. In contrast, in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), the supervisor reassigned the plaintiff to a much worse position and told her that it was in her interest to resign in order to avoid the assignment. The High Court explained the supervisor engaged in an official action in transferring the plaintiff, making the transfer and official act.

A complicating factor is that constructive discharge can occur as a result of harassment by supervisors, co-workers, or both. Only if the plaintiff alleges a constructive discharge resulting from harassment by her supervisor(s) should the court determine whether this constitutes a tangible employment action to allow the employee to avoid the vicarious defense to employer liability. Otherwise, if the plaintiff alleges constructive discharge solely as a result of harassment by co-workers (or customers), then the traditional negligence standard for employer liability applies.

D. How Federal Courts Have Applied the Affirmative Defense

The lower courts have had to determine whether the defendant employer can invoke the affirmative defense when there has been no tangible employment action. The following are a sampling of cases from the Courts of Appeals.

1. Defendant Satisfied the Affirmative Defense

In *Helm v. State of Kansas*, 656 F.3d 1277 (10th Cir. 2011), the Tenth Circuit Court of Appeals affirmed a grant of summary judgment to the State on a claim of sexual harassment against a judge. The Court held that an employer can meet the defense by showing, as part of the first element, that it exercised reasonable care to prevent and correct sexual harassment. As part of the “prevention” prong of the first element, the Court concluded that the fact that the State did not train managers on its sexual harassment policy and that there was evidence that “numerous employees” were “completely unaware of the policy” (including plaintiff) did not defeat the defense. *Id.* at 1288. On the correction prong, the Court held that the plaintiff did not sufficiently put the State on notice of sexual harassment (thus triggering the duty of corrective action) by alluding only to “inappropriate” conduct by the judge. *Id.* at 1290. When the plaintiff did make a full complaint, the State immediately began an investigation “that resulted in disciplinary proceedings” against the judge. *Id.* at 1291. The State also satisfied its obligation of showing that the plaintiff unreasonably failed to take advantage of the sexual harassment procedures by failing to report the judge’s sexual harassment for “several years.” *Id.* at 1291-92.

In *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009), the Court held that the plaintiff unreasonably failed to use employer’s complaint procedure to report harassment and that the alleged fear of retaliation did not excuse employee’s delay before reporting harassment. The Court held that a reasonable employee in the plaintiff’s position would have come forward to her supervisors about the harassment instead of posting the employer’s sexual harassment policy on

her office door and only telling a fellow coworker that she was being sexually harassed. Since the plaintiff posted the sexual harassment policy on her door, the court reasoned that she knew about the employer's complaint procedure and should have followed it when confronted with sexual harassment. The Court also disregarded the plaintiff's assertions that she reasonably feared retaliation if she reported the harasser, which prevented her from reporting the harassment through the official complaint procedure. Although the harasser threatened the plaintiff that "no one would believe" her and that she would be viewed as "the problem," the Court explained that since the harasser was not her supervisor and did not have authority to evaluate her performance or to take any action against her, she did not have a reasonable fear of retaliation. *Id.* at 131.

Fontanez v. Jansen Ortho LLC, 447 F. 3d 50 (1st Cir. 2006): A male packing manager alleged that his supervisor, used vulgar language in front of him, told him that he was looking for someone to engage in homosexual relations with him, and routinely touched his own buttocks and the front of his pants in front of plaintiff. The company had well-established complaint procedures and an anti-discrimination policy that was aware of and had utilized on one occasion. The court found that the supervisor's actions did not rise to the level of a hostile work environment, and that the employee failed to take advantage of those procedures during the years of alleged harassment. *Id.* at 57.

Finnerty v. William H. Sadler, Inc., No. 04-449, 2006 WL 910339 (2d Cir. 2006): The court affirmed the district court's grant of summary judgment for the defendant. The defendant was able to establish the affirmative defense even though the plaintiff did report the sexual harassment, because the plaintiff waited three years before reporting it. The plaintiff's three-year delay was unreasonable as a matter of law. *Id.* at *4. The plaintiff had argued that she delayed because she feared that her complaint would not be confidential and she feared reprisal from the harasser. The court stated that it has never required a company to maintain a policy that guarantees confidentiality, and that in fact it would be nearly impossible to keep a complaint confidential and also conduct an investigation. *Id.* at *4. The plaintiff's alleged fear of reprisal from the harasser did not justify her delay in reporting his behavior, because (1) for such reluctance to preclude the affirmative defense, it must be based on fear of what the *employer* might do, not what the harasser might do; and (2) a plaintiff must produce evidence that his or her fear is credible – such as "proof that the employer has ignored or resisted similar complaints or taken adverse actions against employees in response to such complaints" – and the plaintiff had failed to offer such evidence.

Arnold v. Tuskegee University, No. 0611156, 2006 WL 3724152 (11th Cir. Dec. 19, 2006). In *Arnold*, the Eleventh Circuit focused on time lapse between the harassment and the plaintiff's report and found a female employee had failed to use reasonable care to avoid harm where she was allegedly coerced into sexual relationship with male supervisor where she did not report harassment until she had sex with him on two occasions, and where she was aware of and had previously utilized University sexual harassment reporting procedures. *Id.* at *5. The court also found that the University acted reasonably in response to her complaint when it investigated her complaint, assigned her a new supervisor and instructed the harasser not to contact or retaliate against the plaintiff.

Gordon v. Schafer Contracting Co. Inc., 469 F.3d 1191 (8th Cir. 2006): Defendant was entitled to summary judgment in its favor on hostile work environment claim in which plaintiff, a roller operator for a construction company, alleged he was greeted with racially hostile offensive remarks by his supervisor two or three times per week. The Eighth Circuit found that the construction company had an Employee Policy Manual that described its anti-discrimination and anti-harassment policies and reporting procedures, which was distributed to all employees, and that plaintiff had received the manual. The policy identified three company officials to whom harassment could be reported. The court found that plaintiff had unreasonably failed to report the harassment to any of the named officials. Although the plaintiff alleged he failed to report the harassment because he believed a report would be ineffective, the court found “Such bare assertions are insufficient to avoid summary judgment” and found that the defendant had effectively established the affirmative defense. *Id.* at 1195.

In *Roebuck v. Washington*, 408 F.3d 790 (D.C. Cir. 2005), the Court upheld the jury’s verdict that the plaintiff unreasonably delayed in complaining about the harassment to her employer. The harasser resumed harassing the plaintiff in October 1997 and the plaintiff did not complain until late January 1998. The plaintiff argued that she delayed her complaint because she feared reprisal and because she was unsure whether the harassment that occurred outside the workplace was covered by the employer’s anti-harassment policy. The Court, however, cited the evidence that the plaintiff had filed ten sexual harassment complaints between 1986 and 1995 as sufficient for a reasonable jury to conclude that her delay was unreasonable.

Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005). A female parking enforcement officer was riding with her shift supervisor when he forcibly unhooked her bra, ripped it from her body, hung it outside the vehicle and shouted a crude sexual remark to a fellow employee on the street. Plaintiff complained and the city suspended the perpetrator, investigated the incident, then discharged him. The First Circuit found that Plaintiff failed to provide evidence that her alleged harasser had authority to hire fire or otherwise dictate the terms and conditions of her employment and was a mere “second-rung shift supervisor.” Therefore, the court found that the plaintiff was obligated to prove using the negligence standard that the City knew or should have known of the harassment and failed to take prompt action to stop it. Without evidence of prior misconduct on the part of the harasser, plaintiff failed to meet this burden. *Id.* at 96.

In *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001), the Fourth Circuit held that the employer was entitled to the affirmative defense, because the plaintiff unreasonably failed to invoke the anti-harassment policy, since she never reported the harassment to any of the twelve managers. *Id.* at 266-67. The Fourth Circuit rejected the plaintiff’s claims that the defendant must have had notice “because she told so many of her co-workers about [the harasser’s] behavior,” because the plaintiff had “no evidence, however, that her conversations with her colleagues filtered up to management,” and “it is undisputed that she never told management herself.” *Id.* at 267. To the contrary, the defendant independently discovered that the plaintiff was being harassed, immediately investigated the harassment, and terminated the harasser within a week. Further, the plaintiff’s generalized fear of retaliation based on the close friendships between the harasser and other corporate managers “[did] not excuse a failure to report sexual harassment,” particularly where the anti-retaliation provision of Title VII provides a remedy should any such retaliation occur. *Id.*

In *Matvia v. Bald Head Is. Mgmt., Inc.*, 259 F.3d 261 (4th Cir. 2001), the Fourth Circuit affirmed the district court's grant of summary judgment on the plaintiff's sexual harassment claims because the employer satisfied the affirmative defense to liability. The Court based its holding on the fact that the employer "suspended [the harasser] without pay four days after he attempted to kiss [the plaintiff]" and terminated the harasser "twelve days later, after completing an investigation." *Id.* at 268. The Fourth Circuit rejected the plaintiff's claim that the employer's failure to prevent the subsequent ostracism by her co-workers negated the affirmative defense, because this ostracism was not sexual harassment. *Id.* at 269. The Fourth Circuit also rejected the plaintiff's claim that she did not file a complaint with the employer because "she needed time to collect evidence against [the harasser] so company officials would believe her," since *Faragher* and *Ellerth* "command that a victim of sexual harassment report the misconduct, not investigate, gather evidence and then approach company officials." *Id.*

In *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999), the Fourth Circuit held that the employer established the affirmative defense. The Court found that the defendant's sexual harassment policy was fully adequate and that the employer's response to the plaintiff's report of sexual harassment was also reasonable. When the plaintiff informed her supervisor of the harassment, he stated: "Whatever you do, I'll support you 100 percent." It was the plaintiff that decided that she did not want "to do anything." *Id.* at 396. Notably, the Court held that the employer established the second prong of the defense by showing that the plaintiff "unreasonably failed... to avoid harm otherwise." *Id.* at 397. The Court cites the plaintiff's decision to voluntarily decide to go to bar-hopping and then go to harasser's hotel room alone with him within six months after initially rebuffing his advances.

2. Employer Failed to Establish Affirmative Defense

EEOC v. Mgmt Hospitality of Racine, Inc., No. 10-3247, 2012 WL 37112 (7th Cir. Jan 9, 2012). The Court affirmed entry of judgment for the plaintiff after a jury verdict, rejecting the employer's claim that it was entitled to judgment as a matter of law on the *Faragher/Ellerth* defense, where company supervisors failed to report complaints of sexual harassment, training on the company's sexual harassment policy was "inadequate," the policy did not name a contact person or persons for complaints, and the company's investigation of the plaintiffs' complaints did not begin for two months. *Id.* at **9-10. Additionally, the Court held that the plaintiffs did not unreasonably fail to take advantage of the company's corrective procedures since a supervisor had ignored one plaintiff's prior complaint of sexual harassment and another plaintiff testified that her supervisor treated her "more harshly" after she complained of sexual harassment. *Id.* at *11.

Agusty-Reyes v. Department of Educ. of P.R., 601 F.3d 45 (1st Cir. 2010): Reversed the district court's grant of summary judgment for the employer and held that the defendant did not establish the affirmative defense. First, although the DOE had a sexual harassment policy, there was no evidence that the DOE made any effort to *communicate* its policy (whether or not the policy was reasonable) to any of its employees, regional directors, supervisors, or the plaintiff. *Id.* at 54. Second, there was a genuine issue of material fact as to whether the DOE's policy was reasonable: it afforded victims of harassment no chance to testify in support of their complaints

once filed or to reply to the alleged harasser's testimony, but gave those accused of sexual harassment an *ex parte* proceeding at which they could present their version of events, with counsel, without any rebuttal testimony or corroborative evidence from victims and witnesses. The DOE did not give victims notice of the hearings. *Id.* at 56. Third, even if the plaintiff had not followed the DOE's formal policy to the letter, a reasonable jury could find that the plaintiff's two union complaints constituted notice to the DOE. *Id.*

Gorzynski v. Jetblue Airways, Inc., 596 F.3d 93 (2d. Cir. 2010): The court vacated summary judgment for the employer. Gorzynski alleged sexual harassment by her supervisor. Whether Gorzynski complained to the supervisor about the harassment was a disputed fact. Even conceding that she had complained to the offending supervisor, who was the first person designated in the company's sexual harassment policy as the one to whom complaints should be addressed, Jetblue argued that it was unreasonable as a matter of law for Gorzynski not to have complained to anyone else. The court rejected Jetblue's reading of the *Faragher/Ellerth* defense in no uncertain terms, stating:

We do not believe that the Supreme Court, when it fashioned this affirmative defense, intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints. There is no requirement that a plaintiff exhaust all possible avenues made available where circumstances warrant the belief that some or all of those avenues would be ineffective or antagonistic... Accordingly, we hold that an employer is not, as a matter of law, entitled to the *Faragher/Ellerth* affirmative defense simply because an employer's sexual harassment policy provides that the plaintiff could have complained to other persons as well as the alleged harasser.

Id. at 104-105. Instead, the court held that the facts and circumstances of each individual case must be examined to determine whether it was reasonable *under those circumstances* for the plaintiff to have failed to take advantage of the employer's preventative measures. In *Gorzynski*, the evidence revealed that the other two managers to whom JetBlue suggested Gorzynski should have complained were not receptive to receiving complaints from employees: when she had complained about disparate treatment based on age, one of them had responded by admonishing her, and when a similarly-situated coworker had complained to the other, she had almost immediately been suspended. *Id.* at 105. Because these channels appeared to be ineffective or even threatening, a fact question existed as to whether Gorzynski's actions had been reasonable, and JetBlue was not able to establish the affirmative defense. *Id.*

Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85 (1st Cir. 2006): The First Circuit found no error when trial court failed to give the jury a *Ellerth Faragher* affirmative defense instruction. While there was testimony at trial that the municipality had a sexual harassment policy, no such policy was entered into evidence and there was no evidence in the record that the plaintiff or other police officers were aware of the policy or that it was distributed. The First Circuit also noted that notwithstanding the defendant's failure to distribute a policy for complaints, the plaintiff acted reasonably in complaining on numerous occasions about the harassment, although she did not do so in writing. The First Circuit found, "where the evidence

shows the plaintiff cannot prove an affirmative defense under the Faragher standard, there is no reason to remand for the giving of a *Faragher* instruction. *Id.* at 99 (citation omitted).

Mack v. Otis Elevator Co., 326 F.3d 116 (2d Cir. 2003): The court vacated and remanded the district court's grant of summary judgment for the employer on the plaintiff's hostile work environment claim. Otis's sexual harassment policy required aggrieved employees to inform their supervisor of harassment, "unless he/she is the alleged harasser," and in this case, Mack's supervisor was the alleged harasser. Mack thus complained to her supervisor's supervisor. The court held that there was thus evidence in the record from which a reasonable trier of fact could find that the plaintiff did not fail to take advantage of Otis's complaint procedures. *Id.* at 128.

In *Homesley v. Freightliner Corp.*, Nos. 02-1158, 02-1242, 2003 WL 19081744 (4th Cir. 2003), the plaintiff's supervisor repeatedly made lewd comments and made sexual advances on her, including rubbing her breast repeatedly. The plaintiff reported the harassment to the personnel manager, who did not investigate, although informed her that he had passed the complaint on to the plant manager. The plaintiff later spoke with other female employees, who informed her that they too had been harassed by the same supervisor. The plaintiff again reported the harassment to the personnel manager. Although the defendant demoted the harasser because of the complaints, the defendant kept the harasser in the same work area as the plaintiff. The departmental supervisor then instructed the plaintiff that she had to use a restroom that was inconvenient, so that she would not walk near the harasser. The supervisor stated that he was trying to protect the harasser, who "had bills to pay." *Id.* at *4. The Fourth Circuit found that the employer failed to exercise reasonable care to promptly correct any sexually harassing behavior. Specifically, it failed to investigate two of the plaintiff's complaints and on other occasions she complained her supervisor excused the harasser's behavior. Additionally, when the employer did take action to stop the harassment, it was wholly ineffective.

In *E.E.O.C. v. R&R Ventures*, 244 F.3d 334 (4th Cir. 2001), the EEOC represented two female employees who suffered constant verbal abuse and sexually inappropriate comments from their immediate supervisor. Both employees repeatedly complained about the conduct, but no action was taken by the defendant to stop the harassment. The Fourth Circuit held that the defendant could not escape liability via the affirmative defense because the employees complained to management at virtually every available opportunity, one manager responded by saying that the employee was overreacting, employee's complaints to the three other managers went similarly unattended, and when the employee's mother complained, the defendant failed to adequately investigate by either interviewing the employee or the alleged harasser.

Gentry v. Export Packaging Co., 238 F.3d 842 (7th Cir. 2001). The Seventh Circuit affirmed the jury award (\$25,000) to the plaintiff on her Title VII hostile environment sexual harassment claim. The employee, who was an administrative assistant, claimed that her supervisor repeatedly harassed her during a four month period, including (1) "40 hugs, 15 shoulder rubs, a kiss on her cheek, and two instances where [supervisor] petted her cheeks;" (2) inquiring "about her staying the night with him" and saying "that her clothes would look better on the floor;" (3) "asked her to 'try out the back counter' with him;" (4) giving "her a single page 'World of Love 1997, Mexico' calendar that depicted cartoon drawings of different sexual

positions, one for each day,” and asking “her to pick out a couple of her favorite days.” *Id.* at 845. In addition, her second-level supervisor said, in her presence, that “she was going to become a ‘sex’retary.” *Id.* The Seventh Circuit rejected the employer’s invocation of the *Ellerth/Faragher* affirmative defense, because the employer’s sexual harassment policy did not specify the identity of the “Human Resource Representative” to whom complaints were to be made, and the defendant’s own witnesses presented conflicting testimony as to who served in this position. *Id.* at 847-48. Even if the policy were adequate, the corrective actions were held to be inadequate. For example, when the plaintiff complained to the Benefits Coordinator (a woman) about her supervisor’s conduct, and her concerns that this conduct was causing other workers to gossip about her, this person initially told the employee “that she should develop a thick skin” and later said that they couldn’t change the supervisor: “this was his personality, that was how he worked. He had been there for years type thing. There was really nothing that had ever been done about it and she didn’t think that there ever [would be].” *Id.* at 848-49.

Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864 (9th Cir. 2001). In this case, which involved sexually derogatory remarks about a restaurant employee, the Ninth Circuit held that the employer’s failure to investigate and remedy the sexual harassment meant that the employer was not entitled to invoke the affirmative defense with respect to the supervisor’s harassment of the plaintiff. Although Azteca Restaurant had policies in place, its response to Mr. Sanchez’s repeated complaints of sexual harassment were merely to ask him to inform the manager if any offensive conduct recurred. *Id.* at 876. Critically, the employer “made no effort to investigate Sanchez’s complaint; it did not discuss his allegations with the perpetrators; it did not demand that the unwelcome conduct cease; and it did not threaten more serious discipline in the event the harassment continued.” *Id.* The result is that “by conditioning its response on Sanchez’s reports of further harassment, Azteca placed virtually all of its remedial burden on the victimized employee.” *Id.* Thus, the Ninth Circuit held that “Azteca did not exercise reasonable care to promptly correct the sexually harassing behavior directed at Sanchez, and therefore cannot assert the affirmative defense,” and is therefore “liable for the hostile environment created by its supervisor.” *Id.* at 877.

Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 1027-28 (10th Cir. 2001) (“the evidence indicates that non-supervisory personnel were not provided with copies of the [harassment and discrimination] policy, nor were copies of the policy posted on all of the bulletin boards More importantly, the evidence strongly suggests that . . . the policy was largely ignored. Brown, the harasser in this case, testified without contradiction that no mention was made of the policy . . . and that no seminars on the subject of sexual harassment were ever held.”).

In *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999), the Court upheld the district court’s denial of summary judgment and explained that the defendant failed to show that a reasonable person in the plaintiff’s position would have come forward at a sufficiently early stage of the sexual harassment to prevent the harassment from becoming severe or pervasive. The plaintiff alleged that from the first day of work and “virtually every day thereafter,” her immediate supervisor subjected her to “unwelcome discussions concerning sexual matters” and to sexual advances. *Id.* at 674. Ten days after she began work, her supervisor raped her. A month after the rape, the plaintiff reported the assault because her immediate supervisor again began to proposition her. *Id.* Although the Court found that the defendant could satisfy the first element

of the affirmative defense, that it took reasonable care to prevent and correct the harassment, the Court concluded that the defendant could not establish as a matter of law that the plaintiff had failed to avail herself of the defendant's sexual harassment reporting scheme during the first ten days of her employment. The Court focused on the fact that too little was known about the first ten days of the plaintiff's employment to hold as a matter of law that the plaintiff unreasonable delayed reporting the harassment.

Wilson v. Tulsa Jr. College, 164 F.3d 534, 541-42 (10th Cir. 1998): Defendant's policy was inadequate, since complaints could not be reported on evenings or weekends, when many students and employees were on the campuses; and supervisors were not told of their obligations to report informal complaints.