

**RAPE, OTHER EGREGIOUS HARASSMENT, THREATS OF PHYSICAL HARM
TO DETER REPORTING, AND RETALIATION**

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Rape is unquestionably among the most severe forms of sexual harassment. Being raped by a business associate, while on the job, irrevocably alters the conditions of the victim's work environment. It imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex. Being raped is, at minimum, an act of discrimination based on sex.²

Sexual harassment involving rape is the raw exercise of power – both real and perceived. And the imbalance of power creates the conditions for sexual predators to commit their acts. Perhaps of all settings, the workplace exhibits the greatest imbalance of power especially for non-English speaking women, immigrants, those who work the fields, and those who are geographically, socially, and linguistically isolated.³ After all, the harasser supervisor can determine whether the victim has a job, can feed her children, has a roof over her head and whether the members of her family can stay alive.⁴

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² *Little v. Windermere Relocation, Inc.*, 265 F. 3d 903, 912 (9th Cir. 2001) (reversing summary judgment for defendant and holding that the defendant could potentially be liable for rape committed by third-party customer – the then Human Resources Director of Starbucks)

³ See, Rebecca Clarren, “The Green Motel”, *Ms. Magazine*, Summer 2005 (the “green motel” is what female farm workers describe the fields where women are forced to have sex with supervisors in order to get a job or keep a job); see also, William R. Tamayo, “The Role of the EEOC in Protecting the Civil Rights of Farm Workers”, 33 *U.C. Davis L. Rev.* 1075 (2000); see also, William R. Tamayo, “The EEOC and Immigrant Workers”, 44 *Univ. San Fran. L.R.* 253 (Fall 2009)

⁴ While most of EEOC's cases alleging egregious sexual harassment involve low-wage, blue collar employees as victims, the Seattle area case of *Little v. Windermere Relocation, Inc.*, 265 F. 3d 903 (9th Cir. 2001) illustrates that

rape is not confined to those employees. Maureen Little was a Corporate Services Manager with Windermere Relocation Services in Washington state whose job was to develop business relationships with potential corporate clients needing relocation services for their employees. Until she was terminated she received only positive feedback from her supervisors and had the best transaction closure records of her peers by a large margin. Dan Guerrero, then Starbucks Human Resources Director, made it known that he was unsatisfied with its primary relocation provider. Windermere's President, Mr. Glew, told Maureen to "do whatever it takes to get this account" and to "do the best job she could". She had two business lunches with Guerrero to try to get the account. What happened next is described in detail by the Court of Appeals:

On October 14, Little accepted Guerrero's invitation to discuss the account at a restaurant. After eating dinner with Guerrero and having a couple of drinks, Little suddenly became ill and passed out. She 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.

Little was reluctant to tell anyone at Windermere about the rape because, in her own words, "I knew how important the Starbucks account was to Mr. Glew. ...I was afraid that if I told him about the rape, he would see me as an impediment to obtaining the Starbucks account." This belief was reinforced when, *a few days after the rape, Little reported the rape to Chris Delay, Director of Relocation Services and Delay advised her not to tell anyone in management.*

....

On October 23, about nine days after the rape, Little reported it to Peggy Scott, the Vice President of Operations, who was designated in Windermere's Harassment Policy as a complaint receiving manager. Little described Scott's response: "She came out around the desk and I could tell she was upset and she just gave me a hug and said she wished there was something she could do. ...She asked me if I was in therapy. Then she proceeded to tell me she wouldn't say anything to [Mr. Glew] unless I [took] legal action [against Dan Guerrero]."

Peggy Scott told Little that "[s]he thought it would be best that [Little] try to put it behind [her] and to keep working in therapy,". She did not give Little any advice about going to the police, and she did not conduct an investigation of Little's complaint or any follow-up interview with Little. Scott testified in her deposition that, because the rape occurred outside the "working environment," she believed that it fell outside the scope of Windermere's Harassment Policy.

Despite Little's supposed removal from the Starbucks account, Glew continued to ask her about the status of the Starbucks account. ... Concerned by Glew's questions, Little told her immediate supervisor, Linda Bellisario, the Vice President of Sales and Marketing, on December 2, 1997, about the rape. Little had been reluctant to tell Bellisario because she "felt that [Bellisario] would immediately go to Glew and Glew would terminate my position.... I knew how much this account meant to him. He said he would do whatever it took to get this account."

When Little told Glew of the rape, which, according to Glew, was the first he had heard of it, Glew's "immediate response was that he did not want to hear anything about it." He told Little that she would have to respond to his attorneys. Glew then informed her that he was restructuring her salary from \$3,000 monthly to \$2,000 monthly plus \$250 per closed transaction. The pay reduction was effective immediately and non-negotiable.

Little found the pay cut unacceptable, and Glew told her to go home for two days to think it over "because he did not want any 'clouds in the office.'" When Little still found the pay cut unacceptable two days later, Glew told her it would be best if she moved on and that she should clean out her desk.

While sexual harassment allegations filed with the EEOC constitute roughly 13-15% of charges, sexual harassment cases are consistently 25-30% of the EEOC's national litigation docket and 35% of the San Francisco District's docket. We're not just talking about inappropriate sexual comments or propositions for sex but actual rape, sometimes repeated rape of farm workers and janitors in the fields, in the packing sheds, in the back room, or in isolated offices as higher management turns a blind eye. Perhaps most disturbingly is the young age of some of these victims. Some of them are 15 or 16 year old girls and boys being propositioned, fondled or raped by men 2 to 3 times their age. **What is clear is that as the disparity in power increases the conditions for egregious, violent sexual harassment to occur also increase.** Frightened and confused teenagers, workers with shaky immigration status, and the single mother desperate to feed her children are the easy prey for a harasser.

In agricultural industry cases, a pattern is emerging. The owners of the major farms tend to be white, English speaking longtime family members who turn over operations of the farm to "Jose", a long time employee who is bilingual and who is expected to maintain the operations and keep labor problems to a minimum – you know, "out of sight, out of mind." The workers are geographically isolated from community services, have few options in life and are in desperate poverty. They are dependent on Jose to navigate the English-speaking world for them. If Jose is a predator and/or his supervisors below him are predators, it is the ideal situation for sexual harassment to occur – unfettered, unpunished, and unstoppable. An effective human resource department is usually non-existent. In industries where flouting the law has been common, where legislative exemptions from labor and employment laws for is common – much like slavery – sexual assault of the workers can easily occur.

Unfortunately, some of the harassment cases that the EEOC has litigated involve rape (s) of the charging party (or class member) and/or the classic quid pro quo situation of a job opportunity contingent upon engaging in sex with the hiring official. The rapes involve weapons (gun) or a sharp object (gardening shears to the victim's throat) and immediate threats to kill the complainant's husband, siblings and/or family members along with threats to terminate.

In *EEOC v. Tanimura & Antle*, C99-20088 JW (N.D. Cal.) EEOC alleged that Blanca Alfaro and a class of women had been sexually harassed and specifically, that Alfaro had been forced to have sex with the hiring official on two separate occasions (once in Yuma, Arizona and another in Salinas, California) in order to be able to pick crops so that the single mother could feed her three-year-old daughter. After she protested further harassment she was fired as was her co-worker who spoke up on her behalf. After a lengthy investigation and extensive negotiations, the EEOC announced a \$1.855 million settlement in February 1999, which sent shockwaves through an industry long neglected by the EEOC.

Little v. Windermere Relocation, Inc., 265 F. 3d 903, 908-909 (9th Cir. 2001) (emphasis added) Every supervisor or manager that Maureen Little looked to for help failed her.

In *EEOC v. Iowa AG, LLC dba DeCoster Farms*, No. 01-CV-3077 (N.D. Iowa) I received a disturbing call late one night in 2000 from a staff attorney of the Iowa Coalition Against Domestic Violence telling me that several Mexican women had been trafficked into the United States to work in the poultry plants of DeCoster Farms. These women were repeatedly raped by co-workers and supervisors and had little recourse as they were threatened with termination and deportation if they complained. The EEOC Milwaukee office promptly sent a team of investigators to Iowa. But the victims were scared to cooperate with the federal investigation since they had also been threatened with physical harm, including more rapes, termination and deportation if they cooperated. The EEOC quickly a motion for a temporary restraining order to stop the retaliation so we could investigate. After months of investigation and litigation, the EEOC announced a \$1.525 million settlement in September 2002.

In *EEOC v. Harris Farms*, EEOC alleged that Olivia Tamayo had been raped in the fields at gunpoint by her supervisor who also threatened to kill her husband if she reported the rapes. The rapes occurred in 1993, 1994 and 1995, and not until 1999 did she disclose the rapes to a sexual assault clinic and eventually to the EEOC. See generally, *EEOC v. Harris Farms*, 2005 WL 2071741 (E.D. Cal. 2005)(order denying renewed Motion for Judgment as a Matter of Law).⁵ At the trial, the charging party’s husband testified that the harasser waived a “silver-blue” gun in his presence several times. And, the husbands of other women who had been harassed also testified about the harasser waiving the same silver-blue gun at them. Despite Olivia telling the company about the rapes, the company human resources officials waited for six weeks before notifying the sheriff. And to undermine the criminal investigation, the company’s assistant manager of HR served to “translate” (although she was not fluent in Spanish) for the English-speaking deputy sheriff and opined that Olivia and the alleged harasser were having an affair. The deputy sheriff concluded that Olivia was not believable and the department stopped the investigation. More than five years after she reported the rapes to the company and the sheriff, a jury in Fresno, California unanimously found that Olivia had been sexually harassed and retaliated against and awarded her nearly \$1 million dollars.⁶

In *EEOC v. Allstar Fitness, LLC*, CV-10-1082 (W.D. WA), EEOC alleged that a Latina janitor, a 38-year-old mother of three, was forced to have sex with her supervisor at the Seattle-based health club where they worked and was threatened with termination if she refused to have sex or reported the activity to management. When she finally said that she would not have sex with him, he fired her. The case settled for \$150,000

In *EEOC v. ABM Industries, Inc. and ABM Janitorial Services, Inc.* No. 1:07 CV01428 LJO JLT, (E. D. Cal.), EEOC alleged that a class of Latina female janitors had been sexually harassed by their supervisors and co-workers and one was raped on the job. The vulnerability of these women was described by Anna Park, EEOC Regional Attorney of the Los Angeles District Office at the press conference announcing the settlement:

These women often worked late nights in office buildings and churches, never seen by anyone, but silently suffering from terrible working conditions. These

⁵ See also, *EEOC v. Harris Farms*, 274 F. App’x 511 (9th Cir. 2008); *EEOC v. Harris Farms*, 2006 WL 1881236 (E.D. Cal. 2006) (order denying Defendant’s Rule 62 (c) motion;

⁶ See fn. 2.

women were vulnerable and isolated, yet found the courage to come forward to tell what happened to them. The women worked predominantly in and around central California, specifically in Fresno, Bakersfield and the Visalia region.

They were subjected to varying degrees of unwelcome touching, explicit sexual comments, and requests for sex. They also received invitations to hotels by 14 male co-workers and supervisors, one of whom is a registered sex offender.

Some of the male supervisors and co-workers exposed themselves to the women, and groped them in their vaginal area. They also grabbed breasts, and forced the women to touch an erect penis.

In one case, a woman was cleaning the bathroom, when a supervisor attempted to assault her by closing the door to the restroom, turning off the lights, and grabbing her legs and buttocks.

One of the most unfortunate aspects of this case involved a woman who was raped. Other women were subjected to attempted assaults and sexual battery.

Some of the claimants will tell you that when some of them were brave enough to complain, their hours were cut, and ultimately, they lost their jobs. In other instances, the complaints fell on deaf ears, either because the supervisors or leads did not know how to handle them properly, or because they simply did not respond effectively.⁷

After intense negotiations, ABM agreed to pay \$5.8 million to 21 Latina janitors, most of whom were monolingual Spanish-speakers.

In *EEOC v. Wilcox Farms*, No. 08-CV-1141 (D. Or.) EEOC alleged that a Latina farm worker was subjected to ongoing sexual harassment including grabbing of her private parts, groping of her body, grabbing of breasts, etc in the fields. The case settled for \$260,000.

In *EEOC v. Micro Pacific Development dba Saipan Grand Hotel*, C-04-0028 (D.N.M.I.), EEOC alleged that a Filipina restaurant worker was subjected to ongoing sexual harassment including the digital penetration (fingers) of her private parts by the hotel chef. The case settled for \$175,000.

Equitable tolling

In *EEOC v. Willamette Tree Wholesale, Inc.*, CV 09-690-PK (D. Ore.) EEOC alleged that a farm worker had been raped with shears to her throat by her supervisor who also threatened to terminate and kill her two siblings and brother-in-law and to harm her relatives in Mexico if she ever reported the rapes to anyone. Following the first rape, the farm worker was forced to

⁷ Statement of Anna Park at September 2, 2010 press conference announcing settlement, Los Angeles, California.

perform sex on the supervisor in the fields several times during the winter months in Oregon.⁸ Such threats deter the victim from notifying management, and more importantly, can serve to deter the individual from filing a timely charge. After she refused to have sex with the harasser, he fired her. Traumatized by the rapes and threats to kill her family, the charging party did not file a charge with the EEOC until 62 days past the 300 day deadline to file a charge. The company moved for summary judgment *inter alia* on timeliness grounds. The EEOC opposed the motion and argued that the facts of the case warranted “equitable tolling” of the filing deadline. In denying summary judgment and granting “equitable tolling”, the court held that “An applicable limitations period may be equitably tolled ‘when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff’s control made it impossible to file a claim on time.’ *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), *citing Alvarez-Machain v. United States*, 107 F.3d 696 600 (9th Cir. 1997). The *Stoll* court found equitable tolling applicable when a plaintiff was sexually harassed and repeatedly raped by supervisors in the workplace, and the experience left her “so broken and damaged” that she was unable to protect her rights”, *Willamette Tree*, 2011 WL 886402. In finding equitable tolling warranted, the court noted,

Moreover, Willamette Tree does not dispute (psychologist) Dr. Wallis’ testimony or (therapist) Ms. Tredinick’s testimony regarding the psychological effects of the repeated workplace rapes suffered, including severe depression, post-traumatic stress, suicidal ideation, social isolation and panic attacks, all exacerbated by any reminder of the sexual assaults, including being called upon to report or describe her experiences. Considered together with the evidence of Rodriguez’ repeated threats to harm (the victim) and her family should she disclose the sexual assaults to anyone, as well as the undisputed evidence that (the victim) was at all material times a monolingual, illiterate Spanish speaker unrepresented by legal counsel, plaintiff’s evidence of psychological damaged suffered by (the charging party) in consequence of the sexual assaults she suffered in the Willamette Tree workplace is sufficient to establish the elements of equitable tolling under *Stoll*.

Willamette Tree, *id.*

The court had also issued a protective order barring the defendant’s discovery into the charging party’s immigration status⁹, her prior sexual history and her reasons for not reporting the rapes to the police.

RETALIATION AFTER THE EMPLOYER IS PUT ON NOTICE

Employer conduct which would deter a reasonable employee from reporting discrimination or harassment or from pursuing a complaint is retaliation. *Burlington Northern Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006). Following the decision in *Burlington Northern*, the U.S. Supreme Court issued several decisions recognizing the broad protections of employees against retaliation. In *Crawford v. Metro. Gov’t of Nashville & Davidson Cty* 555 U.S. 271 (2009) the court held that an employee’s participation in an employer launched internal investigation of

⁸ *EEOC v. Willamette Tree Wholesale* 2011 WL 886402 (D. Or. March 14, 2010).

⁹ See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004)

sexual harassment by the department director constituted “protected activity” because she described acts of sexual activity that reflected her opposition to the harassment. The court declined to address the question of whether the employee (who alleged that she was fired in retaliation for cooperating in the investigation) participation in the internal investigation constituted “participation in a proceeding” for purposes of Title VII’s anti-retaliation provision coverage. In *Kasten v. Saint-Gobain Plastics Corp*, ___ U.S. ___, 131 S. Ct. 1325 (2011) the court held that for purposes of the FLSA’s anti-retaliation provision, an oral complaint about the location of time clocks constituted “protected activity”. In *Thompson v. North American Stainless Co.*, ___ U.S. ___, 131 S. Ct. 863 (2011), the court held that the terminated fiancé of an employee who filed an EEOC charge fell within the zone of interests of “aggrieved persons” and that Thompson’s relationship to the charging party was sufficient to meet the first prong of the retaliation scheme, i.e. engaged in protected activity.

Unfortunately, over 25% of charges filed with the EEOC are accompanied by a retaliation charge. *Nearly every harassment lawsuit filed by the EEOC includes a retaliation allegation.* Often times the retaliatory behavior occurred right after sex was refused, a protest was made, or a formal complaint was made to management. The fact that an employee is retaliated against after she has complained about harassment indicates that a supervisor not only was unaware about the prohibition against retaliation but more importantly, a belief that no consequences would occur for the retaliatory behavior.

Supervisors must also understand the employee’s right to complain about what she reasonably believes is harassment – whether she is right or not. This again speaks to the need for training for supervisors but also to the importance of imposing adequate discipline (including termination) against supervisors or co-workers who retaliate. A finding of retaliation can lead to a punitive damages award, but disciplining the retaliating party might serve to limit the award.

Intimidation Warranting Court Intervention

In *EEOC v. Evans Fruit Company*, CV 10-3033-LRS (E.D. WA), EEOC alleged that a class of women were sexually harassed by supervisors. After a February 2010 meeting between the EEOC and the claimants just prior to the filing of the complaint, claimants and potential witnesses were subjected to intimidation, threats, and acts of retaliation that would serve to chill out the claimants and witnesses. Charges of retaliation were subsequently filed launching another EEOC investigation. The EEOC filed a Motion for a Temporary Restraining Order arguing that the intimidation, threats, etc, would thwart the EEOC lawsuit and the retaliation investigation. The court granted the Motion finding that a claimant saw Evans Fruit employees taking pictures of the claimants as they departed the meeting with the EEOC attorneys, that the presence of those taking pictures frightened one claimant who had been threatened in 2006 by the alleged harasser when she first sought help from the EEOC, etc. The court issued a Temporary Restraining Order¹⁰; and after a four day hearing on the preliminary injunction, issued a preliminary injunction order, amended November 30, 2010.

¹⁰ *EEOC v. Evans Fruit Co., Inc.* 2010 WL 25995960 (E.D. Wash.) (June 24, 2010). The court noted:

Based on the pleadings and declarations, the Court makes the following findings:

1. Plaintiff filed a “Jane Doe” Complaint in *EEOC v. Evans Fruit Company* under seal on June 17, 2010, alleging that Defendant Evans Fruit violated section 703(a), [42 U.S.C. § 2000e-\(2\)\(a\)](#), of the Civil Rights Act of 1964 as a result of Juan Marin and other supervisors subjecting the Charging Parties and a class of similarly situated female employees to sexual harassment and a hostile work environment because of sex.

2. Prior to the filing of the Complaint, the EEOC held a meeting on February 10, 2010 in Sunnyside, Washington, to gather evidence from the Charging Parties, Class Members and other potential witnesses who had come to give testimony to the EEOC that purportedly corroborated sexual harassment allegations against Defendant Evans Fruit, Juan Marin and other supervisors, which EEOC had found violated Title VII after its investigation of those allegations in charges filed with the Commission.

3. One or more of the persons attending the meeting observed persons believed to be current Evans Fruit employees taking pictures of the Charging Parties, Class Members and other meeting participants who had come to give testimony to the EEOC.

4. Charging Party Jane Doe 1 states she was frightened by the presence of individuals she believed to be current Evans Fruit employees in the library because she alleges she had been threatened in 2006 by Juan Marin when she first sought help from the EEOC with regard to filing charges of sexual harassment stemming from Marin's alleged sexual harassment. She claims this threat caused her to change her phone number and become unavailable to the EEOC for an extended period of time.

5. In their affidavits, Ms. Flores and John Does 1 and 2 testify that Juan Marin and certain other Evans Fruit supervisors began a pattern of retaliation against the Charging Parties, Class Members and other potential EEOC witnesses who participated in the February 10, 2010 meeting that has continued to this date, including, among other things, (a) offers to pay money to potential EEOC witnesses for information about the EEOC's efforts to prosecute its case against Evans Fruit; (b) offers to pay money to past and present female Evans Fruit employees for testimony favorable to the Company; and (c) threats and other intimidation tactics to deter potential EEOC witnesses from future cooperation with the Commission; (d) implicit and explicit threats of force and physical harm to the Charging Parties, Class Members and potential EEOC witness for cooperating with the EEOC; and (e) alleged solicitation of accomplices to commit criminal acts, all of which have assertedly caused the Charging Parties, Class Members and potential witnesses to fear for their safety.

*2 6. As a result of the foregoing, Charging Party Jane Does 1 and 3, Class Member Jane Does 1-4, and potential witnesses John Does 1-4 allege they are fearful for their safety and the safety of their families because of their belief that Defendant Evans Fruit, through Juan Marin and other supervisors and employees, will retaliate or continue to retaliate against them for cooperating with the EEOC and participating in its lawsuit against Defendant Evans Fruit.

7. Based on the foregoing, the court finds that at this juncture, pending the holding of a preliminary injunction hearing, the EEOC is likely to succeed on the underlying sexual discrimination claims, that the balance of the equities tip in favor of the EEOC, and that a temporary restraining order is in the public interest. Moreover, it is likely there will be irreparable injury to the Charging Parties, Class Members and potential witnesses involved in *EEOC v. Evans Fruit Company* if Defendant Evans Fruit, Juan Marin, and certain other supervisors are permitted to continue their alleged witness tampering and related conduct in that: (a) the Commission's prosecution of its case is likely to be chilled; (b) the Commission's investigation of the retaliation charges now pending against Evans Fruit is likely to be chilled; and (c) current and past Evans Fruit employees are likely to be deterred from exercising their rights under Title VII; and (d) the Charging Parties, Class Members and potential witnesses are likely to suffer damage.

Now, therefore, for good cause shown, it is ORDERED that Evans Fruit Company, Juan Marin, and other supervisors, including, but not limited to, Alberto Sanchez, Simon LNU, and Gustavo LNU, as well as officers, agents, managers and employees of Evans Fruit Company, and any other persons in active concert with Evans Fruit Company, be, and hereby are, temporarily enjoined and restrained until August 31, 2010 and no longer without the further order of this Court, from engaging in or performing the following:

(a) taking any retaliatory measures or other adverse actions based on retaliatory intent affecting identified Charging Parties, identified and/or reasonably known Class Members, and identified and/or reasonably known potential witnesses, or any of their family members, in *EEOC v. Evans Fruit Company*;

Retaliatory Investigation

In *EEOC v. Video Only* (D. Or.) EEOC alleged that an African-American employee and a Latino employee in a Portland store of a Seattle-based company were subjected to racial and national origin harassment, religious harassment and retaliation. The attorney for the employees sent a letter to the company stating that an African-American employee and a Hispanic employee were being harassed by managers and co-workers on a constant basis. Within a week the owner instructed the general manager to engage a private investigator who had done some theft investigations for the company. The investigator spoke to the mother of the African-American employee's fiancée to ask if he had ever beaten her. Co-workers told the African-American employee that the investigator went to their workplaces to ask if the employee had sued anyone for race discrimination. A former manager and family members told the Hispanic employee that a private investigator was asking "disturbing questions" about him, and furthermore the investigator ran criminal background checks on the complaining employees. The court had no problem finding that the hiring of the private investigator to make these inquiries was unlawful retaliation and was intended to chill out the charging parties. *EEOC v. Video Only*, 2008 WL 2433841 (D. Ore.), 91 Empl. Prac. Dec. ¶ 43,232. The case eventually settled for \$500,000 for the two charging parties, and \$130,000 for two co-workers who were retaliated against for offering supporting testimony.

HR's Conduct as Retaliation

The conduct of the investigator after a complaint has been made will also be scrutinized by plaintiff's counsel. Any acts by the investigator that hint of retaliation will also defeat the affirmative defense. These acts might include *inter alia* statements like, "if you withdraw your charge we can all go home" or "I'm not here to help you but to protect the company" or "Joe is a family man and needs his job. Are you sure you want to pursue this?" Any hint of retaliation will also raise the question of whether the investigator is truly unbiased.

In *EEOC v. Lockheed Martin*, 05-00479 DAE-LEK (D.Hawaii) the EEOC alleged that the Charging Party, an experienced African-American avionics electronic technician and Air Force and Gulf War veteran, was subjected to ongoing racial harassment including threats of bodily

(b) taking any action calculated to discourage current or past employees of Evans Fruit from free and open association with any identified Charging Party, identified and/or reasonably known Class Member, or identified and/or reasonably known potential witness in *EEOC v. Evans Fruit Company*;

(c) paying or offering to pay persons for favorable testimony in *EEOC v. Evans Fruit Company* or for information about EEOC's case or investigation of the retaliation charges filed against Evans Fruit Company; and

(d) discharging, firing, terminating, suspending, failing to pay, disciplining or taking any other similar adverse action which has the anticipated or intended effect of precluding or discouraging any current Evans Fruit employee from (i) making charges, testifying, assisting or participating in any proceeding, hearing or investigation under Title VII, including the EEOC's investigation of the pending retaliation charges against Evans Fruit, or (ii) in any manner opposing a practice made unlawful by Title VII; provided, however, that nothing in this Order shall prevent Evans Fruit from making normal and customary hiring and firing decisions in the normal course of business.

harm (choking, hanging, burying) and was fired in retaliation by the largest military government contractor. After receiving the written complaints of the charging party and a white co-worker who befriended him (which the first supervisor shared with the harassers), the HR investigator told the charging party that she “wasn’t here to help the charging party but to protect the company”. (Much of the harassment occurred on **Whidbey Island, just outside Seattle** in Puget Sound and at the airbase in Kaneohe, Oahu, Hawaii.) The HR investigator stated that when she heard that the harassers called the charging party vile, racial slurs on a daily basis and made threats of lynching (comments that they did not deny) she concluded that this wasn’t harassment but merely “guys being guys”. She also erroneously stated that in determining whether harassment exists, the investigator must focus on the intent of the alleged harasser.

The charging party, Charles Daniels, traveled from Hawaii to Greenville, South Carolina to speak with the head of HR at corporate headquarters. Daniels asked that he not be assigned to work with the same crew that had been racially harassing him and threatening his safety in Hawaii and in Washington state. He was told that if he did not take the assignment, he would be laid off. Thereupon, Daniels informed the HR official that on his last day in Hawaii he had filed a charge with the EEOC Honolulu Local Office. The HR official then stated to the effect, “You did what? Why did you that? We have 130,000 employees. I could have found you a job. You see those file cabinets? They’re full of cases filed by employees. You can take your chances with the EEOC. We’re Lockheed Martin. We never lose.” The lay off and the official’s statements were clearly intended to “chill the charging party” and constituted retaliation. The case settled for \$2,500,000, the termination of the supervisor harasser and a permanent bar to the rehire of the remaining harassers. **Lockheed Martin’s slogan is, “We Never Forget Who We’re Working For”.**

Thus, the steps taken by a company even before the formal investigation begins and during the investigation are critical. They can doom an investigation, buttress a charge of retaliation and defeat an affirmative defense. *Additionally, such actions may also support a claim for punitive damages.* See *EEOC v. Harris Farms*, 2005 WL 2071741 (E.D. Cal.) (punitive damage jury award upheld where employee had complained about sexual harassment (including rapes by her supervisor) and retaliation during the investigation and while the EEOC charge was pending.ⁱ

The increase in cases litigated by the EEOC alleging egregious harassment like rape or threats to kill combined with additional threats to silence the victim is disturbing. But given the imbalance of power in the workplace and the expansion of certain industries that are dependent on “more pliable” labor the conditions for such harassment and threats to occur continue to exist. Only by continuously educating workers about their rights, supervisors about their obligations, and companies about their duty to end and deter harassment and by vigorously enforcing the law when violations occur can we begin to stem this tide.

ⁱ The court in Harris Farms noted:

As applied to this case, there is sufficient evidence to support the award of punitive damages. First, evidence was presented that Defendant had an out of date written policy against sexual harassment. For example, the policy did not describe conduct that could constitute sexual harassment or have an anti-retaliation provision. From 1989 until 2001, the same policy, without any updates, was in force and distributed to Defendant's employees. Despite testimony from Erick

Johnson (former executive vice president) and John Harris (president) that they knew that the policy was out of date, no revisions or up-dates of Defendant's policy were printed or distributed. (footnote omitted)

....

Also, evidence was presented that after the conclusion of Tamayo's (charging party) first complaint against Rodriguez (for grabbing her arm and harassing her), Tamayo was assigned to work in a field near Rodriguez's home. Although Tamayo's supervisor, Raul Enriquez, admitted that he assigned Tamayo to work in the field near Rodriguez's home, he was not told by human resources that Tamayo had filed a complaint against Rodriguez or that the two should be kept apart. Similarly, when Tamayo reported Rodriguez's truck driving slowly back and forth near the field where she was working and that she was afraid, no further formal action appears to have been taken.

On August 18, 1999, two days after the "drive by" incident, evidence was presented that Tamayo reported to Defendant's human resources department that Rodriguez had raped her. Although Defendant had called Deputy Sheriff Crittenden to investigate the "grabbing incident" involving Rodriguez, Crittenden was not contacted about the rapes. Moreover, Rodriguez was not interviewed regarding the rapes until September 29, 1999, approximately six weeks after Tamayo reported the rapes. During this six week period, Tamayo filed a complaint with the EEOC on September 24, 1999. Despite the seriousness of the allegations, no further discipline was taken and no final report or findings were made by Defendant/the human resources department. Instead, the status quo remained and Rodriguez retired in December 1999.

Also, testimony was presented that between 1999 and 2001, rumors regarding Tamayo and Rodriguez were being spread. The rumors evolved into threats of violence, specifically that Rodriguez was willing to pay \$2,000 to have Tamayo drugged and then have pictures made showing her having sex. The pictures would then be sent to Tamayo's husband in order to break up the marriage. Additionally, rumors/gossip was spread that Tamayo preferred to be on top of men during sex. Tamayo complained of these rumors in late twice in late January 2001 to her immediate supervisors. On February 2, 2001, Tamayo went to the office and told the human resources director, Sylvia Gomez, about the rumors, said that employees Hernandez, Mendoza, and Mosqueda were spreading the rumors, said that she was scared, and requested not to work alone. The following day Tamayo returned to the office and was informed that her request to be transferred to a job where she would not work alone was denied. Tamayo then requested that she and two witnesses to the gossip/rumors (Gustavo and Lourdes Ramirez) speak with Larry Chrisco, the farm manager. Despite the violent nature of the rumors and Tamayo's fears, Tamayo and her witnesses did not meet with Chrisco until approximately three weeks later on February 21, 2001. At the meeting with Chrisco, the gossip and rumors were related to Chrisco by both Tamayo and her witnesses. Additionally, the Ramirezes told Chrisco that their work vehicles had been vandalized prior to the meeting. Specifically that the tires of Gustavo's truck had been slashed and hydraulic lines on Lourdes's vehicle had been cut.

Gomez began an investigation that ended on March 12, 2001. Gomez concluded that there were two groups involved in the rumors, one group consisting of Tamayo and the Ramirezes and a second group consisting of Hernandez, Mendoza, and Mosqueda. All involved in the gossip/rumors were disciplined, including Tamayo and the Ramirezes. Tamayo was suspended for one day without pay and given a final written warning about engaging in sexually inappropriate behavior at the work place. Chrisco had recommended that everyone involved be suspended without pay for two weeks. Gomez concluded that Tamayo had participated in the gossip and made sexually inappropriate comments, but no specific evidence was introduced to support this conclusion. Gomez also refused to tell Tamayo what was going to happen to the other workers involved. Three of the workers involved, Lourdes Ramirez (one of Tamayo's witnesses), Mendoza, and Mosqueda were terminated because of prior warnings. Even though Tamayo was the one who complained about the gossip against her and sought help, and despite the prior

histories of inappropriate gossip and harassment by Mendoza and Mosqueda, Gomez and Defendant's management reached the conclusion that Tamayo had engaged in inappropriate sexual communications/conduct and that discipline was appropriate.

Taken as a whole, the above evidence is sufficient to support a finding that Defendant acted with reckless disregard to Tamayo's rights. The evidence of the failure to transfer jobs, suspension, and a final written warning is sufficient to support the jury's finding of retaliation, which can support an award of punitive damages. (citations omitted) The fact that Defendant maintained the same written sexual harassment policy for 12 years with no up-dates or modifications, despite knowing that changes in the law occurred, indicates reckless disregard for rights. Additionally, the out-of-date written policy, the amount of time to investigate complaints (particularly the rape allegation and the 2001 gossip allegation), the conclusion of the 2001 gossip complaint, the non-conclusion reached with respect to the rape allegations, and the translation problems point to an ineffective sexual harassment policy. (citations omitted). Finally, the investigations of the 1999 complaints were performed by Defendant's human resources agents and the investigation and retaliatory conduct regarding the 2001 complaint were performed and approved by Defendant's human resources director and management. (citations omitted) The standard for judgment as a matter of law under Rule 50 is very stringent as the court must view the evidence in the light most favorable to the non-moving party, draw all reasonable inferences in favor of the nonmoving party, and disregard all evidence favorable to the moving party that the jury is not required to believe. (citations omitted) Viewed in this favorable light, the above evidence is sufficient to show that Defendant acted with reckless disregard to Tamayo's federally protected rights.

(emphasis added)