Chapter 1

UNDERSTANDING THE HARASSMENT CLAIM

Introduction
Before attempting to investigate a claim of harassment, you must understand some basic concepts of harassment law. That way, you will know what types of facts to look for during your investigation. Harassment in the workplace is never a good thing. However, the law actually prohibits only certain kinds of harassment. Thus, you may find that an employee legitimately claims to feel harassed, but upon proper investigation, the facts simply do not make out any legal claim against the employer or alleged perpetrator. For example, a boss indiscriminately yells at all his or her employees continually and for no good reason. Employees enduring such behavior daily may feel harassed. However, yelling is not, in and of itself, illegal in the workplace. Although we may argue that it should be, it simply isn’t . . . yet.1 Clearly, however, such behavior may constitute a management issue that the employer should address, even if the behavior doesn’t give employees grounds for a lawsuit.

So, what makes harassment illegal? Basically, the harassment must be based on one or more categories protected from discrimination under state or federal law.

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Title VII

Title VII of the Civil Rights Act of 1964, the seminal federal law prohibiting certain behaviors in the workplace, makes it illegal for employers to discriminate against employees based on their race, color, religion, sex, or national origin.2

Title VII—42 USC § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.3

Interestingly, gender or sex, as a category protected from discrimination, was not in the original bill presented to Congress.4 Obviously, given the timing of the bill’s introduction, the bill focused on ending racial discrimination in employment. However, a cunning senator amended the bill to include sex discrimination as a protected category in an attempt to block passage of the bill.5 The ploy boomeranged back on Sen. Howard W. Smith of Virginia when the bill passed with gender included as an illegal form of discrimination.6

Given the fact that gender was included as a protected category not to advance but to block passage of Title VII, it is not surprising that sexual harassment wasn’t fully acknowledged as a legitimate cause of action until 1986, more than twenty years later, when the Supreme Court finally ruled such in Meritor Savings Bank v. Vinson.7 In fact, sexual harassment, as a cause of action, was not often claimed until 1991 when catapulted to the national stage by Anita Hill during the senate hearings held to determine whether Clarence Thomas was fit to hold the position of US Supreme Court justice. Hill claimed that ten years prior, Thomas, then chairman of the Equal Employment Opportunity Commission (EEOC), the governmental agency in charge of enforcing Title VII, sexually harassed her while she worked for him.8 During those hearings many questioned why she hadn’t previously brought forward this information.9 However, if you do the math, you see that the alleged conduct would have taken place five years before the US Supreme Court legitimized the cause of action in Meritor. Hill’s testimony swelled a huge wave of sexual harassment claims that continues to this day.

3. Id.
5. Id.; see also Comment, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U. Chi. L. Rev. 430, 432 (1965); 110 Cong. Rec. 2577–84 (1964).
6. Whittenbury, supra note 4 at 358.
8. ANITA HILL, SPEAKING TRUTH TO POWER 70 (1997).
9. Id. at 131.
Other Laws Giving Rise to Harassment Claims

Following Title VII, more federal laws developed expanding employment rights and creating bases for employment harassment claims:

- The Americans with Disabilities Act
- The Age Discrimination in Employment Act (protecting workers over the age of forty from discrimination)
- The Family and Medical Care Leave Act

Some states provide additional categories such as sexual orientation, gender preference, gender expression, and marital status. You should check your state codes to determine whether the facts presented by the complainant may make out a cause of action.

Types of Harassment Claims

To properly investigate harassment claims, you must understand the elements that make up these legal claims. Courts have defined two types of harassment cases: (1) hostile environment and (2) quid pro quo or tangible employment action. Additionally, retaliation claims may arise out of harassment cases. You may also find yourself investigating claims of retaliation unrelated to harassment cases. The following sections provide the needed legal background for proper investigations into these sorts of claims.

Hostile Environment

To prove a hostile environment sexual harassment claim, the complainant must establish three elements: (1) sexual conduct occurred, (2) such conduct was subjectively unwelcome, and (3) the conduct created a hostile or abusive working environment both to the complainant subjectively and to a reasonable person of the same gender and in the same set of circumstances as the complainant.

Sexual Conduct

Since sexual harassment is a form of sex discrimination, complainants can meet the sexual conduct prong by showing that they were treated differently than members of the opposite sex or by proving that the conduct was sexual in nature. Although some courts hold out for a showing of differential treatment, the majority of the courts seem to feel that if the conduct is sexual in

13. See, e.g., CAL. GOV’T CODE § 12900 (West or Deering 2012).
nature, there must be a gender distinction of some sort buried in the facts. Courts don't always specify that distinction in their opinions. So for the purposes of an investigation, you should look for a gender distinction or conduct that is about sex in some way.

Note that the complainant and the accused do not have to be of opposite genders to find sexual harassment. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. You also may look for comparative evidence of how the alleged harasser treated those of both genders in a mixed-gender workplace. In same-sex cases, pay close attention to the circumstances surrounding the allegations, taking into account the social context in which the alleged events occur.

Recent cases have allowed those who were not the direct subject of the unwelcome conduct to sue for sexual harassment as affected third parties. During an investigation you need to determine whether sexual conduct occurred in the workplace or had an impact on the workplace. For example, did a supervisor engage in sexual favoritism to promote those who acquiesced to sexual conduct rather than those better qualified for promotion but who did not so engage?

Please note that you can substitute any of the protected categories for the sexual conduct prong for other types of hostile environment cases. For example: Was there racially related conduct? Was the conduct based on someone's disability or medical condition? Was the complainant experiencing derogatory comments or behaviors based on age; if so, was the person older than forty? Although not sexual harassment claims, harassment based on race, disability, or age certainly creates legitimate claims of illegal conduct.

Unwelcome

Whether the sexual conduct at issue was unwelcome is purely subjective on the part of the recipient of the behavior. In general, courts do not require the victim to tell the perpetrator to stop before having a legitimate claim of sexual harassment. The facts may tempt you to

18. See cases cited supra note 17; see also Flowers v. Honigman Miller Schwarz & Cohn, LLP, No. 04-71928, 2005 U.S. Dist. LEXIS 9062, at *17 (E.D. Mich. May 16, 2005) (defining “sexual in nature” so Michigan courts find that sexual harassment cases require conduct or communication that inherently pertains to sex).
20. Id. at 81.
21. Id. at 81.
22. Id.
24. See cases cited supra note 23.
27. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986) (citing Mercado, 2011 U.S. Dist. LEXIS 122145, at *9 n.26 (concluding that despite consensual sex between a superior and employee, employee still created a genuine dispute of material fact as to whether the conduct was unwelcome)); T.L. v. Toys R Us, Inc., 255 N.J. Super. 616, 635
question whether the claimant actually found the conduct offensive. Many courts have found that the plaintiff’s actions can indicate whether the conduct was unwelcome. Some courts have stated that you can take into account the plaintiff’s provocative speech or clothing, but that the “use of foul language or sexual innuendo in a consensual setting” does not waive the plaintiff’s legal protections. Some courts do not believe conduct with other employees in the workplace gives any evidence of whether the plaintiff welcomed sexual conduct from a specific individual. Your job as an investigator is to determine whether the plaintiff welcomed the conduct from the alleged harasser specified in the complaint. Courts make clear that you cannot take into account the plaintiff’s past personal acts outside of the workplace to determine the “unwelcome” prong in sexual harassment cases.

Often, the accused will say they did not know the conduct was unwelcome. However, motive is not an element in a sexual harassment claim. The perpetrator does not need to have intended to harass for the facts to make out a claim of harassment. This often catches people by surprise, so be ready with the appropriate response if such a situation arises during your investigation. You should view the investigation as an opportunity to educate as well as resolve issues while you gather the relevant facts.

(1992) (although “unwelcome” is an implicit requirement in a sexual harassment case, that element is not negated by acquiescence or even the consent of the victim as a matter of law); 

28. Terry, 2000 U.S. Dist. LEXIS 136707, at *16–18 (citing Scusa v. Nestle USA Co., 181 F.3d 958, 966 (8th Cir. 1999) (finding employee failed to demonstrate conduct at issue was “unwelcome” because “plaintiff engaged in behavior similar to that which she claimed was unwelcome and offensive,” including yelling at coworkers and using foul language in the workplace); Mangrum v. Republic Indus., Inc., 260 F. Supp. 2d 1229, 1252 (N.D. Ga. 2003) (finding plaintiff could not show conduct at issue was unwelcome when she “participated in and, in some instances, initiated inappropriate language and activity at [the workplace]”); Pittman v. Cont’l Airlines, Inc., 35 F. Supp. 2d 434, 442 (E.D. Pa. 1999) (finding plaintiff could not demonstrate fourth element of hostile work environment claim when plaintiff engaged in banter among employees, flirted with employees at work, and asked an employee if he was a homosexual); Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539, 1547 (S.D. Fla. 1995) (finding plaintiff had not demonstrated that she subjectively perceived conduct as abusive when plaintiff participated in name-calling, used vulgarities, attempted to pull down a male coworker’s pants, and bragged to coworkers about her sexual activities at the workplace); Marshall v. Nelson Elec., 766 F. Supp. 108, 1023, 1041 (N.D. Okla. 1991) (finding work atmosphere was not unwelcome or offensive to plaintiff when she was a leading participant in the sexually charged workplace, as she used “dirty talk” in the workplace and asked coworkers about their sexual activities); Tindall v. Hous. Auth. of Fort Smith, 762 F. Supp. 259, 263 (W.D. Ark. 1991) (concluding plaintiff was not offended by conduct at issue because plaintiff acted like “one of the boys and freely joined in sexual jokes with the men” at the workplace)).


30. See Mercado, 2011 U.S. Dist. LEXIS 122145, at *10 (employer’s claim that plaintiff had a sexual relationship with another employee does not negate the unwelcome element); King v. Town of Hanover, 959 F. Supp. 62, 66 (D.N.H. 1996) (sexual banter with coworkers did not mean that the plaintiff welcomed such behavior from her supervisor).


32. B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1015 (9th Cir. 2002); see also Stacks v. Sw. Bell Yellow Pages, 27 F.3d 1316, 1327 (8th Cir. 1994) (focusing on plaintiff’s private life is error as matter of law); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (holding that plaintiff’s choice to pose for a nude magazine after work hours is not probative of whether plaintiff felt that certain sexual conduct at work was unwelcome); Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (a person’s private, consensual activities do not waiver legal protections against unwelcome, unsolicited sexual harassment); Cunningham v. Town of Ellicott, No. 04CV301 (Consent), 2007 U.S. Dist. LEXIS 24779, at *7 (W.D.N.Y. Apr. 3, 2007) (evidence of sexual activity outside the workplace is generally irrelevant and inadmissible).


34. See id.
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Many people confuse “consent” with “welcome.” Courts make clear that a focus on “voluntariness” is misplaced. Look to whether the conduct was welcome—did the recipient want the behavior to occur?—rather than whether the recipient acquiesced to the behavior.

Severe and Pervasive

The third element needed to make out a case of hostile environment harassment is that the unwelcome, sexual conduct must be so severe and pervasive that it actually changes the conditions of employment and creates a hostile environment for the complainant. Please note that it takes all three elements, (1) sexual conduct (2) that is unwelcome and (3) that is severe and pervasive before a legal claim of harassment exists. However, the presence of one or two of the elements should put employers on notice to do something to prevent a situation in which all three elements occur together and open the employer to legal liability. What the employer knows about the situation and how it reacts can make the difference between an eventual costly court case and a harmonious, secure workplace.

How do you know when an environment has changed into an abusive work environment? Ask yourself: Is this the type of environment a worker in this particular job should expect when accepting the position with the company? For example, a receptionist probably would expect to answer phones, greet clients, take messages, and sign in visitors. However, a receptionist probably would not expect those visitors to constantly make comments about physical attributes or to ask the receptionist out on dates.

The severe and pervasive prong of the equation is both subjective and objective. Therefore, the complainant must feel that the environment is hostile, and a reasonable person of the same gender and situation as the complainant must agree. Unlike the unwelcome prong, the severe and pervasive aspect is not up to just the claimant to decide.

Determining whether the unwelcome conduct was severe and pervasive is a matter of balance. The more severe the behavior, the less pervasive it must be. Conversely, the more pervasive, the less severe it must be. There is no bright-line test, and within this analysis lies a large field of gray. However, the EEOC has clearly stated that just one touching of an intimate body part constitutes a hostile environment. Although some courts make this same point, they all look to the entirety of the circumstances in determining whether the conduct is severe enough to constitute a hostile environment. A one-time molestation would make most people
feel they worked in a hostile environment. They would naturally fear that what happened once
could happen again. Conversely, one dirty joke told over the course of a ten-year career probably
would not make most people feel that they could not work in such an environment. However,
if an employee could not get to a workstation without enduring a gauntlet of dirty jokes every
morning, a person might reasonably feel that the conditions of employment had changed to an
abusive environment.

When drawing your conclusions about the hostile environment element, consider the nature
of the unwelcome conduct, bearing in mind that courts generally consider physical touching
more severe than verbal displays. If Look at the frequency and duration of the conduct. Bear
in mind the context in which the behavior occurred. Did the behavior unreasonably interfere
with an employee’s work performance?

As the investigator, it will fall to you to gather the facts that will allow decision makers
to determine if a hostile environment exists. With a hostile environment claim, you will find
yourself questioning several witnesses to get a clear picture of the severity and pervasiveness of
the alleged conduct. One of your greatest challenges may be to reserve judgment until you have
gathered all the relevant facts. Remember that you must judge this prong from the perspective
of a reasonable person of the same gender as the complainant who is similarly situated. If you
are the opposite gender of the complainant, you might find this task a bit difficult, necessitating
the interviews of more witnesses who might provide you with that perspective.

**Company Liability in Hostile Environment Cases**

Whether a court will hold a company liable in a hostile environment case is determined
under a negligence standard. Did the employer know or should it have known of the hostile
environment, and, if so, did the employer take the appropriate steps to end and remedy the
harassment? During the investigation, look for facts that would clarify if the company knew
or had reason to know of the harassment before the complaint. How many people witnessed the
reported events? Were any of the witnesses members of management? Obviously, you are there
to investigate a situation that has somehow come to the attention of the employer. How you
proceed with the investigation will effect an ultimate determination of whether the company
responded appropriately once it learned of the issue. So make sure to conduct a thorough inves-
tigation into all relevant issues.

**Quid Pro Quo or Tangible Employment Action**

The Latin term “quid pro quo” translates to “something for something.” The stereotypical sce-
nario occurs when a boss threatens to fire a subordinate for refusing sexual advances. However,
modern-day quid pro quo cases can arise from much subtler facts.

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46. Id.
47. Id.
48. Id. at 1348.
49. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 743.
(8th Cir. 1986) (citing Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982))); see also Dornheffer v. Malibu
Grand Prix Corp., 828 F.2d 307, 309 n.3 (5th Cir. 1987); Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987).
To make a case for quid pro quo—or as the US Supreme Court seems to refer to it now, a claim of “tangible job detriment”—you must again find three elements. Here, the first two elements are the same as for hostile environment claims: (1) sexual conduct that is (2) unwelcome. However, in these types of cases you should be even more sensitive to the concept that “welcome” and “consensual” are not the same thing. One can consent to conduct that is not welcome. Although in rape cases one must prove that the act was not consensual to win a case, in sexual harassment cases one merely needs to state that the act or conduct was unwelcome. This point can cause some difficulty in investigations because what may have appeared welcome at the time may not, in fact, have been so. For example, if a boss has an affair with another employee who appears to welcome the liaisons, how does the boss later prove that the affair was welcome when the employee now claims it wasn’t? The employee can easily claim that he or she felt pressured to make the liaisons appear welcome to keep a job. If this issue arises during your investigation, you will need to determine the relative credibility of the parties to try to determine whether the conduct was truly unwelcome.

The third element of a quid pro quo claim differs from that of a hostile environment claim. In a quid pro quo case, the complainant must show that failure to submit to the unwelcome sexual conduct was used as the basis for a tangible employment decision. A tangible employment decision is any that results in a significant change in an individual’s employment status. Hiring and firing decisions usually come first to mind as tangible employment decisions. However, other, much subtler actions also qualify—for example, changing someone’s boss, although the job description, compensation, work hours, and even desk or workspace stays the same. If the original boss was a nice person and the new boss has a reputation as a difficult
person, such a change can constitute a tangible employment decision.\textsuperscript{60} If that change comes on the heels of the employee’s objection to indecent remarks frequently made in the workplace, a quid pro quo claim may exist.\textsuperscript{61} The following presents a partial list of actions that can constitute tangible employment decisions:

- hiring/firing
- promotion/demotion
- change of shift assignment
- change of job description
- change of job location
- change in benefits
- change in compensation
- significant change of work area\textsuperscript{62}

Even a denial of bathroom breaks may constitute a tangible employment decision.\textsuperscript{63} In \textit{Soto v. John Morrell & Co.},\textsuperscript{64} the plaintiff alleged that she had been denied the same amount and length of bathroom breaks as other female coworkers who went along with sexual harassment from an employee she thought was her supervisor.\textsuperscript{65} Although the plaintiff was fired by the person she believed to be her supervisor, the court found that only the human resources department had the actual authority to fire employees of the company.\textsuperscript{66} The plaintiff found out about her “termination” through a coworker while the plaintiff was out of town attending to a family emergency.\textsuperscript{67} The day after she returned from her trip she went to human resources to request her final paycheck.\textsuperscript{68} At that time, the same day she would have returned to work under normal circumstances, the plaintiff was told that she had not been fired and that she could return to work with the same benefits and seniority as before.\textsuperscript{69} The court found that even though the plaintiff reasonably believed she’d been fired given the “firing employee’s” apparent authority to do so, she had not incurred any tangible employment decision resulting in loss of pay, benefits, or employment status due to the actual timing of the events.\textsuperscript{70} However, the court did find a triable issue of fact as to whether the plaintiff had been denied the same discrimination, demonstrated where hearing officer in juvenile court was involuntarily "transferred, without any reduction in pay or benefits, to a permanent position on the legal staff" of the court), \textit{aff’d on second ground}, 741 F.2d 1087 (8th Cir. 1984), \textit{cert. denied}, 469 U.S. 1216 (1985);\textsuperscript{60} \textit{Rodriguez v. Bd. of Educ.}, 620 F.2d 362, 364–66 (2nd Cir. 180).

\textsuperscript{61} \textit{Id.}


\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id. at 1160}.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}
quality bathroom breaks as other coworkers who went along with the “firing employee’s” sexual harassment, stating that if true, such conduct could be deemed a tangible employment decision.\textsuperscript{71}

The question often arises whether a threat of a tangible employment decision is enough to constitute a tangible employment action. For many years, courts appeared split on their answers to that question.\textsuperscript{72} However, the US Supreme Court in \textit{Burlington Industries, Inc. v. Ellerth}\textsuperscript{73} clearly stated that to constitute a quid pro quo claim, there must have been an adverse employment decision made and implemented.\textsuperscript{74} Threats of adverse employment actions, according to the court, fall into the category of hostile environment claims and must be severe or pervasive to make out a legal claim.\textsuperscript{75}

Remember that for a quid pro quo claim, the tangible employment action must have been taken as a result of the employee’s response to unwelcome, sexual conduct.\textsuperscript{76} So during your investigation, you should look for any employment decision that affected the complaining employee, and then determine if the company can articulate a legitimate business justification for that decision. A legitimate business justification may nullify the allegation that the employment decision was made based on the complainant’s submission or lack of submission to unwelcome, sexual conduct.\textsuperscript{77} As an investigator, you may find yourself questioning the reasonableness of the articulated business justification to determine if it is legitimate or a mere pretext for discrimination or harassment.

\textbf{Company Liability for Quid Pro Quo Harassment}

If quid pro quo harassment occurs, the company is strictly liable for the actions of a complainant’s immediate supervisor or those with successively higher authority over the complainant.\textsuperscript{78} Even if the company has written, promulgated, and enforced a policy against sexual harassment, when a supervisor takes an adverse employment action against an employee who spurned sexual advances, the company is liable under agency theories.\textsuperscript{79} Agency theory dictates that when an employer gives the authority to act on behalf of the employer, any employment actions taken by the supervisor are considered to be taken by the employer.\textsuperscript{80} Therefore, the employer is liable for the actions of its supervisors who indulge in sexual harassment in the workplace.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{71} Id. at 1162.
\item \textsuperscript{72} See Jansen v. Packaging Corp. of Am., 123 F.3d 490, 494 (finding judges within its own court of appeals split on whether strict liability for quid pro quo is limited to company acts or can encompass mere threats).
\item \textsuperscript{73} 524 U.S. 742 (1998).
\item \textsuperscript{74} Id. at 753–75.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Chambers v. Trettco, Inc., 463 Mich. 297, 310 (2000); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (stating the framework for establishing a discrimination case under Title VII).
\item \textsuperscript{77} See McDonnell Douglas, 411 U.S. at 802 (1973) (employer may articulate a legitimate business justification for the decision; then the burden shifts back to the plaintiff to show that the articulated reason was pretextual).
\item \textsuperscript{78} Id. at 753 (citing Davis v. Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997)); Nichols v. Frank, 42 F.3d 503, 513–14 (9th Cir. 1994); Boudon v. BMW of N. Am., Inc., 29 F.3d 103, 106–07 (3d Cir. 1994); Sauers v. Salt Lake Cnty., 1 F.3d 1122, 1127 (10th Cir. 1993); Kaufman v. Allied Signal, Inc., 970 F.2d 178, 185–86 (6th Cir. 1992), cert. denied, 506 U.S. 1041 (1992); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
\item \textsuperscript{79} Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982); Davis v. Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997).
\item \textsuperscript{80} Restatement (Second) of Agency §§ 219(l), (2)(d) (1958); 29 C.F.R. § 1604.11(c); Karibian, 14 F.3d at 780.
\item \textsuperscript{81} See sources cited supra note 80.
\end{itemize}
In a quid pro quo case, you may need to determine if the law would consider the accused to be a supervisor. Courts typically relegate supervisor status to those who direct an employee's daily activities, those who can impact employment decisions about another employee, and those with the apparent authority to act as a supervisor.\textsuperscript{82} Investigators cannot rely on the company's designation to determine supervisory status.\textsuperscript{83} Rather, one must determine what the employee actually does within the company. Does the employee have any job duties that influence employment decisions about others, such as engaging in peer reviews or assigning shifts? Also, does any employee give the impression that he or she is a supervisor, and has the company done anything to dissuade workers from forming this false impression?\textsuperscript{84} Frequently, long-term rank-and-file employees take on trainer roles with newer employees. They show less-experienced employees how to do the job and may appear to give orders or direction. If the company has not clarified the chain of command, then the courts might consider the long-term rank-and-file employee a supervisor for the purpose of a quid pro quo analysis.\textsuperscript{85}

For Example: In an Oregon case, the court found that when a company introduced a probationary employee to another employee and told the probationary employee to follow the other employee's direction, that employee essentially became the supervisor of the probationary employee.\textsuperscript{86} The regular employee’s job description and title did not matter.\textsuperscript{87} Later, when the probationary employee sued for sexual harassment and sexual orientation harassment, the regular employee's conduct and the company's lack of response to the probationary employee's complaints incurred liability for the company.\textsuperscript{88}

Some courts find that coworkers endowed with the ability to affect someone else's terms of employment may also incur quid pro quo liability for the company.\textsuperscript{89} For example, if a coworker's job includes the task of designating other's shift assignments, a coworker may commit quid pro quo harassment if after being turned down for a date, he or she suddenly gives the spurning employee the graveyard shift. Likewise, if the company employs a peer-review system, a shunned employee could give a bad review based on spurned advances. If this review leads to the denial of a deserved promotion, the subject of the review may have a quid pro quo case. Although jurisdictions are split over the handling of these types of scenarios, at least some

\textsuperscript{83} See Dawson v. Entek Int’l, 630 F.3d 928, 940 (9th Cir. 2011) (employee can be deemed supervisor even if the company did not define him that way); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (“[The distinction] is not dependent upon job titles or formal structures within the workplace, but rather upon whether a supervisor has the authority to demand obedience from an employee.”).
\textsuperscript{84} See Dawson, 630 F.3d at 940 (if an employee engages in supervision or has authority over another employee, the court can deem him or her a supervisor even if the company does not define his or her role that way).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 941.

\textsuperscript{89} See Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185 (6th Cir. 1992) (even though an employee did not have the ultimate authority to hire and fire, he had significant input into the process so that a question of fact existed as to whether he had enough authority to qualify as an agent of the employer under Title VII); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), modified on other grounds, 900 F.2d 27 (4th Cir. 1990) (en banc) (an employee can qualify as an employer so long as she had significant input into personnel decisions).
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case law suggests that the previous examples may make out cases of quid pro quo harassment. 90 Therefore, look for these types of facts during your investigation.

**The Intersection of Hostile Environment and Quid Pro Quo Claims**

Sometimes, hostile environment and quid pro quo claims overlap. 91 You may find threats so abundant as to constitute a hostile environment and the fulfillment of a final threat that creates a quid pro quo cause of action. 92 Also, a discharge from employment that occurs in a hostile environment may constitute a quid pro quo case. 93 However, at least one court has cautioned that a sexual advance with the proper nexus to a tangible employment decision for a quid pro quo case will not, in and of itself, support the severe or pervasive element of a hostile environment case. 94 Since under agency theory the company is strictly liable for the actions of its supervisors, the question arises whether companies are automatically liable for hostile environments created by supervisors. The Supreme Court answered this question by establishing an affirmative defense to employer liability for hostile environment harassment by supervisors:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see FED. RULE CIV. PROC. 8(c). 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. 95

During your investigation, look at the company’s policy against sexual harassment. Find out if the complainant followed the policy to bring the issues to the attention of the company. If the alleged victim used the company policy and procedure to bring a complaint to the attention of the employer, you are no doubt there to conduct the investigation under company policy. Therefore, how you conduct the investigation will impact whether the company can successfully implement the affirmative defense if the case goes to trial.

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90. *See cases cited supra note 89; But see* Merritt v. Albemarle Corp., 496 F.3d 880, 883–85 (8th Cir. 2007) (team leader with authority to assign employees different tasks or to work with an alleged unsafe coworker did not have the authority to make a tangible employment decision); Sandoval v. Am. Bldg. Maint. Indus., 765 F. Supp. 2d 1138, 1162 (D. Minn. 2010) (although employee could hire staff, he could not discipline, demote, or fire employees and so was not a “supervisor” under Title VII).

91. *See* Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982) (sexual harassment claims are often characterized interchangeably as hostile environment or quid pro quo cases); Carrero v. N.Y.C. Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (the discrimination giving rise to both types of claims cannot always be neatly compartmentalized and the two claims may be complementary to each other).


93. *Id.* at 783.

94. *Id.*

Retaliation Cases: The Prima Facie Case

A retaliation case may arise from facts similar to those of sexual harassment cases, so you should look for facts that might give rise to a retaliation claim while conducting your investigation. In retaliation cases, plaintiffs must initially prove that they (1) engaged in some sort of protected activity, (2) experienced an adverse employment action, and (3) that a causal link exists between the protected activity and the adverse action. Courts emphasize that the plaintiff’s burden of establishing a prima facie case of retaliation is “minimal and does not even require proof by the preponderance of the evidence.”

Protected Activity

Protected activity consists of opposing a discriminatory practice; making or filing a charge; filing a complaint; or testifying, assisting, or participating in an investigation, proceeding, or hearing. Certainly, refusing the sexual advances of a supervisor or filing a harassment complaint constitutes protected activity. Acting as a witness during an investigation into discrimination allegations has also been deemed protected activity by the courts. Even an employee who did not actually act as a witness but experienced retaliation in an effort to prevent the employee from giving true statements during an investigation established the protected activity prong and won a retaliation case. Therefore, involvement as a potential witness can constitute “protected activity.”

In some cases, the courts go so far as to rule that even if the activity is not actually protected by law, but a reasonable person would think it is, that is enough to establish the first prong of a retaliation claim.
Understanding the Harassment Claim

For example: A regional sales manager was asked to fire a cosmetics-counter employee because, in the eyes of the vice president, the employee was not "hot" enough. The manager did not fire the employee, nor did she verbally refuse to do so or discuss the incident with human resources. She simply asked for an adequate justification. The regional manager claimed that she was then "subjected to heightened scrutiny and increasingly hostile treatment" that ultimately "caused severe emotional distress that led her to leave her position." When the regional manager left the company, she claimed retaliation and stated that she had felt it was illegal to fire someone because they are not "hot" enough. The court acknowledged that although no statute exists prohibiting appearance discrimination, most people would reasonably assume that such employer conduct would be unlawful. Therefore, even though there was no statutorily protected activity, a reasonable belief of protected activity, though not directly communicated to anyone, meets the requirements of the first prong of a retaliation claim.

This case raises another important point: plaintiffs do not necessarily need to directly inform the employer that they believe they are engaging in protected activity. "Under certain circumstances, implicit complaints may constitute protected activity under Title VII." Circumstances surrounding an employee's conduct can establish an employer's knowledge that an employee is refusing to comply with an order based on the employee's reasonable belief that the order is discriminatory. In such cases, an employer may not avoid the reach of the law's anti-retaliation provisions by stating that the employee did not explicitly inform the employer that the order was discriminatory.

As the Sixth Circuit summarizes:

In short . . . there is no qualification on who the individual doing the complaining may be or on the party to whom the complaint is made known—i.e., the complaint may be made by anyone and it may be made to a co-worker, newspaper reporter, or anyone else about alleged discrimination against oneself or others; the alleged discriminatory acts need not be actually illegal in order for the opposition clause to apply; and the person claiming retaliation need not be the person engaging in the opposing conduct.

Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) (in retaliation cases, plaintiff must act "under a good faith, reasonable belief that a violation existed"); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992) ("It is enough that the plaintiff had a reasonable, good-faith belief that a violation occurred [and] that she acted on it . . . ."); Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) ("[R]equiring an employee to discriminate is itself an unlawful employment practice."") A plaintiff who demonstrates at trial that he or she was discharged for refusing to implement a policy that discriminates in violation of law, he or she has stated a retaliation claim.)

105. Yanowitz, 36 Cal 4th at 1034.
106. Id. at 1035.
107. Id.
108. Id. at 1034.
109. Id.
110. Id. at 1044.
111. See id.
112. See Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (listing several ways that plaintiffs can establish protected activity); Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995) (courts do not require a formal letter of complaint to an employer as the only acceptable indication of "protected activity").
114. Yanowitz, 3b Cal 4th at 1047.
115. Id.
Adverse Employment Action

Although the adverse employment action prong of a retaliation claim sounds similar to the tangible employment action prong in quid pro qu0 cases, the Supreme Court has clarified a difference. In a retaliation claim, an adverse employment action “is not limited to discriminatory actions that affect the terms and conditions of employment.” Likewise, a plaintiff alleging retaliation based on harassment or a hostile work environment is not required to show the harassment was severe and pervasive enough to constitute a hostile environment to prove retaliation. "The scope of the anti-retaliation provision extends beyond workplace-related or employment related retaliatory acts and harm." According to the Court, in retaliation cases, a plaintiff can establish the adverse action prong by showing an employment action to be “materially adverse” and one that might have dissuaded a reasonable employee from making or supporting a charge of discrimination.

For Example: Two plaintiffs had their lawyer send a letter to their employer complaining that the company was harassing and discriminating against them. The company hired an investigator, but rather than investigating the claims of the two employees, he conducted a background investigation of the employees themselves. The private investigator believed that the company had requested him to conduct the investigation in that way, although the company later denied that had been its intent. The investigator ran criminal background checks on both men and asked the their former manager and family members disturbing questions about the two men. The court found that the employer ordered the investigation because of the employees’ complaint. Finding the employer’s motive irrelevant, the court instead focused on the likelihood that this response by the employer would dissuade others from complaining about harassment. The court ruled as a matter of law that when the employer ordered the investigation it violated Title VII by retaliating against the two employees who filed the complaint.

Other courts have found that employment actions such as delaying a promotion decision, requiring an employee to get prior approval to work extra shifts, cutting an employee’s staff, denying sick and vacation pay, writing an employee up for working too many hours, practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful.”), Keys v. U.S. Welding, Fabricating & Mfg., Inc., No. 1:91CV0113, 1992 U.S. Dist. LEXIS 13197, at *13, No. CV91–0113, 1992 WL 218302, at *5 (N.D. Ohio Aug. 26, 1992) (“Under § 704(a) of Title VII, [the plaintiff] needed only a ‘good faith belief’ that the company practice about which he was complaining violated Title VII; it is irrelevant whether the allegations are ultimately determined to violate Title VII.”).

118. Burlington N., 548 U.S. at 62–63; Moore v. City of Philadelphia, 461 F.3d 331, 341–42 (3d Cir. 2006) (the plaintiff is not required to show an employment action that alters the employee’s compensation, terms of employment, or status as an employee).
119. Moore, 461 F.3d at 341–42.
120. Burlington Northern, 548 U.S. at 64.
121. Id. at 65.
123. Id. at *4.
124. Id.
125. Id. at *5.
126. Id. at *10.
127. Id. at *11.
128. Id.
reassignment of job duties, and unfavorable job evaluations131 constitute adverse actions, to
name a few. The Ninth Circuit has found that even a transfer to a job with the same pay and
status can be an adverse employment action.132 Many other courts have found that transfers
to positions with the same pay and rank but without the same prestige or possibilities for
advancement constitute adverse employment actions.133 However, according to one court, a
plaintiff’s vague contentions that engaging in protected activity caused a negative change in his
supervisor’s interactions with him did not constitute adverse action.134 As the Supreme Court
has noted, “petty slights, minor annoyances, and simple lack of good manners will not create
such deterrence.”135

Retaliation by Coworkers as Adverse Action

Although most retaliation cases turn on the actions of the employer, some cases arise in which
a complainant may experience adverse treatment or hostility from coworkers after filing a

“materially adverse depends upon the circumstances of the particular case, and ‘should be judged from the perspective
of a reasonable person in the plaintiff’s position, considering all the circumstances’” (quoting Oncale v. Sundowner
Offshore Servs., 523 U.S. 75, 81 (1998))); “Reassignment with significantly different responsibilities generally indicates
adverse action” Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006) (quoting Burlington Indus., Inc. v. Ellerth, 524
U.S. 742 (1998)).


133. Richardson v. Gutierrez, 477 F. Supp. 2d 22, 29 (D.D.C. Feb. 26, 2007) (whether a particular reassignment is
“materially adverse depends upon the circumstances of the particular case, and ‘should be judged from the perspective
of a reasonable person in the plaintiff’s position, considering all the circumstances’” (quoting Oncale v. Sundowner
Offshore Servs., 523 U.S. 75, 81 (1998))); “Reassignment with significantly different responsibilities generally indicates
adverse action” Holcomb v. Powell, 433 F.3d 889, 902 (D.C. Cir. 2006) (quoting Burlington Indus., Inc. v. Ellerth, 524
U.S. 742 (1998)).

Aug. 29, 2008).

complaint. Although circuit courts differ on coworker harassment, the majority find that such actions can be imputed to the employer if left unchecked, and thus give grounds for a bona fide retaliation claim against the employer. In those circuits an employer is liable for coworker retaliation “if [an employer’s] response manifests indifference or unreasonableness in light of the facts the employer knew or should have known” about the circumstances. According to the Sixth Circuit, a plaintiff may make a claim for coworker retaliation by showing: ”(1) the coworker’s retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker’s retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff’s complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.”

Other than the Sixth Circuit, only two other circuits have addressed coworker retaliation since the Supreme Court’s seminal retaliation case in Burlington Northern: the Eighth Circuit and the Third Circuit. Both found retaliation causes of action for coworker harassment. According to the Eighth Circuit, to hold an employer liable for coworker retaliation, a plaintiff must show that the employer’s failure to stop the coworker harassment was motivated by the fact that the plaintiff had engaged in protected activity. However, the Third Circuit found company liability for coworker retaliation “where supervisors ‘knew or should have known about the [coworker] harassment, but failed to take prompt and adequate remedial action’ to stop the abuse.” So when conducting an investigation, look for evidence of coworker harassment after the filing of the complaint, since some circuits accept such conduct as evidence fulfilling the adverse action requirement of a retaliation claim against the employer.

136. Berry v. Delta Airlines, 260 F.3d 803, 809 (7th Cir. 2001) (creation of a hostile working environment through filing of complaint can be actionable as retaliation); Heuer v. Weil-McLain, 203 F.3d 1021, 1024 (7th Cir. 2000) (creation of a hostile environment motivated not by sex but by filing a complaint is form of retaliation).

137. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 348 (6th Cir. 2008) (citing Fielder v. UAL Corp., 218 F.3d 973, 984–85 (9th Cir. 2000) (recognizing a claim for coworker retaliation based on the principle that employers are liable for coworker retaliation on grounds similar to the grounds on which they are liable for coworker harassment), vacant on other grounds in light of Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264–65 (10th Cir. 1998) (recognizing claims for coworker retaliatory harassment if the conduct is “sufficiently severe”; the company had knowledge of the acts; and the company orchestrated, condoned, or encouraged them); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (upholding that a company may be held liable for retaliation through acquiescence in a coworker’s campaign of retaliatory harassment); Wyatt v. City of Boston, 35 F.3d 13, 15–16 (1st Cir. 1994) (explaining that an adverse employment action includes “toleration of harassment by other employees”); See also Marrero v. Goya of P.R., Inc., 304 F.3d 7, 26 (1st Cir. 2002) (finding such claims allowed where employer tolerates harassment by other employees); Richardson v. N.Y. State Dep’t of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999) (“We adopt the view that unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action so as to satisfy the second prong of the retaliation prima facie case.”).


139. Hawkins, 517 F.3d at 348.

140. Id. at 347–348.

141. Id.

142. Id. (citing Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 619 (8th Cir. 2007)).

Causal Link

To prove the third prong of a retaliation claim, a plaintiff must establish that the employer would not have taken the adverse employment action if not for the protected activity.144 A plaintiff’s subjective belief in a causal connection is not enough to establish this prong.145 To establish this link, a plaintiff must show that the decision makers knew of the protected activity and that the protected activity and the adverse action were not “wholly unrelated.”146 Plaintiffs may establish that the employer knew of the protected activity through direct or inferred evidence.147 To show that the protected activity and the adverse action are related, the courts can consider the time between the protected activity and the adverse action.148 A substantial delay between the protected activity and the adverse action without other evidence to the contrary can be enough to grant summary judgment to the employer.149 The Eleventh Circuit found that three months can constitute a substantial delay if the employer was already contemplating a demotion before the protected activity.150 Another court has stated: “A ‘close temporal proximity’ is between one and two months.”151

However, in cases that the plaintiff cannot show proximity between the protected activity and an adverse action, such as termination, courts may look to circumstantial evidence of a “pattern of antagonism following protected activity.”152 Note that plaintiffs cannot use previously contemplated adverse actions to support their prima facie case.153 “Employers need not suspend previously planned transfers upon discovering that [an employee has engaged in protected activity], and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.”154


146. Id. at *7 (quoting McCann v. Tillman, 526 F.3d 1370, 1376 (11th Cir. 2008) (quoting Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000))).


148. Id.

149. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004).


Beyond the Prima Facie Case

If the plaintiff can establish evidence of a causal connection, the burden shifts to the employer to show some legitimate reason for the adverse action other than discrimination, harassment, or retaliation.155 During your investigation, make sure to follow up with the employer to determine its articulated reason for the alleged adverse action. The defendant employer, in court, need not prove its stated reason to be the actual reason.156 Once an employer articulates a legitimate reason for its action, the burden then shifts back to the plaintiff to show that the proffered reason is pretextual and that it is more likely that retaliation was the determinative cause of the adverse action.157 The plaintiff must show that “but for” the protected activity, the employer would not have taken the adverse action.158 For such a showing the plaintiff may use either direct or circumstantial evidence.159 For example, the plaintiff can use statistics to show bias or that the employer’s proffered explanation for the adverse action is “unworthy of credence.”160 Also, “[i]n extreme enough cases, an employer’s inconsistencies in its proffered reasons for discharge can constitute evidence of pretext.”161 So bear these points in mind as you gather facts during the course of your investigation.

Conclusion

Understanding all the elements involved in the various types of harassment and retaliation cases will help you conduct a more thorough investigation. You may wish to keep a list of the elements handy during your interviews to remind yourself of the types of facts you must gather. Although this chapter is not intended to be an exhaustive treatise, it should give you the basic legal understanding to proceed with your harassment investigations.

157. Jalil, 873 F.2d at 701, 708; Grizzle v. Travelers Health Network, 14 F.3d 261, 267 (5th Cir. 1994).
158. Grizzle, 14 F.3d at 267.
159. Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1094–95 (9th Cir. 2005).
160. Id. at 1095 (quoting Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
161. Casas v. Bank of Am., N.A., No. 09-6133, 2011 U.S. Dist. LEXIS 97462, at *17–18 (E.D. Pa. Aug. 30, 2011) (citing Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 284 (3d Cir. 2001) (employer offered new and unrelated reasons for termination at latter stages of litigation)); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998) (employer gave entirely unrelated rationales for termination to EEOC and trial court); EEOC v. L.B. Foster Co., 123 F.3d 746, 753 (3d Cir. 1997) (deposition and trial rationales were unrelated); see also Hoeschtetter v. City of Pittsburgh, 79 F. App’x 537, 539–40 (3d Cir. 2003) (stating that pretext can be evidenced by inconsistencies in the rationale for the adverse action when the decision maker has provided “totally different and unrelated rationales for the employment decision at different stages of the litigation”).