CHAPTER 1

Gender Harassment and Retaliation

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Statutory protection for employees who believe they have been sexually harassed or retaliated against for reporting sexual harassment in the workplace has been expanding since the enactment of Title VII of the Civil Rights Act of 1964 (Title VII) and the 1998 landmark US Supreme Court cases of Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton. This chapter discusses the basic elements of bringing forth sexual harassment and retaliation claims and the defenses available to employers.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Basic Legal Analysis Under Title VII

Title VII protects employees from workplace discrimination based on certain protected characteristics, including sex and gender, and from retaliation for reporting claims of harassment or discrimination. Title VII covers any employer having more than fifteen employees during any twenty-week period in the current or preceding year.

Under Title VII, discrimination claims may be based on allegations of disparate treatment or disparate impact discrimination. Disparate treatment refers to instances where the employer intentionally treats the employee differently based on a protected characteristic, including race, sex, national origin, color, or religion. In contrast, disparate impact claims involve allegations that the employer engaged in a certain practice or implemented policies that had the effect or impact of subjecting employees to discrimination, even if the intent to discriminate is not present. This chapter will focus on the elements of claims related to disparate treatment discrimination or harassment.

In very few cases, employees have direct evidence of discrimination, such as where the employer admits to discriminating on the basis of a protected qualification. Direct evidence of discrimination is "evidence, which if believed, proves the fact of discriminatory animus without inference or presumption."\(^7\) If an inference is required for the evidence to be probative as to an employer's discriminatory animus, the evidence is circumstantial, not direct. However, cases of direct evidence discrimination are rare.\(^8\)

Most cases rely upon circumstantial evidence. In cases where the plaintiffs are relying on circumstantial evidence, federal courts, since 1973, have used the three-stage analysis established in *McDonnell Douglas Corp. v. Green* to decide intentional employment discrimination cases.\(^9\) Under the *McDonnell Douglas* burden-shifting framework, plaintiffs may present a *prima facie* case of disparate treatment by showing these basic elements:

- The plaintiff is a member of a protected class under Title VII (race, color, sex, religion, and national origin).
- The plaintiff is qualified for the position and applied for the position in question.
- The plaintiff was rejected despite his qualifications and the employer continued to seek applications from persons with the same qualifications as the plaintiff.

If the plaintiff establishes this *prima facie* case, which creates the presumption that the employer has unlawfully discriminated, the burden of production next shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the employment action.\(^10\) The plaintiff must then demonstrate that the employer's reason was a pretext for discrimination.

However, the Court in *McDonnell Douglas* noted that the elements of a *prima facie* proof will vary depending on different factual situations.\(^11\) The *McDonnell Douglas* framework was intended to create a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."\(^12\) This has resulted in some federal circuit courts requiring an alternative fourth prong necessary to prove a *prima facie* case of discrimination, to wit, whether "nonmembers of the protected class were treated more favorably."\(^13\) In *Taylor v. Virginia Union University*, the Fourth Circuit stated that in order to state a Title VII *prima facie* case of

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8. See Scott v. Univ. of Miss., 148 F.3d 493, 504 (5th Cir. 1998).
11. 411 U.S. at 802 n.13; see also Governors v. Athens, 460 U.S. 711, 715 (1983) (the *prima facie* case was "never intended to be rigid, mechanized or ritualistic"); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (the *prima facie* case test of *McDonnell Douglas* "was not intended to be an inflexible rule.").
12. 438 U.S. at 577.
disparate discipline, a sex discrimination plaintiff must show that “she suffered more severe discipline for her misconduct as compared to those employees outside the protected class.”\textsuperscript{14}

Similar to the Fourth Circuit, the Fifth Circuit has required that, absent direct evidence, a plaintiff must point to a similarly situated employee as part of his \textit{prima facie} case.\textsuperscript{15} The Fifth Circuit has required that to be similarly situated, “those employees’ circumstances, including their misconduct, must have been ‘nearly identical’ to support a plaintiff’s burden of proof in disparate treatment cases.”\textsuperscript{16}

In some circuits, even if a plaintiff has established a \textit{prima facie} case and presented evidence that a defendant’s legitimate, nondiscriminatory justification for its actions was a pretext, a defendant can still be entitled to summary judgment when “no rational fact finder could conclude that the action was discriminatory.”\textsuperscript{17} If the employee chooses the mixed-motive alternative and proves that discrimination was a motivating factor, the burden shifts back to the employer to prove that it would have made the same decision despite the discriminatory animus.\textsuperscript{18} If the defendant meets its burden of demonstrating that it would have made the same decision regardless of any retaliatory motive, then it is entitled to summary judgment.\textsuperscript{19}

\section*{B. Gender Discrimination and Sexual Harassment Under Title VII}

\subsection*{1. Types of Harassment}
In the past, two types of sexual harassment claims were recognized: \textit{quid pro quo} and hostile environment. Generally, \textit{quid pro quo} harassment was found in situations that involved harassment based on gender, whereas hostile work environment harassment applied to all types of unlawful harassment.\textsuperscript{20} The traditional meaning of harassment changed somewhat in the Supreme Court decisions in \textit{Burlington Industries v. Ellerth}\textsuperscript{21} and \textit{Faragher v. City of Boca Raton}.\textsuperscript{22} In this set of cases, the Supreme Court modified the meaning of harassment to include:

\begin{itemize}
  \item a. tangible employment action, and
  \item b. hostile work environment.
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\textsuperscript{14} 193 F.3d 219 (4th Cir. 1999), cert. denied.
\textsuperscript{15}  See generally Rutherford v. Harris County, 197 F.3d 173, 183–84 (5th Cir. 1999); Urbano v. Cont’l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998) (cert. denied); Rohde v. K.O. Steel Castings, Inc., 649 F.2d 317, 322 (5th Cir. 1981); Williams v. Trader Publ’g Co., 218 F.3d 481, 484 (5th Cir. 2000).
\textsuperscript{16}  See Javier Perez v. Texas Department of Criminal Justice, 395 F.3d 213 (5th Cir. 2004); see also Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir.1990) (per curiam); Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296 (5th Cir. 2000); Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995).
\textsuperscript{17}  See Reeves, 530 U.S. at 148.
\textsuperscript{18}  Richardson v. Monitronics, 434 F.3d 327, 333 (5th Cir. 2005).
\textsuperscript{19}  Id.
\textsuperscript{21}  524 U.S. 742 (1998).
\textsuperscript{22}  524 U. S. 775 (1998).
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2. What Is a Tangible Employment Action?
A tangible employment action is a significant change in employment status, such as firing, failing to hire, failing to promote, reassignment with significantly different responsibilities or a significant change in benefits. A tangible employment action is based on a threat of a job detriment or a promise of a job benefit in exchange for sexual favors which, if refused, results in an adverse employment action, such as termination, denial of a raise, etc. As discussed in further detail as follows, employers are strictly liable for conduct by supervisors that constitutes a tangible employment action.

3. Hostile Work Environment
Hostile environment harassment is harassment that creates adverse working conditions, but does not result in a tangible employment action. This type of harassment is not limited to gender, but may also be used to prove harassment based on other protected classifications, such as race, national origin, religion, age, disability, and color. Examples of hostile work environment harassment include unwelcome jokes of a sexual nature, graffiti, comments, stories, photographs, gestures, emails, or any conduct based on gender that interferes with the employee’s work performance.

In order to prove a prima facie case of coworker hostile work environment exists, a plaintiff must prove that:

1. she belongs to a protected class;
2. she was subject to unwelcome sexual harassment;
3. the harassment was based on sex;
4. the harassment affected a term, condition, or privilege of employment; and
5. the employer knew or should have known of the harassment and failed to take prompt remedial action.

Threats of job loss or promises of job-related advantages/benefits that do not result in tangible employment action are suitable claims for hostile environment harassment, if the threats or promises create an intimidating, hostile, or offensive work environment. Examples of behaviors that may create a hostile work environment include:

- unwanted sexual advances;
- offering employment benefits for sexual favors;
- leering, making sexual gestures, displaying derogatory pictures, emails, cartoons, or drawings;
- sexually derogatory comments, epithets, slurs, or jokes;
- verbal abuse, degrading words to describe men or women;

23. See Ellerth, 524 U.S. at 761.
• touching, assault, impeding, or blocking movements; and
• retaliating against an employee for complaining of sexual harassment.

C. Employer Liability for Unlawful Harassment by Managers and Supervisors

Employers are strictly liable under Title VII for any sexual harassment by a supervisor that results in a tangible employment action. The elements of a prima facie case of tangible employment action harassment are:

1. the plaintiff is a member of a protected group;
2. the plaintiff was subjected to unwelcome sexual advances or requests for sexual favors;
3. the harassment was sexually motivated;
4. the employee’s reaction to the supervisor’s advances affected a tangible aspect of the employment; and
5. a basis for employer liability has been established.26

If the harassment does not result in a tangible job detriment, the Supreme Court has held that the employer may still be liable for a hostile work environment by supervisors.27 However, an employer may avoid liability for a hostile environment created by managers and supervisors under two conditions:

a. if the employer used reasonable care to prevent and correct any harassment, including implementing a sexual harassment policy and training employees on the complaint procedures; and
b. if the employee unreasonably failed to make a complaint under the policy or to avoid harm otherwise.28

Having a sexual harassment policy will not be enough, by itself, to avoid liability using the affirmative defenses provided in Ellerth and Faragher. If the employer does not comply with the policy or promptly address the alleged behavior, some courts have found that the affirmative defenses were not available to the employer.29 In Homesley v. Freightliner

26. Tang v. Citizens Bank, N.A., 821 F.3d 206, 215 (1st Cir. 2016); Cook v. Life Credit Union, 138 F.Supp.3d 981, 991 (M.D. Tenn. 2015); Byrd v. Wis. Dep’t of Veterans Affairs, 98 F.Supp.3d 972, 980 (W.D. Wis. 2015); see also Puleo v. Texana MHMR Ctr., 187 F. Supp.3d 769, 780 (S.D. Tex. 2016) (internal punctuation marks omitted) (noting that the ultimate question for a quid pro quo claim is “whether the tangible employment action suffered by the employee resulted from her acceptance or rejection of her supervisor’s alleged sexual harassment”).

27. Id.


29. See Homesley v. Freightliner Corp., 61 F. App’x 105 (4th Cir. 2003) (employer was not entitled to an affirmative defense in a sexual harassment case in part because the company did not comply with its harassment policy and did not act promptly to address the alleged harassment).
Corp., the supervisor told the plaintiff, who complained of sexual harassment, that she should have asked her husband to “whip the alleged harasser’s butt” as a remedy for the harassment. The employer’s failure to promptly investigate and resolve the complaint prevented it from being able to rely on the Ellerth and Faragher affirmative defenses. The court also held that the plaintiff reasonably tried to take advantage of corrective measures offered by the employer, because she promptly complained about the behavior.

1. Who Is a Supervisor?

Employers may be strictly liable for the harassing conduct by supervisors, thus it is important to understand the definition of the term “supervisor” in a Title VII claim for sexual harassment. In Vance v. Ball State University, the Supreme Court held that an employee is a supervisor for purposes of vicarious liability under Title VII if he is empowered by the employer to take tangible employment action against the complaining employee. In Vance, the court held that the alleged harasser, who considered himself a coworker of the plaintiff, was not actually her supervisor because he could not promote, fire, hire, transfer, or discipline the plaintiff.

2. Who Is the Employer’s Proxy?

If the alleged harasser is the employer’s proxy, that is, stands in the place of the employer, the employer may be automatically vicariously liable for the proxy’s harassing conduct. In Ackel v. National Communications, the Fifth Circuit held that the president of the company, who sat on its board of directors and owned 2 percent of the company stock stood in proxy for the employer. The employer could not use the Ellerth/Faragher affirmative defenses to liability because the alleged harasser was high enough in management to be regarded as speaking and acting for the company.

D. Employer Liability for Acts of Coworkers

An employer is liable for a hostile work environment created by a coworker of the complaining party if the employer knew or should have known of the harassment and failed to take prompt remedial action. In Star v. West, the court ruled that a medical center was not liable for the conduct of the male coworker of a female plaintiff, because the

30. Id. at 108.
31. Id. See also O’Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (female firefighter’s case of sex harassment against her supervisors and coworkers was allowed to proceed because the employer allegedly made no effort to stop the harassing conduct).
32. 133 S. Ct, 2434, 2439 (2013).
33. Id.
34. Id. at 2443.
35. 339 F.3d 376 (5th Cir. 2003).
36. See also Townsend v. Benjamin Enterprises, 679 F.3d 41 (2d Cir. 2012), where the court affirmed that the alleged harasser, who worked as the employer, was the alter ego to the employer.
37. See Star v. West, 237 F.3d 1036 (9th Cir. 2001).
employer investigated the complaints and immediately transferred the alleged harasser to another shift and warned him to stay away from the plaintiff. After the company took this action, the harassing conduct stopped. The Court held that the employer’s prompt response halted the harassment and was adequate to eliminate liability.\(^\text{38}\)

1. **Liability for Acts of Nonemployees**

   Under Title VII, an employer is liable for the harassment of a nonemployee if it was negligent, either in discovering the harassment, or remedying the harassment.\(^\text{39}\) The employee must prove that the employer failed to provide a reasonable method for reporting the complaint, or that it knew, or should have known, about the harassment, yet failed to take appropriate remedial action.\(^\text{40}\) In assessing whether the employer took appropriate remedial action, the court looks to whether the response was immediate or timely and appropriate in light of the circumstances. In *Summa v. Hofstra*, after a female team manager complained of harassing conduct on the part of the football team, the school instructed the players to remove objectionable social media postings, remove R-rated movies and eject an offending player within 48 hours after the plaintiff complained.\(^\text{41}\)

### E. Personal Liability for Harassment

Courts have generally ruled that managers and supervisors may not be found personally liable for sexual harassment under Title VII.\(^\text{42}\)

#### F. Defenses to Hostile Work Environment Claims

Employers have defenses to hostile environment sexual harassment claims where:

1. the conduct was not unwelcome,
2. the conduct was not based on the sex or gender of the victim,
3. the conduct was not offensive to a reasonable person or to the alleged victim,
4. the alleged victim failed to exhaust the remedies offered by the employer, and
5. the employer exercised reasonable care to prevent and correct the alleged harassment and the employee unreasonably failed to take advantage of the company’s reporting procedures.

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\(^{38}\) See also *Muhammed v. Caterpillar*, 767 F.3d 694 (7th Cir. 2014); *Foster v. University of Maryland*, 787 F.3d 243 (4th Cir. 2015).

\(^{39}\) See *Nischan v. Stratosphere Quality*, LLC, 865 F.3d 922, 931 (7th Cir. 2017); *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423–24 (4th Cir. 2014); *Turnbull v. Topeka State Hospital*, 255 F.3d 1238, 1244 (10th Cir. 2001).

\(^{40}\) See *Summa v. Hofstra University*, 708 F.3d 115 (2nd Cir. 2013).

\(^{41}\) Id.

\(^{42}\) See *Fantini v. Salem State College*, 557 F.3d 22, 30–31 (1st Cir. 2009); *Grant v. Lone Star College*, 21 F.3d 649 (5th Cir. 1994); *Sheridan v. E.I. du Pont de Nemours & Co.*, 100 F.3d 1061, 1077–78 (3rd Cir. 1996).
SEXUAL HARASSMENT AND RETALIATION IN THE WORKPLACE

If the alleged harasser is a supervisor, and the supervisor's actions did not result in a "tangible employment action" against the employee, employers may assert the *Ellerth/Faragher* defenses, which require the employer to prove by a preponderance of the evidence:

a. that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and  
b. that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.43

1. Conduct Not Unwelcome
Flirting at work among coworkers can create confusion when one of the flirting employees claims he or she was harassed by the other. Accordingly, courts have held that a necessary element to proving a sexual hostile environment claim is that the conduct is unwelcome.44 Where there is evidence that the alleged victim welcomed the conduct by not complaining about the conduct, appearing to enjoy spending time with the alleged harasser, or is seen flirting with the alleged harasser, employers may rely upon the *Ellerth/Faragher* defense.45 The courts look at the totality of the circumstances, including the alleged victim's behavior and relationship with the alleged harasser, for proof that he or she perceived the conduct as unwelcome.46

2. Conduct Not Offensive to a Reasonable Person
In order to prove a sexually hostile working environment, an employee must show that he or she found the alleged harasser's conduct offensive and that a reasonable person in the employee's position would have found the conduct offensive.47 Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination . . . because of sex."48 Workplace harassment, even harassment between men and women, is not automatically deemed discrimination based on sex

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43. *Faragher*, 524 U.S. at 807; see also Lauderdale v. Texas Dep’t of Criminal Justice, Institutional Div., 512 F.3d 157, 164 (5th Cir. 2007).
45. *Id.*
46. *Id.*
47. See Harris v. Forklift Systems, 510 U.S. 17 (1993); the court held that: “(1) to be actionable under Title VII as 'abusive work environment' harassment, the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury; (2) the Meritor standard requires an objectively hostile or abusive environment as well as the victim's subjective perception that the environment is abusive; and (3) whether an environment is sufficiently hostile or abusive to be actionable requires consideration of all the circumstances, not any one factor.”
merely because the words used have sexual content or connotations.\textsuperscript{49} Courts consider the totality of circumstances, including the frequency of the offensive conduct, its pervasiveness and severity, any physical threats or violence, or humiliating as opposed to being a mere offensive utterance.\textsuperscript{50} Courts also look at whether there is evidence that the conduct unreasonably interfered with the employee's work performance.\textsuperscript{51}

In \textit{Gupta v. Florida Board of Regents},\textsuperscript{52} a female professor claimed she was sexually harassed by a department chairman who she claimed leered at her body, took her to lunch frequently, took her to and another couple to dinner, told her she was attractive, and called her at home late at night. The Eleventh Circuit court found that this conduct did not constitute sexual harassment from an objective perspective because an employer cannot guarantee that supervisors will not look at other employees or call subordinates attractive.\textsuperscript{53}

Also in \textit{Cram v. Lamson & Sessions Co.}, a supervisor who had previously made polite romantic overtures to an employee got into an off-duty altercation with that employee and her date at a bar.\textsuperscript{54} Following the altercation, the supervisor told the employee that "you know I'll get you for this."\textsuperscript{55} The court rejected Title VII employer liability, noting that the altercation at the bar was "not in any way work-related."\textsuperscript{56}

3. Severe or Pervasive Conduct

For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."\textsuperscript{57} In determining whether an environment is "hostile" or "abusive" within the meaning of Title VII, courts look at the totality of the circumstances including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."\textsuperscript{58} Courts also consider whether the complained of conduct undermines the plaintiff's workplace competence.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} See \textit{864 F.3d 541, 549 (7th Cir. 2017)}.
\item \textsuperscript{52} 212 F3d. 571 (11th Cir. 2000).
\item \textsuperscript{53} Id.
\item \textsuperscript{54} 49 F.3d 466, 470–71 (8th Cir. 1995).
\item \textsuperscript{55} Id. at 471.
\item \textsuperscript{56} Id. at 475; see also \textit{Fontenot v. Buus, 370 F. Supp.2d 512 (W.D. La. 2004)} (finding no hostile work environment where most of harassing conduct took place outside the workplace); \textit{Carter v. Caring for the Homeless of Peekskill, Inc., 821 F. Supp. 225, 228 (S.D.N.Y. 1993)} (incidents occurring off work premises and not related to employment did not constitute sexual harassment).
\item \textsuperscript{57} \textit{Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)}.
\item \textsuperscript{58} \textit{Harris v. Forklift, 510 U.S. 17, 23 (1993)}.
\item \textsuperscript{59} \textit{Hockman v. Westward Comm'nns, 407 F.3d 317, 326 (5th Cir. 2004)} (citing \textit{Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 270 (5th Cir. 1998)}). "To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so." \textit{Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 874 (5th Cir. 1999)}.
\end{itemize}
Plaintiffs do not have to prove that a specific number of harassing incidents occurred in order to meet the severe and pervasive threshold. The Supreme Court has stated that even isolated incidents, if egregious, can alter the terms and conditions of employment. Courts have often recognized that "even one act of harassment will suffice [to create a hostile work environment] if it is egregious." However, incidents must be severe. It is important to remember that "Title VII, is not a 'general civility code,' and 'simple teasing, offhand comments, and isolated incidents (unless extremely serious)’ will not amount to discriminatory changes in the 'terms and conditions of employment.'"

4. Conduct Not Based on Gender
Some alleged harassers treat everyone, both male and female employees, equally harshly. Some courts have found that the “equal opportunity offender” cannot be liable for offensive sexual conduct if he treats men and women the same. For example, in Reine v. Honeywell International Inc., the Fifth Circuit found that when the conduct is equally harsh toward men and women, there is no hostile work environment based on sex. However, not all courts agree with the Reine decision. In McGinest v. GTE Service Corp., the Ninth Circuit held that a harasser's abuse of women and men did not provide an excuse of defense to a harassment claim. Accordingly, because the “equal opportunity harasser” defense is not accepted by all courts, employers should not rely upon this defense when reviewing how to respond to complaints about such a harasser.

5. Employee Failed to Take Advantage of Internal Administrative Remedies
One element of the Ellerth/Faragher defense is that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Courts will consider the way in which the employer publicized its anti-harassment complaint procedure, the number of avenues the employee had to complain, and the effectiveness of the company’s response to employees who used the complaint procedure. This is true, even when the employee complains of the sexual harassment to the person who is harassing her. Whether a plaintiff’s complaints to the harasser constitute reasonable use of an employer’s sexual harassment policy is to be determined by the
specific facts and circumstances of each case. In *Gorzynski v. JetBlue Airways*, the Second Circuit held that the employer was not entitled to summary judgment using the *Ellerth/Farragher* defense, because a fact issue existed as to whether it was unreasonable for *Gorzynski* to have complained of sexual harassment to her supervisor, who was also the harasser, rather than pursuing alternative options listed in her employee manual. In contrast, in *Wyatt v. Hunt Plywood Co.*, the plaintiff reported her supervisor’s harassment to his supervisor, who dealt ineffectively with the harassment and subsequently began harassing the plaintiff himself. The Fifth Circuit held that it was unreasonable for the plaintiff not to report the harassment to another person listed in the defendant’s reporting policy once her initial complaint was obviously ineffective. The Supreme Court has held that once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint.

### G. Types of Claims

1. **Same-Sex Stereotyping as Harassment**

Where the alleged harasser is the same sex as the alleged victim, or the harasser discriminates because the victim does not conform to expectations of how he/she should act, courts have held that employees may still bring claims of sexual harassment or discrimination under Title VII. In *Price Waterhouse v. Hopkins*, the Supreme Court recognized that employment discrimination based on sex stereotypes (e.g., assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.), is unlawful sex discrimination under Title VII. In *Price Waterhouse*, the employer denied the plaintiff a promotion, in part, because other partners at the firm felt that she did not talk, dress, or act as feminine as the firm thought a woman should act. The Court found that this constituted evidence of sex discrimination as “[i]n the . . . context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” This reasoning was repeated in *Oncale v. Sundowner Offshore Servs.* In *Oncale*, the Supreme Court held that same-sex harassment is sex discrimination under Title VII, where the sex

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67. *Id.*
68. 297 F.3d 405, 412 (5th Cir. 2002).
69. *Faragher*, 524 U.S. at 807. See also *Lauderdale v. Texas Dep’t of Criminal Justice, Institutional Div.*, 512 F.3d 157, 165 (5th Cir. 2007).
70. 490 U.S. 228 (1989).
71. *Id.* at 230–31, 235.
72. *Id.* at 250. The Court further explained that Title VII’s “because of sex” provision strikes at the “entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* (quoting City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978)).
discrimination is based on sexual stereotyping. In Oncale, the plaintiff was a male employee who was physically assaulted and threatened with rape because he did not appear sufficiently masculine to his male coworkers.

In an effort to provide additional guidance, the Oncale decision limited liability to cases involving same-sex conduct, which a reasonable person in the plaintiff’s position would find severely hostile or abusive. The Court re-emphasized that Title VII is an employment discrimination statute, not a remedy for every unfortunate act occurring in the workplace. To be actionable, the harassment must not only be “severely hostile or abusive” conduct, but must also be “because of” the victim’s sex, meaning gender.

2. Sexual Orientation Harassment

Most recently, the Seventh Circuit became the only federal appellate court to rule that discrimination based on sexual orientation is a form of sex discrimination and thus prohibited by Title VII. Until the court ruling in Hively v. Ivy Tech. Comm. College, appellate courts had not ruled that discrimination, based solely on sexual orientation, was actionable under Title VII. A plaintiff could survive summary judgment if he claimed he was discriminated against because he was seen as “feminine,” but could not typically claim discrimination for being or being perceived to be gay, lesbian, or bisexual. However, the circuit courts are now split on this topic.

In March 2017, the Eleventh Circuit dismissed a similar lawsuit and held that Title VII does not protect against sexual orientation discrimination. The court rejected the argument that sexual orientation discrimination is another form of gender stereotyping. Thus, outside of the Seventh Circuit, the most likely successful elements of a sexual discrimination claim for employees who believe they have been discriminated against because of their sexual orientation, is to allege that the employer treated the employee differently because they did not conform to gender stereotypes.

74. Id. at 79–80.
75. Id.
76. Id.
77. Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017).
78. See Evans v. Georgia Regional Hospital, 850 F.3d 1240 (11th Cir. 2017); see also Zarda v. Altitude Express, 855 F.3d 76 (2nd Cir. 2017) (court permitted same sex orientation claim under New York Statute, but dismissed claims under Title VII).
79. Several states have enacted statutes that protect employees based on their sexual orientation:
   - Delaware: 19 Del. C. §711(a) (2016) prohibits employment discrimination on the basis of “sexual orientation.”
3. Gender Identity Claims
The Equal Employment Opportunity Commission (EEOC) has taken the position that Title VII’s meaning of a person’s “sex” includes a person’s biological sex as well as pregnancy, sexual orientation, gender identity, and gender-based stereotypes, perceptions, or comfort level. The EEOC Fact Sheet expressly states the following actions violate Title VII:

- “Denying an employee equal access to a common restroom corresponding to the employee’s gender identity is sex discrimination.
- An employer cannot condition this right on the employee undergoing or providing proof of surgery or any other medical procedure.
- An employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).”

- Illinois: 775 Ill. Cons. Stat. 5/1-103(Q), 5/2-102 (2015) prohibit employment discrimination on the basis of “sexual orientation,” which 775 Ill. Cons. Stat. 5/1-103(O-1) defines as “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.”
- Iowa: Iowa Code § 216.6(1)(a) (2016) prohibits employment discrimination on the basis of “sexual orientation.”

80. The U.S. Congress specifically included “pregnancy” in Title VII’s definition of “sex” with the passage of the Pregnancy Discrimination Act of 1972. Congress has not passed any legislation to include sexual orientation or gender identity into Title VII’s definition of sex.
The EEOC has been involved in several cases in its efforts to expand the scope of Title VII to include discrimination based on gender identity and transgender status:

- **EEOC v. Lakeland Eye Clinic, P.A.** (M.D. Fla., filed Sept. 25, 2014). EEOC alleged in the now settled lawsuit that the employer discriminated based on sex in violation of Title VII by firing an employee because she is transgender, transitioning from male to female, and/or not conforming to the employer’s gender-based expectations, preferences, or stereotypes.

- **Lewis v. Highpoint Reg’l Health Sys.**, 2015 WL 221615 (E.D.N.C. Jan. 15, 2015). In that case, the EEOC filed a brief in support of the transgender female employee who brought the lawsuit arguing that failing to hire an individual because she is transgender violates Title VII.

- **Lusardi v. McHugh**, EEOC Appeal No. 0120133395 (April 1, 2015). The EEOC ruled that denying employees use of a restroom, consistent with their gender identity and subjecting them to intentional use of the wrong gender pronouns, constitutes discrimination because of sex, and thus violates Title VII. The EEOC specifically analyzed the bathroom issue and the accommodation of allowing the transitioning employee to use a unisex restroom. They found that because the decision to use a different restroom than the gender the employee identifies with is based on gender identity, it is a violation of Title VII, even if the employee consents to the accommodation.81

Despite the EEOC’s position as stated in its Fact Sheet, there is no federal statute, including Title VII, which explicitly prohibits discrimination in the workplace against individuals based on sexual orientation or gender identity. In fact, nearly every year since 1994, Congress has failed to enact a proposed Employment Non-Discrimination Act (ENDA), which would make it illegal for employers with fifteen or more full-time workers to refuse to hire, terminate, or otherwise discriminate against any individual on the basis of his or her actual or perceived sexual orientation or gender identity. Prior to 2017, various federal agencies, during the Obama administration, issued regulations that required federal contractors and/or employers to provide equal treatment to transgender employees with regard to bathroom privileges.82

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81. Further, the EEOC ruled that discrimination based on sexual orientation is also sex discrimination under Title VII. Complainant v. Foxx, EEOC, Appeal No. 0120133080 (July 16, 2015).

82. OSHA Guidance: On June 1, 2015, OSHA published its Guide to Restroom Access for Transgender Workers. “The core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity,” said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. “OSHA’s goal is to assure that employers provide a safe and healthful working environment for all employees.” See https://www.osha.gov/newsrelease/trade-20150601.html; see also Exhibit A: OSHA Guide to Restroom Access for Transgender Workers. OFCCP: On December 3, 2014, the OFCCP issued final rules implementing Executive Order 13672, which prohibits government contractors from discriminating in employment on the basis of gender identity. In its FAQ Guidance on the issue of restroom use, the OFCCP states:
On February 22, 2017, the US Department of Justice and the US Department of Education issued a “Dear Colleague” letter withdrawing the prior statements of policy and guidance issued by the Department of Education on January 7, 2015, and the Departments of Justice and Education on May 13, 2016. In the February 22, 2017, letter, the Office of Civil Rights division of both departments stated that the previous guidance to schools regarding access to restrooms for transgender students was being withdrawn. Also, the Department of Justice filed an *amicus curiae* brief in 2017, arguing that Title VII does not reach sexual orientation discrimination.83 At this time, in most federal circuit courts, claims under Title VII arguing gender identity or transgender discrimination are not likely to be successful unless the plaintiff also alleges gender stereotyping discrimination.

4. Retaliation
Title VII prohibits employers from retaliating against employees who have either (1) opposed any practice made an unlawful employment practice under Title VII, or (2) filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing “under this subchapter.”84 These provisions, respectively, are commonly known as the “opposition” and the “participation” clauses of the statute. In order to establish a *prima facie* case of retaliation, under the opposition or participation provisions, a plaintiff must show the following: that he (1) engaged in an activity protected by Title VII, (2) the employer knew of the employee’s engagement in protected activity, (3) the employer took adverse action against the plaintiff after he or she engaged in protected activity, (4) and a causal connection existed between the protected activity engaged in by the employee and the adverse action taken by the employer.85

5. Protected Activity
Many federal courts have held that an employee engages in the most basic form of protected activity when she tells her harasser that he must stop harassing her.86 Title VII does not spell out each act that might constitute “engaging in protected activity.” There is little dispute that filing discrimination charges with administrative agencies, participating in investigations, and filing internal company complaints in compliance with company procedures constitutes engaging in protected activity. However, there is still some confusion regarding the scope of other types of conduct

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which could constitute engaging in protected activity. The US Supreme Court provided guidance in *Crawford v. Metropolitan Government of Nashville & Davidson County*.\(^\text{87}\) In *Crawford*, the court recognized that “the term ‘oppose’ is not defined by the statute. Thus, the court relied upon its ordinary meaning: ‘to resist or antagonize . . . , to contend against, to confront, resist, withstand . . . ’”\(^\text{88}\) Accordingly, in many cases, employee complaints to management and less formal protests of discriminatory conduct constitutes engaging in protected activity. However, the Fifth Circuit stands slightly apart on this issue by concluding that communication directly and solely to a harassing supervisor may not constitute protected activity. In *Frank v. Harris County*, the Fifth Circuit held that the plaintiff provided no authority for the proposition that a single express rejection to a harassing supervisor constitutes engaging in protected activity as a matter of law.\(^\text{89}\)

6. Materially Adverse Action

In *Burlington Northern and Santa Fe v. White*, the US Supreme Court defined a materially adverse employment action for purposes of a Title VII retaliation claims to be any conduct that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”\(^\text{90}\) Loss of pay or benefits, termination, and demotion clearly constitute materially adverse actions.\(^\text{91}\) However, under *Burlington Northern & Santa Fe Railway Co. v. White*, an action constitutes an adverse employment action only if it is “materially adverse,” meaning that it would “dissuade[] a reasonable worker from making or supporting a charge of discrimination.”\(^\text{92}\) Courts have often noted that Title VII “does not set forth a general civility code for the American workplace.”\(^\text{93}\) Thus, not every disagreeable workplace action constitutes retaliation; rather, retaliation must produce “an injury or harm.”\(^\text{94}\) At least one circuit court, the Seventh Circuit

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\(^\text{87}\) 555 U.S. 271 (2009).

\(^\text{88}\) Id.

\(^\text{89}\) 118 Fed. Appx. 799, 804 (5th Cir. 2004).


\(^\text{91}\) See Howington v. Quality Restaurant Concepts, 298 Fed. Appx. 436, 442 (6th Cir. 2008). Courts have also held that the adverse action requirement was satisfied when an employee was forced to use a grievance procedure to get overtime work assignments that were routinely awarded to others, Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 848 (9th Cir. 2004), when an employee was assigned more hazardous work than her co-workers, Davis, 520 F.3d at 1089–90, and when an employee was laterally transferred or received undeserved poor performance ratings, Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).


\(^\text{93}\) Id.

\(^\text{94}\) Id. at 67. See, e.g., Whittaker v. N. Ill. Univ. (7th Cir. 2005) 424 F.3d 640, 644, 647–48 (Although the plaintiff’s receipt of a negative evaluation, receipt of a written warning for absenteeism and placement on “proof status” were “putatively disciplinary measures,” none “resulted in tangible job consequences and therefore [were] not adverse employment actions actionable under Title VII.”); Longstreet v. Ill. Dep’t of Corrections (7th Cir. 2002) 276 F.3d 379, 384 (the plaintiff’s “negative performance evaluations and being required to substantiate that her absences from work were illness-related . . . did not result in tangible job consequences and therefore are not adverse employment actions actionable under Title VII”); Oest v. Ill. Dep’t of Corrections (7th Cir. 2001) 240 F.3d 605, 613 (holding that neither “unfavorable performance evaluations” nor “oral or written reprimands” constitute adverse employment actions).
Court of Appeals, has divided adverse actions into categories. In *Herrnreiter v. Chicago Housing Authority*, the court noted that materially adverse employment actions can be categorized into three groups of cases involving: (1) the employee's current wealth such as compensation, fringe benefits, and financial terms of employment including termination; (2) the employee’s career prospects thus impacting the employee’s future wealth; and (3) changes to the employee’s work conditions including subjecting her to “humiliating, degrading, unsafe, unhealthful, or otherwise significant negative alteration in [her] workplace environment.”

7. **Causal Connection**

To establish a causal connection between the protected activity and the adverse action, a plaintiff must demonstrate that a retaliatory motive played a part in the adverse employment action. Adverse conduct that occurred before the employee engaged in protected activity cannot be retaliation under Title VII. In the Fifth Circuit, the plaintiff must also demonstrate that the employer had actual decision-making knowledge that the plaintiff had engaged in a protected activity.

The plaintiff bears the burden of proving that the employer took the adverse action *because of* the plaintiff’s protected activity. In other words, the plaintiff must provide evidence that “but for” the protected activity, the adverse employment action would not have occurred. This requires a showing of retaliatory animus. Some courts have also held that a plaintiff can show indirectly that retaliatory animus caused the adverse employment action by showing that the protected activity was closely followed by an adverse employment action. However, temporal proximity alone is generally not sufficient to establish causation without other compelling evidence. In cases where temporal proximity is sufficient to establish a *prima facie* case of causality, the temporal proximity must be very close. Courts have held that three months or more distance between the protected activity and the adverse action is insufficient to infer causation.

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95. *Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744–45 (7th Cir. 2002).
96. See *Cifra v. G.E. Co.*, 252 F.3d 205, 216 (2d Cir. 2001).
98. See *Corley v. Jackson Police Dept.*, 639 F.2d 1296, 1300 n.6 (5th Cir. 1981) (constructive notice does not suffice).
99. See *Hicks v. Baines*, 593 F.3d 159 (2d Cir. 2010).
100. See *Mota v. U.T. Houston Health Science Center*, 261 F.3d 512, 519 (5th Cir. 2001); see also *EEOC v. Ford Motor Co.*, No. 12–2484, 2015 WL 1600305 at *14 (6th Cir. 2015); *Ward v. Jewell*, 772 F.3d 1199, 1203 (10th Cir. 2014); *Beard v. AAA of Mich.*, 593 F. App’x 447, 451 (6th Cir. 2014); *Smith v. City of Fort Pierce, Fla.*, 565 F. App’x 774, 778–79 (11th Cir. 2014) (*per curiam*).
8. Employer's Burden

After the employee has provided sufficient evidence to demonstrate causation, the burden then shifts to the employer to show that its purportedly retaliatory action was in fact the result of a legitimate nonretaliatory reason. If the employer makes this showing, the burden shifts back to the plaintiff to rebut the employer's evidence by demonstrating that the employer's purported nonretaliatory reasons “were not its true reasons, but were a pretext for discrimination.”

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court gave further guidance on what Title VII retaliation plaintiffs must show to survive a motion for summary judgment. In *Nassar*, the Court held that a successful retaliation plaintiff must prove that retaliatory animus was a “but-for” cause of the challenged adverse employment action, eliminating mixed-motive liability under the “lessened” motivating factor test. However, the *Nassar* Court was silent as to the application of “but-for” causation in *McDonnell Douglas* pretext cases. Other courts have held, either expressly or implicitly, that *Nassar* did not alter the elements of a prima facie case.

A plaintiff who establishes a prima facie case of retaliation bears the “ultimate burden of persuading the court that [she] has been the victim of intentional [retaliation].” In order to carry this burden, a plaintiff must establish “both that the [employer's] reason was false and that [retaliation] was the real reason for the challenged conduct.” The employee must show that “the employer's reason is actually a pretext for retaliation,” which the employee accomplishes by showing that the adverse action would not have occurred “but for” the employer's retaliatory motive.

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828 (1st Cir. 1991) (where some problems predated protected activity, nine-month period insufficient); Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1st Cir. 2002) (finding one-year gap between protected activity and adverse employment action insufficient); Feist v. La. Dept. of Justice, Office of the Attorney Gen., 730 F.3d 450, 454 (5th Cir. 2013).


107. See Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 507 (6th Cir. 2014); Butterworth v. Lab. Corp. of Am. Holdings, 581 F. App'x 813, 817 (11th Cir. 2014) (per curiam).""


110. *Hague*, 560 F. App'x at 336 (“An employee establishes pretext by showing that the adverse action would not have occurred ‘but for’ the employer's retaliatory reason for the action.”) (citing *Nassar*,...
9. Co-Worker Retaliation
Retaliatory conduct by coworkers may include subjecting the victim to demeaning comments, or ridiculing them for reporting sexual harassment.\textsuperscript{111} The Sixth Circuit Court of Appeals determined that an employer should be liable for a coworker’s retaliatory acts if: (1) the coworker’s retaliatory conduct is sufficiently severe to discourage a reasonable worker from making or supporting a charge of discrimination, (2) the employee’s management has actual or constructive knowledge of the retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation by inadequately responding to the employee’s complaints.\textsuperscript{112} An inadequate response on the part of the employer manifests indifference or unreasonableness under these circumstances.\textsuperscript{113}

\textsuperscript{111} See Moore v. City of Philadelphia, 461 F.3d 331, 341 (3rd Cir. 2006).

\textsuperscript{112} See Hawkins v. Anheuser-Busch, 517 F.3d 321 (6th Cir. 2008). (The plaintiff’s co-worker set fire to the plaintiff’s car and threatened her life after she made a complaint of sexual harassment against him.).

\textsuperscript{113} Id., 517 F.3d at 347.