CURRENT STATUS OF SEXUAL HARASSMENT CLAIMS AND CASES

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I. The Development of the Law of Sexual Harassment

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

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

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

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

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

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

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

The result is that practitioners should focus on the presence or absence of a tangible employment action, and not the categories of “quid pro quo” and “hostile work environment,” which distinction the Supreme Court effectively abandoned. See also Stevens v. Saint Elizabeth Med. Ctr., Inc., 533 F. App’x 624, 628-29 (6th Cir. 2013) (“In our view, the label affixed to the claim is not dispositive; instead, the focus should be on the substances of the plaintiff’s allegations”); Schiano v. Quality Control Payroll Sys., Inc., 445 F.3d 597, 605 (2d Cir. 2006) (“Because these terms are judicially created for analytical purposes, not distinctions in the statute itself, we think it most appropriate . . . to look at the substance of the alleged misconduct of which the plaintiff complains rather than the terms used to describe it. If, for example, a plaintiff were to argue that she had been demoted for refusing to respond positively to her supervisor’s sexual overtures, we would think that the assertion would preserve her quid pro quo claim even if she never used the phrase ‘quid pro quo’ in the district court to describe it”); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 120 (3d Cir. 1999) (these cases “largely eliminated the distinction between hostile work environment claims and quid pro quo claims, focusing instead on the presence or absence of tangible adverse employment actions.”); Vonderohe v. B&S of Fort Wayne, Inc., 36 F. Supp. 2d 1079, 1083 (N.D. Ind. 1999) (“the distinction between the two kinds of harassment is analytical, not statutory”).

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

II. Unwelcomeness Requirement

For conduct to constitute sexual harassment, it must be unwelcomed by the victim. See Meritor, 477 U.S. at 69. Conduct is unwelcome if the employee did not solicit or incite it and if the employee regarded the conduct as undesirable or offensive. See Frensley v. N. Miss. Med. Ctr., Inc., 440 F. App’x 383, 386 (5th Cir. 2011); Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962 (8th Cir. 1993); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982). Courts have held that certain severe conduct, particularly rape, is fundamentally unwelcome. See e.g., Lapka v. Chertoff, 517 F.3d 974, 982 (7th Cir. 2008) (“It goes without
saying that forcible rape is ‘unwelcome physical conduct of a sexual nature.’”); accord Little v. Windermere Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2002).

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

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

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

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

It would not make sense to try to treat welcomeness as objective, because whether one person welcomes another's sexual proposition depends on the invitee's individual circumstances and feelings. Title VII is not a beauty contest, and even if Munoz looks like Marilyn Monroe, Lamas might not want to have sex with her, for all sorts of possible reasons. He might feel that fornication is wrong, and that adultery is wrong as is supported by his remark about being a Christian. He might fear her husband. He might fear a sexual harassment complaint or other accusation if her feelings about him changed. He might fear complication in his workday. He might fear that his preoccupation with his deceased wife would take any pleasure out of it. He might just not be attracted to her. He may fear eighteen years of child support payments. He
might feel that something was mentally off about a woman that sexually aggressive toward him. Some men might feel that chivalry obligates a man to say yes, but the law does not…

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

*Id.* at 997-98.

A plaintiff’s sexual conduct unconnected to the workplace does not solicit or incite sexual harassment. The fact that a plaintiff posed naked for a magazine that was distributed nationally did not constitute inviting or soliciting sexual advances. See *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 963 (8th Cir. 1993). A plaintiff’s use of foul language or sexual innuendo in a consensual setting outside the workplace “does not waive her legal protections against unwelcome harassment.” *Sventek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987). Evidence that a plaintiff had consensual sexual relationships with other co-workers outside of work “is not relevant to [plaintiff]’s claims of harassment at work.” *E.E.O.C. v. Wal-Mart Stores, Inc.*, 198 F.3d 257 (10th Cir. 1999). Whether the plaintiff welcomed sexual conduct is an inherently subjective question, a question of fact best decided by a jury.

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

If the plaintiff did not perceive the alleged harassment as abusive, then there can be no violation of Title VII. It is not necessary, however, for a plaintiff to verbally reject or object to the alleged harassment. A plaintiff’s consistent resistance to all sexual advances is enough to establish that she perceived the conduct to be abusive and that it was unwelcome. See *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990). The Chamberlin Court held that there was sufficient evidence that the plaintiff perceived her supervisor’s sexual advances as unwelcome based upon the plaintiff withdrawing her hands from the clasp of her supervisor, changing the topic of conversation when he made sexual advances, and leaving his presence. *Id.*

Similarly, in *EEOC v. SDI Athens East, LLC*, 690 F. Supp. 2d 1370, 1378 (M.D. Ga. 2010), the court held that a reasonable fact-finder could find unwelcomeness where the plaintiff walked away from the harasser, gave him looks of disapproval, and told him not to touch her.
III. Harassment was “Because of Sex”

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

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

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

1. Spurned Lover

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

But in Forrest v. Brinker Int’l Payroll Co., 511 F.3d 225 (1st Cir. 2007), a case involving a plaintiff who claimed a co-worker with whom she had an on-again, off-again romantic relationship, created a hostile work environment, the First Circuit reversed the district court’s finding that the plaintiff offered evidence only of personal animosity and was insufficient to survive summary judgment. Id. at 229. The First Circuit stressed that what has been held to be gender-based harassment in other cases may just a well constitute gender-based harassment when the parties had a previous romantic relationship. In this case, the Forrest court concluded that the use of sexually degrading, gender-specific epithets with which the former boyfriend barraged Ms. Forrest at work constituted harassment based on sex. Id. at 230.
In *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 656 (5th Cir. 2002), the court held that if a supervisor and an employee previously had a consensual relationship, which was broken off by the employee, and the employee rejected the supervisor’s attempt to renew the relationship, upon which the supervisor commenced harassing the employee, the employee can maintain a hostile work environment claim notwithstanding their prior relationship. The Fifth Circuit agreed with the district court’s application of *Oncale* and found that “[the fact that] it was only after the relationship ended that Richardson began to harass her … supports a jury’s inference that he harassed her because she refused to continue to have a casual sexual relationship with him.” *Id.* at 657.

2. **Same-Sex Harassment**

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

In *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012), the Fifth Circuit relied on *La Day* to reverse a district court judge’s decision overturning a jury’s determination that the male plaintiff had been sexually harassed by his male supervisor. In *Cherry*, the plaintiff’s supervisor touched him in ways that made him uncomfortable, asked him to take his shirt and pants off, commented regularly on his looks, and repeatedly sent him crude sexual text messages. Though the jury reached a verdict for the plaintiff, the lower court judge granted the employer’s motion for judgment as a matter of law, concluding that the supervisor’s conduct towards the plaintiff “by itself does not amount to evidence establishing that [the supervisor] has a sexual interest in men.” The court further held that plaintiffs must show “that the harasser made explicit or implicit proposals of sexual activity and provide credible evidence that the harasser was a homosexual.” *Id.* at 187 (emphasis added). The Fifth Circuit, looking to *La Day* for guidance, however, rejected this standard and concluded that it is enough for a plaintiff to “present evidence that he was harassed by a member of the same sex, and that the harassment was sexual rather than merely humiliating in nature.” *Id.* at 188.

In *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001), Antonio Sanchez, one of the three plaintiffs, alleged that he was repeatedly taunted by his male co-workers and a supervisor because, in essence, he did not act like a man. Specifically, his co-workers and a supervisor: (1) “repeatedly referred to Sanchez in Spanish and English as ‘she’ and ‘her’”; (2) “mocked Sanchez for walking and carrying his serving tray ‘like a woman’”; (3) “taunted him in Spanish and English, as, among other things, a ‘faggot’ and a ‘fucking female whore’”; and (4) “derided [him] for not having sexual intercourse with a waitress who was his friend.” *Id.* at 870, 874. Critically, “no witness — including the supervisor accused of participating in the harassment — testified to the contrary.” *Id.* at 872. The Ninth Circuit agreed that Mr. Sanchez was discriminated against on the basis of his sex, because he failed to conform to a male stereotype. The Ninth Circuit applied *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII was violated where the employer discriminated against a
female employee who did not conform to sexual stereotypes of how women should behave, to hold that Title VII is similarly violated where a male employee is discriminated against for not conforming to stereotypes of how men should behave. *Azteca Restaurant*, 256 F.3d at 874-75; *see also E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (applying *Price Waterhouse* to conclude that a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping).

The Ninth Circuit, in an en banc decision, held that essentially all same-sex harassment can be actionable under Title VII if it involves physical assault. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*), cert. denied, 538 U.S. 922 (2003). It should be noted that there was a concurring opinion based on a different rationale, two other concurring opinions, and a strongly stated dissenting opinion; it has not been an influential opinion for other circuits. *Cf. Vickers v. Fairfield Medical Ctr.*, 453 F. 3d 757 (6th Cir. 2006) (distinguishing Smith and holding that the harassment about which the plaintiff complained was “more properly viewed as based on Vickers’ perceived homosexuality, than on his gender non-conformity” because he “failed to allege that he did not conform to gender stereotypes in an observable way at work.”) (emphasis added). In *Rene*, the plaintiff was an openly gay butler at a Las Vegas hotel, who alleged that he was constantly harassed by his supervisor and several co-workers (all male), because he was gay. *Rene*, 305 F.3d at 1064. The district court granted summary judgment on the grounds that Title VII did not cover discrimination based on sexual preference. *Id.* A panel of the Ninth Circuit affirmed, but the *en banc* court reversed, on the grounds that the plaintiff “has alleged physical conduct that was so severe or pervasive as to constitute an objectively abusive working environment,” reaching the level of physical assault, i.e., the supervisor and co-workers “grabbed [the plaintiff’s] crotch and poked their fingers in his anus.” *Id.* at 1065. The Ninth Circuit cited a variety of appellate cases in which “physical sexual assault has routinely been prohibited as sexual harassment under Title VII,” because “such harassment -- grabbing, poking, rubbing or mouthing areas of the body linked to sexuality -- is inescapably ‘because of sex.’” *Id.* at 1065-66 (collecting cases). Thus, his sexual orientation was not relevant, since in traditional male-on-female harassment cases, the victim was not denied relief because she “was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.” *Id.* at 1066; *see also M. Talbot, “Men Behaving Badly,” N.Y. TIMES SUNDAY MAGAZINE, Oct. 13, 2002, at 52. *But see Dawson v. Entek Int’l*, 630 F.3d 928, 2011 WL 61645 (9th Cir. 2011) (verbal same-sex harassment not actionable where not based on the plaintiff’s failure to conform to male stereotypes).

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

In *Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005), the Tenth Circuit found that plaintiff, a female sales representative, could proceed with her sexual harassment claim after presenting evidence that the court found sufficient to assert that the improper conduct she alleged was “based on sexual desire” without a showing that the female alleged harassers were homosexual. The court outlined the three theories of actionable same sex harassment outlined in *Oncale*, but held that the plaintiff met her burden for summary judgment purposes through the first route, by alleging harassment motivated by sexual desire regardless of sexual orientation. *Id.*

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

In *Stancombe v. New Process Steel LP*, 652 F. App’x 729 (11th Cir. 2016), the Eleventh Circuit similarly found that the male plaintiff had not produced evidence that the harassment by a male co-worker was based on sex. Relying on *Oncale*, the court required that the plaintiff show that (1) the harasser was homosexual; (2) the harasser had a gender-hostility toward that particular sex in the workplace; or (3), the harasser treated one sex in a mixed-sex workplace differently than the other sex. *Id.* at 733. The male plaintiff, who alleged that a male harasser had touched the plaintiff’s buttocks and made pelvic thrusts in the plaintiff’s face, did not put forth sufficient evidence that the plaintiff was gay. *Id.* at 733-34. The court found that while the conduct was “sexual in nature,” this fact was not sufficient on its own to show that the conduct was motivated by sexual desire because, “general vulgarity or reference to sex that are indiscriminate in nature will not, standing alone, generally be actionable.” *Id.* at 734 (internal citations omitted). In *Smith v. Rock-Tenn Services, Inc.*, 813 F.3d 298, 308 (6th Cir. 2016), however, the Sixth Circuit found reasonable a jury’s conclusion that a male harasser slapping plaintiff on the buttocks and grinding his pelvis into another’s behind went “far beyond
horseplay,” suggesting that courts may reach differing conclusions about what type of conduct, though sexual in nature, will rise above the level of a mere reference to sex. See also Rickard v. Swedish Match North America, Inc., 773 F.3d 181, 185-86 (8th Cir. 2014) (male supervisor’s alleged squeezing the nipples of male employee and other co-workers insufficient to show that supervisor was hostile toward men in the workplace or was motivated by sexual desire).

In EEOC v. Grief Bros. Corp., No. 02-CV-4688, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004), a district court in New York held that a gay employee (Sabo) who was repeatedly taunted and harassed by his co-workers who did not believe or know that he was gay could, in fact, state a Title VII sexually hostile work environment claim. Critical to the resolution of the Title VII harassment claim was the deposition testimony of the harassing co-workers, who testified that they “did not know that he was a homosexual, nor did they believe that he was.” Id. at *10. As a result, the court denied the defendant’s motion for summary judgment, because “there is sufficient evidence in the record from which a jury could find that Sabo was not harassed because he is a homosexual, but rather, was harassed because he is a male.” Id. at *11. Under Price Waterhouse and Oncale, Sabo’s “nonconformance with gender stereotypes” meant that the resulting harassment of him was actionable under Title VII. Id. at *12-*13.

3. Transgender Harassment and Sexual Orientation Harassment

Courts have generally found that the category of “transgender” is not a protected category under Title VII in and of itself. See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1214, 1221 (10th Cir. 2007) (“This court agrees with … the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII”). But see Schroer v. Billington, 577 F. Supp. 2d 293, 307-08 (D.D.C. 2008) (holding that discrimination because of a “change” in sex is discrimination “because of sex” and, therefore, prohibited by Title VII).

This may change going forward, however. In April, 2012 the Equal Employment Opportunity Commission ("EEOC") concluded in Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives that discrimination against transgender employees amounts to gender discrimination, and that consequently, a claim of discrimination based on gender, identity, change of sex or transgender status is cognizable under Title VII. EEOC Appeal No. 0120120821 (April 20, 2012). The decision applies to all EEOC enforcement and litigation activities undertaken by the EEOC and means that Commission attorneys may now pursue lawsuits against employers who discriminate against transgender employees. See, e.g., EEOC v. Bojangles Restaurants, Inc., Civ. No. 5:16-cv-00654-BO (E.D.N.C., filed July 6, 2016) (filing suit against restaurant corporation alleging discrimination against a transgender woman by subjecting her to hostile work environment based on gender identity); EEOC v. Scott Medical Health Ctr, P.C., No. 2:16-cv-00225-CB (W.D. Pa., filed Mar. 1, 2016) (filing suit alleging that employer discriminated against charging party on the basis of sexual orientation because he did not conform to employer’s gender-based stereotypes). See generally Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jul. 8, 2016), https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.
Nevertheless, discrimination and harassment based on the plaintiff’s failure to fit into
gender stereotypes or norms is actionable under Title VII. In Smith v. City of Salem, Ohio, 378
F.3d 566 (6th Cir. 2004), the Sixth Circuit held that an employee who alleged that discrimination
occurred because the employee was undergoing treatment for “gender identity disorder” which
resulted in the employee’s appearance becoming more feminine, could state a Title VII claim for
gender discrimination. Here, the co-workers “began questioning him about his appearance and
commenting that his appearance and mannerisms were not ‘masculine enough,’” and a
supervisor met with the city’s attorney “with the intention of using Smith’s transexualism and its
manifestations as a basis for terminating his employment” through requiring the plaintiff “to
undergo three separate psychological evaluations” which they hoped would lead to his
resignation or refusal to comply, the latter of which would be grounds for terminating his
employment for insubordination. Id. at 568, 569. The Sixth Circuit agreed that, under Price
Waterhouse, Azteca Restaurants and similar gender stereotyping cases, Mr. Smith had stated a
case for sex stereotyping and gender discrimination based on “his failure to conform to sex
stereotypes concerning how a man should look and behave.” Id. at 572. The defendants’
petition for rehearing en banc was denied on October 18, 2004.

In another case, Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), the Sixth
Circuit drew upon Smith and held that a pre-operative male to female transsexual who failed the
probationary period required to become a police sergeant was a member of a protected class
when he alleged discrimination on the basis of a failure to conform to gender stereotypes. The
court stated, “sex stereotyping based on a person’s gender non-conforming behavior is
impermissible discrimination irrespective of the cause of that behavior; a label, such as
‘transsexual’ is not fatal to a sex discrimination claim where the victim has suffered
discrimination because of his gender non-conformity.” Id. at 737. Although Smith and Barnes
did not involve harassment claims, the conduct may have been sufficient to bring such claims,
based on the co-workers’ verbal and physical conduct. Other non-harassment cases from other
circuits have similarly applied the rationale that discrimination against a transgender person can
be sex discrimination under Title VII based on the idea that the person does not conform to
gender stereotypes. See Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th
Cir. 2016); see also Hunter v. United Parcel Serv., Inc., 697 F.3d 697, 702-04 (8th Cir. 2012)
(applying the gender non-conformity rationale but concluded that it was not obvious to plaintiff’s
employers that transgender male plaintiff was born female and attempting to deviate from
traditional gender stereotypes).

In Dawson v. Entek Intern., 630 F.3d 928, 2011 WL 61645 (9th Cir. 2011), the court
upheld the district court’s grant of summary judgment for the employer, holding that there was
no hostile work environment in a case where a gay male employee was subjected to a barrage of
anti-gay comments because the plaintiff had not presented evidence that he failed to conform to a
gender stereotype or exhibited feminine traits. Id. at *7. Co-workers had made repeated
comments that the plaintiff was a “worthless queer,” that he liked to “suck dick” and “take it up
the ass,” and referred to him as “Tinker Bell,” “a homo, a fag, and a quee” daily for over a
week, and acted in a physically intimidating manner. Based on the plaintiff’s own testimony that
he was not being verbally harassed for appearing non-masculine or otherwise not fitting the male
stereotype, the court held that there were not sufficient facts to support a finding that a
reasonable trier of fact could conclude he experienced a hostile work environment based on his
gender. Id.
In an historic decision, the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (*en banc*), held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. The plaintiff, an openly lesbian college professor, alleged that she had been denied full-time employment and promotions based on sexual orientation. The court based its decision both on the gender nonconformity rationale stemming from *Price Waterhouse*. *Id.* at 346. The court also linked sexual orientation discrimination to theories of associational discrimination, drawing parallels to precedents that discrimination on the basis of the race with whom a person associates is a form of racial discrimination. *Id.* at 347. Although not a sexual harassment claim, this case will have broad implications in the Seventh Circuit. This year, the Eleventh Circuit reached the opposite conclusion. See *Evans v. Ga. Reg’l Hosp.*., 850 F.3d 1248, 1255 (11th Cir. 2017) (finding no actionable Title VII claim for sexual orientation discrimination, but granting plaintiff leave to amend complaint to allege discrimination based on gender non-conformity). The Second Circuit similarly found that Title VII’s prohibition on sex discrimination did not encompass sexual orientation, but then granted a rehearing *en banc* and a new decision is pending. See *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), reh’g *en banc* granted (May 25, 2017).


4. Equal Opportunity Harasser

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

If women suffer more severely from harassment directed at both men and women, a Title VII claim may still survive. In *Davis v. Cal. Dep’t of Corrs.*, No. 10-17890, 2012 WL 2025004 (9th Cir. 2012), the court found in favor of a female social worker who worked as a contractor for the California Department of Corrections and Rehabilitation. The plaintiff, Brenda Davis, alleged that various inmates had stalked her, exposed themselves to her, masturbated in front of her, and threatened to sodomize her to death. She complained to her supervisor, but, rather than address the issue, her supervisor himself harassed Ms. Davis by assigning her to tasks that forced her to interact regularly with the offending inmates. At trial, the California Department of Corrections and Rehabilitation sought to defend against charges that Davis’s supervisor had subjected her to a hostile work environment by pointing out that the supervisor in question “consistently abused men and women alike.” *Id.* at *2. Davis argued that she “experienced hostile conduct from [her supervisor] that differed in both type and frequency from any abusive conduct alleged to have been suffered by her male colleagues.” *Id.* at *2. The district court endorsed the Department of Corrections’ argument and granted summary judgment to the defendant, determining that the alleged harassment was not “because of sex.” The Court of
Appeals reversed concluding that that “evidence of differences in subjective effects (along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex – or gender – specific.” Id. (quoting EEOC/Christopher v. Nat’l Educ. Assn., 422 F.3d 840 (9th Cir. 2005)).

In EEOC/Christopher v. Nat’l Educ. Assn., upon which the Ninth Circuit relied in the Davis case, the court reversed a grant of summary judgment that had been entered against three female union members who brought a sexual harassment case against their Union Executive Director. The Director was alleged to have severely verbally harassed both male and female Union members, including behavior such as shouting, screaming, and using foul language and making threatening physical gestures. The women reported feeling physically threatened, fearful, and “in jeopardy,” and experienced crying, panic attacks, and resignation, as a result of the Director’s conduct. The District Court granted summary judgment on the grounds that the alleged harassment was not “because of sex.” The Ninth Circuit reversed, holding that the ultimate question for the jury was whether the women were treated worse and subjected to “more severe and frequent physically threatening abuse.” See also Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810 (11th Cir. 2010) (finding that although a workplace may be “rife with generally indiscriminate vulgar conduct,” “Title VII does not offer boorish employers a free pass” when those employers tolerate and encourage pervasive, derogatory conduct and references that are gender-specific in the workplace.) Kampier v. Emeritus Corp., 472 F.3d 930, 940-41 (7th Cir. 2007) (holding that plaintiff raised a genuine issue of material fact as to whether the harassment was because of her sex, where the harasser acted inappropriately towards both men and women, including propositioning a male employee and grabbing male employees’ buttocks, but making frequent references to female employees’ “boobs” and stating repeatedly that she could “turn any woman gay”); Petrosino v. Bell Atlantic, 385 F.3d 210 (2nd Cir. 2004) (reviving a female telephone technician’s sexual harassment claim where both male and female employees were exposed to sexually offensive material, finding that a jury could reasonably conclude that the sexual remarks and graffiti were more demeaning of women than of men).

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

5. Sexual Favoritism

The EEOC issued guidelines that stated that sexual favoritism could constitute sexual harassment if favoritism was based upon coerced sexual conduct. See E.E.O.C., Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, No. 915.048 (Jan. 12, 1990). The policy guidelines state that favoritism based on a supervisor coercing a female employee to engage in sexual conduct by providing a benefit could be grounds for other employees to claim sexual harassment, if other employees who were qualified for the benefit but were denied the benefit can establish that sex was generally made a condition for receiving the benefit. The guidelines also state that if favoritism based upon the granting of sexual favors is widespread in a workplace, employees may have a hostile work environment claim.
Generally, federal courts have held there is no claim for sexual harassment or hostile work environment based on a “paramour preference” theory unless there is coerced sexual conduct – i.e., an employee is given special treatment in exchange for sexual favors. In *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 909-10 (8th Cir. 2006), the Eighth Circuit upheld the dismissal of the plaintiff’s sexual harassment claim that her employer terminated her because his wife believed the plaintiff and employer were having an affair. The plaintiff attempted to argue that the employer’s “sexual favoritism” of his wife over the plaintiff constituted sexual harassment. The Eighth Circuit followed the lead of the Second and Seventh Circuits, holding that the plaintiff’s dismissal was not because of her sex, but because of the employer’s desire to allay his wife’s concerns over the plaintiff’s admitted sexual behavior with him. Id. at 910. See also *Kelly v. Howard I. Shapiro & Assocs. Consulting Engineers, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (“Our Circuit has long since rejected ‘paramour preference’ claims, which depend on the proposition that the phrase ‘discrimination on the basis of sex’ encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially treated.” (internal citations omitted)); *Ackel v. Nat’l Comc’ns, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (“When an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender); *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002) (Title VII does not prevent employers from favoring employees because of personal relationships); *Nielsen v. Tropholz Tech., Inc.*, 750 F. Supp. 2d 1157, 1165 (E.D. Cal. 2010) (collecting cases rejecting the propriety of the “paramour” theory as a Title VII cause of action); *Foster v. Humane Society of Rochester & Monroe County, Inc.*, 724 F. Supp. 2d 382, 393 (W.D.N.Y. 2010) (no sexual harassment in a favoritism case where no allegations were made that anyone asked the plaintiff for sexual favors in exchange for preferential treatment).

IV. Conduct Sufficiently Pervasive or Severe

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

A. Objective and Subjective Criteria

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

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

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

Some circuits have expressly adopted the Supreme Court’s *Oncale* “reasonable person in the plaintiff’s position” analysis in workplace harassment claims. See, e.g., *Perez v. Horizon Lines, Inc.*, 804 F.3d 1, 7 (1st Cir. 2015); *Passananti v. Cook County*, 689 F.3d 655, 666 (7th Cir. 2012); *Harsco Corp. v. Renner*, 475 F.3d 1179, 1187 (10th Cir. 2007). Decisions by other appellate courts have relied on *Oncale* for the proposition that the severity of the harassment must be viewed in light of the context of the plaintiff’s circumstances. See *Henry v. CorpCar Servs. Houston, Ltd.*, 625 F. App’x 607, 612–13 (5th Cir. 2015) (“Considering the conduct in light of the ‘social context,’ *Oncale*, 523 U.S. at 82, 118 S.Ct. 998[,] the severity of the harassment is apparent.”); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1302 (11th Cir. 2012) (“[A] reasonable juror also might conclude that, from an objective point of view, the confrontation was intimidating to an African-American employee.”).
Other courts, most frequently those in the Ninth Circuit, have continued to apply a “reasonable woman” standard. See, e.g., Anderson v. CRST Int’l, Inc., 685 F. App’x 524, 526 (9th Cir. 2017) (“Anderson presents evidence from which a jury could determine both that Anderson subjectively perceived her work environment to be hostile and that a reasonable woman in Anderson’s position would have perceived the environment to be hostile.”); Ganucheau v. E-Systems Mgmt., LLC, No. CV 11-01470-PHX-NVW, 2012 WL 1313080, at *2 (D. Ariz. Apr. 17, 2012) (offensive comments must be “severe or frequent enough to support a claim that a reasonable woman would objectively perceive Plaintiff’s work environment to be abusive”); Egelhoff v. Wyndham Resort Dev. Corp., No. 2:11-cv-00007-BLW, 2012 WL 1149299, at *7 (D. Idaho Apr. 4, 2012) (“The Court evaluates the objective hostility from the perspective of a reasonable woman.”); Panelli v. First Am. Title Ins. Co., 704 F. Supp. 2d 1016, 1032 (D. Nev. 2010) (“Although Panelli alleges that she subjectively found it difficult to do her job, the environment to which she was subject must also be considered abusive by an objective reasonable woman.”); see also Kimber-Anderson v. City of Newark, 502 F. App’x 210, 213 (3d Cir. 2012) (plaintiff must show that the “complained of conduct . . . was severe and pervasive enough to make a reasonable woman believe that the working environment was hostile or abusive”); McDonough v. Cooksey, No. 05-cv-00135, 2007 WL 1456202, at *8 (D.N.J. May 15, 2007) (for a plaintiff to state a claim for hostile work environment due to sexual harassment, she must allege that a reasonable woman would consider the conduct sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment).

The Second Circuit, in Richardson, rejected the narrow “reasonable person of the plaintiff’s group” approach in favor of determining “whether a reasonable person who is the target of discrimination would find the working conditions so severe or pervasive as to alter the terms and conditions of employment for the worse.” Richardson v. New York State Dep’t of Corr. Serv., 180 F.3d 426, 436 (2d Cir. 1999). The Second Circuit concluded that the narrower approach would be misleading and incongruent with the goals of Title VII:

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

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

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

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

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


B. Single Incident Hostile Work Environment

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

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

The circuit courts to have reviewed the question have recognized that single incidents that are sufficiently severe can constitute a hostile work environment.  See, e.g., Castleberry v. STI Grp., 863 F.3d 259, 265–66 (3d Cir. 2017) (“The Supreme Court's decision to adopt the ‘severe or pervasive’ standard—thereby abandoning a ‘regular’ requirement—lends support that an isolated incident of discrimination (if severe) can suffice to state a claim for harassment.”); Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 268 (4th Cir. 2015) (en banc) (“[W]e underscore the Supreme Court's pronouncement in Faragher . . . that an isolated incident of harassment, if extremely serious, can create a hostile work environment.”); Henry v. CorpCar Servs. Houston, Ltd., 625 F. App’x 607, 611–12 (5th Cir. 2015) (“[I]t is well established that ‘[u]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim.’” (quoting EEOC v. WC & M Enters., 496 F.3d 393, 400 (5th Cir. 2007)); Adams v. Austal, U.S.A., LLC, 754 F.3d 1240, 1254 (11th Cir. 2014) (although a racially offensive carving on a workplace wall “was an isolated act, it was severe” enough that a “reasonable jury could find that [plaintiff’s] work environment was objectively hostile”); Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577 (D.C. Cir. 2013) (“This single incident [of using the “n-word”] might well have been sufficient to establish a hostile work environment.”); Little v. Windermere Relocation, Inc., 301 F.3d 958, 966–67 (9th Cir. 2002) (“Guerrero’s rape of Little was ‘severe.’ Under the circumstances, it would have made a reasonable woman feel that her work environment had been altered[].”); Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1243 (10th Cir. 2001) (“[A]n isolated incident may suffice if the conduct is severe and distressing.”); Richardson v. New York State Dep’t of Corr. Serv., 180 F.3d 426, 439 (2d Cir. 2000) (“There is neither a threshold ‘magic number’ of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.”) (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993)); Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (the Ellerth/Faragher “defense, adopted in cases that involved ongoing sexually harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipatable sexual harassment”).

In Little, a female employee was raped by a client following a business dinner.  Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002).  Ms. Little’s position required her to develop and maintain client contacts for a Seattle real estate corporation.  She was assigned to Starbucks, a potentially lucrative client.  Id. at 964.  During a client dinner with the Starbucks Human Resources Director, Dan Guerrero, after having several drinks, she “suddenly became ill and passed out,” and then “awoke to find herself being raped by Guerrero in his car. She fought him off and jumped out of the car, but again she became violently ill. Guerrero put her back in the car and took her to his apartment, where he raped her again.  Little fell asleep, and when she awoke he was raping her again.  Afterward, he showered and drove her to her car.”  Id.
(Although the court opinion does not say so, one wonders if she was exposed to a date rape drug). Ms. Little was initially reluctant to report this rape, because she “knew how important the Starbucks account was to Mr. Glew [Windermere’s President].” *Id.* When she did report the rape to another manager, that person “advised her not to tell anyone in management.” *Id.* When she told a second manager, a person who was designated by Windermere as a “complaint receiving manager,” that person told Ms. Little that “she wouldn’t say anything to Glew unless I proceeded to seek legal action against Dan Guerrero.” *Id.* at 965. Finally, Ms. Little told Mr. Glew of the rape, and he responded “that he did not want to hear anything about it,” that she would have to discuss it with counsel, and that her salary was being reduced immediately by one-third. *Id.* When Ms. Little challenged this pay cut, she was terminated two days later. *Id.*

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

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

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

Although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. . . . It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley’s working conditions . . .

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

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

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

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

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

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

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

Courts in a variety of circumstances have held that either the single incident at issue in a particular case was not sufficiently severe to constitute a hostile work environment. See, e.g., Young v. City of Philadelphia Police Dep’t, 94 F. Supp. 3d 683, 700 (E.D. Pa. 2015), aff’d, 651 F. App’x 90 (3d Cir. 2016) (single incident in which co-worker rubbed his penis and licked his lips at plaintiff and told her that “she dressed like a whore and he was going to treat her as such” was not sufficiently severe to alter the conditions of plaintiff’s employment); Demmons v. Fulton County, No. 09-cv-2312, 2010 WL 3418325, at *12 (N.D. Ga. Aug. 2, 2010) (single incident of breast-touching not sufficiently severe to constitute a hostile work environment); Sedotto v. Borg-Warner Prot. Servs. Corp., 94 F. Supp. 2d 251, 265 (D. Conn. 2000) (an “isolated remark by a co-worker does not meet the requirements of a hostile work environment”); Dunegan v. City of Council Grove, 77 F. Supp. 2d 1192, 1198–99 (D. Kan. 1999) (a single incident where a teenage co-worker made “two [unsuccessful] attempts to kiss the plaintiff” was not sufficiently severe); Adenji v. Admin. for Children Serv., 43 F. Supp. 2d 407, 422 (S.D.N.Y. 1999) (“A single incident of discriminatory comments is not sufficient to establish a hostile work environment.”); Jones v. Clinton, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (“This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment”).

C. The Continuing Violation Doctrine

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

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

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

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

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

In order to use the continuing violation doctrine, the plaintiff must first show “that at least one act occurred within the filing period.” _West v. Philadelphia Elec. Co._, 45 F.3d 744, 754 (3d Cir. 1995) (citing _United Airlines, Inc. v. Evans_, 431 U.S. 553, 558 (1977)); _see also Macias v. Sw. Cheese Co., LLC_, 624 F. App’x 628, 634 (10th Cir. 2015); _Stewart v. Mississippi Transp. Co._, 586 F.3d 321 (5th Cir. 2009); _Vickers v. Powell_, 493 F.3d 186 (D.C. Cir. 2007); _Gilliam v. South Carolina Dept. of Juvenile Justice_, 474 F.3d 134 (4th Cir. 2007). Then, the plaintiff must prove the requisite nexus among the individual incidents of discrimination or harassment. _West_, 45 F.3d at 755. The second determination can be made by considering the following three factors, which are non-exhaustive:

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

_Id._ at 755 n.9 (citing _Martin v. Nannie and Newborns, Inc._, 3 F.3d 1410 (10th Cir. 1993)). This determination must be made in “the particular context of individual employment situations [which] requires a fact-specific inquiry that cannot easily be reduced to a formula.” _Huckabay_, 142 F.3d at 239 (citing _Berry v Board of Supervisors_, 715 F.2d 971, 981 (5th Cir. 1983)). For a plaintiff who satisfies the requirements of the continuing violation doctrine, she can incorporate a much broader range of harassing conduct and can more readily meet the severe or pervasive conduct requirement. Yet, even those plaintiffs who cannot satisfy this doctrine may still be able to use untimely events as background evidence to support her claims based on the timely events. See _Morgan_, 536 U.S. at 113.

V. Existence of Employer Liability

Under certain circumstances, courts will hold employers liable for the behavior of their employees when one employee is sexually harassed by another. The harassing employee may be
a supervisor or a co-worker, but courts will impose different standards depending on whether the alleged harasser has supervisory responsibility and whether the victim of harassment suffers a tangible employment action.

### A. Employer Liability for Supervisor Harassment

In 1998, the Supreme Court’s decisions in two sexual harassment cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), significantly clarified and revised the framework for imposing employer liability (respondeat superior) in cases where a supervisor has sexually harassed an employee.¹ The Supreme Court held that “an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Ellerth*, 524 U.S. at 765; accord *Faragher*, 524 U.S. at 807 (quoting *Ellerth*). It went on to determine that where a supervisor takes a tangible action against the employee, the employer will be subject to strict liability. *Ellerth*, 524 U.S. at 760-62. As the Court recognized:

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

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

The Court also established that where no tangible employment action occurs, an employee may still prevail on a court to hold the employer liable for the behavior of a supervisor provided that the employer is unable to establish an “affirmative defense to liability or damages.” *Id.* The affirmative defense requires defendants to show that

1) the employer exercised reasonable care to prevent and correct sexually harassing behavior, and 2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

*Ellerth*, 524 U.S. at 764; accord *Faragher*, 524 U.S. at 807.

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¹ Some courts have cited this case as “*Ellerth*” (the plaintiff-respondent) and others as “*Burlington*” (the defendant-petitioner)
1. When is a Supervisor not a Supervisor?

A critical question a court will ask when considering whether an employer should be held liable under Title VII for the discriminatory or harassing conduct of its employees is whether the harassing employee is in fact a supervisor. In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), the Court used traditional agency principles as a starting point from which to consider whether a defendant employer can be held liable under Title VII for the discriminatory or harassing conduct of its agents or supervisors. Specifically, the Court turned for guidance to the Restatement (Second) of Agency, § 219(2)(d), which provides for liability under certain circumstances:

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

Ellerth, 524 U.S. at 758 (quoting Restatement (Second) of Agency, § 219(2)).

In referencing the Restatement, however, the court was careful to note that the Restatement of Agency should serve as a guide and that the Court did not intend to “make a pronouncement of agency law in general or to transplant [Restatement language] into Title VII.” Ellerth, 524 U.S. at 758. “Rather,” the Court stated, “it is to adapt agency concepts to the practical objectives of Title VII.” Id. Thus, though the Court did allude to several criteria, the Court nonetheless left open to interpretation the precise definition of “supervisor” for the purposes of Title VII sexual harassment claims. See Faragher, 524 U.S. at 803 (noting that a supervisor has the power “to hire and fire, and to set work schedules and pay rates”) (quoting S. Estrich, Sex at Work, 43 Stan L. Rev. 813, 854 (1991)).

The EEOC, in response to Ellerth and Faragher, issued an Enforcement Guidance, “Vicarious Liability for Unlawful Harassment by Supervisors” (June 18, 1999) (reprinted in FEP Manual, at 405:7651-7672 and online at <http://www.eeoc.gov/policy/docs/harassment.html>). The EEOC applied agency principles to conclude that:

An individual qualifies as an employee’s “supervisor” if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or

b. the individual has authority to direct the employee’s daily work activities.

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

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

*Id.* at 405:7655.

In the years since the Supreme Court decided *Ellerth* and *Faragher*, courts assessed whether an employer may be held liable for the behavior of its employees in different ways – some adhering closely to traditional agency principles and others using them as a guide, but adjusting them to fit within the context of employment disputes. Consequently, the lower courts varied widely in their definitions of what it means to be a supervisor.

In 2013, the Supreme Court provided additional clarity regarding the definition of the term “supervisor” in *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013). The plaintiff in Vance brought suit under Title VII, alleging that her employer is vicariously liable for the racial harassment she suffered at the hands of her supervisor. *Id.* at 2440. She argued that the perpetrator of the harassment had the ability to assign her work and determined her hours, and that such a person, having been given control over the day to day tasks of other employees and having the ability to significantly alter their work experiences, should be considered a supervisor. Brief of Petitioner-Appellant at 19-20, *Vance v. Ball State University*, No. 11-556 (U.S. argued Nov. 26, 2012). The Supreme Court held that Ball State University cannot be held vicariously liable for the harassment because the harassing employee lacked the ability to take tangible employment actions against the plaintiff, *i.e.*, to effect a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,” and therefore could not be considered a supervisor for the purposes of Title VII. *Vance*, 133 S. Ct. at 2443 (quoting *Ellerth*, 524 U.S. at 762).

2. **What Constitutes a “Tangible Employment Action”**?

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

   In 2004, the U.S. Supreme Court held that a constructive discharge arising from an actionable workplace harassment case would only be a tangible employment action if it was
precipitated or accompanied by an “official act” of the employer. In other words, racist and sexist remarks or sexual contact alone would not suffice to amount to a tangible employment action. Rather, the employee must show some “official act” that caused the constructive discharge. Pennsylvania State Police v. Suders, 542 U.S. 129 (2004). There must be some “employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.” Id. at 2347. The Supreme Court rejected the Third Circuit’s approach, under which a constructive discharge was always considered a tangible employment action. Id. at 2355.

Therefore, unless a harassment plaintiff who alleges a constructive discharge arising from the harassment can prove that some “official act” was connected with the constructive discharge, courts will find that no tangible employment action has been taken and the defendant will be able to assert the Faragher/Ellerth affirmative defense. Suders, 542 U.S. at 148-49; see generally L. Banks & D. Katz, “Constructive Discharge,” NAT’L L.J., Aug. 2, 2004, at S9, S11; M. Coyle, “More Suits Seen After Ruling on Sex Harassment,” NAT’L L.J., June 21, 2004, at 1, 18. The High Court cited to cases as examples of what did and did not qualify as an official act. In Reed v. MBNA Marketing Syst., Inc., 333 F.3d 27 (1st Cir. 2003), the plaintiff claimed that she was constructively discharged based on repeated sexual comments and a sexual assault. The Supreme Court pointed out that these acts were unofficial and that they involved no direct exercise of company authority. In contrast, in Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003), the supervisor reassigned the plaintiff to a much worse position and told her that it was in her interest to resign in order to avoid the assignment. The Court explained the supervisor engaged in an official action in transferring the plaintiff.

In addition to being an official act, a tangible employment action must affect a significant change to an employee’s status. Recently, the Sixth Circuit held that assigning an employee’s daily duties and recommending disciplinary actions (which recommendations may or may not be accepted) were not tangible employment actions. Hylko v. Hemphill, 698 F. App’x 298, 299 (6th Cir. 2017). See also Kim v. Coach, Inc., 692 F. App’x 478, 479 (9th Cir. 2017) (giving an employee instructions about her work, giving her copies of company policies and talking to her about them, and sitting in on meetings regarding an employee’s performance are not tangible employment actions). The Third Circuit has held that the reduction of an employee’s working hours, if proven, could be a tangible employment action. Moody v. Atl. City Bd. of Educ., 870 F.3d 206, 219 (3d Cir. 2017).

A complicating factor is that constructive discharge can occur as a result of harassment by supervisors, co-workers, or both. For example, in Kennedy v. Fed. Express Corp., 698 F. App’x 24, 25 (2d Cir. 2017), the Second Circuit held that “quid pro quo” sexual harassment by a supervisor can be a tangible employment action. If the plaintiff alleges a constructive discharge resulting from harassment by her supervisor(s), the court must determine whether this constitutes a tangible employment action to allow the employee to avoid the vicarious defense to employer liability. Otherwise, if the plaintiff alleges constructive discharge solely as a result of harassment by co-workers (or customers), then the negligence standard for employer liability applies (see below).
3. The Ellerth/Faragher Affirmative Defense

In *Ellerth* and *Faragher*, the Supreme Court turned to principles of vicarious liability to determine whether the employer should be held liable when there is no tangible employment action (i.e., the employee is still employed with no adverse change in her status). The Court was reluctant to impose “automatic liability” for all occurrences of harassment which did not lead to a tangible employment action, given Title VII’s statutory goals of “promot[ing] conciliation rather than litigation” and “encouraging employees to report harassing conduct before it becomes severe or pervasive.” *Ellerth*, 524 U.S. at 764. Therefore, the Court held that the “employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Id.* at 765. Unlike the strict liability when a tangible employment action has occurred, however, the employer can raise an affirmative defense to vicarious liability:

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

*Id.; accord Faragher*, 524 U.S. at 807 (citing *Ellerth*). The first element can be satisfied by showing that the employer had an effective or reasonable mechanism for deterring and remediying workplace discrimination and harassment; and the second element can be satisfied by showing that the plaintiff did not proceed with or exhaust the internal processes before proceeding to litigation. Determination of (1) whether the employer’s anti-discrimination and anti-harassment policies were “reasonable” and (2) whether the plaintiff was “unreasonable” in failing to invoke these policies is necessarily a fact-based determination. In some cases, it will be obvious that the affirmative defense will fail, e.g., as in *Faragher* itself, where the employer had “entirely failed to disseminate its policy against sexual harassment among the beach employees” and this “policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints.” *Faragher*, 524 U.S. at 808 (“we hold as a matter of law that the [defendant] could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct”); *see also Byrd v. District of Columbia*, 807 F. Supp. 2d 37, 67 (D.D.C. 2011) (finding that “[the employer], due to its size and structure, needed to systematically communicate complaint procedures to reasonably prevent harassment.”).

A key issue with respect to whether the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior is whether an anti-harassment policy exists (including written procedures for processing complaints) and whether the policy is sufficient. The Supreme Court recognized that: “While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807 (citing *Ellerth*); *see also Wilson v. Gaston Cty., NC*, 685 F. App’x 193, 201 (4th Cir. 2017) (“While we do not suggest that [a reasonable sexual harassment policy] alone operates to foreclose employer liability, it does weigh measurably in the
balance.”); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 491 (S.D.N.Y. 1998) (“the employer’s promulgation of ‘an antiharassment policy with complaint procedure’ is an important, if not dispositive, consideration’); Landrau-Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185, 192 (D. Puerto Rico 1998) (“The Supreme Court in Faragher implied that issuance of an explicit anti-harassment policy with a complaint procedure would satisfy the first prong . . . . In fact, the Court specified that such a policy is not necessary as a matter of law and that even a less obvious policy may sometimes suffice.”).

Not all company policies, however, are sufficient. A company-mandated sexual harassment policy may indicate that a company took reasonable care to prevent harassing behavior only if it is “both reasonably designed and reasonably effectual.” Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999). A policy that is “defective or dysfunctional” will not support the employer’s contention that it exercised reasonable care. Id. Courts have held, for example, that even anti-harassment policies that contain complaint procedures do not constitute reasonable care on the part of the employer if those policies do not specify complaint procedures that encourage employees to make complaints. See, e.g., Wilson v. Tulsa Junior College, 164 F.3d 534 (10th Cir. 1998) (holding that merely adopting and distributing a sexual harassment policy is insufficient if the policy is deficient by not specifying a realistic complaint procedure and not indicating the responsibilities of a supervisor who learned of harassment through informal means); see also Shields v. Federal Exp. Customer Info. Servs., Inc., No. 10-4494, 2012 WL 3893099, at *6 (6th Cir. 2012) (denying summary judgment based on the affirmative defense because the employer’s policy “does not inform employees that their complaints may be informal and need not be placed in a formal writing … [and] the policy does not expressly instruct the employees on any particular mechanism to bypass a harassing supervisor when making a complaint of harassment”) (citing Clark v. UPS, Inc., 400 F.3d 341, 348 (6th Cir. 2005)). Merely having a policy alone, without any further reasonable steps to implement the policy, is also legally insufficient to satisfy the employer’s duty of reasonable care. See, e.g., Kramer v. Wasatch Cty. Sheriff’s Office, 743 F.3d 726, 749 (10th Cir. 2014) (denying summary judgment based on affirmative defense when employer failed to follow investigation procedure set forth in its personnel policies); Hollis, 28 F. Supp. 2d 812, 823 (W.D.N.Y. 1998) (“the policy does not contain any procedures for reporting or investigating complaints of sexual harassment”); Lancaster v. Sheffler Enterp., 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998) (“McDonald’s had a sexual harassment policy, but there appears to be no evidence of the employer exercising reasonable care to prevent sexual harassment. Simply forcing all new employees to sign a policy does not constitute ‘reasonable care.’ The employer must take reasonable steps in preventing, correcting and enforcing the policy. Reasonableness requires more than issuing a policy.”) (internal citations to Ellerth omitted).

With regards to the second prong of the affirmative defense, i.e. whether the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, a major area of concern for courts is whether plaintiff’s delay in reporting the harassing conduct was reasonable. If the court finds that the plaintiff had unreasonably delayed in reporting the conduct, the employer will be able to satisfy the second prong of the affirmative defense and avoid liability. See E.E.O.C. v. AutoZone, Inc., 692 F. App’x 280, 286 (6th Cir. 2017) (employees unreasonably failed to take advantage of corrective opportunities when they waited two and a half months to report harassment); Crawford v. BNSF Railway Co., No. 11-1953, 2012 WL 75256, at *5 (8th Cir. Jan. 11, 2012) (holding that a
generalized fear of retaliation did not make it reasonable for harassment victims to wait eight months to invoke a complaint procedure); *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009) (affirming summary judgment for the employer and holding that absent credible threat of retaliation, no reasonable jury could find the plaintiff reasonably waited five or six months before reporting what she believed was sexual harassment); *Adams v. O’Reilly Automotive, Inc.*, 538 F.3d 926 (8th Cir. 2008) (delay of two and a half years to report harassment caused by plaintiff’s search for a corroborating witness was unreasonable, particularly when company responded within two days of receiving the complaint; *Faragher* and *Ellerth* do not require the employee in question to investigate the situation and find witnesses, but simply to report the harassment); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1306-07 (11th Cir. 2007) (three months and two weeks delay in reporting held to be an unreasonable delay); *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (finding seven-month delay in reporting unreasonable).

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

Another significant issue bearing on whether the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm is whether plaintiff’s fear of reprisal for complaining about harassment would excuse delays in reporting, or not reporting at all. If the fear of retaliation is genuine and reasonable, that may in some cases make it permissible for a plaintiff to delay in reporting. *See Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 932-33 (8th Cir. 2008) (although holding that in that case the plaintiff’s delay was unreasonable, noting that in unusual circumstances such as “genuine [and] reasonable … fear of retaliation” a delay in complaining may be reasonable); *see also Roebuck v. Washington*, 408 F.3d 790, 795 (D.C. Cir. 2005) (“fear and uncertainty” about the scope of the employer’s policy may in certain circumstances make an employee’s delay reasonable); *Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (plaintiff “presented abundant evidence that to lodge such a complaint against a fellow officer was effectively forbidden by the code of silence”); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747-48 (M.D. Tenn. 1998) (evidence showed an “atmosphere” where employees feared “retaliation” and “retribution” for complaining; hence it was reasonable for plaintiff not to report the harassment). As the Fifth Circuit noted, a plaintiff may be faced with “an unfortunate dilemma: report the harassment and lose her career, or endure the harassment and lose her dignity.” *Sharp*, 164 F.3d at 931. However, courts rarely find a plaintiff’s fear of reprisal to be reasonable. *See, e.g., Alvarez v.*

The question of who the employer designates as the appropriate person(s) to whom a complaint can be raised bears directly on the reasonableness of the employer's policies and the reasonableness of the plaintiff's actions in choosing not to avail herself of the policies. District courts have held that where the employer had designated only one person “as the individual to receive and investigate complaints,” and it was that very individual who had allegedly harassed the plaintiff, then it is a question of fact, inappropriate for summary judgment resolution, as to whether the defendant “exercised reasonable care” in implementing its anti-harassment policy. Ponticelli v. Zurich Am. Ins. Group, 16 F. Supp. 2d 414, 431 (S.D.N.Y. 1998); see also Brandrup v. Starkey, 30 F. Supp. 2d 1279, 1289 (D. Or. 1998) (“Instructing an employee to voice complaints directly to the supervisor who is allegedly responsible for the harassing behavior would not be a reasonable response to an employee’s concerns and would contravene the spirit, if not the terms of [defendant’s] own sexual harassment policy.”). An employee may also satisfy the requirement that she take advantage of preventative or corrective opportunities by pursuing grievance channels other than those set forth by the employer, such as filing a union grievance. Watts v. Kroger Co., 170 F.3d 505, 511 (5th Cir. 1999) (“Taking advantage of the union grievance procedure falls within this language [Ellerth] because both the employer and union procedures are corrective mechanisms designed to avoid harm.”). Courts take the words of a company’s sexual harassment policy literally. In Clark v. United Parcel Serv., Inc., 400 F.3d 341 (6th Cir. 2005), the court rejected the employer's argument that, as a matter of law, supervisors who “were not high enough in the company hierarchy and had no authority to control [the harasser]” had no duty to convey their knowledge of harassment to higher management. Id. at 350. The court observed that “[t]his argument might have merit but for the fact that UPS itself has, through its sexual harassment policy, placed a duty on all supervisors and managers to ‘report [ ] incidents of sexual harassment to the appropriate management people.’” Id. (emphasis original).

In light of the various factors that go into determining whether the defendant employer can invoke the affirmative defense, the lower courts have had to engage in fact specific considerations when there has been no tangible employment action. The following are a sampling of cases from U.S. Courts of Appeals.

i. Defendant Satisfied the Affirmative Defense

In McKinnish v. Brennan, 630 F. App’x 177, 179 (4th Cir. 2015), the Fifth Circuit held that an employer was entitled to the benefit of the Ellerth/Faragher affirmative defense when the employer had a “clear and comprehensive” anti-harassment policy that identified the individuals to whom the plaintiff could have reported the harassment. The court also found that the employer took “swift action to correct the harassment” by terminating the harasser as soon as it learned of his actions. The court further held that the plaintiff failed to take advantage of the
employer’s corrective opportunities by declining to report the harassment. The plaintiff’s reasons for choosing not to report the harassment – fear of “ruffling feathers” and facing negative repercussions – were deemed insufficient to excuse her failure to report the harassment.

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

In *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009), the court held that the plaintiff unreasonably failed to use her employer’s complaint procedure to report harassment and that the alleged fear of retaliation did not excuse the employee’s delay before reporting harassment. The court held that a reasonable employee in the plaintiff’s position would have come forward to her supervisors about the harassment instead of posting the employer’s sexual harassment policy on her office door and only telling a fellow co-worker that she was being sexually harassed. Since the plaintiff posted the sexual harassment policy on her door, the court reasoned that she knew about the employer’s complaint procedure and should have followed it when confronted with sexual harassment. The court also disregarded the plaintiff’s assertions that she did not report the harassment through the official complaint procedure because she reasonably feared retaliation if she reported the harasser. Although the harasser threatened the plaintiff that “no one would believe” her and that she would be viewed as “the problem,” the Court reasoned that since the harasser was not her supervisor and did not have authority to evaluate her performance or to take any action against her, she did not have a reasonable fear of retaliation. *Id.* at 131.

In *Fontanez v. Jansen Ortho LLC*, 447 F. 3d 50 (1st Cir. 2006), a male packing manager alleged that his supervisor used vulgar language in front of him, told him that he was looking for someone to engage in homosexual relations with him, and routinely touched his own buttocks and the front of his pants in front of plaintiff. The company had well-established complaint procedures and an anti-discrimination policy that the plaintiff was aware of and had utilized on one occasion. The court found that the employee failed to take advantage of those procedures during the years of alleged harassment. *Id.* at 57.

In *Finnerty v. William H. Sadlier, Inc.*, 176 F. App’x 158 (2d Cir. 2006), the court affirmed the district court’s grant of summary judgment for the defendant. The defendant was able to establish the affirmative defense even though the plaintiff reported the sexual harassment because the plaintiff waited three years before reporting it. The court concluded that plaintiff’s
three-year delay was unreasonable as a matter of law. *Id.* at 162. The plaintiff had argued that she delayed because she feared that her complaint would not be confidential and she feared reprisal from the harasser. The court stated that it had never required a company to maintain a policy that guarantees confidentiality and that, in fact, it would be nearly impossible to keep a complaint confidential and also conduct an investigation. *Id.* The employee's alleged fear of reprisal from the harasser did not justify her delay in reporting his behavior, because: (1) for such reluctance to preclude the affirmative defense, it must be based on fear of what the employer might do, not what the harasser might do; and (2) a plaintiff must produce evidence that his or her fear is credible – such as “proof ‘that the employer has ignored or resisted similar complaints or taken adverse actions against employees in response to such complaints’” – and the plaintiff had failed to offer such evidence. *Id.* at 163 (quoting *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001)).

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

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

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

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

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

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

\textbf{ii. Employer Failed to Establish Affirmative Defense}

In \textit{EEOC v. Mgmt Hospitality of Racine, Inc.}, 666 F.3d 422 (7th Cir. 2012), the court affirmed entry of judgment for the plaintiffs after a jury verdict, rejecting the employer’s claim that it was entitled to judgment as a matter of law based on the \textit{Faragher/Ellerth} defense.

The court based its decision to affirm the jury’s judgment on the following facts: company supervisors had failed to report complaints of sexual harassment, training on the company’s sexual harassment policy was “inadequate,” the policy did not name a contact person or persons for complaints, and the company’s investigation of the plaintiffs’ complaints did not
begin for two months. Id. at 435-36. Additionally, the court held that the plaintiffs did not unreasonably fail to take advantage of the company’s corrective procedures since a supervisor had ignored one plaintiff’s prior complaint of sexual harassment and another plaintiff testified that her supervisor treated her “more harshly” after she complained of sexual harassment. Id. at 437.

In Agusty-Reyes v. Dep’t of Educ. of P.R., 601 F.3d 45 (1st Cir. 2010), the court reversed the district court’s grant of summary judgment for the employer and held that the defendant did not establish the affirmative defense. First, although the Department of Education (“DOE”) had a sexual harassment policy, there was no evidence that the DOE made any effort to communicate its policy (whether or not the policy was reasonable) to any of its employees, regional directors, supervisors, or the plaintiff. Id. at 54. Second, there was a genuine issue of material fact as to whether the DOE’s policy was reasonable: it afforded victims of harassment no chance to testify in support of their complaints once filed or to reply to the alleged harasser’s testimony, but gave those accused of sexual harassment an ex parte proceeding at which they could present their version of events, with counsel, without any rebuttal testimony or corroborative evidence from victims and witnesses. The DOE did not give victims notice of the hearings. Id. at 56. Third, even if the plaintiff had not followed the DOE’s formal policy to the letter, a reasonable jury could find that the plaintiff’s two union complaints constituted notice to the DOE. Id.

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

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

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

In *Valintin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85 (1st Cir. 2006), the First Circuit found that the trial court had not erred in refusing to give the jury an *Ellerth/Faragher* affirmative defense instruction. While there was testimony at trial that the municipality had a sexual harassment policy, no such policy was entered into evidence and there was no evidence in the record that the plaintiff or other police officers were aware of the policy or that it was distributed. The First Circuit also noted that notwithstanding the defendant’s failure to distribute a policy for complaints, the plaintiff acted reasonably in complaining on numerous occasions about the harassment, although she did not do so in writing. The First Circuit found, “where the evidence shows the plaintiff cannot prove an affirmative defense under the *Faragher* standard, there is no reason to remand for the giving of a *Faragher* instruction. *Id.* at 99 (citation omitted).

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

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

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

In *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001), the Seventh Circuit affirmed the jury award ($25,000) to the plaintiff on her Title VII hostile environment sexual harassment claim. The employee, who was an administrative assistant, claimed that her supervisor repeatedly harassed her during a four month period, including (1) “40 hugs, 15 shoulder rubs, a kiss on her cheek, and two instances where [supervisor] petted her cheeks”; (2) inquiring “about her staying the night with him” and saying “that her clothes would look better on the floor”; (3) “asking her to ‘try out the back counter’ with him”; (4) giving “her a single page ‘World of Love 1997, Mexico’ calendar that depicted cartoon drawings of different sexual positions, one for each day,” and asking “her to pick out a couple of her favorite days.” *Id.* at 845. In addition, her second-level supervisor said, in her presence, that “she was going to become a ‘sex’retary.” *Id.* The Seventh Circuit rejected the employer’s invocation of the *Ellerth/Faragher* affirmative defense, because the employer’s sexual harassment policy did not specify the identity of the “Human Resource Representative” to whom complaints were to be made, and the defendant’s own witnesses presented conflicting testimony as to who served in this position. *Id.* at 847-48. Even if the policy were adequate, the corrective actions were held to be inadequate. For example, when the plaintiff complained to the Benefits Coordinator (a woman) about her supervisor’s conduct, and her concerns that this conduct was causing other workers to gossip about her, this person initially told the employee “that she should develop a thick skin” and argued that the employer couldn’t change the supervisor, stating “this was his personality, that was how he worked. He had been there for years type thing. There was really nothing that had ever been done about it and she didn’t think that there ever [would be].” *Id.* at 848-49.

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

In *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999), the court upheld the district court’s denial of summary judgment and explained that the defendant failed to show that a reasonable person in the plaintiff’s position would have come forward at a sufficiently early stage of the sexual harassment to prevent the harassment from becoming severe or pervasive. The plaintiff alleged that from the first day of work and “virtually every day thereafter,” her immediate supervisor subjected her to “unwelcome discussions concerning sexual matters” and to sexual advances. *Id.* at 674. Ten days after she began work, her supervisor raped her. A month after the rape, the plaintiff reported the assault because her immediate supervisor again began to proposition her. *Id.* Although the court found that the defendant could satisfy the first element of the affirmative defense, that it took reasonable care to prevent and correct the harassment, the court concluded that the defendant could not establish as a matter of law that the plaintiff had failed to avail herself of the defendant’s sexual harassment reporting scheme during the first ten days of her employment. The court focused on the fact that too little was known about the first
ten days of the plaintiff’s employment to hold as a matter of law that the plaintiff unreasonably delayed reporting the harassment.

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

**B. Employer Liability for Co-Worker and Customer Harassment**

Harassment by co-workers and third parties in the workplace (clients or customers), can also result in employer liability under certain circumstances. See, e.g., *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir. 2006) (an employer is liable for a co-worker's sexual harassment only if it knew or should have known of the harassment and failed to take effective remedial action); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002) (same). For example, the Ninth Circuit found that there was hostile work environment sexual harassment of the plaintiff, a female prison guard, where prison officials were aware of and failed to correct a hostile work environment created by male prisoners’ harassment of female guards. *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). Plaintiff was regularly subjected to male prisoners’ use of obscenities and their masturbation in front of her and another female prison guard. On one occasion plaintiff was subjected to a male prison guard ejaculating into a meal tray she was clearing. Despite her repeated complaints, prison officials failed to take any action to prevent or correct the behavior stating, “it's only sex.” Instead, officials retaliated against her by referring her to a psychologist, threatening her job, and eventually terminating her after alleging that she made false claims against co-workers. The Ninth Circuit held that employers are liable for harassing conduct by non-employees where “the employer either ratifies or acquiesces by not taking immediate and/or corrective action.” *Id.* at 538.

Many other courts have held similarly. In *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003), the Fourth Circuit held that an employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it. *Id.* at 333-34. It further stated that “[a]n employer cannot avoid Title VII liability of co-worker harassment by adopting a ‘see no evil, hear no evil’ strategy. Knowledge of harassment can be imputed to an employer if a reasonable person, intent on complying with Title VII, would have known about the harassment.” *Id.* at 334 (internal quotations excluded); see also *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009) (holding that a plaintiff may prevail by showing that the employer did not provide a “reasonable avenue of complaint” or that the employer knew or should have known about the harassment but failed to take “appropriate remedial action”); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003) (“An employer may be found liable for the harassing conduct of its customers if the employer fails to take immediate and appropriate corrective action in response to a hostile work environment of which the employer knew or should have known.”); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (*per curiam*) (“When an employee’s ability to perform his or her job is compromised by discriminatory acts including sexual harassment and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate.”); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998) (“other circuits, interpreting
Title VII, have said that employers can be liable for a customer’s unwanted sexual advances, if the employer ratifies or acquiesces in the customer’s demands”); **Lockard v. Pizza Hut, Inc.**, 162 F.3d 1062, 1073 (10th Cir. 1998) (“We agree with our sister circuits that an employer may be found liable for the harassing conduct of its customers.”); **Crist v. Focus Homes, Inc.**, 122 F.3d 1107, 1111 (8th Cir. 1997) (“In light of these allegations, a fact finder could characterize Focus Homes’ response as implicitly or even explicitly requiring the appellants to endure repeated sexual assaults [by patients] as an essential part of their job.”); **Folkerson v. Circus Circus Enterprises, Inc.**, 107 F.3d 754, 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”); **Aman v. Cort Furniture Rental Corp.**, 85 F.3d 1074, 1077-84 (3d Cir. 1996) (regular and pervasive racial harassment by co-workers and supervisors established hostile environment claim); **West v. Philadelphia Elec. Co.**, 45 F.3d 744, 755-56 (3d Cir. 1995) (same).

The following federal appellate decisions are representative of those involving co-worker or customer harassment.

1. **Employer liable for co-worker harassment**

   In **Fuller v. Idaho Dep't of Corr.**, 865 F.3d 1154 (9th Cir. 2017), the Ninth Circuit reversed the district court’s entry of summary judgment in favor of an employer on its employee’s hostile work environment claim. The court held that the employer’s knowledge of previous sexual harassment complaints against the plaintiff’s co-worker, while alone insufficient to create a hostile work environment, was relevant and probative of the employer’s general attitude of disrespect toward its female employees. *Id.* at 1162 n. 8.

   In **Nichols v. Tri-Natl Logistics, Inc.**, 809 F.3d 981, 987 (8th Cir. 2016), *reh'g denied* (Feb. 11, 2016), the Eighth Circuit reversed the district court’s entry of summary judgment dismissing the plaintiff’s sex-based hostile work environment claim. The court held that a question of fact existed as to whether the employer had notice of the harasser’s actions and subsequently took appropriate remedial actions. Evidence in the case demonstrated that the employee complained about her co-worker’s actions shortly after they took place and that the employer did not take available and appropriate steps to address the harassment, such as removing the plaintiff from the truck where she was working with the harasser, reserving a motel room for the employee away from the harasser, obtaining a statement from the employee, relieving the employee from future assignments with the harasser, or reprimanding the harasser. Instead, after receiving the employee’s complaints, the employer simply told the employee to “try to get along with [the harasser].”

   In **EEOC v. Prospect Airport Servs. Inc.**, 621 F.3d 991 (9th Cir. 2010), the court held that the jury could reasonably find that the employer knew about the co-worker harassment and its response was inadequate. The employee complained to his immediate supervisor, who failed to take any action. *Id.* at 1001. He then complained repeatedly to others in management, and, while one told the harasser to stop, management did nothing when the harasser did not cease harassing him, despite knowing that the harassment continued. *Id.*

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

The Second Circuit held in *Duch v. Jakubek* that an employer can be liable for sexual harassment when it fails to take appropriate remedial action after receiving a “nonspecific” complaint of co-worker harassment. 588 F.3d 757, 762 (2d Cir. 2009). In *Duch*, the plaintiff did not specifically complain of sexual harassment by a co-worker but the supervisor knew that the plaintiff had requested a change of schedule to avoid working alone with the co-worker. Indeed, when the supervisor asked her about the reason for the schedule request, the plaintiff became emotional. *Id.* at 765. Moreover, the supervisor was aware that the harassing co-worker had engaged in sex-related misconduct in the past. The court reversed a grant of summary judgment on the issue of employer liability, holding that “when an employee’s complaint raises the specter of sexual harassment, a supervisor’s purposeful ignorance of the nature of the problems . . . will not shield an employer from liability under Title VII.” *Id.* at 766.

In *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5th Cir. 2012), the Fifth Circuit held that an employer can avoid liability for co-worker harassment “if it takes remedial action calculated to end co-worker harassment as soon as it knows or should know of the harassment.” *Id.* at 189. In Cherry, the plaintiff and his first-level supervisor made ten complaints about sexual harassment in a two-month timeframe to the plaintiff’s third-level supervisor and despite a company policy requiring the third-level supervisor to report the complaint to Human Resources, the supervisor failed to do so. *Id.* Rather, the supervisor intimated to the plaintiff that the harasser was just “horsing around.” *Id.* When the company did initiate an investigation, the company found “insufficient evidence” of harassment despite documents, text messages, and eyewitness testimony supporting plaintiff’s allegations. *Id.* Reversing the district court’s entry of judgment as a matter of law, the Fifth Circuit held that the employer had failed to take prompt remedial action to address the harassment and could not escape liability for the harassment. *Id.* (Interestingly, although the harasser was plaintiff’s second-level supervisor, the court for no apparent reason applied the law of co-worker harassment in its analysis, rather than the more plaintiff-friendly *Faragher /Ellerth* framework.)

In *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678 (7th Cir. 2001), the Seventh Circuit reversed the grant of summary judgment to the employer on the plaintiff’s Title VII hostile work environment claim. The plaintiff, a school custodian, alleged numerous incidents of disparate treatment in which she and other female custodians were forced to do tasks that male custodians were not required to do. She also asserted that the male custodians made derogatory remarks in the presence of their supervisors, including that women “were not qualified to do their job...”
because they were women and that they should not be paid as much as men,” and that the plaintiff was “nothing more than a fat-ass bitch.” *Id.* at 685-88. Critically, the defendant failed to deny or explain “plaintiff’s most damaging allegation: that the male custodians were told not to help the female custodians.” *Id.* at 696. The Seventh Circuit concluded that the school district was liable for co-worker harassment and supervisor harassment because after the plaintiff reported her complaints, the employer “did nothing — no internal investigation was pursued and no remedial action was taken.” *Id.* at 699, 700.

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

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

2. Employer not liable for co-worker harassment

In *Chavez-Acosta v. Sw. Cheese Co., LLC*, 610 F. App’x 722, 731 (10th Cir. 2015), the Tenth Circuit held that an employer was not vicariously liable for the sexual harassment of one of its employees by her co-worker. The employer did not have actual or constructive knowledge of the harasser’s alleged conduct of exposing his genitals to the plaintiff at work. *Id.* at 732. The plaintiff had never reported the harasser’s conduct to the employer, and although the harasser had engaged in improper conduct at a company party by taking a photograph of his exposed genitals, the court held that the incident was dissimilar, had taken place two years earlier, and was therefore insufficient, by itself, to impute knowledge to the employer of the harasser’s improper conduct at work. *Id.*
In Bertsch v. Overstock.com, 684 F.3d 1023, 1028 (10th Cir. 2012), the court upheld dismissal of the plaintiff's lawsuit because Overstock responded promptly to the plaintiff’s complaints about her co-worker’s sexually harassing behavior. The plaintiff alleged that her co-worker viewed sexually explicit videos at work, posted a picture of a “scantily clad” woman in his cubicle, frequently made comments demeaning women, “engaged in demeaning conduct, such as ridiculing her in meetings, treating her like a ‘servant,’ and refusing to look at her while they talked.” Id. at 1025. Although the court determined that there might have been a genuine issue of material fact as to whether the co-worker’s behavior was sufficiently severe or pervasive as to merit a trial, the court dismissed the case without further consideration because each time the plaintiff complained to her supervisors, Overstock took steps to address the problem. Id. at 1028.

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

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

In Alvarez v. Des Moines Bolt Supply, Inc., 626 F.3d 410 (8th Cir. 2010), the Eighth Circuit held that an employer can be held liable for sexual harassment by co-workers where the employer knew or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action. Id. at 419. In Alvarez, the court affirmed summary judgment on the plaintiff’s claim of sexual harassment against a co-worker where the employer responded to her complaint, investigated the matter, suspended both the co-worker (and the plaintiff for engaging in inappropriate conduct), and transferred the co-worker to another department, thus ending his harassment of the plaintiff. Id. at 420-21. The court also affirmed summary judgment on the plaintiff’s claim for sexual harassment by other co-workers following the transfer of the first co-worker since the plaintiff did not report this subsequent harassment to the employer. Id. at 421. The court rejected the plaintiff’s claim that her fear of retaliation based on the company’s response to her first complaint justified her failure to report the subsequent retaliation, thus giving the employer constructive knowledge of the harassment. Id. at 421-22.
The court held that this scenario did not represent a “truly credible threat of retaliation,” which is necessary to justify a failure to report. *Id.* at 422.