HARASSMENT IN THE WORKPLACE: DANGEROUS LIAISONS

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- B.A., *summa cum laude*, Texas Christian University
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Court Admissions

- 1984, Texas
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W. Gary Fowler's practice includes both counseling and defending clients in labor and employment matters. He is Chair of the Dallas Labor and Employment Section for Jackson Walker.

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Memberships

Mr. Fowler is a member of the Labor and Employment Council of the Dallas Bar Association and served as an officer from 2006-08 and as its Chair in 2009. He is a board member of the Greater Dallas Youth Orchestra and served as its President in 2008-09 and its Chair from 2009-11.

Awards

Mr. Fowler was named a "Super Lawyer" (2003-2012) by Thomson Reuters. He is also listed in the 2006-2013 editions of *The*

Best Lawyers in America under Labor and Employment Law. He was named one of the "Best Lawyers in Dallas" in *D Magazine* on several occasions and most recently in 2012.

Publications & Speaking Engagements

Mr. Fowler is a frequent author and speaker. His articles and presentations include the following:

- " *Did They Turn Out the Light: The Supreme Court Rules on Covenants Not to Compete*," Texas Bar Journal (May 2007) (with M. Scott McDonald)
- *State of Employment Law*, Texas Bankers Association Conference, March 30, 2012
- " *Covenants Not to Compete: The Swinging Pendulum of Enforceability*," State Bar of Texas Advanced Employment Law Course, January 2012
- " *Covenants Not to Compete: From Sheshunoff and Beyond*," State Bar of Texas Advanced Employment Law Course, January 2010, and Plano Bar Association, May 2010
- " *Ready to Work? Implementing 2009 Employment Law Changes in the American Workplace*," DFW Chapter of American Corporate Counsel Association, May 2009
- " *Getting a Firm Grip on HR Things That Go Bump in the Night*," Texas Employment Law and Human Resources Forum (with Marc Joseph of Haggar Clothing Co. and David Watkins of Jenkins & Watkins), April 2009
- " *Covenants Not to Compete in the Post-Light World*," University of Houston Law Foundation, December 2008
- " *Litigation Pitfalls When Drafting Executive Employment Agreements*," State Bar of Texas Executive Compensation Course, May 2008
- " *Top Seven Issues for Employment Law in 2008*," University of Texas Corporate Counsel Institute, February 2008 (with Mark Steiner of Jackson Walker and Susan Sandidge of Brinker International)
- " *Internal Affairs: Ethical Issues for In-House Counsel in Workplace Investigations*," DFW Chapter of the American Corporate Counsel Association, September 10, 2004
- *Privacy Issues In the Workplace*, Council on Education in Management, February 2005

REPRESENTATIVE APPELLATE AND PUBLISHED DISTRICT COURT CASES

- *Roberson v. Game Stop/Babbage's*, 152 Fed.Appx. 356, 2005 WL 2622977 (5th Cir. 2005)
- *Parkerson v. Orix Financial Services, Inc.*, 2007 WL 1667279 (11th Cir. 2007)
- *Thomas v. LTV Corp.*, 39 F.3d 611 (5th Cir. 1994)(preemption under LMRA)
- *Federal Exp. Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex.1993)
- *E.E.O.C. v. Boeing Services Intern.*, 968 F.2d 549 (5th Cir. 1992)
- *Oldham v. ORIX Financial Services, Inc.*, 2007 WL 530202 (N.D.Tex., February 21, 2007)
- *Hinds v. Orix Capital Markets, L.L.C.*, 2003 WL 22132791 (N.D.Tex., Sept. 11, 2003)
- *Prudential Ins. Co. of America v. Neal*, 768 F.Supp. 195 (W.D.Tex.1991)
- *Burnet County Appraisal Dist. v. J.M. Huber Corp.*, 808 S.W.2d 613 (Tex.App.-Austin 1991, writ denied)

- Covenants Not to Compete: The Swinging Pendulum of Enforceability
- Texas Supreme Court Upholds Enforceability of Covenants Not to Compete
- Texas Supreme Court Wades Again into Murky Waters of Covenants Not to Compete
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I. WORKPLACE HARASSMENT – WHY IT MATTERS[1]

Workplace harassment cases present great liability risks for employers in both the courts of law and public opinion. Although harassment may arise within any level of employment, perhaps the most devastating cases of all involve situations where the alleged perpetrator is a major decision maker within a company. A few examples are illustrative:

- In April 2012, Best Buy chief executive officer Brian Dunn resigned amid allegations that he had engaged in an inappropriate relationship with a 29-year old female subordinate.[2] According to an internal audit conducted by the company, Dunn had given the female a number of gifts, spent a great deal of time with her, and was in constant contact.[3] For example, the audit reported: "During one four-day and one five-day trip abroad during 2011, the CEO contacted the female employee by cell phone at least 224 times, including 33 phone calls, 149 text messages, and 42 picture or video messages. In one instance, several photographs were discovered on the CEO's personal cell phone that contained messages expressing affection, one of which included the female employee's initials."[4] According to insiders, Dunn's resignation negatively impacted morale at Best Buy and cost the company roughly $6.6 million in the form of a severance package.[5]
- In 2010, Hewlett Packard CEO Mark Hurd resigned after settling a suit brought by celebrity attorney Gloria Allred which alleged that Hurd had sexually harassed a contractor working for the company's marketing division.[6] HP's Board of Directors alleged that Hurd had improperly used company funds in connection with his relationship to the alleged victim.[7] Following news of Hurd's resignation, HP's stock price tumbled roughly ten percent.[8]
- In 2006, Hideaki Otaka, the chief executive officer of Toyota Motor North America, resigned after allegations arose that he had sexually harassed and assaulted his assistant.[9] According to the alleged victim, she had reported the incidents to human resources and Toyota North America's second-ranking executive, and in response, had been offered a buyout or transfer.[10] Toyota settled the assistant's lawsuit for an unspecified amount.[11]

These cases demonstrate the potentially damaging effects that a high-profile harassment case may have upon a company's morale, managerial continuity, public reputation, and financial health. Accordingly, it is imperative that companies develop and adopt sound strategies to prevent work-related harassment cases from arising in the first place. To that end, this paper

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[1] The author wishes to thank David Schlottman, Jackson Walker L.L.P., for his work, writing, and research, particularly on the development of case law under Title VII, the Texas Commission on Human Rights Act, and other statutes concerning workplace harassment. Thanks also go to Ashley Scheer, Jackson Walker L.L.P., and Connie Cornell, of Cornell, Smith & Merrill, for sharing their thoughts on workplace investigation. Any errors, of course, remain solely my responsibility.

[2] Erin Carlyle, *Best Buy CEO Brian Dunn Gets $6.6 Million Severance Package After 'Friendship' With 29-Year-Old Employee*, FORBES (May 24, 2012), http://www.forbes.com/sites/erincarlyle/2012/05/14/best-buy-ceo-brian-dunn-gets-6-6-million-severance-package-after-friendship-with-29-year-old-employee/.

[3] *Id.* A full version of the report can be found at http://www.scribd.com/doc/93499181/Best-Buy-Final-Report-5-14-121.

[4] *Id.*

[5] *Id. See* Miguel Bustillo, et al., *Best Buy Probes CEO Relationship*, THE WALL STREET JOURNAL (Apr. 12, 2012), http://online.wsj.com/article/SB10001424052702304444604577340081967524376.html?mod=WSJ_hp_MIDDLENexttoWhatsNewsForth.

[6] Ashlee Vance, *H.P. Ousts Chief for Hiding Payments to Friend*, THE NEW YORK TIMES (Aug. 6, 2010), http://www.nytimes.com/2010/08/07/business/07hewlett.html?pagewanted=all.

[7] *Id.*

[8] *Id.*

[9] Hannah Clark, *Toyota's Otaka Sued for Sexual Harassment*, FORBES.COM (May 2, 2006), http://www.forbes.com/2006/05/02/toyota-otaka-harassment-cx_hc_0502autofacescan07.html.

[10] *Id.*

[11] Micheline Maynard, *Automaker Reaches Settlement in Sexual Harassment Suit*, THE NEW YORK TIMES (Aug. 5, 2006), http://www.nytimes.com/2006/08/05/business/worldbusiness/05harass.html.

will discuss, in broad terms, the legal framework for harassment claims under Fifth Circuit and Texas law.

II. THE DEVELOPMENT OF WORKPLACE HARASSMENT IN THE UNITED STATES SUPREME COURT

Title VII of the Civil Rights Acts of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[12] Although seemingly straightforward, exactly what this provision prohibits and who may be held liable for its violation has been a topic of recurring judicial treatment. Thus, any understanding of modern harassment law first requires a brief detour through its origins.

In the initial years after its passage, Title VII was generally understood by courts to prohibit only workplace discrimination and not necessarily workplace harassment. However, beginning in the early 1970s, federal circuit courts began to recognize that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.[13] Thus, these courts held that an employee could maintain a so-called "hostile work environment" claim based on working conditions which were permeated with racial, religious, or national origin harassment.[14]

Meritor Savings Bank, FSB v. Vinson represents the United State Supreme Court's first foray into Title VII harassment issues. In that case, the Court considered whether, as the D.C. Court of Appeals had held, a hostile work environment claim based on sexual harassment was an actionable form of sex discrimination under Title VII.[15] Meritor Savings argued that because Title VII's text only prohibited discrimination with respect to "compensation, terms, conditions, or privileges of employment," the statute could only be read to prohibit actions that result in tangible economic loss rather than "purely psychological" aspects of the workplace environment.[16] The Court, however, disagreed. Observing that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is [an] arbitrary barrier to sexual equality at the workplace," the Court concluded that hostile work environment claims based on acts of sexual harassment were cognizable under Title VII.[17] The Court held that in order for workplace sexual harassment to affect a "term, condition, or privilege of employment" within the meaning of Title VII, the harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[18]

However, despite creating the cause of action, the *Vinson* majority expressly declined to resolve the precise circumstances under which an employer could be held vicariously liable for the creation of a hostile work environment by its employees.[19] Justice Marshall took issue with the majority's hesitance. In a preview of cases to come, he argued in concurrence that "sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer . . . regardless of whether the employee gave 'notice' of the offense."[20]

The Court's next significant opinion on workplace harassment came in *Harris v. Forklift Systems, Inc.*[21] The case arose when Teresa Harris sued Forklift Systems, alleging that her supervisor, Charles Hardy, had a created a hostile work environment based on Ms. Harris's gender.[22] Hardy had allegedly subjected Harris to disparaging comments regarding her gender as well as sexual innuendos.[23] The district court, applying the law of the Sixth Circuit at the time, dismissed Harris's claim on the grounds that the work environment was not so severe as to seriously affect her psychological well-being or lead her to injury.[24] After the appellate court affirmed, Harris appealed to the Supreme Court, arguing that the lower courts had applied too strenuous of a standard to prevail on hostile work environment claims.[25]

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[12] 42 U.S.C. § 2000e-2(a)(1).

[13] *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 65–66 (1986).

[14] *See, e.g.*, *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977) (race); *Cariddi v. Kan. City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (national origin); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religion).

[15] *Vinson*, 477 U.S. at 59–62,

[16] *Id.* at 64.

[17] *Id.* at 66–67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (1982)).

[18] *Id.* at 67 (quoting *Rogers v. Equal Emp't Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971)) (brackets and quotation marks omitted).

[19] *Id.* at 72.

[20] *Id.* at 78.

[21] 510 U.S. 17 (1993).

[22] *Id.* at 19.

[23] *Id.*

[24] *Id.* at 20.

[25] *Id.*

Agreeing with Harris, the Supreme Court reversed.[26] The Court began its analysis by recognizing the need for hostile environment liability to strike a middle ground between penalizing "merely offensive" acts and requiring psychological injury.[27] The Court then reaffirmed the position it took in *Meritor* and further clarified what a plaintiff must establish to prevail on a hostile work environment claim. First, in order to be sufficiently severe or pervasive, the Court held that a plaintiff must show that the complained of conduct was both subjectively and objectively hostile or abusive.[28] Noting that such a standard "cannot be a mathematically precise test," the court concluded that the objective hostility inquiry requires consideration of the totality of the circumstances.[29] These circumstances 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."[30] Applying the standard it announced, the Court concluded that the lower courts had committed error by focusing solely on the potential for psychological injury to the plaintiff rather than considering the work environment as a whole.[31]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Court was asked to address the scope of Title VII's prohibition on harassment "because of . . . sex."[32] Specifically, the issue was whether Title VII allowed recovery where the harasser and the victim were members of the same sex.[33] In *Oncale*, a male plaintiff alleged that his male supervisors had forcibly subjected him to sex-related actions.[34] Prior to this case, the lower courts had taken a variety of stances on the issue. For example, as held by the lower courts in *Oncale*, some took the position that same-sex harassment claims were never cognizable under Title VII.[35] Others held that same-sex harassment claims were actionable only when the harasser was homosexual—the theory being that these harassers were presumably motivated "because of sex."[36] Still others assumed that workplace sexual harassment was actionable, regardless of the harasser's sex, sexual orientation, or motivations.[37]

Addressing the split in authority, the Supreme Court held that based on Title VII's plain text, a per se prohibition on same-sex harassment claims was improper.[38] Also rejected was an absolute requirement that the alleged harasser be homosexual.[39] Instead, the Court reiterated that hostile work environment claims based on same-sex harassment should be evaluated in the same manner as any other Title VII sexual harassment claims.[40] Thus, the standard for recovery was still whether the alleged harassment was, under the totality of the circumstances, subjectively and objectively severe and pervasive to such a degree that it altered the plaintiff's terms and conditions of employment.[41] However, the Court did pause to emphasize that "the statute does not reach genuine but innocuous differences in the way men and woman routinely interact with members of the same sex."[42] Thus, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."[43]

The Court's decisions in *Vinson*, *Harris*, and *Oncale* provided a certain degree of clarity regarding when and on what basis a plaintiff could recover for workplace harassment. However, still unresolved—and a topic of great debate amongst the lower courts—was the issue left open in *Vinson*: When can an employer be held vicariously liable for a hostile work environment created by one or more of its employees? It was against the backdrop of this uncertainty that the Court issued its landmark decisions in *Burlington Industries, Inc. v. Ellerth*[44] and *Faragher v. City of Boca Raton*.[45]

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[26] *Id.* at 22–23.

[27] *Id.* at 21.

[28] *Id.* at 21–22.

[29] *Id.* at 22 (punctuation omitted).

[30] *Id.* at 23.

[31] *Id.* at 22.

[32] 523 U.S. 75, 76 (1998).

[33] *Id.*

[34] *Id.* at 77.

[35] *Id.* at 79; *see Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

[36] *See, e.g.*, *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996); *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 138 (4th Cir. 1996).

[37] *See, e.g.*, *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997).

[38] *Oncale*, 523 U.S. at 79.

[39] *Id.* at 80 ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.").

[40] *Id.* at 80–81.

[41] *See id.*

[42] *Id.* at 81.

[43] *Id.* at 81 (brackets and quotation marks omitted).

[44] 524 U.S. 742 (1998).

[45] 524 U.S. 775 (1998).

The facts in both cases were quite similar. In *Ellerth*, the plaintiff, a Burlington employee, brought a hostile work environment claim, alleging that she had been sexually harassed by Ted Slowik, a mid-level manager at Burlington.[46] It was undisputed that despite Burlington's published sexual harassment policy, the plaintiff never reported Slowik's conduct.[47] In *Faragher*, a female lifeguard sued the City of Boca Raton, alleging that her supervisors had created a sexually hostile work environment by subjecting her and other female lifeguards to uninvited touching and disparaging gender-based comments.[48] Importantly, the Court noted that although the City had a published sexual-harassment policy, it had failed to disseminate the policy to the marine division in which the plaintiff was employed.[49] Furthermore, although the plaintiff herself had not reported the conduct, another female lifeguard had, which resulted in disciplinary conduct being taken against the supervisors.[50]

The primary issue in *Ellerth* and *Faragher* was when and under what circumstance could an employer be held vicariously liable for the acts of its supervisors who create a sexually hostile work environment.[51] After an extensive discussion of common-law agency principles and their appropriate application within the context of Title VII workplace harassment, the Court determined that the issue of employer vicarious liability was dependent upon the identity and status of the harasser.[52] Thus, where the alleged harasser was a supervisor with direct authority over the victim, the employer would be vicariously liable for the supervisor's creation of a sexually hostile work environment.[53] However, when no tangible employment action had been taken against the victim, the employer could assert an affirmative defense to liability or damages by showing: (1) that the employer exercised reasonable care to prevent and correct promptly any 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.[54] However, where a sexually hostile work environment was created by a plaintiff's coworkers (as opposed to a supervisor), the employer can only held vicariously liable if it knew or should have known about the harassment and failed to stop it.[55]

Applying its newly announced standard, the Court in *Ellerth* determined that the case should be remanded to allow Burlington an opportunity to establish the affirmative defense.[56] In *Faragher*, the court affirmed the judgment of the lower courts against the City of Boca Raton, finding that the City had no basis in the record to argue for the application of the newly-created affirmative defense.[57] The Court justified its conclusion by noting that even if the City had disseminated its policy to the plaintiff's employment division, the policy contained no provision which allowed complainants to bypass harassing supervisors.[58] Thus, as a matter of law, the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.[59]

As is often the case, the Court's decision in *Ellerth* and *Faragher* perhaps created as many questions as it answered; however, one issue in particular has vexed the lower courts: Who qualifies as a "supervisor" for purposes of the affirmative defense created in *Ellerth* and *Faragher*? One line of authority holds that a "supervisor" is one who retains "the power to hire, fire, demote, promote, transfer, or discipline" the alleged victim,[60] while another holds that a "supervisor" is a person who oversees the victim's daily work assignments and performance.[61] The Supreme Court has granted certiorari and will resolve the issue in the current October term.[62]

III. HARASSMENT LAW IN THE FIFTH CIRCUIT AND TEXAS

Since its recognition in *Vinson*, the hostile work environment theory of discrimination has been expanded beyond sexual harassment. The following

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[46] *Ellerth*, 542 U.S. at 747–48.

[47] *Id.* at 748–49.

[48] *Faragher*, 524 U.S. at 780–81.

[49] *Id.* at 781–82.

[50] *Id.* at 781.

[51] *Id.* at 780; *Ellerth*, 542 U.S. at 746–47.

[52] *Ellerth*, 542 U.S. at 775–64.

[53] *Id.* at 765.

[54] *Id.*

[55] *Id.* at 759.

[56] *Id.* at 766.

[57] *Faragher*, 524 U.S. at 808.

[58] *Id.*

[59] *Id.*

[60] *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034–35 (7th Cir. 1998); *see, e.g.*, *Noviello v. City of Bos.*, 398 F.3d 76, 95 & n.5 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004).

[61] *See, e.g.*, *Whitten v. Fred's, Inc.*, 601 F.3d 231, 246 (2d Cir. 2010); *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126–27 (2d Cir. 2003).

[62] *Vance v. Ball State Univ.*, No. 11–556, 2012 WL 2368689 (June 25, 2012).

subsections will explore that expansion as it pertains to Fifth Circuit and Texas law.

A. Sexual Harassment

The Fifth Circuit has, on numerous occasions, addressed sexual harassment claims and the application of the Supreme Court cases described above. To resolve these claims, the Fifth Circuit has outlined the following procedure:

> At the first stop on the *Ellerth/Faragher* road map, courts are required to determine whether the complaining employee has or has not suffered a "tangible employment action." If he has, his suit is classified as a "quid pro quo" case; if he has not, his suit is classified as a "hostile environment" case. That determination provides a fork in the road on the *Ellerth/Faragher* map: In a "quid pro quo" case, the road branches toward a second stop at which the court must determine whether the tangible employment action suffered by the employee resulted from his acceptance or rejection of his supervisor's alleged sexual harassment. If the employee cannot show such a nexus, then his employer is not vicariously liable under Title VII for sexual harassment by a supervisor; but if the employee can demonstrate such a nexus, the employer is vicariously liable per se and is not entitled to assert the one and only affirmative defense permitted in such cases since *Ellerth* and *Faragher*. In other words, proof that a tangible employment action did result from the employee's acceptance or rejection of sexual harassment by his supervisor makes the employer vicariously liable, *ipso facto;* no affirmative defense will be heard.
>
> On the other hand, if the first-stop question is answered in the negative, *i.e.*, the employee did not suffer a tangible employment action . . . the suit is a "hostile environment" case, and the other branch at the fork in the *Ellerth/Faragher* road must be followed. On this branch, a different inquiry ensues at the second stop: If proved, would the actions ascribed to the supervisor by the employee constitute severe or pervasive sexual harassment? If they do not, Title VII imposes no vicarious liability on the employer; but if they do, the employer is vicariously liable-*unless* the employer can prove both prongs of the *Ellerth/Faragher* affirmative defense, to wit: Absent a tangible employment action, (1) the employer exercised reasonable care to prevent and correct promptly any such sexual harassment, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. As noted, this is the employer's only affirmative defense in a supervisor sexual harassment case post *Ellerth/Faragher*, and it is available only in a hostile environment (*no* tangible employment action) situation; never in a quid pro quo (tangible employment action) case.[63]

Below are a series of cases illustrating the arguably high standard for recovery in the Fifth Circuit.

1. Severe or Pervasive?

A significant number of cases addressing sexual harassment deal with whether the alleged harassment was sufficiently severe or pervasive to be actionable under Title VII as a hostile work environment. Below are but a few examples.

In *Lauderdale*, the court held the following to be sufficiently severe and pervasive:

> Viewing Lauderdale's allegations in the most favorable light, as we must, Arthur's behavior was pervasive. Lauderdale alleges that he called her ten to fifteen times a night for almost four months. Though Lauderdale does not assert that each phone call carried sexual overtones, the frequency of unwanted attention, over a four-month time period, amounts to pervasive harassment. Given this pervasiveness, the level of severity necessary to establish an altered work environment is diminished and Arthur's invitation to Lauderdale to "snuggle" in Las Vegas, the physical act of pulling her to himself, and the repeated requests to get coffee after work all satisfy the requirement. Thus, Lauderdale has a viable hostile work environment claim under title VII.[64]

In *Shephard*, the following was held to be not sufficiently severe or pervasive as a matter of law: (1) suggestive comments such as "your elbows are the same color as your nipples;" (2) a remark made by a supervisor that the plaintiff "had big thighs" while simulating looking under her skirt; (3) an invitation by a supervisor, made on two occasions, for the plaintiff

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[63] *Casiano v. AT&T Corp.*, 213 F.3d 278, 283–84 (5th Cir. 2000) (citing *Ellerth*, 524 U.S. 742) (footnotes omitted).

[64] *Lauderdale v. Tex. Dept. of Criminal Justice Institutional Div.*, 512 F.3d 157, 164 (5th Cir. 2007).

to sit on his lap; and (4) instances of touching where the supervisor would rub his hand down the plaintiff's arm.[65]

In *Harvill*, the alleged harasser (1) grabbed the plaintiff and kissed her on the cheek; (2) touched her breasts "numerous times"; (3) popped rubber bands at her breasts and patted her on the buttocks "numerous times"; and (4) once made comments about her sex life.[66] According to the Fifth Circuit, these allegations were sufficiently severe to survive summary judgment.[67]

2. Ellerth Defense

Casiano provides an example of the *Ellerth* defense. James Casiano was a customer representative at AT&T.[68] During a job-related training course, Casiano alleged that an AT&T Course Administrator, Susie Valenzuela, began sexually harassing Casiano.[69] According to Casiano, Valenzuela had demanded that he bring her personal items such as food and drink, referred to him as "honey" or "James, my honey," and propositioned him for sex on at least fifteen occasions.[70] Casiano filed a complaint with AT&T, and in response, AT&T suspended Valenzuela pending an investigation.[71] After AT&T's investigation concluded that no sexual harassment had occurred, Casiano sued.[72] The district court granted summary judgment in favor of AT&T, and Casiano appealed.[73]

The court first considered whether Casiano had suffered a "tangible employment action" sufficient to support a quid pro quo harassment claim.[74] Casiano argued that he had suffered a tangible employment action because, due to his denial of Valenzuela's sexual advances, he had been given a "satisfactory" performance rating which in turn had precluded him from taking a particular advancement test.[75] According to the court, the summary judgment evidence did not support an inference that Casiano's "satisfactory" rating was the reason he had been refused the opportunity to take the advancement test.[76] The court thus concluded that in the absence of a link between the performance rating and the advancement test, Casiano could not prove a "tangible employment action" had been taken against him.[77]

The Court next determined that Casiano had created a fact issue on whether Valenzuela's behavior had established a sexually hostile work environment.[78] However, the court further held that despite the fact issue, AT&T was still entitled to summary judgment because it had conclusively proven the *Ellerth* affirmative defense.[79] The court stated, "The summary judgment evidence adduced by AT&T regarding its extant procedures for encouraging and facilitating employee complaints of sexual harassment and for thereafter dealing with them swiftly and effectively is essentially uncontroverted and eschews the existence of a genuine dispute of material fact in that regard."[80] It further noted that AT&T had responded promptly and effectively to Casiano's initial complaint by suspending Valenzuela and conducting an extensive investigation.[81] Finally, the court observed, "[T]he only reasonable conclusion we can reach is that [Casiano] unreasonably failed to take advantage of any preventative or corrective opportunities afforded him by AT&T or to avoid harm otherwise. By his own account, he suffered at least fifteen propositions yet never reported any of the incidents until months after the last of them. In his earlier complaints, he never raised one specter of direct sexual overtures, even implicitly. He did nothing else, within or without the prescribed policy and procedures, until his lawyer wrote the company, well after the fact. We are satisfied that, were this case ever to go to trial, AT&T would be entitled to judgment as a matter of law on its *Ellerth/Faragher* affirmative defense, if nothing else."[82]

B. Same-Sex Harassment

1. Fifth Circuit

As recognized in *Oncale*, Title VII's prohibition on discrimination "because of sex" includes acts of same-sex harassment.[83] Under the Fifth Circuit's

[65] *Shephard v. Comptroller of Pub. Accounts of the State of Tex.*, 168 F.3d 871, 874–75 (5th Cir. 1999).

[66] *Harvill v. Westward Comms., L.L.C.*, 433 F.3d 428, 435–36 (5th Cir. 2005).

[67] *Id.*

[68] *Id.* at 280.

[69] *Id.* at 281.

[70] *Id.*

[71] *Id.* at 281–82.

[72] *Id.* at 282.

[73] *Id.* at 282–83.

[74] *Id.* at 284–85.

[75] *Id.* at 284.

[76] *Id.* at 284–85.

[77] *Id.* at 285.

[78] *Id.* at 286.

[79] *Id.* at 286–87.

[80] *Id.* at 286.

[81] *Id.* at 287.

[82] *Id.*

[83] *Oncale*, 523 U.S. at 77.

interpretation of *Oncale*, same-sex harassment claims are analyzed in a two-step process.[84]

First, the plaintiff must present evidence that the alleged same-sex harassment constitutes "sex discrimination."[85] To do so, the court has pointed to three possible scenarios described in *Oncale*:

> First, he can show the alleged harasser made explicit or implicit proposals of sexual activity and provide credible evidence that the harasser was a homosexual. Second, he can demonstrate that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace. Third, he may offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.[86]

The court has highlighted two types of evidence which can demonstrate that the harasser was homosexual: (1) evidence that the harasser intended to have some type of sexual contact with the plaintiff rather than merely humiliate him for reasons unrelated to sexual interest; or (2) proof that the alleged harasser made same-sex sexual advances to others, especially other employees.[87] The Fifth Circuit has not explicitly decided whether the three quoted scenarios above are the *only* ways in which a plaintiff can establish that same-sex harassment was sex discrimination; however, in *Boh Brothers* (discussed below), the court seemed at least receptive to the idea that discriminatory same-sex harassment might be proved through alternative means.[88]

Assuming the plaintiff can establish the sex discrimination requirement outlined above, the plaintiff must next demonstrate either "quid pro quo" or "hostile environment" harassment.[89] For quid pro quo harassment, the plaintiff must show that he suffered a "tangible employment action" that resulted from his acceptance or rejection of his supervisor's alleged sexual harassment.[90] A "tangible employment action" is 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.[91] Alternatively, a plaintiff can demonstrate a hostile work environment under the familiar standard set out in *Vinson* and *Harris*—whether the alleged harassment was, under the totality of the circumstances, subjectively and objectively hostile or abusive to such a degree that it altered the plaintiff's terms and conditions of employment.[92]

Additionally, the Fifth Circuit permits employers to assert the *Ellerth* affirmative defense in response to claims of supervisor same-sex harassment.[93]

a. *La Day v. Catalyst Technology, Inc.*

La Day v. Catalyst Technology, Inc. demonstrates the application of the Fifth Circuit's same-sex framework and further clarifies how a plaintiff may demonstrate "sex discrimination" under step one of the court's framework. In that case, Patrick La Day filed suit against Catalyst alleging that that his male supervisor, Willie Craft, had committed quid pro quo same-sex harassment and created a hostile work environment.[94] The summary judgment record revealed the following instances of alleged harassment. (1) Upon observing "passion marks" on La Day's neck, Craft approached the car in which La Day and his girlfriend were sitting and stated, "I see you got a girl. You know I'm jealous."[95] (2) Craft fondled La Day's anus while La Day was bent over and described the contact as similar to "foreplay with a woman."[96] (3) After La Day reported the fondling incident to management, Craft spit tobacco on La Day's hard hat, stating "this is what I think of you." La Day eventually resigned from Catalyst.[97] The district court held that La Day had failed to raise a fact issue on his same-sex harassment claims.[98]

On appeal, the court first considered whether La Day had produced evidence that the same-sex harassment was "sex discrimination" under one of the

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[84] *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002).

[85] *Id.*

[86] *Id.* (quoting *Oncale*, 523 U.S. at 80) (brackets, citations, and quotation marks omitted).

[87] *Id.* at 480.

[88] *See Equal Emp't Opportunity Comm'n v. Boh Bros. Constr. Co., L.L.C.*, 689 F.3d 458, 461 (5th Cir. 2012) ("Our court has not been presented the question whether *Oncale*'s enumerating the above three forms of same-sex harassment excludes other possible forms, such as alleged sex stereotyping, which is at issue in this appeal.").

[89] *La Day*, 302 F.3d at 481 (citing *Casiano v. AT&T Corp.*, 213 F.3d 278, 283–84 (5th Cir. 2000)).

[90] *Id.*

[91] *Id.* at 481–82.

[92] *Id.* at 482.

[93] *Id.* at 483.

[94] *Id.* at 476.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 477.

three scenarios outlined above. After reviewing the alleged instances of harassment, the court determined that La Day had created an issue of fact as to whether Craft was homosexual—thus, satisfying the requirement that La Day demonstrate "sex discrimination."[99] According to the court, "[Craft's] remark that he was 'jealous' of La Day's girlfriend, combined with his poking of La Day's anus, easily is susceptible of [the] interpretation" that Craft was homosexual.[100] Additionally, there was evidence that Craft had made sexual overtures to other male Catalyst employees.[101]

The court then turned to whether La Day had presented sufficient evidence of quid pro quo harassment or hostile work environment harassment. Noting that La Day had not suffered a tangible employment action due to his refusal of Craft's sexual advances, the court affirmed the district court's summary judgment on La Day's quid pro quo claim. However, the court reversed as to La Day's hostile work environment claim. The court stated, "Craft's conduct was physically 'humiliating' . . . it was arguably severe, and there is a disputed question of fact whether it unreasonably interfered with La Day's work performance."[102]

b. *Cherry v. Shaw Coastal, Inc.*

In this same-sex harassment case, John Cherry sued his former employer, Shaw Coastal, for battery, sexual harassment, and retaliation, seeking compensatory and punitive damages. The wrongful acts were alleged to have been committed by Cherry's supervisor, Michael Reasoner.[103] The evidence presented at trial demonstrated the following instances of alleged same-sex harassment. (1) Reasoner repeatedly brushed into Cherry.[104] (2) Reasoner would ask Cherry to take his shirt off and to wear cut-off jeans, and suggest that Cherry should take his pants off to try and get a tan.[105] (3) Reasoner would send Cherry text messages containing statements such as "I want cock"; "ur 2 sexy. U drive me insane . . . Ur sexy voice puts me to slumber"; and "your missing the dipper"—a term Reasoner used to refer to his genitals.[106](4) Reasoner would rub Cherry's legs and shoulders.[107] (5) Reasoner invited Cherry to his home, and in response to Cherry's protestation that he did not have a change of clothing, Reasoner stated, "You don't need to wear any clothes. You can wear my underwear."[108] Despite this testimony, the trial granted judgment as a matter of law against Cherry's sexual harassment claim.

On appeal, the Fifth Circuit reversed.[109] After reviewing the trial evidence, the court concluded there was sufficient evidence for the jury to conclude that: (1) Reasoner's harassment was sexual in nature; (2) the harassment was severe and pervasive; and (3) Shaw Coastal failed to take prompt remedial action after learning of the harassment.[110]

c. *EEOC v. Boh Brothers Construction Co., L.L.C.*

In the ever-evolving realm of harassment law, a new theory of same-sex harassment has been advanced by plaintiffs and the Equal Employment Opportunity Commission. This theory—often referred to as "sex-stereotyping" or "gender stereotyping"—posits that prohibited discrimination occurs when a person harasses a member of the same sex for failing to conform to the stereotypical attributes of that sex. Judicial acceptance of the theory has been mixed.[111]

In *Boh Brothers*, the Fifth Circuit was presented with its first opportunity to pass upon the viability of the sex-stereotyping harassment theory. In that case, Kerry Woods was an ironworker for Boh Brothers Construction Company.[112] While at Boh Brothers, Woods alleged that Chuck Wolfe, a crew superintendent, had engaged in sex-stereotyping harassment against Woods.[113] According to the trial testimony, the following had occurred. (1) Wolfe called Woods names such as "faggot" and "princess"

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[99] *Id.* at 481.

[100] *Id.* at 480.

[101] *Id.* One male employee had filed a complaint against Craft alleging that Craft had told him to sit on Craft's lap and that Craft had told the employee he had "pretty lips" and could "suck dick" or "suck my dick." *Id.* at 477. Another male employee had complained that Craft had touched his genitals. *Id.* Craft characterized these incidents to management as "misunderstandings." *Id.*

[102] *Id.* at 482.

[103] *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 185 (5th Cir. 2012).

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 188–190.

[110] *Id.*

[111] *Compare Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467–69 (6th Cir. 2012) (treating three *Oncale* forms of same-sex harassment as exclusive), *with Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (allowing same-sex harassment claim by man who was "discriminated against for acting too feminine").

[112] *Boh Bros. Constr. Co.*, 689 F.3d at 459.

[113] *Id.*

and would approach Woods from behind to simulate having sexual intercourse while Woods was bent over to perform job duties.[114] (2) Wolfe exposed himself to Woods multiple times.[115] (3) Wolfe made fun of Woods for using "Wet Ones" instead of toilet paper.[116]

The Fifth Circuit framed the issue on appeal as whether *Oncale*'s three examples were the exclusive means by which a plaintiff could prove that same-sex harassment constituted "sex discrimination" (and thus satisfy the first step of the Fifth Circuit's same-sex harassment framework).[117] Noting the disagreement amongst the circuit courts as to the resolution of that issue,[118] the court found a way to sidestep the matter. It held that even if sex-stereotyping were a viable theory, the EEOC had failed to present sufficient evidence to recover on that theory.[119]

The Court observed that the EEOC's theory of the case was that Woods had been harassed in violation of Title VII on the basis of gender because of his femininity; thus, the court reasoned that to prevail, the EEOC would have to produce evidence that Wolfe had harassed Woods *because of* a lack of masculinity.[120] However, the court concluded that the EEOC had little evidence that Wolfe had harassed Woods because of his masculinity (or lack thereof). Instead, the court pointed out that "misogynistic and homophobic epithets were bandied about routinely among crew members" and that Wolfe testified he did not think Woods was feminine.[121] Thus, while the court characterized Wolfe as a "world-class trash talker and the master of vulgarity in an environment where [those] characteristics abound," it found insufficient evidence to support the EEOC's theory that Woods was discriminated against for being feminine.[122]

2. Texas

Like Title VII, the Texas Commission on Human Rights Act (TCHRA) makes its unlawful for an employer to discriminate against an employee with respect to compensation or the terms, conditions, or privileges of employment because of sex.[123] Although lacking an extensive body of case law, Texas courts have recognized same-sex quid pro quo and hostile work environment theories of sexual harassment.[124] The general standards for recovery under Texas law appear to largely emulate Fifth Circuit law with one significant exception.[125] Texas courts seem to have rejected the Fifth Circuit's two-step framework, holding instead, that a plaintiff need only establish quid pro quo or hostile work environment harassment.[126] Cases addressing the matter have also found the *Ellerth* affirmative defense to be available in appropriate cases.[127]

C. Race and National Origin Harassment

Even prior to *Vinson* and *Harris*, courts had recognized the viability of workplace harassment claims based on national origin. Indeed, in *Vinson*, the United States Supreme Court cited *Rogers v. EEOC*[128]—a Fifth Circuit case dealing with race and national origin harassment—as the first authority to hold that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.[129] Since those seminal cases, a number of race-based harassment cases have been considered. Below are a few highlights.

1. Fifth Circuit

To establish a claim of race or national origin-based hostile work environment under Title VII, a plaintiff must prove he (1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3)

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[114] *Id.* at 460.

[115] *Id.*

[116] *Id.* at 462.

[117] *See supra*, note 88.

[118] *See supra*, note 111.

[119] *Boh Bros. Constr. Co.*, 689 F.3d at 462.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 459, 462–63.

[123] TEX. LAB. CODE ANN. § 21.051.

[124] *See Cox v. Waste Mgmt. of Tex.*, 300 S.W.3d 424, 432 (Tex. App.—Fort Worth 2009, pet. denied); *City of San Antonio v. Cancel*, 261 S.W.3d 778, 783 (Tex. App.—San Antonio 2008, pet. denied); *Dillard Dept. Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 406–07 (Tex. App.—El Paso 2002, pet. denied).

[125] *Compare supra*, note 124 and cases cited therein, *with La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002).

[126] *See Cancel*, 261 S.W.3d at 784 ("Thus, rather than identifying an additional element required for a claim of same-sex harassment, we construe the quoted of *Oncale* as identifying examples of 'evidentiary routes' by which a plaintiff could prove this element of its sexual harassment." (brackets omitted)); *see also Cox*, 300 S.W.3d at 432–36 (analyzing same-sex harassment case without reference to Fifth Circuit's requirement of initially determining whether same-sex harassment constituted "sex discrimination"); *Gonzales*, 72 S.W.3d 406–10 (same).

[127] *Cox*, 300 S.W.3d at 435–36; *Gonzales*, 72 S.W.3d at 410–11.

[128] 454 F.2d 234 (5th Cir. 1971).

[129] *See Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)

the harassment complained of was based on race or national origin; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action.[130] Harassment affects a "term, condition, or privilege of employment" if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[131] In order to deem a work environment sufficiently hostile, "all of the circumstances must be taken into consideration," 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."[132] To be actionable, the work environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[133]

a. *EEOC v. WC&M Enterprises*

Mohammed Rafiq was a car salesman of Indian descent.[134] In the wake of 9/11, Rafiq began receiving derogatory comments and treatment from his coworkers and supervisors.[135] Eventually, the EEOC filed suit on behalf of Rafiq alleging a hostile work environment on the basis of Rafiq's race and religion.[136] The district court granted summary judgment against the EEOC and an appeal was taken.

The Fifth Circuit reversed, finding that the EEOC had created a fact issue as to both harassment claims (race and religion).[137] The Court found that the following evidence was sufficient for a jury to find that harassment suffered by Rafiq was so severe and pervasive as to alter a condition of his employment:

> The evidence showed that Rafiq was subjected to verbal harassment on a regular basis for a period of approximately one year. During that time, Rafiq was constantly called "Taliban" and referred to as an "Arab" by Kiene and Argabrite, who also mocked his diet and prayer rituals. Moreover, Rafiq was sporadically subjected to additional incidents of harassment, such as his co-workers' comments on September 11, 2001, which suggested that he was somehow involved in the terrorist attacks against the United States; Kiene's statement that Rafiq should "just go back where [he] came from;" and Swigart's October 16, 2002 written warning, which stated that Rafiq was acting like a "Muslim extremist." Finally, Argabrite frequently banged on the glass partition of Rafiq's office, in order to startle him. As noted above, in the context of Argabrite's other actions toward Rafiq, a factfinder could reasonably conclude that this conduct was also motivated by animus stemming from Rafiq's religion and national origin.[138]

Additionally, the court found the following to be sufficient to show that Rafiq's harassment was based on his religion and national origin:

> First, some of the alleged harassment dealt specifically with Rafiq's Muslim faith, including: (1) mocking comments about his dietary restrictions and prayer rituals; (2) Swigart's written comment that Rafiq was acting like a "Muslim extremist;" (3) Kiene's statement to Rafiq that "We don't want to hear about your religious beliefs" even though Rafiq was not even talking about them at the time; (4) Kiene's question to Rafiq, "Why don't you go back to where you came from since you believe what you believe?"; and (5) Swigart's statement to Rafiq, "This is America. That's the way things work over here. This is not the Islamic country where you came from." Also, a factfinder could reasonably infer that the comments suggesting that Rafiq was (1) involved in the September 11th terrorist attacks and (2) a member of the Taliban because he, like members of the Taliban, was Muslim, were based on his religion.[139]

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[130] *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir.2002) (citations omitted).

[131] *Id.* (citations and quotation marks omitted).

[132] *Id.* (citations and quotation marks omitted).

[133] *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 652 (5th Cir. 2012) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)) (citation omitted).

[134] *Equal Emp't Opportunity Comm'n v. WC&M Enters., Inc.*, 496 F.3d 393, 396 (5th Cir. 2007).

[135] *See id.* at 396–97.

[136] *Id.* at 397.

[137] *Id.* at 403.

[138] *Id.* at 400–01.

[139] *Id.* at 401.

Accordingly, the court concluded that the EEOC had presented enough evidence to survive summary judgment.[140]

b. *Hernandez v. Yellow Transportation, Inc.*

In *Hernandez*, the Fifth Circuit was asked to confront a somewhat novel theory of race-based workplace harassment. The plaintiffs in the case were two Mexican-American males.[141] As the basis of their hostile work environment claim, they alleged a number of instances of racially derogatory comments and postings about Mexicans.[142] The district court noted, however, that only four instances over the course of ten years were sufficiently severe enough to alter the conditions of the plaintiffs' employment.[143] On the appeal, the Fifth Circuit determined that the infrequency of these instances precluded the possibility of a hostile work environment as a matter of law.[144] In an attempt to save their claim, the plaintiffs argued that the district court should have taken into account the considerable evidence regarding racially insensitive comments and behavior which had been directed at African-American employees while the plaintiffs were present.[145] While the court noted that, in the abstract, "cross-category discrimination could be relevant when there is a sufficient correlation between the kind of discrimination claimed by a plaintiff and that directed at others," in this case, evidence of racial harassment towards African-Americans was not highly probative evidence that the Mexican-American plaintiffs had been discriminated against because of *their* race.[146] Accordingly, the court held that the infrequent comments regarding Mexican-Americans combined with the evidence pertaining to African-Americans was insufficient to survive summary judgment.

2. Texas

There are few Texas cases discussing racial workplace harassment in detail. However, by its plain terms, the TCHRA prohibits employment discrimination on the basis of race and national origin.[147] Because the TCHRA was enacted to correlate state law with federal law in employment discrimination cases, Fifth Circuit authority likely represents the state of the law regarding racial harassment under TCHRA.[148]

D. Religious Harassment

1. Fifth Circuit

Title VII also prohibits employment discrimination on the basis of religion.[149] A plaintiff can establish he was harassed based on religion by proving that the harassment created a hostile or abusive working environment.[150] To establish a prima facie case of harassment based on religion, a plaintiff must produce evidence that (1) he belongs to a protected class; (2) he was subject to unwelcome harassment; (3) the harassment was based on religion; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

In *Dediol v. Best Chevrolet*, the Fifth Circuit addressed a religious harassment claim brought in conjunction with an age harassment claim (discussed below). As to the religious harassment claim, the summary judgment evidence established that the plaintiff's supervisor had made a number of highly insensitive comments regarding the plaintiff's religion. First, in response to a request for time off to attend a church function, the supervisor stated, "You old motherf***er, you are not going over there tomorrow" and "if you go over there, I'll fire your f***ing ass."[151] The supervisor also threatened the plaintiff's job, extorting him to "go to your God and [God] would save your job;" and "go to your f***ing God and see if he can save your job."[152] In another incident, the supervisor was alleged to have taken off his shoe, placed it on the plaintiff's desk, and stated, "Do you see these shoes? Your God did not buy me these shoes. I bought these shoes."[153] According to the court, "[The plaintiff] has pointed to certain instances of acrimony based on religion that, based on our standard of review, support our conclusion that the district court's grant of summary judgment on this issue is reversible error."[154]

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[140] *Id.* at 402.

[141] *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012).

[142] *Id.* at 651.

[143] *Id.*

[144] *Id.* at 652.

[145] *Id.*

[146] *See id.* at 652–54.

[147] *See* TEX. LAB. CODE ANN. § 21.051.

[148] *See Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003); *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999).

[149] 42 U.S.C. § 2000e-2(a)(1).

[150] *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443 (5th Cir. 2011).

[151] *Id.* at 438 (brackets omitted).

[152] *Id.*

[153] *Id.* at 444.

[154] *Id.*

EEOC v. WC&M Enters., Inc., discussed above, provides an additional example of a religious harassment claim.

2. Texas

TCHRA prohibits employment discrimination based on religion.[155] Once again, there is virtually no Texas case law discussing religious workplace harassment in detail. In the absence of Texas-specific law, Fifth Circuit law is likely controlling.[156]

E. Disability Harassment

1. Fifth Circuit

a. *Flowers v. S. Reg'l Physicians Services, Inc.*

The Americans With Disabilities Act provides that no employer covered by the Act "shall discriminate against a qualified individual because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment." [157] Because of the similarities between this provision and Title VII, the Fifth Circuit held in *Flowers v. Southern Regional Physician Services Inc.* that a cause of action for disability-based harassment is viable under the ADA.[158] To succeed on a disability-based harassment claim, the plaintiff must prove: (1) that she belonged to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action.[159] Moreover, the disability-based harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment.[160]

After recognizing the cause of action, the court next held that the plaintiff, who was HIV positive, had presented sufficient evidence for a jury to conclude that she had suffered disability-based harassment.[161] The court focused on the following facts to support its holding. First, it noted that managers became very distant and unfriendly towards the plaintiff after she revealed that she was HIV positive.[162] They apparently refused to shake the plaintiff's hand and would go to "great lengths" to avoid the plaintiff.[163] Next, the court noted that the plaintiff had been subjected to constant drug testing.[164] Finally, the court observed there was evidence produced that the plaintiff's employer had subjected her to a series of pretextual disciplinary actions.[165] In one such disciplinary meeting, a supervisor called the plaintiff a "bitch" and told her he was "tired of her crap."[166]

b. *Gowensky v. Singing River Hospital Systems*

In this case, Dr. Gowensky sued her employer alleging that she had faced a disability-based hostile work environment after revealing to her employer that she had been accidentally exposed to the hepatitis C virus.[167] After being exposed, Dr. Gowensky took a leave of absence to treat the infection.[168] She later asked to be reinstated, and the request was granted subject to a series of conditions designed to minimize the risk that patients would be exposed to Dr. Gowensky's hepatitis C.[169] These conditions, as stated by supervisors in the hospital, were that she: (1) present a full medical release from her physicians; (2) take a refresher course in emergency medicine; (3) submit to weekly blood samples; (4) perform her work as she had before; (5) she would not present the risk of infection to others; and (6) she must inform patients and hospital staff about her successful treatment for the virus.[170] A supervisor also allegedly told the plaintiff that given her infection, he would not want her to suture his child.[171] The plaintiff argued that these conditions created a disability-based hostile work environment.[172]

Judge Edith Jones, writing for the court, disagreed. She stated, "It is not difficult to conclude on this slender evidence that no actionable disability-based harassment occurred. The conditions that [the supervisors] placed on Gowensky were, given the

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[155] *See* TEX. LAB. CODE ANN. § 21.051.

[156] *See supra*, note 148.

[157] 42 U.S.C. § 12112(a).

[158] *Flowers v. S. Reg'l Physicians Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001).

[159] *Id.* at 235–36.

[160] *Id.* at 236.

[161] *Id.*

[162] *Id.* at 236–37.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Gowensky v. Singing River Hosp. Sys.*, 321 F.3d 503, 506 (5th Cir. 2003).

[168] *Id.*

[169] *Id.* at 507.

[170] *Id.* at 510.

[171] *Id.*

[172] *Id.*

nature of Gowensky's work, eminently reasonable."[173] The court further held that the comments made regarding the supervisor's child were, as a matter of law, not sufficiently severe to constitute a hostile work environment.[174]

c. *EEOC v. Bobrich Enterprises*

Tammy Gitsham was a hearing-impaired individual employed by Bobrich Enterprises.[175] Due to her impairment, Gitsham had to wear hearing aids, and even with her hearing aids, she experienced difficulty comprehending speech and sounds.[176] During her employment, Gitsham's immediate supervisor, Gilbert, repeatedly made statements about Gitsham's hearing impairment that Gitsham found embarrassing, including asking whether Gitsham had her "ears on" at the start of staff meetings.[177] There was also testimony that Suarez, the president of Bobrich, made similar remarks at an office Christmas party.[178] Despite Gitsham's complaints to management, the pattern of remarks continued and Gitsham sued on the grounds that Bobrich had created a disability-based hostile work environment.[179] Gitsham prevailed in a jury trial and was awarded $150,000 in compensatory and punitive damages.[180]

On appeal, the Fifth Circuit affirmed the trial court's judgment for the plaintiff.[181] The court stated, "A reasonable juror could find a hostile-work environment. Among other things, the testimony . . . is probative of a repeated pattern of harassing statements; Gitsham voiced her objection to these statements; and the harassment continued."[182]

2. Texas

Texas case law on the issue of disability-based harassment is quite sparse. *LeBlanc* v. *Lamar State College* appears to be the only reported case addressing the issue.[183] TCHRA—like the ADA—makes it unlawful for employers to discriminate because of a disability.[184] In *LeBlanc*, the Beaumont Court of Appeals held that TCHRA permits a plaintiff to assert a disability-based harassment claim.[185] To recover under such a claim, a plaintiff must show: (1) the complained-of conduct is sufficiently severe or pervasive to alter the conditions of employment and create and abusive working environment; (2) she has "protected group" status; (3) she suffered unwelcome, disability-based harassment that affected a term condition or privilege of employment; and (4) her employer knew or should have known about the harassment, but did not take prompt, remedial action.[186]

In *LeBlanc*, the plaintiff had a neurological disorder called Friedrich's ataxia, which affects balance and coordination and, apparently, had confined the plaintiff to a wheelchair.[187] LeBlanc alleged that her employer had maintained a hostile work environment by: (1) placing obstacles in the path of her wheelchair; (2) placing documents out of her reach; and (3) designing a test for a new position that precluding her from scoring well.[188] Noting that the standard for disability-based harassment was "high," the court held that even if these acts had happened, as a matter of law, they were not sufficiently pervasive to support a disability-based harassment claim.[189]

F. Age Harassment

1. Fifth Circuit

The Age Discrimination in Employment Act (ADEA) makes it unlawful for employers to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[190] In *Dediol v. Best Chevrolet, Inc.*, the Fifth Circuit recognized for the first time a cause of action for age-based workplace harassment.[191] A plaintiff advances such a claim by establishing that (1) he was

[173] *Id.*

[174] *Id.*

[175] *Equal Emp't Opportunity Comm'n v. Bobrich Enters.*, No. 08-10162, 2009 WL 577728, at *1 (5th Cir. Mar. 6, 2009) (unpublished).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at *5.

[182] *Id.* at *4.

[183] *LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294 (Tex. App.—Beaumont 2007, no pet.).

[184] *See* TEX. LAB. CODE ANN. § 21.051.

[185] *LeBlanc*, 232 S.W.3d at 303.

[186] *Id.*

[187] *Id.* at 297.

[188] *Id.* at 305.

[189] *Id.*

[190] 29 U.S.C. § 623(a)(1).

[191] *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441 (5th Cir. 2011).

over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.[192]

In *Dediol*, the court illustrated the application of this rule. In that case, the plaintiff was a 65-year old car salesman.[193] The summary judgment record contained the following examples of age-based harassment. (1) In response to Dediol's request for time off to volunteer at a church event, Dediol's supervisor, Donald Clay stated, "You old motherf***er, you are not going over there tomorrow" and "if you do go over there, I'll fire your f***ing ass."[194] (2) Clay almost always referred to Dediol as "old motherf***er," "pops," or "old man."[195] (3) Clay would direct car sales to younger salespersons.[196] (4) Clay often physically threatened Dediol by stating that he was going to "kick [Dediol's] ass," and in one instance, Clay took off his shirt and told Dediol, "You don't know who you are talking to. See these scars. I was shot and was in jail."[197]

Citing this evidence, the Fifth Circuit reversed the trial court's summary judgment in favor of Best Chevrolet.[198] The court concluded that "Clay's repeated profane references to Dediol, and the strident age-related comments about Dediol used by Clay on almost a daily basis within the work setting, are sufficient to create a genuine issue of material fact concerning Dediol's ADEA-based claim for hostile work environment discrimination."[199]

2. Texas

The TCHRA prohibits an employer from discharging or in any other way discriminating against an employee because of the employee's age.[200] Again, there is very little authority addressing age-based harassment under Texas law; however, the Eastland Court of Appeals, prior to *Dediol*, recognized a cause of action for age-related harassment under the TCHRA.[201] In creating the cause of action, the Eastland court relied on the same Sixth Circuit precedent as the Fifth Circuit in *Dediol*.[202] Thus, presumably, both courts utilize similar standards to adjudicate age-based hostile work environment claims.

In *Fletcher*, the Eastland Court of Appeals held that the following was sufficient to affirm a jury finding in favor of the plaintiff on an age-based hostile work environment claim. (1) The plaintiff's supervisor yelled and screamed at her on a daily basis, using terms such as "incompetent," "old woman," "senile," or "stupid old woman."[203] (2) The supervisor repeatedly told the plaintiff that the younger employees were much better than the plaintiff.[204] (3) The court noted that the plaintiff's testimony that the abuse made her depressed, asthmatic, and unable to eat was sufficient to support the jury's finding that the abuse had interfered with her work performance.[205]

G. USERRA Harassment

The Uniformed Services Employment and Reemployment Rights Act (USERRA) generally prohibits civilian employers from discriminating against an employee because of the employee's military service.[206] In *Carder v. Continental Airlines, Inc.*, the Fifth Circuit held that USERRA does not permit a cause of action for workplace harassment based on military service.[207] The court reached this conclusion after a lengthy discussion of the text and legislative history of USERRA.[208] Thus, alleged comments made by Continental management such as "It's getting really difficult to hire you military guys because you're talking so much military leave," and "I used to be a guard guy, so I know the scams you guys are running" would not give rise to an action for harassment under USERRA.[209]

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[192] *Id.* (citing *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834–35 (6th Cir. 1996)).

[193] *Id.* at 438.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* at 439.

[198] *See id.* at 441.

[199] *Id.* at 442–443.

[200] TEX. LAB. CODE. ANN. § 21.051

[201] *City of Hous. v. Fletcher*, 166 S.W.3d 479, 489 (Tex. App.—Eastland 2005, pet. denied).

[202] *Id.* at 489 (citing *Crawford,* 96 F.3d at 834–35); *see Dediol*, 655 F.3d at 441 (same).

[203] *Id.* at 491.

[204] *Id.*

[205] *Id.*

[206] *See* 38 U.S.C. §§ 4301–335.

[207] *Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 179 (5th Cir. 2011)

[208] *See id.* at 175–83.

[209] *See id.*

PREVENTING AND INVESTIGATING SEXUAL HARASSMENT

IV. ADOPTING A HARASSMENT POLICY

The first step in preventing and defending a harassment matter is to have a clear, distributed policy that is available at all times to employees.

The EEOC states that the following are essential to a harassment policy:

> An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:
>
> - A clear explanation of prohibited conduct;
> - Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
> - A clearly described complaint process that provides accessible avenues of complaint;
> - Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
> - A complaint process that provides a prompt, thorough, and impartial investigation; and
> - Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[210]

Each of these points deserves some elaboration. The prohibited conduct should not be limited to sexual harassment, but should also include any conduct that may harass an individual based upon his gender, sexual orientation, race, color, national origin, religion, disability, age, or other protected status. Both conduct that could give rise to *quid pro quo* and hostile work environment claims should be described with examples and prohibited explicitly. The policy should provide that the conduct proscribed may include not only fellow employees, but also customers, contractors, and vendors.

The policy should assure employees that they will not be subject to retaliation for making a claim of harassment. In this regard, the policy should provide that employees who feel that they are subject to retaliation should re-engage the complaint procedure again. As noted below, the complaint procedure should provide for multiple avenues of reporting so that an employee who feel he or she is retaliated against will have another means to bring a complaint of retaliation. The protection of retaliation should extend to all persons who participate in the investigation.[211]

The EEOC also states, "It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved. While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so."[212]

The complaint procedure should extend several avenues of reporting. Third-party "hotlines" should be considered. Also, while all managers should be trained to recognize harassment and to act upon it, generally the policy should be limited to three or, at most, four, avenues of reporting—such as a hotline, the Human Resources Department, and the audit committee of the Board of Directors.

Fourth, the procedures for the investigation are noted below, including the consideration of who the investigator should be.

Some employers question whether they should go so far as to prohibit any sexual or dating relationship among co-workers. Prohibiting all romance among co-workers, however, is neither practical nor advisable. Employers have a legitimate interest in prohibiting supervisors from dating subordinates or other situations where issues of favoritism may arise or where allegations of harassment may later develop. Likewise, employers have a legitimate interest in ensuring that expense accounts are used for business purposes and not for liaisons between co-workers.

The last two points—the investigation and the determination—are discussed in the next section.

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[210] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), available at http://www.eeoc.gov/policy/docs/harassment.html.

[211] *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S.Ct. 846 (2009). However, in one recent case, the Second Circuit held that an internal HR employee investigating a claim of alleged harassment was not engaged in an EEOC charge or other proceeding; the summary judgment dismissing the case was affirmed. *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41(2nd Cir. 2012)

[212] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, supra.*

V. WORKPLACE INVESTIGATIONS

A. Why Investigate

As shown above, federal and state law impose a duty to promptly investigate allegations of sexual harassment and based on the results, take prompt remedial action to stop the harassment. Even where the *Faragher* and *Ellerth* defense is not available, conducting an investigation is important to establish that the employer takes claims of harassment seriously. Such action may minimize damages, particularly punitive damages. Further, if corporate expense accounts or other misdeeds accompany the harassment, the directors have a fiduciary duty to the owners of the company to conduct a thorough investigation and take remedial action.

B. Components of the Investigation

Investigations are conducted in a variety of ways depending on the nature and severity of the complaint, the amount of witnesses involved, the time constraints present and the overall scope of the investigation. Certainly an investigation of a line worker in a production plant will be vastly different from an investigation of a high level executive.

To be effective, an employer's investigation should be prompt, thorough and impartial. Additionally, an action should be taken in response to the investigation. Finally, it is important to try to maintain confidentiality throughout the investigation.

1. Promptness

"Prompt" remedial action in the form of an investigation, can provide an employer a "safe harbor" from liability where there is no tangible employment action. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765. Although there is no hard and fast rule as to how quickly is prompt, the EEOC states that any investigation should be taken "immediately."[213]

2. Thoroughness

In addition to acting quickly, an employer must also take a thorough approach to an investigation. In addition to helping protect an employer from liability, a thorough investigation will also give employees confidence that complaints are taken seriously.

3. Action Taken

Following the investigation, it is important that the employer take some type of action. An employer's action should be in response to the wrongdoing and bear a direct correlation.

4. Follow Up

Following up with the complaining party is necessary way to protect against allegations brought up later. Additionally, following up can help ensure that the remedial action taken was effective. Finally, following up with employees can help send the message that you are truly interested in the wellbeing of your employees.

C. Conducting the Investigation

1. Who Will Conduct

Determining who will conduct the investigation is a critical part of the planning process. It is very important for the investigator to be objective and unbiased. It is also important that the complaining party be comfortable with the investigator.

A female complaining of sexual harassment will probably be more at ease with a female investigator. Additionally, a complaining party is often more comfortable with an investigator who has a "fresh" set of eyes and ears.

There are many factors to consider when choosing an investigator:

- cost
- in house or outsource
- impartiality
- experience
- credibility as a witness
- availability

Often courts will determine the adequacy of the investigation based in part on the credentials of the investigator. Naturally, the investigator should not be a supervisor of either party and should not be friends with any of the parties or witnesses.

2. Timing and Order

With respect to timing, it can be critical in establishing that a prompt investigation took place. However, often timing and the sequence of the interviews to be conducted is governed by the availability of the witnesses which can be affected by workloads, vacations, travel schedules, personal commitments and other leave issues.

Typically, the order of interviews is:

Complainant – Alleged Wrongdoer – Witnesses[214]

[213] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999)

[214] The EEOC notes, for instance, that it may not be necessary to do any investigation at all if the accused admits to the behavior. EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, supra.*

Interviewing the complaining party a second time is often necessary as the alleged wrongdoer may raise new issues and new facts and there may be additional information obtained that needs clarification.

3. Objectives of the Investigation

With any complaint, a threshold determination needs to be made as to whether a formal investigation is necessary and what the objectives are. Some problems can be resolved efficiently and informally without the need for an investigation. Issues to be considered are:

- Whether the complaint involves more than one employee
- Whether safety is at risk
- Whether a potential termination is involved
- Whether the complaint involves a single incident or a pattern of conduct
- Whether all the players and issues are known

4. Identify Other Resources Needed

- Law enforcement – may be necessary if evidence of criminal conduct comes out during the investigation
- Public relations – may be a good idea if there a potential for adverse publicity
- Outside counsel – for assistance in planning the investigation, conducting the investigation or determining the employer's obligations

5. Assemble Important Documentation

During the investigation, each person interviewed should be asked whether they have any documentation that could be helpful in addressing the issues present. Additionally, relevant documents should be compiled and reviewed including but not limited to, the personnel files of the parties involved, policies and procedures in issue, emails, text messages, correspondence and any other pertinent records.

D. Launching the Investigation

1. Review Policies and Procedures

To the extent the subject of an investigation involves a company policy, certainly the investigator should be familiar with the policy before conducting the investigation.

2. Analyze Relevant Documents

In addition to reviewing policies, the investigator should review any other documents that could be relevant to the subject matter of the investigation. Reviewing these documents PRIOR to conducting interviews of witnesses can educate the investigator on what questions to ask during the interviews. This may cut down on unnecessary interviews or the timing of interviews. Additionally, there may be documents which are needed to question certain witnesses about (i.e. emails sent). Ensure that all electronic information—emails, text messages, cell phone records, social media—are preserved.

3. Decide Who, When & Where

a. Who to interview

i. Complaining party
ii. Alleged offender
iii. Any direct witnesses
iv. Supervisors
v. People identified by the complaining party
vi. People identified by the alleged offender

b. When to interview

Obviously, timing is important and promptness is key. However, it is important to plan and not rush into an interview without preparation. Certainly work schedules need to be accounted for and often supervisors of the employees being interviewed need to be consulted. Additionally, sometimes meeting after hours is helpful.

c. Where to interview

Try to protect privacy and confidentiality as much as possible and minimize any potential embarrassment to the parties being interviewed. Do not meet in a fishbowl conference room where other employees are. Sometimes meeting away from the workplace is helpful. The more comfortable and informal the setting is, the more likely it is to get candid and free flowing information from the interviews.

d. Should you record?

NO

Employers often ask if an investigation interview should be recorded. In addition to making a witness feel uncomfortable and less likely to disclose pertinent information, tape recordings lead to discoverable recordings that complicate the investigation process.

4. General Questioning

There are certain preliminary statements and questions that should be given to all parties interviewed in the investigation.

a. Introduction of the investigator

My name is Jane Investigator. I am an attorney in private practice with the law firm of Jackson Walker LLP. I am here today to meet with you and investigate some claims that have been made. Based on what I know so far, it appears that you may have some important information.

I am here as an independent investigator. I do not represent you nor do I regularly represent XYZ Company. I do not have any relationship, personally or professionally with any XYZ Company employee. Rather, I have been hired to investigate this matter and this is the first time I have ever been to XYZ Company.

b. Discuss confidentiality
c. Discuss importance of honesty
d. Discuss that no retaliation will be tolerated
e. Avoid using legal terms (e.g., "hostile work environment," "severe and pervasive")
f. Ask open ended questions
g. Save tough questions until the end
h. Do not ask leading questions that suggest a response
i. Review your understanding of what was said in interview
j. Ask follow up questions (e.g., "anything else?")
k. Make sure witness knows how to contact you in event of further incidents or information
l. Make closing remarks (circle back on confidentiality and retaliation)
m. Be thankful for cooperation

E. Dealing with Resistance

1. Individual Representation of Employees

An employer has a qualified privilege to investigate allegations concerning employee wrongdoing. *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282 (Tex. App. – Corpus Christi 2000, pet. denied). Generally, if an employee refuses to cooperate in the investigation, the company may discipline or discharge the employee. This may or may not be prudent, depending on the unique facts and circumstances of the situation.

Also, the company's right to interview employees in a manner the company deems appropriate has its limits. An interview may trigger allegations of defamation and false imprisonment, or other tort claims.[215] However, with respect to defamation, an employer has a conditional or qualified privilege that attaches to communications made during an investigation following a complaint of employee wrongdoing.[216]The right of a company with a unionized workforce to conduct an interview in the manner of its choosing is also limited by *NLRB v. Weingarten*, 420 U.S. 251 (1975). In *Weingarten*, the United States Supreme Court ruled that a company with a unionized workforce must, pursuant to a workplace investigation, permit a union representative to be present for an interview of a represented employee if (1) the employee requests a union representative's presence during the interview and (2) the employee reasonably believes he or she could be subjected to disciplinary action as a result of the interview. For a period of time, the ruling in *Weingarten* also applied to companies with non-union workforces. In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), the National Labor Relations Board ("NLRB") extended *Weingarten* rights to non-union employees. The NLRB reasoned that § 7 of the National Labor Relations Act ("NLRA"), which gives employees the right to act concertedly for mutual aid and protection, applies "to circumstances where employees are not represented by a union, for in these circumstances the right to have a co-worker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id*.

However, in 2004, the NLRB released its decision in *IBM, Corp.*, 341 NLRB No. 148 (2004), overruling *Epilepsy Foundation*. The duty of employers to conduct workplace investigations factored heavily into the NLRB's decision in *IBM*.

> A relatively new fact of industrial life is the need for employers to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with [various] legal requirements. An employer must take steps to prevent sexual and racial harassment, to avoid the use of toxic chemicals, to resolve issues involving

[215] *Randall's Food Market, Inc .v. Johnson*, 891 S.W.2d 640, 646 (1995) (employee alleged defamation and false imprisonment claims in connection with company investigation and interview).

[216] *Id.*

> employee health matters, and the like. Employers may have to investigate employees because of substance abuse allegations, improper computer and internet usage, and allegations of theft, violence, sabotage, and embezzlement.
>
> Employer investigations into these matters require discretion and confidentiality. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects. The effectiveness of a fact-finding interview in sensitive situations often depends on whether an employee is alone. If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by in-ability to get the truth about workplace incidents.

IBM, Corp., 2004 WL 1335742, * 8 (June 9, 2004) (*footnote omitted*).

In light of *IBM*, the United State Supreme Court's holding in *Weingarten* is once again limited to unionized workforces, at least for the time being. Consequently, a non-union employee generally does not have a right to have a co-worker present for an interview even if the employee reasonably believes the interview may result in him or her being subjected to disciplinary action.

Another wrinkle in the confidentiality of the investigation was raised by a recent NLRB decision. *Banner Estrella Medical Center* is a recent NLRB Board decision dealing with internal investigations by employers. There, a human resources consultant "suggested" to employees making complaints that the employee refrain from discussing the complaint with other employees while the company's investigation was ongoing. The issue presented to the Board was whether this suggestion violated Section 8(a)(1). In another 2-1 decision, Members Griffin and Block found that it did. Citing the decision in Hyundai America Shipping Agency, where the Board concluded the employer had no justification for a policy prohibiting employee discussion regarding investigations, Griffin and Block reached the conclusion that "[Banner's] generalized concern with protecting the integrity of its investigation is insufficient to outweigh employees' Section 7 rights." Instead, it was "[Banner's] burden to first determine when in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." Dissenting, Member Hayes argued that the no-discussion "suggestion" was just that—a suggestion; not a work rule. Thus, because the "suggestion" was not an official company work rule, Hayes concluded that there was no need to determine whether the it complied with the NLRA.

Critics have observed that *Banner Estrella* severely complicates the numerous investigative obligations placed upon employers by other federal statutes such as Title VII. Thus, in the wake of *Banner Estrella*, employers are left to resolve when and how they may require employee confidentiality without violating the NLRA. Although sparse in its reasoning, *Banner Estrella* does provide some assistance. First and foremost, an employer's concern with protecting investigation integrity is, by itself, insufficient to require confidentiality. Indeed, the EEOC itself has stated that witnesses should be assured of confidentiality. Also, employers should consider and document whether the circumstances are such that witnesses need protection, evidence might be destroyed, testimony might be fabricated, or the potential a cover up exists. To prospectively avoid NLRA issues, employers should carefully document the existence of the above factors prior to commencing the investigation. The pre-investigation documentation should describe the issues, the laws and privacy concerns involved, the evidence, if any, at risk and in need of protection, the identity of the investigator (e.g., HR, in-house or private counsel, outside forensics investigator), and the justification for conducting the investigation in the manner finally chosen. In addition, employees, particularly those who are the victims of the alleged conduct, should be told that the confidentiality request does not prevent them from contacting the EEOC or the Texas Workforce Commission.

2. Representation of the Accused

An employee accused of sexual harassment has a reasonable expectation that the interview could result in disciplinary action. Consequently, under *Weingarten*, the employee is entitled to have a union representative present if the employee belongs to a unionized workforce. A refusal to honor this request will violate *Weingarten*. Conversely, under *IBM* the employee is not entitled to have a co-worker present if the workforce is non-union.

The more difficult issue is whether to permit the accused employee of having an attorney present for the interview. If the allegations could reasonably expose the employee to criminal liability, then the employee should be permitted to have his or her personal counsel present during the interview. TEX. DISCIPLINARY R. PROF'L CONDUCT Rule 4.04(a) states, "[I]n representing a client, a lawyer shall not . . . use

methods of obtaining evidence that violate the legal rights of . . . a [third] person." If an individual is exposed to criminal liability and requests to have an attorney present for questioning, the company may run afoul of Rule 4.04(a) if it insists on proceeding with the interview notwithstanding the request. This does not mean the company should necessarily pay for the attorney, although the company may well have the duty to do so under its bylaws or under the law of the applicable jurisdiction.[217] A refusal to indemnify under these circumstances could violate Rule 4.04 or its equivalent under the Model Rules.

3. Representation of the Complaining Party

An employee who accuses another employee of sexual harassment usually will not have a reasonable expectation that his or her interview could result in disciplinary action. Consequently, under *Weingarten* the accuser normally does not have *Weingarten* rights, *even if the employee is a member of a collective bargaining unit.* However, the accuser may nevertheless have rights similar to those enunciated in *Weingarten* under an applicable collective bargaining agreement or under the law of the applicable jurisdiction.

Whether or not the accuser has a right to have his or her personal attorney present, experts differ on whether to proceed with the interview with the attorney. My opinion is that the interview should proceed, although if the investigator is not an attorney, it may be advisable for an attorney to sit in.

F. Interview Complaining Party

1. Questions

The primary focus of any interview should be to get the facts: who, what, why, when, where and how.[218]

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Was this an isolated incident or part of a pattern? Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Are there any other facts the investigator should know?
- How would you like to see the situation resolved?

G. Interview Alleged Offender

1. Questions

When interviewing the alleged offender, it is important to let the employee know that you are objective and impartial. Avoid sounding accusatory and do not pass any judgment on the credence of the complaint. The investigator should ALWAYS allow the alleged offender to offer an explanation of what happened, even if the investigator is convinced that there is no explanation that gets the alleged offender off the hook. While the investigator should never sound accusatory, it is important to confront the alleged offender with each and every allegation made against him or her. As with the complaining party, the investigator should ask who, what, where, when, how and why questions.

- Obtain details of what happened
- Who does the alleged offender work with and/or supervise?
- Were there any witnesses?
- Get the details of time, place and location
- How does the alleged offender view the conduct of the complaining party?
- Has the alleged offender used such conduct or remarks (profanity, slurs, etc.) with any other employees?
- What is alleged offender's relationship with complaining party?
- Has the alleged offender been reprimanded for any conduct?
- Has any supervisor ever spoken to the alleged offender about any conduct?
- Does the alleged offender have any relevant documents?
- Has the alleged offender spoken to anyone about this?

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[217] *See, e.g.*, 8 Del. Code Ann. § 145(c), requiring indemnification where the person has been successful on the merits.

[218] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, supra.*

- If the alleged offender denies the conduct, ask of any reasons the complaining party would make up the allegations?
- Does the alleged offender have a suggested resolution?
- Are there any other facts the investigator should know?

2. Discuss Process

Often, the alleged offender feels like the investigator is biased and the outcome of the investigation is predetermined. It is important to reassure the employee and let the alleged offender know the process of the investigation.

There are various stereotypes of alleged offenders.

- Cooperative
- Joking
- Silent
- Hostile
- Questioning
- Smarter than investigator

3. Beware of Liability for "Sex Stereotyping"

a. *Sassaman v. Gamache et al*, 566 F.3d 307 (2d. Cir. 2009)

In *Sassaman*, the male plaintiff was discharged after a female coworker accused him of sexual harassment. He alleged the defendants pressured him to resign based on a sex stereotype regarding the propensity of men to sexually harass female coworkers. The United States District Court for the Southern District of New York granted defendants summary judgment on the grounds that Sassaman failed to establish a prima facie case of sex discrimination. However, the Second Circuit disagreed and concluded that the employer's failure to properly investigate the charges of sexual harassment against Sassaman was sufficient to permit a jury to infer discriminatory intent.

The employer's defense after telling Sassaman he would be terminated unless he chose to resign:

> "I really don't have any choice. Michelle knows a lot of attorneys; I'm afraid she'll sue me."

> "And besides you probably did what she said you did because you're a male and nobody would believe you anyway."

The Second Circuit rejected the notion that action against the accused harasser may be justified by fear of being sued by the complaining employee. "[A]n employer may not rely on an alleged fear of a lawsuit as a reason to shortcut its investigation of harassment and to justify an employment decision adverse to the putative harasser that in itself violated Title VII."

H. Interview Witnesses

1. Determine Who to Interview

The involvement of witnesses should generally be limited to those identified by either the complaining party or the alleged offender, those believed to have knowledge of relevant events, or those the investigator feels are important to the investigation. Avoid spiraling out too far on witness interviews.

2. Questions

Like the questions for the complaining party and the alleged offender, you want to focus on who, what , why, when, where and how questions. Remember to ask open ended questions and try to give as little information as possible in your questions. Do NOT refer to the complaining party as the "Complainant" or to the alleged offender as the "Harasser." Instead, use their real names and try to keep everything as low key as possible.

- Have you seen (describe the accused conduct)?
- Do you recall seeing or hearing anything that might have offended anyone?
- Have you seen or heard anything that might have been misinterpreted?
- What is your impression of the relationship between the parties?
- Are you aware of any inappropriate comments or actions that have taken place in the workplace?
- Were you present when…? Get more details.
- Has anyone involved discussed this incident with you?
- Are you aware of any conduct by (name of the "accused") that is offensive?
- Is there anything else you think I need to know?

3. Confidentiality Importance

Keeping witnesses quiet is a difficult part of the investigation process. It is important to emphasize the confidentiality of the investigation.

4. Retaliation

a. Employees who participate in investigation are protected

Finally, remember that any retaliatory actions toward the complaining party violate the law. As noted above, the U.S. Supreme Court held that Title VII's anti-retaliation provision protects an employee who cooperates with an employer's internal investigation of sexual harassment. *Crawford v.*

Metro. Gov't of Nashville & Davidson County, 129 S.Ct. 846 (2009).

In this case, Crawford claimed she was discharged because she cooperated in her employer's investigation of sexual harassment complaints against Metro's human resources director. No EEOC charge had been filed prior to the investigation. After her termination, Plaintiff sued under Title VII for retaliation. The District Court granted Metro summary judgment, and the Sixth Circuit affirmed, holding that Crawford was not protected by either the "opposition" clause or the "participation" clause (Title VII Section 704(a) protects an employee from retaliation because the employee "has opposed" an unlawful employment practice or "participated in any manner in an investigation ... under this chapter."). The Sixth Circuit reasoned that, because the requirements under Title VII can be onerous, if the law protected employer-initiated investigations, employers would have a disincentive to conduct such investigations. The Supreme Court rejected this reasoning, holding that the opposition clause of the anti-retaliation provision of Title VII protects employees who speak out against sexual harassment when questioned during an employer's investigation of another employee's complaints, and defined "oppose" under the statute by its "ordinary dictionary meaning of resisting or contending against."

Accordingly, employers must proceed with caution with respect to adverse actions against employees involved in an investigation.

b. However, failure to investigate does not constitute an adverse employment action

The Second Circuit recently ruled that an employer's failure to investigate a complaint of bias cannot be considered an adverse employment action taken in retaliation for lodging the very same discrimination complaint. *Fincher v. Depository Trust and Clearing Corporation*, 604 F.3d 712 (2d Cir. 2010).

In this case, a female African-American employee resigned her employment as an auditor due to her employer's purported failure to investigate her complaints that black employees were not provided the same training opportunities as their white counterparts. Fincher appealed the district court's granting of summary judgment to her employer arguing that her employer's failure to investigate her complaint of discrimination was itself an act of retaliation for making the discrimination complaint. Affirming the district court, the Second Circuit concluded that such a failure does not constitute an adverse employment action taken in retaliation for the filing of the same discrimination complaint.

I. Making a Determination

Very few investigations lead to a clear cut answer. Often things are not black and white and you are dealing with shades of gray. Nevertheless, it is important to reach a conclusion. A determination is made after evaluating the credibility of the witnesses, reviewing the facts, reviewing applicable policies and applying common sense. The investigator must be willing to conclude the investigation, even if the determination is that the investigator is unable to make a determination.

Many employers feel that any case of "he said/she said" must mean that no credible determination may be made. The EEOC disagrees, "the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors." Instead, the EEOC recommends the following factors to consider in breaking the impasse:

- **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?[219]

If you are unable to make a determination, it is important to document this and prepare a memorandum to the accused stating that after a thorough investigation the Company was unable to determine whether a policy was violated. It is important to remind the accused of the company's policies and stress in this memo that any activity such as this, if proven in the future, will not be tolerated.

Additionally, it is important to meet with the complaining party and let he or she know that a determination has been made. Let the complainant know to contact you if any other instances occur.

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[219] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, supra.* However, the EEOC also notes that "the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again."

VI. TAKING ACTION

A. Recommend Action

After the investigator has completed the investigation, he or she should make a recommendation to the company as to the actions that should be taken. The recommended action should be consistent with actions taken in similar situations in the past, be consistent with company policies and most importantly, be designed to resolve the complained of issue.

B. Courts are Requiring More from Employers

1. EEOC v. Central Wholesalers, Inc., 573 F.3d 167 (4th Cir. 2009)

The Fourth Circuit held that when an employer knows about harassment, it must take remedial actions "reasonably calculated to end the harassment." In *Central Wholesalers, Inc.* ("CWI"), the Fourth Circuit reversed summary judgment in favor of CWI holding that the company did not do enough to end racial and sexual harassment that included racial slurs, pornographic photos and videos, and blue colored mop-head dolls hanging from nooses.

In response to an employee's complaint, management investigated and performed inspections of the areas involved. Subsequently, measures to curtail the conduct were taken including limiting one employee's access to the Internet. However, the court held that the measures taken were not sufficient. In a list that the court noted was illustrative and not exhaustive, the Fourth Circuit stated that CWI could have: (1) demoted the offending employees; (2) reduced the offending employees' pay; (3) suspended the offending employees from work; or (4) issued reprimands.

C. Importance of Documentation

1. Be Cautious about Wording

It is important to document all aspects of the investigation including interviews with employees. It is difficult to defend the thoroughness of an investigation, if there is no documentation. Be factual in your notes and do not express opinions or editorialize. Avoid sarcastic statements or judgmental remarks. Specifically, avoid statements like the following:

- "The accused was fishy about his story."
- "The complaining party was a basket case."

Always remember that it is likely that the investigation notes will be discoverable and admissible in court. Address your investigation notes to the employer's attorney so that the employer can assert privilege in later discovery requested by opposing counsel.

Prepare notes while information is fresh (preferably right after the investigation). Be sure and edit for accuracy and completeness. Always make sure that you as the investigator are comfortable with the contents of your notes.

2. Investigation Report

Depending on the complexity of the investigation, consider preparing a final investigation report summarizing all aspects of the investigation. Typically, the following information should be included:

- The date of the complaint which was the subject of the investigation
- The names and titles of the persons conducting the investigation
- A summary of the complaint
- When the investigation was conducted
- Summaries of all interviews
- Final determination made and summary of facts relied upon in reaching determination
- Discussion of policies applicable to incident
- Identify any unresolved issues
- Identify actions taken

Remember that anything in writing may later be in front of a jury. The goal of any documentation should be to convince a jury that the employer took the situation seriously, responded promptly and appropriately and had a good faith basis for any subsequent action taken.

D. Follow-Up

As stated above, circling back with the complaining party can be a great way to protect against allegations brought up later. Additionally, following up can help ensure that the remedial action taken was effective. Finally, following up with employees can help send the message that you are truly interested in the wellbeing of your employees.

VII. UNINTENDED CONSEQUENCES OF WORKPLACE INVESTIGATIONS: DISQUALIFICATION OF COUNSEL AND LOSS OF PRIVILEGES

A. Disqualification of Counsel

Ethical considerations generally preclude an attorney, including in-house counsel, from acting as both a fact witness and an advocate in the same proceeding. Consequently, when an attorney is utilized to conduct an investigation, the investigating attorney runs the risk of becoming a fact witness in a subsequent lawsuit and thus being disqualified from representing the client at trial. This is especially true in sexual harassment cases because the employer's response to a sexual harassment complaint, and hence the investigation that was conducted, is an essential

part of the *Ellerth/Faragher* affirmative defense announced by the United States Supreme Court. Accordingly, if the employer relies on an internal investigation and subsequent corrective action as an affirmative defense under *Ellerth* and *Faragher*, the attorney conducting the investigation will most likely be a fact witness in the lawsuit and will be disqualified from representing the employer at trial. *See, e.g., Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996); *Pray v. New York City Ballet Co.*, 1997 WL 266980 (S.D.N.Y. 1997).

With respect to the issue of disqualification, most states have adopted one variant or another of Model Rule 3.7, which generally forbids an attorney from acting as an advocate at a trial if the attorney "is likely to be a witness." Usually, this prohibition cannot be waived by the parties. *See, McArthur v. Bank of N.Y.*, 524 F. Supp. 1205, 1209 (S.D.N.Y. 1981).[220] Texas and California, however, have taken a different approach, and give the parties more discretion in whether to waive disqualification.

1. Disqualification of Counsel under Texas Law

Texas state courts refer to TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 in determining whether an attorney should be disqualified because of being a potential witness in a case in which the attorney is also acting as an advocate. *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996). Rule 3.08 does not establish the disqualification standard, but it does provide considerations relevant to the determination. *Id.*; TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 10. While the disciplinary rules should not be used as a tactical weapon to disqualify opposing counsel, counsel may be disqualified where the party seeking disqualification can demonstrate actual prejudice resulting from opposing counsel's dual role of advocate-witness.[221] *Id*. The limitations placed upon attorneys by Rule 3.08 need to be considered by in-house counsel when determining whether a specific attorney will conduct the initial investigation of a discrimination or harassment allegation or whether the attorney will instead represent the company should a lawsuit be filed.

Rule 3.08 provides as follows:

> (a) A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
> (4) the lawyer is a party to the action and is appearing pro se; or
> (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.
> (c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08.

Rule 3.08 distinguishes between situations in which the attorney may be called to testify on his or her client's behalf and situations in which the attorney may be compelled by the opposing party to give

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[220] One court did not require disqualification of the employee's attorney, who had participated in a discussion with the defendant university as to proposed reasonable accommodations in a case involving the Americans with Disabilities Act. *Harter v. University of Indianapolis*, 5 F. Supp. 2d 657 (S.D. Ind. 1998).

[221] The comments to Rule 3.08 state that if "the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 4.

testimony that is substantially adverse to the client.[222] In the former situation, disqualification is required unless one of Rule 3.08's exceptions is met. In the latter situation, Rule 3.08 allows the client to waive disqualification after full disclosure.

Although the investigating attorney may be disqualified from representing the employer at trial if the complaining employee subsequently files a lawsuit, Rule 3.08 does not prohibit the investigating attorney from assisting in pretrial matters. *Anderson*, 929 S.W.2d at 423. Further, when an outside attorney is utilized to conduct the investigation, the disqualification of the investigating attorney will not be imputed to other attorneys at the same firm. Other attorneys at the investigating attorney's firm may still represent the company at trial so long as the company gives its informed consent to the representation. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 8; *In re Acevedo*, 956 S.W.2d 770, 774 (Tex. App. – San Antonio 1997, no pet.); *Anderson*, 929 S.W.2d at 425; *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 658 (Tex. 1990); *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990). Accordingly, if the company has given its informed consent, it is appropriate for one attorney at a firm to conduct the investigation and for other attorneys at the same firm to actually try the case. *Id.* In deciding whether to consent to this type of representation, in-house counsel should consider that the credibility of the investigating attorney testifying as a fact witness may be damaged when his relationship to the representing trial counsel is divulged.

Texas state courts have yet to address Rule 3.08 in the context of a harassment or discrimination investigation. However, other Texas cases illustrate the analysis courts engage in when determining whether to disqualify attorney investigators.[223] *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App. – Corpus Christi 1989, writ denied) is one such case. In *Warrilow*, a hunter whose pistol accidentally discharged and killed a fellow hunter sued Lloyd's of London for bad faith denial of insurance coverage. *Id.* at 517. The hunter alleged that as a member of the National Rifle Association ("NRA") he was privy to an insurance policy providing coverage for liability to third-parties resulting from firearms-related accidents.[224] *Id.* After the shooting, the hunter became involved in a wrongful death suit filed by the deceased hunter's heirs and in a product liability suit against the gun manufacturer. *Id.* at 518. The hunter's insurer, under his homeowner's policy, retained an attorney to defend the hunter in both lawsuits. *Id.* at 517-18. The attorney settled the wrongful death lawsuit by assigning the hunter's planned claim against Lloyd's for bad faith denial of coverage under the NRA policy. *Id.* at 518. The hunter's attorney testified as both a fact witness and an expert witness at the trial on the hunter's bad-faith denial claim, and the jury awarded the hunter close to $19 million. *Id.* at 518-19. On appeal, Lloyd's argued that the trial court erred in refusing to disqualify the hunter's attorney, and the appellate court agreed.[225] *Id.* at 519-20. Part of the attorney's testimony focused on the attorney's dealings with Lloyd's during the attorney's investigation of and pursuit of the hunter's claim under the NRA policy. *Id.* at 520. The court concluded that the attorney's testimony "was crucial at trial to prove bad faith." *Id.* With respect to the attorney's expert testimony, the court noted that "[i]t would have been extremely difficult for the jury to separate what . . . [the] attorney said as an advocate from what he said as an expert witness." *Id.* at 522. Ultimately the court reversed the $11 million verdict and remanded the case for a new trial as a result of the violation of the witness-advocate rule. *Id.* at 523.

The *Warrilow* case highlights the importance of considering the potential ramifications of using the same attorney to both investigate and defend a harassment or discrimination lawsuit. Even if the investigating attorney escapes disqualification at the trial court level, a violation of Rule 3.08 might result in reversal of a favorable result on appeal.

2. The Fifth Circuit Approach to Disqualification of Counsel

Federal courts, including the Fifth Circuit, are not bound by a state's rules of professional responsibility and may consider the Model Code, the Model Rules, and/or the rules adopted in the state in which the court

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[222] The comments to Rule 3.08 indicate that the Rule is intended to address situations in which "serving dual roles as advocate and witness could impair the attorney's ability to represent the client effectively and could create confusion for the factfinder." *Schwartz v. Jefferson*, 930 S.W.2d 957, 959 (Tex. App. – Houston [14th Dist.] 1996, no pet.) (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 4). Further, the comment observes that the jury may not understand whether a statement by an advocate-witness should be taken as proof or as analysis of the proof. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt 4. In addition, the Rule reflects the concern that an opposing party may be handicapped in challenging the credibility of a testifying attorney. *Anderson*, 929 S.W.2d at 422.

[223] *See also, Star-Telegram, Inc. v. Schattman*, (Tex. App. – Fort Worth 1990, orig. proceeding), addressed in § 4.2.2.3 *infra*.

[224] The NRA policy was known as "the Peacemaker." *Warrilow*, 791 S.W.2d at 517.

[225] The appellate court noted that although the trial court erred in not disqualifying the hunter's attorney, the factual testimony provided by the attorney did not warrant reversal of the case, but the expert testimony he provided did warrant reversal. *Id*. at 519-24.

sits when deciding a disqualification motion.[226] *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995) (holding that disqualification motions are substantive motions that are governed by federal law when brought in federal court). In addition, the Fifth Circuit considers "social interests at stake" including "whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety [that] outweighs any societal interests which will be served by the lawyers' continued participation in the case." *Id.* at 1314. The Fifth Circuit has stated that the advocate-witness rule should not be "mechanically applied" because "[s]uch inflexible application of a professional rule" would "abrogate important societal rights such as the right of a party to his counsel of choice and an attorney's right to feely practice her profession." *Id.*

In *U.S. Fire Ins.*, a savings and loan association that had failed and been taken over by the FDIC sued the carrier of its misconduct bond for bad-faith denial of coverage. *Id.* at 1307-08. The association's attorney had previously investigated the alleged officer misconduct and made a claim with the carrier on behalf of the association, which the carrier denied. *Id.* In the lawsuit, the carrier raised the comparative bad faith of the association's attorneys as an affirmative defense and announced its intention to call the association's attorneys as witnesses. *Id.* at 1308-09. The court found that the attorney who had investigated the alleged officer misconduct was a "necessary witness" and refused to allow the investigating attorney to serve as trial counsel even with the association's informed consent. *Id.* However, the court refused to impute the investigating attorney's disqualification to the attorney's law firm and held that with the association's informed consent, the law firm could still represent the association at trial. *Id.* at 1314.

Though the Fifth Circuit is not bound by Rule 3.08, *U.S. Fire Ins.* indicates that a Fifth Circuit's disqualification decision may reach a similar result as that reached by Texas courts applying Rule 3.08. *See also, Ayus v. Total Renal Care, Inc.*, 48 F.Supp.2d 714 (S.D. Tex. 1999) (disqualifying attorney from representing company at trial, but refusing to disqualify attorney's entire law firm).

The case law evidences that investigating attorneys may be subject not only to disqualification but also to waiver of privileges, especially when the investigation and remedial action taken as a result of that investigation is raised as a defense to a harassment or discrimination complaint.

B. Maintaining the Privilege

Assuming an attorney is retained primarily for the purpose of providing legal advice and the employer wishes to preserve the option of asserting the attorney-client privilege in response to a request for the attorney's investigative files, there are a few things to keep in mind.

The attorney should always identify him or herself as the author of the documentation. When a communication is involved, the attorney should also identify the recipient of the communication. Failure to do so may result in an inability to prove up the attorney-client privilege. *See*, *In re Monsanto Co.*, 998 S.W.2d 917, 932 (Tex. App. – Waco, 1999, orig. proceeding) (rejecting claim of privilege where author and recipient were not identified). It is also advisable to label all the attorney's communications as "confidential" so that the intent to maintain confidentiality appears on the face of the document.

Generally speaking, to be a privileged attorney-client communication, the communication should be between the client, the client's representatives, the lawyer and/or the lawyer's representatives. Tex. R. Evid. 503(b)(1). Additionally, communication must be confidential. *Id.* Accordingly, it is advisable that the investigators communications be directed to as narrow an audience as possible. Also, any recipient should be specifically informed of the confidential nature of the communication so as to prevent waiver of the privilege.

VIII. CONCLUSION

No matter how well an investigation is conducted, there may still be a lawsuit as a result of the conduct. The investigation may be a critical part of the Company's defense and the investigator may become a critical witness. A workplace investigation can impose numerous ethical perils. Additionally, there are many sensitive issues that may complicate matters. The bottom line in an investigation is whether the investigator can convince a jury that the investigation was handled in the best possible manner.

This paper is for general informational purposes and is not intended to substitute for legal advice. If you have questions about a specific situation you should seek consultation from an attorney.

[226] Each federal district court is authorized to adopt local rules for the conduct of attorneys practicing before that district. 28 U.S.C. § 2671 (1994).

HARASSMENT IN THE WORKPLACE: DANGEROUS LIAISONS

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Prevention and Cure: The Policy

- Clearly explain prohibited conduct
- Assure no retaliation
- Complaint process with multiple accessible avenues

Prevention and Cure: The Policy

- Assure confidentiality to the extent possible
- Provide prompt, thorough, and impartial investigation
- Assure that immediate and appropriate corrective action will be taken for harassment
- Training, availability of policy, open door policies

Prevention and Cure: The Investigation

- Selecting the Investigator
- Timing and Order of Witnesses
- Reviewing and Determining the Objectives of the Investigation
- Reviewing Policies
- Preserving, Collecting, and Reviewing the Physical Evidence

Prevention and Cure: The Investigation

- Selecting the Investigator
- Who, When Where of Interviewees
- Reviewing and Determining the Objectives of the Investigation
- Reviewing Policies
- Preserving, Collecting, and Reviewing the Physical Evidence

Prevention and Cure: The Investigation

- Preliminary Warnings and Admonitions
- Other parties present
- *Weingarten* and *Banner Estrella*
- Counsel Present
- "Just Want You to Know"

Prevention and Cure: The Interview of the Accuser

- Who, what, when, where, and how
- How did you react/respond?
- How did the harassment affect you?
- Has your job been affected in any way?
- Are there any persons who have relevant information?
- Was this an isolated incident or part of a pattern?
- Notes, physical evidence, or other documentation?
- How would you like to see the situation resolved?

Prevention and Cure: The Interview of the Accused

- Obtain details of what happened
- Witnesses
- Who, What, When, Why?
- If conduct denied, why lie?
- Similar conduct?
- Prior reprimands?
- Who talked to?
- Suggested resolution?
- Are there any other facts the investigator should know?

Prevention and Cure: The Interview of the Witnesses

- Select which witnesses to interview and stop when you have enough
- Have you seen (describe the accused conduct)?
- Recall seeing or hearing anything that might have offended anyone?
- Impression of the relationship between the parties?

Prevention and Cure: The Interview of the Witnesses

- Aware of any inappropriate comments or actions that have taken place in the workplace?
- Were you present when…? Get more details.
- Has anyone involved discussed this incident with you?
- Are you aware of any conduct by (name of the "accused") that is offensive?
- Is there anything else you think I need to know?

Prevention and Cure: The Determination

- Inherent plausibility
- Demeanor
- Motive
- Corroboration:
- Past record

Prevention and Cure: The Determination

- Inherent plausibility
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Prevention and Cure: The Determination

- The Report
- The Follow-Up
- Retaliation Pitfalls
- Gender Stereotyping

Prevention and Cure: The Determination

- The Report
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- Gender Stereotyping

The Aftermath: Attorneys

- Investigator as Witness
- Loss of Privilege

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