EFFECTIVE EMPLOYER RESPONSES TO COMPLAINTS OF “ANONYMOUS” HARASSMENT

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Complaints of harassment in which the alleged harasser is not easily discernible or identifiable pose particular problems for employers. This situation often presents itself in the form of graffiti, slurs, symbols, anonymous notes or messages, pictures, and items of obvious racial insensitivity or sexual overtone in the workplace, such as nooses or sexual items. While anonymous harassment analytically is not strictly limited to conduct that is racial or sexual in nature, almost all of the reported cases fall into these two categories. When an employee has placed the employer on notice of alleged harassment in this circumstance, an employer faces formidable problems. Is there actually harassment taking place? Is it because of a protected characteristic? Can the employer identify who is engaging in the harassment? Are there effective steps that the employer can take to stop any harassment that actually is occurring?

Further, most of the cases that involve “anonymous harassment” also include comments or other actions by alleged harassers who are known. What is the interplay between the known harasser(s) and how the company responds to real or alleged anonymous harassment? Employers may find themselves at increased risk if they fail to respond effectively either to the known harassers or to the supposed anonymous harassment, regardless of whether these occurrences are contemporaneous or separated temporally. It is critical for the employer to determine what steps it is going to take in an effort to identify anonymous harassers and how far it is obligated to go in addressing and dealing with such harassment. Failure of an employer to undertake adequate steps to identify anonymous harassers and to make “appropriate” efforts to put an end to such conduct may have disastrous consequences.

A. The Legal Framework

Anonymous harassment, like other forms of harassment, is subject to the general legal framework for harassment cases enunciated by the United States Supreme Court. In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that a workplace “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the
conditions of the victim’s employment and create an abusive working environment” violates Title VII of the Civil Rights Act. 510 U.S. 17, 21 (1993). In evaluating hostile work environment claims, the Supreme Court has instructed that a plaintiff must prove both (1) that the conduct is sufficiently severe or pervasive that an objectively reasonable person would find the work environment to be hostile or abusive, and (2) that the victim in fact subjectively perceived the work environment to be an abusive one, i.e., the conduct must actually have altered the conditions of the victim’s employment. Id. at 21-22. The Court repeatedly has emphasized and affirmed that hostile work environment claims are “limited to extreme work conditions,” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998), and that the “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” does not offend the employment discrimination laws. Harris, 510 U.S. at 21; Faragher v. City of Boca Raton, 514 U.S. 775, 787 (1998) (citing with approval cases holding that “discourtesy,” “rudeness,” or “lack of racial sensitivity” do not amount to and should not be confused with racial harassment).

Whether a work environment is sufficiently severe or pervasive is determined by the totality of the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Harris, 510 U.S. at 23. “[P]ervasiveness and severity are independent and equal grounds” upon which to base a hostile work environment claim; “a sufficiently severe episode may occur as rarely as once . . ., while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute.” Tademy v. Union Pac. Corp., 520 F.3d 1149, (10th Cir. 2008) (quotations and citations omitted).

When a harassing environment exists, the legal standard for whether the employer is liable depends on whether the harassment was committed by supervisors or by co-workers. Assuming that there is no tangible employment action such as discharge, demotion, or unfavorable assignments, the employer is vicariously liable for such supervisory behavior unless it can establish the affirmative defense created by the Supreme Court in Faragher. The employer must establish that it (a) “. . . exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take
advantage of any preventive or corrective opportunities provided by the employer . . .” Faragher, 524 U.S. at 807. As to the first element of the affirmative defense, an employer’s anti-harassment policy generally is sufficient to prove this element unless the policy was “defective or dysfunctional” or unless the employer administered the policy “in bad faith.” Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1299 (11th Cir. 2000). An employee’s unreasonable failure to use the employer’s complaint procedure ordinarily is sufficient to demonstrate the second element of the defense. Faragher, 524 U.S. at 807-08. In regard to co-worker harassment, an employer is liable for the acts of its employees only if the employer was negligent, i.e., if the employer knew or should have known of the harassing conduct and did not take prompt and appropriate remedial actions to stop such conduct. Faragher, 524 U.S. at 799.

B. Complications Related To The Limitations Period And Adequacy Of Company Response To Previous Reports of Harassment

Under Title VII, a victim of harassment generally must file a charge of discrimination with the EEOC or state administrative agency within 300-days of the alleged discriminatory conduct. 42 U.S.C. § 2000e-5(e)(1).¹ In the context of hostile work environment claims, however, the Supreme Court has observed that a single act of harassment may not be actionable on its own. Rather, in contrast to a discrete act, a hostile work environment is “composed or a series of separate acts that collectively constitute one ‘unlawful employment practice.’” National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). Accordingly, the Court held “that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period. Id. at 105.

Tademy v. Union Pac. Corp., 520 F.3d 1149 (10th Cir. 2008), reversing a district court’s grant of summary judgment to an employer, illustrates a significant risk that employers face in responding to complaints of anonymous harassment. Tademy is particularly troublesome from the employer’s perspective because the only act within the limitations period was that the plaintiff alleged he saw a “hangman’s noose” suspended from a

¹ The filing period is 180 days in non-deferral states. 42 U.S.C. § 2000e-5(e)(1).
large wall clock in his work area. After the plaintiff reported this occurrence, the company promptly investigated, sending a special agent to conduct the investigation. The special agent viewed the noose and interviewed employees, resulting in the employee who had placed the rope there admitting that he did so. The employee denied any malicious intent and claimed that it was merely a piece of industrial rope that he placed over the clock so that he would remember to take it home with him to assist in helping his son move. *Id.* at 1158. As a result of the investigation, the company terminated the employee, but he later was reinstated as a result of a grievance and arbitration award. *Id.* at 1153. Still, the company later held “town hall” meetings with its employees to discuss the situation and how the noose could violate the company’s EEO policy. *Id.* at 1155.

The Tenth Circuit in *Tademy* relied almost entirely upon alleged conduct occurring outside the limitations period to hold that these events were all part of the same hostile work environment as the noose incident and that the plaintiff was entitled to present his claim to a jury. *Id.* at 1159. The court noted that the plaintiff previously had reported a number of incidents of anonymous racial graffiti to the company, including writings in the bathroom and etchings on his locker using the “n” word, racial drawings, and racial cartoons posted on the bulletin board at the worksite. The company’s response to these reports apparently was simply to remove or cover the offensive writings without further investigation. *Id.* at 1153-54. In addition, the plaintiff reported three racially insensitive comments or slurs to management, but the company had not responded or had responded inadequately. *Id.*

The court reasoned that the anonymous graffiti and the slurs by known individuals were all part of the same hostile work environment as the noose because they occurred in the same work unit. The court further observed that the company’s failure to investigate the source of the graffiti meant that it was possible that the same individuals as those involved in the racial comments could have been responsible for the anonymous conduct. *Id.* at 1161. Moreover, the court easily found that the use of the “n” word and other racial epithets, combined with the appearance of the “noose,” were such that a jury could conclude the harassment was severe. *Id.* at 1164.

The court’s analysis in *Tademy* relating to the adequacy of the company’s response, however, seems problematic. While the record in the
case appears to support the court’s conclusion that the company knew or should have known of the “bigoted messages” of which the plaintiff had complained in the past, the court further determined that a reasonable jury could find that the company failed to take “appropriate remedial or preventative action.” \textit{Id}. at 1167 (citations and quotations omitted). Given that the court’s only critique of the company’s response to the noose incident – the sole event within the limitations period – was that the company did not require the offending employee to attend EEO training after being reinstated by the arbitrator, the court appears to have conflated its consideration of pre-limitations events for the purpose of determining whether a hostile work environment existed with its analysis of the adequacy of the company’s response to the only actionable event in the case. The court relied extensively on the company’s failure to respond adequately to the anonymous graffiti and the prior race-related comments, concluding that the company’s earlier failures may have “contributed to the subsequent acts of harassment,” even though there was only one such act within the limitations period for which the company’s response was quite robust. \textit{Id}.\textsuperscript{2}

In discussing potential responses to anonymous graffiti, the court listed with approval the following actions which had been taken by employers in previous cases:

Further, our precedent suggests that employers have remedies available for graffiti in the workplace. For example, in \textit{Baty} . . . an employer received complaints about graffiti containing inappropriate sexual references to a particular female employee in the men’s restroom. In response, the employer collected samples of the graffiti and compared them to handwriting on job applications. Similarly, in \textit{Scarberry} . . . the employer’s human resources manager: (1) personally viewed the graffiti; (2) took pictures of it; (3) authorized the

\textsuperscript{2} Notably, the plaintiff in \textit{Tademy} previously had filed a charge of discrimination relating to the conduct occurring before the noose incident, and had been issued a right-to-sue letter. After the issuance of the right-to-sue letter, the plaintiff agreed not to pursue a lawsuit in exchange for the company agreeing to conduct on-going, annual EEO training. \textit{Id}. at 1154-55. The company, however, cancelled the training about two years later for financial reasons. \textit{Id}. at 1155.
graffiti’s immediate removal; (4) began interviewing employees and security guards to determine who could be a suspect; (5) began interviewing employees who had been targeted as suspects; (6) collected writing samples from the suspects’ employee records and compared them with the graffiti; (7) reviewed the company’s security system surveillance tapes; (8) reviewed trucking logs of outside contractors who were on the premises during the relevant period; (9) attempted to identify a forensic handwriting expert; (10) contacted headquarters seeking additional assistance; and (11) told security to be more aware of potential problems at the plant. In response to a second incident, the employer took similar measures, concluded that it was “highly probable” that a particular employee was responsible, and terminated him. Id. at 1258. In our view, those measures were reasonably calculated to end the harassment caused by the graffiti.


Most hostile work environment cases addressing anonymous harassment also include claims of racial comments by identifiable perpetrators or acts involving specific individuals. Tademy vividly demonstrates the risks attendant to failing to respond vigorously to reports of conduct by known offenders. A lackluster response to earlier incidents, even those that are long time-barred, may later serve as the basis on which a court or jury concludes a hostile work environment exists or that the company failed adequately to respond to complaints.

C. Representative Cases Involving Anonymous Harassment

Second Circuit –

Petrosino v. Bell Atlantic, 385 F.3d 210, 220-26 (2nd Cir. 2004)

A female plaintiff asserted a hostile work environment claim based on anonymous worksite graffiti demeaning women generally and specific co-worker and supervisor comments. The court reversed the district court’s grant of summary judgment for the employer holding, in part, that even
though the anonymous graffiti was not directed specifically at the plaintiff, a jury still could find that such conduct constituted a hostile work environment. The employer argued that the plaintiff did not report the harassment. The plaintiff contended that the defendant’s EEO hotline was ineffective based on her experience regarding a previous report. The court found that this also created a fact issue for a jury.

**Third Circuit**  
*Austin v. Norfolk Southern Corp.*, 158 F.3d 374, 378 (3rd Cir. 2005)  
A female plaintiff asserted a hostile work environment claim based on sexually offensive graffiti and offensive comments overheard on the company radio. A jury found in favor of the plaintiff. The Third Circuit reversed, holding that no reasonable jury could have found that the employer failed to take appropriate corrective action when the supervisors met frequently with the plaintiff about the alleged harassment, posted notices of the company’s EEO policy, interviewed employees who the plaintiff identified as harassers, trained employees regarding the sexual harassment policy, removed graffiti, and contacted the plaintiff’s union representative and asked him to address the subject of graffiti with union members.

**Fourth Circuit**  
The plaintiff, an African-American Muslim, asserted a hostile work environment claim based on specific comments by supervisors relating to the plaintiff’s religion, anonymous posting of a derogatory cartoon depicting Muslim suicide bombers, the defacement of his business card, and the hiding of his timecards. The district court granted summary judgment in favor of the employer, but the Fourth Circuit reversed. The court held that a reasonable jury could have found that the defendant’s request for employees to sign a form stating that they would not tamper with plaintiff’s timecard and the company warning employees not to talk about Muslims were insufficient remedial actions.

**Fifth Circuit**  
A female plaintiff asserted a hostile work environment claim based on allegations that her supervisor and a coworker urged her to have sex with another coworker, other coworkers allegedly directed led and suggestive comments toward plaintiff on a consistent basis, and anonymous persons
harassed her over the company public address system, placed pornographic magazines anonymously in plaintiff’s locker, and wrote sexually offensive graffiti in the workplace. The district court held, in part, that the company took appropriate remedial measures after plaintiff reported the alleged harassment. The court of appeals reversed, holding that a fact issue existed regarding whether the company’s remedial actions were sufficient.

**Sixth Circuit** –  
**Bailey v. USF Holland, Inc.,** 526 F.3d 880, 882-87 (6th Cir. 2008)  
The plaintiff, an African-American male, asserted a hostile work environment claim based on coworkers allegedly referring to plaintiff as “boy” on a regular basis, a noose anonymously left in the work area, and racially offensive graffiti at the worksite. The Sixth Circuit affirmed the district court’s judgment for the plaintiff (following a bench trial). The court of appeals observed that, although the defendant eventually was able to control the graffiti, this did not happen until after the plaintiff filed his lawsuit. The company’s remedial measures included hiring a handwriting expert who was able to identify the graffiti culprit. The defendant immediately terminated the perpetrator, but he was reinstated after filing a union grievance, despite the fact that he even refused to stop using racially offensive language at that point. The graffiti did stop, however, after the defendant installed twenty-five security cameras.

**Seventh Circuit** –  
**Daniels v. Essex Group, Inc.,** 937 F.2d 1264, 1269-75 (7th Cir. 1991)  
An African-American male plaintiff asserted a hostile work environment claim based on the anonymous placement of a human-like dummy (made to look like an African-American man) hanging from a doorway and racist graffiti on the bathroom walls and around the worksite. The district court, in a bench trial, concluded that such conduct constituted a hostile work environment and that the defendant had failed properly to remedy the harassment after the plaintiff reported it. The defendant had not removed the dummy for at least 18 hours, was slow to remove graffiti, and made virtually no effort to investigate the alleged conduct. Additionally, the joint resolution that the company drafted with the union, condemning discrimination in the workplace, was untimely. The court of appeals agreed.
Eighth Circuit –
*Beach v. Yellow Freight System*, 312 F.3d 391, 394-98 (8th Cir. 2002)
A male plaintiff asserted a hostile work environment claim under Minnesota law based on alleged graffiti constituting same-sex harassment. The plaintiff drove trucks for the defendant trucking company, and approximately 70% of the company’s trailers contained graffiti stating offensive comments regarding plaintiff’s alleged sexual orientation and sexual habits. The district court and the Eighth Circuit both agreed that the company was liable for a hostile work environment despite the fact that the company, at some point before plaintiff’s lawsuit, began checking the trailers regularly for graffiti (plaintiff’s trailer was checked daily). The Court held that the company knew about the graffiti and, for too long, failed to stop it.

Ninth Circuit –
*McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1110-19 (9th Cir. 2002)
The plaintiff, an African-American male, asserted a hostile work environment claim involving supervisors making racially offensive remarks, co-workers refusing to obey plaintiff’s supervisory directions, coworkers using racially derogatory language, and anonymous racist graffiti in the bathroom and in other worksite areas. The Ninth Circuit reversed the district court’s grant of summary judgment for the employer, holding that management had failed to remedy the graffiti problem. The court noted that managers used the same restroom that contained the graffiti on a daily basis, and that the defendant’s slow correction of the problem was sufficient to create a fact issue for the jury regarding whether the defendant promptly acted to stop the alleged harassment.

Tenth Circuit –
*Scarberry v. ExxonMobil Oil Corp.*, 328 F.3d 1255 (10th Cir. 2003)
A female plaintiff asserted a hostile work environment claim based on alleged sexually offensive graffiti displayed in the workplace that was demeaning to plaintiff and to another female employee. In arguing that ExxonMobil’s response to the alleged harassment was inadequate, plaintiff stated that three coworkers engaged in sexual harassment in the past and the company had not responded appropriately. The Tenth Circuit affirmed the district court’s grant of summary judgment in favor of the company, holding that ExxonMobil promptly investigated the alleged offensive graffiti and took “progressively more serious remedial action that not only ended harassment by specific employees, but was also reasonably calculated to
demonstrate to all employees that its policy against sexual harassment would be enforced.” ExxonMobil’s remedial measures included prompt removal of graffiti and an extensive investigation that included, among other things, photos, interviews, sophisticated handwriting analysis, and increased security.

**Eleventh Circuit**—

Plaintiffs, six African-American males, asserted a hostile work environment based on nooses left anonymously at the worksite, racist graffiti consisting of racial slurs and references to the KKK, derogatory language and racial slurs used by coworkers and supervisors when referring to plaintiffs, and displays of the confederate flag in the workplace. The district court granted summary judgment for the employer. The Eleventh Circuit reversed, holding that a fact issue existed with respect to the severity of the harassment, and regarding whether the defendant’s EEO policy and remedial measures were sufficient. The court of appeals held that the defendant was too slow to remedy the racist graffiti and other incidents of racial conduct about which it had knowledge.
D. Checklist Of Considerations And Suggestions In Responding To Anonymous Harassment

In responding to a complaint or complaints about anonymous harassment, it is important to bear in mind that the nature of the company’s response to the current complaint may later determine both whether a hostile work environment exists and whether the company’s response to complaints of harassment was adequate. In light of the potential significance of the response to each report of harassment (anonymous or otherwise), employers may find the following checklist of considerations and suggestions helpful in evaluating an appropriate response:

1. Take all reports or complaints of harassment seriously.

2. Be sure supervisors and others in management know that they MUST report complaints of harassment and inappropriate actions observed to appropriate authorities of the company.

3. Respond to all complaints or observed actions promptly.
   a. Take interim action if more time is needed to complete an investigation.
   b. Consider whether there has been previous, similar conduct reported.
      (1) Are the allegations similar?
      (2) Are they close in time?
      (3) Was previous conduct in same work area or unit?
      (4) Are there other similarities (e.g., persons involved, nature of event or identifying characteristics) between the present situation and earlier reports?

4. Personally view any writings or items.

5. Take pictures of them if possible.
6. Promptly cover or remove offensive writings or articles (delay of as little as a day may be harmful to the company’s position).

7. Interview employees and witnesses who may have knowledge of the occurrence.
   a. Does the witness know or suspect who engaged in the anonymous harassment?
   b. What is the basis for the witness’ knowledge or belief?
   c. Is the witness aware of other actions not previously reported?
   d. Evaluate the credibility of the response of anyone who may be a suspect.

8. If you are able to determine when offensive materials appeared, review all available logs, card swipes, surveillance tapes, etc., to identify persons who would have had the opportunity to place writings or offensive items.

9. For graffiti and anonymous harassing notes, compare writing to known exemplars (employment applications, other known writings).
   a. Consider hiring a handwriting expert.

10. Seek assistance from corporate headquarters or outside sources.

11. Alert security and supervisors to keep watch for particular conduct or problems.

12. Consider other surveillance that is appropriate and permitted by law.
   a. Evaluate invasion of privacy and labor law issues.

13. Solicit further ideas for investigation or response from the employee making the complaint.
   a. Issue memoranda discussing inappropriate events or conduct, forcefully state such conduct will not be tolerated, and that anyone caught engaging in such behavior faces termination.
   b. Consider meetings and training regarding policies and expectations.

15. Evaluate whether your response (including any discipline) in a particular situation is sufficient and effective (not fodder for humor).
   a. The more severe the alleged conduct (“n” word, nooses), the more vigorous and swift the investigation and response must be.
   b. If there are repeated occurrences of anonymous activity (when someone has complained or about which employer otherwise has knowledge), employer must take effective steps to stop the conduct.

16. Involve high-level management in the response to demonstrate that company takes situations involving such conduct seriously.

17. Regularly monitor the situation after remedial steps have been taken.
   a. Remember, the goal is to stop the offensive conduct and to ensure that it does not recur.