MORE THAN JUST LIP SERVICE:
DEVELOPING AND ENFORCING EFFECTIVE
SEXUAL HARASSMENT POLICIES

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I. Introduction

Among the decisions the Supreme Court issued in its term ending the summer of 1998, were two—Ellerth v. Burlington Industries, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)—that changed dramatically the ground rules of sex harassment cases. Specifically, these decisions created great incentives for employers to implement and enforce effective sex harassment policies, and created correlative penalties for employers who fail to do so. Because of the importance of these decisions, this outline will begin with an overview of the Court’s holdings and a discussion of recent lower federal court decisions that have begun to define the contours of the same. This outline then will discuss the various elements of a reasonable sex harassment policy, prevention and enforcement efforts.

II. Overview of Faragher and Ellerth

Prior to 1998, there were divergent court opinions over whether “quid pro quo” sexual harassment is actionable when the victim was only threatened with harm for failure to acquiesce in the harassment, as opposed to actually suffering a tangible job detriment in retaliation for her failure to acquiesce and over the standard of liability for harassment by supervisors. This issue was resolved by Ellerth v. Burlington Industries and in Faragher v. City of Boca Raton in which the Supreme Court held that an employer is strictly liable for sexual harassment by a supervisor that culminates in a ‘tangible employment action,’” such as a discharge, demotion or undesirable assignment. Notwithstanding that holding, the employer may escape liability by establishing, as an affirmative defense, that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Thus, the court made clear that while strict liability
may be imposed, the appropriate implementation of an effective sex harassment policy could preclude that liability.

A. Background and The Faragher and Ellerth Analysis

In 1980, the Equal Employment Opportunity Commission (EEOC) published guidelines providing that sex harassment violates Title VII of the Civil Rights Act of 1964. The EEOC’s guidelines broadly defined illegal sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” when: (1) submission to such conduct is either explicitly or implicitly a term or condition of an individual’s employment; (2) submission to or rejection of such conduct is used as the basis for employment decisions; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or of creating an intimidating, hostile, or offensive workplace. Consistent with the EEOC guidelines, courts construing sexual harassment claims discerned two distinct categories of workplace sexual harassment. In the first category, called *quid pro quo* sex harassment, a supervisor demands sexual favors in exchange for improved working conditions, favorable reviews, raises, or promotions. The second category, termed “hostile or offensive workplace harassment,” includes unwelcome demeaning or sexually related behavior and language that create an intimidating or offensive work environment.

Case law involving sex harassment claims focused on the type of sex harassment. If the harassment was *quid pro quo*, employers were, essentially, strictly liable for the conduct. If the harassment was of the hostile workplace type, the employee could prevail only if the harassment were sufficiently pervasive and, in addition, the employer knew or should have known of the harassment and failed to take prompt remedial action. Employers who took prompt remedial action upon learning of the harassment usually would be insulated from liability.

The Supreme Court’s recent decisions have been widely heralded by employee advocates, but the decisions actually may be more helpful to employers, and it is questionable whether the rulings will alter the results in many cases. The Supreme Court’s rulings, however, unquestionably create powerful new incentives for employers to adopt a rule prohibiting sexual harassment that includes an effective, anti-retaliatory mechanism for reporting incidents of sexual harassment, to communicate that policy to supervisors and employees, to train supervisors, and to effectively respond to complaints of harassment.

The plaintiff in *Ellerth* worked as a salesperson for Burlington Industries. She claimed that her immediate supervisor’s boss, a mid-level manager, harassed her. This individual made boorish and offensive remarks including suggestions that the plaintiff needed to “loosen up” and hints that he could make her work life easy or hard. The plaintiff did not tell anyone in authority about the manager’s conduct, even though she was aware that Burlington had a policy prohibiting sexual harassment and a complaint procedure. In *Faragher*, a lifeguard for the City of Boca Raton sued her two immediate supervisors and the City for allowing a sexually hostile atmosphere to exist, which included uninvited offensive touching and lewd and derogatory comments about women. The City had a sex harassment policy, but had not distributed the policy to the lifeguards or supervisors working in the marine safety section of its
Parks & Recreation Department where the plaintiff worked. Like the plaintiff in Ellerth, the Faragher plaintiff had not officially reported the harassment of the two supervisors to the City.

In both cases, the principal issue was the standard of liability of an employer for harassment by its supervisors. The appeals courts dismissed the claims of the employees on the grounds that the employers had no vicarious liability under agency standards. The Supreme Court disagreed, and for the first time announced that an employer may be liable for sex harassment by its supervisors even if it was unaware of the harassment. Reviewing case law governing employer liability, the Court stated that the emphasis of the parties and lower federal courts on the type of harassment—whether it is quid pro quo or hostile workplace harassment—was misplaced. Likewise, the Court disagreed with those cases that held that, because illegal harassment is not part of a supervisor’s job, an employer is not liable unless it knew or should have known about the conduct and took no steps to stop it.

While acknowledging that sexual harassment is outside the scope of a supervisor’s job duties, the Court nevertheless found that holding employers liable for both known and unknown supervisory harassment is appropriate because the conduct is made possible or facilitated by the existence of the supervisory authority. Thus, the Court reasoned, when a person with supervisory authority discriminates in the terms and conditions of a subordinate’s employment, his actions necessarily draw upon his superior position which prevents employees from checking the abusive conduct in the same way that they might deal with abuse from a co-worker. The Court further reasoned that an employer has a greater opportunity to guard against misconduct by supervisors than by co-workers and that employers have a greater incentive to screen, train, and monitor the performance of supervisors.

Accordingly, the Supreme Court held that an employer is liable for actionable hostile environment created by a supervisor with immediate (and successively higher authority) over the harassed employee irrespective of the employer’s actual knowledge of the conduct. If the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, no defense is available to the employer. If no tangible employment action is taken, the employer may raise an affirmative defense to liability.

B. Central Importance of Sex Harassment Policies and Their Enforcement

The affirmative defense identified in Faragher and Ellerth contains two prongs. First, the employer must prove that it exercised reasonable care to prevent and promptly correct sexually harassing behavior. With respect to this prong, the Court made it clear that, while proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first prong of the defense. The Court’s decision in Faragher made it clear that, for all but the smallest of employers, the defense usually will require at least proof that the employer had a written sex harassment policy with an effective complaint procedure that had been communicated to employees.
To establish the second prong of the affirmative defense, the employer must prove that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise. This means that the employee must attempt to mitigate any harm occasioned by the harassment. With respect to this element, the Court stated that, generally, a demonstration of the employee’s failure to use the employer’s complaint procedure normally will suffice to satisfy the employer’s burden under the second element of the defense.

The decisions of the Supreme Court in *Faragher* and *Ellerth* provide useful guidance for employers in limiting potential liability. The good news of these decisions is that, in general, conformity with them should not require a complete revamping of a responsible employer’s rules, but simply a review and, as appropriate, a reinvigoration of them. The Court's decisions do not mean that an employer is absolutely liable for all improper behavior. Of special significance is the Court's pronouncement that harassed employees are obligated to take some steps to protect themselves and minimize the harm from sexual harassment. This requirement, according to the Court, is designed to encourage employees to report harassing conduct before it becomes severe or pervasive, thus serving Title VII’s deterrent purpose and refusing to reward employees for what their own efforts could have avoided.

Prudent employers must have an effective policy prohibiting sex harassment in the workplace. Generally, the policy should be written and should include a clear mechanism for raising claims of harassment that will enable the employer to promptly investigate and, as appropriate, remedy such claims. Although not expressly discussed in the decisions, an effective policy should include: (1) a clear expression that employees making complaints will be protected from retaliation; (2) appropriate assurances (but not guarantees) of confidentiality; and (3) more than one avenue of presenting complaints so that the employee is not forced to complain to his or her supervisor if that supervisor is the subject of the complaint. When a policy does not provide such mechanisms, an employee’s failure to use the complaint system could be viewed as not unreasonable and, thus, may defeat the employer’s affirmative defense.

As *Faragher* made clear, the creation of an effective policy is not enough, and the failure to communicate the policy to employees, including supervisors, will prevent all but very small employers from successfully defending a claim of harassment. Accordingly, employers should ensure that their policy is communicated to employees, particularly supervisors. To enhance the effectiveness of the policy, employers should conduct training sessions, especially for supervisors, on the types of comments and conduct that might be deemed to constitute unlawful harassment. In this connection, employers also should educate supervisors on the employer’s procedures for responding to claims of harassment, as well as anti-retaliation protections in the policy. Because of the emphasis placed by the Supreme Court on ensuring dissemination, prudent employers should consider having employees and supervisors acknowledge in writing their receipt and understanding of the employer’s sex harassment policy.

Employers also should develop a policy for taking appropriate action against those guilty of sexual harassment. Harassment should be treated as a major disciplinary event so that,
depending on the circumstances and the degree of harassment, the offender can be subject to appropriate discipline, including discharge.

III. Post-Faragher/Ellerth Decisions

Since the Supreme Court handed down these two important decisions, the lower federal courts have already begun to define the parameters of the Court’s holdings.

A. Reasonable Care Defense

Several courts have reviewed the first prong of the employer’s affirmative defense established in Faragher and Ellerth. For example, in Nuri v. PRC, Inc., 13 F. Supp. 2d 1296 (M.D. Ala. 1998), the court recognized that the employer maintained a comprehensive sexual harassment policy that was vigorously enforced. Nevertheless, the court upheld a jury verdict in favor of the plaintiff who claimed that she was subjected to a hostile working environment because PRC failed to disseminate its policy and make known its grievance procedure to all employees. Specifically, the plaintiff and her colleagues, who worked at one of the company’s satellite offices, were inadvertently kept in the dark. The court explained:

PRC established that it sent Nuri a new employee package when she began work, but PRC had no evidence about whether the package contained an adequate description of PRC’s sexual harassment policy. PRC also established that it sent out two mailings detailing PRC’s sexual harassment policy, but the evidence reflected that three employees who worked in the [plaintiff’s] office never received any such mailings. PRC also published an article about sexual harassment in its June 1995 newsletter, but the article did not detail the procedures one would use to report sexual harassment at PRC, and there was also no confirmation that any of the employees in the [plaintiff’s] office saw the article. Finally, PRC presented evidence that it conducted a live new employee orientation for employees beginning work in its Virginia office, and that the company did sexual harassment training for some of its offices, but these also appear to have missed [plaintiff’s office]. The short of the evidence is that although PRC did engage in a number of different efforts to distribute its sexual harassment policy, the evidence indicates that these efforts failed in the [plaintiff’s] office. (emphasis added)

Large employers may be especially vulnerable to the oversights the court described above.

In a more recent case, a federal district court in Kohler v. Inter-Tel Technologies, 1999 U.S. Dist. LEXIS 5425 (N.D. Cal. April 13, 1999), found the first prong of the affirmative defense satisfied where the employer had a comprehensive sex harassment policy with multi-level complaint procedures, and the plaintiff testified that she received the policy on the first day of her employment and had read and understood the same. Moreover, following the plaintiff’s filing of an EEOC charge, the company hired an independent third party attorney to investigate the allegations and did conduct a thorough investigation.
At least one court decision also indicates that an effective sexual harassment policy and procedure will not necessarily shield an employer from liability, even where that employer is prompt in taking action. In Fall v. Indiana University Bd. of Trustees, 12 F. Supp. 2d 870 (N.D. Ind. 1998), a federal district court found that the employer had acted with reasonable care to promptly correct an alleged sexually hostile environment created by the plaintiff’s supervisor. In so concluding, the court pointed to the employer’s anti-sexual harassment policy, the alleged victim’s use of the employer’s grievance procedure, the employer’s immediate investigation once the plaintiff had initiated a complaint, and the ultimate resignation of the alleged harasser. Nevertheless, the court could not hold as a matter of law that the employer was not liable for the alleged harassment. Noting that the “primary objective of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place,” the court held, “the affirmative defense requires employers to prove that they exercised reasonable care not only to promptly correct any sexually harassing behavior, but also to prevent such behavior from occurring.” Pointing to the employer’s knowledge of previous complaints of sexual harassment about the alleged harasser, the court held that the plaintiff had raised genuine issues of material fact as to whether the employer was negligent in preventing the harassment from occurring in the first place. Further, the employer was aware of incidents of harassment involving other female employees but which were not officially reported. The court concluded, this “leads to an inference that [the alleged harasser’s] sexual harassment of women was so pervasive and well known . . . that the University, in the exercise of reasonable care, should have discovered it,” or even that University personnel with appropriate authority actually knew of [the] behavior.”

The Fourth Circuit also has held that, under Faragher and Ellerth, the existence of an anti-harassment policy and procedure alone will not serve as a shelter to liability. See Ocheltree v. Scollon Productions, Inc., 161 F.3d 3 (4th Cir. 1998) (per curium) (policy and grievance procedure shown to be ineffective where employer’s managers failed to make themselves available to plaintiff allegedly subjected to hostile work environment and where alleged harasser prevented plaintiff from making complaint).

An effective and well-publicized policy and complaint procedure, on the other hand, will allow an employer to raise this affirmative defense. See Montero v. AGCO Corp., 19 F. Supp. 2d 1143 (E.D. Cal. 1998) (“AGCO exercised reasonable care to prevent sexual harassment by maintaining and distributing a policy prohibiting sexual harassment and by providing a mechanism for employees to report such conduct directly to the Human Resources Department). However, employers should be aware that failure to follow the promulgated harassment policy could be used as adverse evidence in a sex harassment case. See, e.g., Badlam v. Reynolds Metal Co., 1999 U.S. Dist. LEXIS 5787 (N.D.N.Y. April 19, 1999)(employer deemed to have knowledge of harassment where plaintiff complained to supervisor as policy directed, and employer could not contend that the plaintiff was required to bring her complaint directly to corporate headquarters).

B. Employee’s Unreasonable Failure To Take Advantage Of Grievance Procedure
A number of federal courts also have begun to take on the issue of an employee’s unreasonable failure to utilize his or her employer’s known grievance procedure—the second affirmative defense available to employers as announced in Faragher and Ellerth. In Kendrick v. Country Club Hills Board of Education, 1998 WL 440891 (N.D. Ill. 1998), one federal court held that an employer successfully asserted this defense to liability for hostile environment sexual harassment where the plaintiff failed to use her employer’s internal grievance procedure and admitted that first time her employer had knowledge of her complaints was when EEOC notified the employer that she had filed a charge of discrimination.

Again, the failure of an employer to maintain a sexual harassment policy and an effective grievance procedure, or to distribute and implement it, can operate to excuse an employee who fails to bring his or her sexual harassment complaints to the attention of management. Pyne v. Procacci Bros. Sales Corp., 1998 WL 386118 (E.D. Pa. 1998) (mem.) (especially in absence of a formal anti-harassment policy and complaint procedure, jury could reasonably find that plaintiff had not acted unreasonably in waiting 16 days and until he had a witness to complain to management); Williamson v. City of Houston, 148 F.3d 462 (5th Cir. 1998) (actual notice given to first-line supervisor sufficient to impute knowledge to City employer where sexual harassment policy instructs employers to report instances of harassment to first-line supervisors. Fact that victim did not take further steps to notify employer according to policy when supervisor failed to take action did not undermine victim’s claim because “[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law”).

On the other hand, where an effective policy and procedure is in place, the employee’s failure to use it must be shown to be unreasonable. See, e.g., Landau Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185 (D.P.R. 1998) (plaintiff’s failure to avail himself of employer’s sexual harassment complaint procedure not justified merely because plaintiff did not trust district manager, did not want to have anything to do with the harasser, was too ashamed to tell anyone, and feared he would not get backpay); Sconce v. Tandy Corp., 9 F. Supp. 2d 773 (W.D. Ky. 1998) (mem.) (plaintiff’s fears of retaliation and further humiliation because employer’s grievance procedures would not have been fairly administered is no excuse for not invoking grievance procedure where no evidence suggested that procedures were inadequate); Fierro v. Saks Fifth Avenue, 13 F. Supp. 2d 481 (S.D.N.Y. 1998) (employee’s generalized fears of “repercussions” can never constitute reasonable grounds for an employee’s failure to take advantage of employer’s complaint procedures, where no evidence suggested that other employees suffered negative repercussions for doing so). Montero v. AGCO Corp., 19 F. Supp. 2d 1143 (E.D. Cal. 1998) (holding that plaintiff’s explanation for waiting two years to report allegedly sexually harassing conduct—fear of retaliation by alleged harassing supervisor—was insufficient and, therefore, plaintiff unreasonably failed to take advantage of preventative and corrective opportunities provided by employer).

C. Models of Appropriate Response

Although the an appropriate response to a complaint of sex harassment is a fluid concept, dependent upon the circumstances in which such a complaint arises, some recent cases
provide exemplars of management response. For example, in Fenton v. Hassan, Inc., 1999 U.S. App. Lexis 7818 (6th Cir. April 23, 1999), a court held that management’s actions constituted “compelling evidence” that the company “encouraged complaints about the [harassment] and handled such complaints in a manner consistent with its explicitly-stated company policies.” In Fenton, the plaintiff made what she characterized as an informal complaint to her supervisor. Her supervisor, however, immediately took the matter to her supervisor who went to the company’s human resources manager. The human resources manager met the following day with the plaintiff to discuss her concerns about her supervisor’s behavior and conducted an internal investigation, speaking with a number of individuals to corroborate the plaintiff’s accounts of the alleged harassing behavior. Within the week, the human resources manager met with the alleged harasser and made clear that any such future behavior would require disciplinary action against him, up to and including termination. In addition, there was evidence that, after the company’s warnings, the alleged harasser’s conduct was not repeated. In light of this evidence, the court rejected plaintiffs claim that she later resigned her position because of the company’s failure to resolve her complaint.

Similarly, in DeCesare v. National Railroad Passenger Corp., 1999 U.S. Dist. LEXIS 7560 (E.D. Pa. May 24, 1999), although the court found that the purportedly harassing actions were insufficiently severe or pervasive to state a claim, the company also had responded in such a manner as to state an affirmative defense under Farragher and Ellereth. The court found that the employer did exercise reasonable care in preventing and correcting any offensive conduct on the part of the alleged harasser. Specifically, following an informal complaint, the alleged harasser was counseled about his conduct, read the sexual harassment policy and told that his conduct would have to conform to that standard. When a formal grievance was filed, the employer again spoke with the harasser and instructed him to behave professionally toward the plaintiff, conducted an investigation and instituted formal investigation charges against the individual. After an internal hearing on the charges in which it was found that the harasser did in engage in the alleged conduct his employment was terminated. The court noted that “a remedial action is adequate if it is reasonably calculated to prevent further harassment,” and that, following the harasser’s termination, the plaintiff suffered no harassment. Thus, as a matter of law, the company’s remedial action was “adequate.” Compare Merrit v. Delaware River Port Authority, 1999 U.S. Dist. LEXIS 5896 (E.D. Pa. April 20, 1999) (denying summary judgment where supervisors responded to complaints with laughter, inaction, and affirmative efforts to hide harasser’s conduct, by asking plaintiff to keep quiet and “cooperate with them” because they all could get fired or sued).

D. Farragher and Ellerth Principles Also Apply to Other Forms of Harassment

Courts have recognized that the principles of harassment recognized by the Supreme Court in Farragher and Ellerth apply equally to claims of harassment based on protected attributes other than sex. See, e.g., Allen v. Michigan Dep’t of Corrections, 1999 WL 2480 (6th Cir. 1999) (“although Ellerth and Faragher dealt with claims of sexual harassment, their reasoning is equally applicable to claims of racial harassment”); Wright-Simmons v. Oklahoma City, 155 F.3d 1264 (10th Cir 1998) (principles of Farragher and Ellerth also apply to racial harassment claims); Daron v. Pemdor Entry System, 1998 WL 869960 (6th Cir. 1998)
(analyzing religious harassment claim under Faragher); Wallin v. Minnesota Dep’t of Corrections, 153 F.3d 681 (8th Cir. 1998) (applying Faragher reasoning to claim of harassment under the Americans with Disabilities Act).

E. When is the Employer Responsible For Co-Worker and Third-Party Harassment?

1. Harassment by Co-Workers

Prior to the Supreme Court’s 1998 decisions, an employer was only liable for sexual harassment by a co-worker if the employer was aware of the offending conduct, but failed to take reasonable steps to abate it, under what was essentially a negligence standard. Kauffman v. Allied Signal, 970 F.2d 178. Similarly, where an employee’s actions toward a co-employee were unforeseeable, not a normal result of an employment situation created by the company, and amounted to an intentional tort, the company was not liable for the behavior. Graham v. Atlantic Richfield, 848 S.W.2d 747 (Tex. Ct. App. 1993). It appears that these standards will continue to be applicable to claims of co-worker and third party harassment. See Fenton v. Hisan, Inc., 1999 U.S. App. Lexis 7818 (6th Cir. 1999); Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir., 1999). Thus, the courts’ decisions on the various issues arising under these standards will continue to be instructive.

a. The Employee’s Failure to Complain or Give Notice

Under the EEOC guidelines, an employer can successfully defend against a claim of sexual harassment by a co-worker or a third party when the evidence indicates that it was not aware of the offending conduct. Thus, the plaintiff must first be able to establish that the employer knew about the harassment or should have known about the harassment. Knowledge of harassment can be established by proving that plaintiff complained to higher management or by demonstrating that the harassment was so severe or pervasive that the employer should have known about the conduct. Once employer’s knowledge is established, the focus will turn to whether the employer took prompt and effective remedial action. See Hosey v. McDonald’s Corp., 113 F.3d 1232, 1997 U.S. App. LEXIS 10713 (4th Cir. 1997) (Plaintiff’s comment to supervisor, that alleged harasser was “asking me out and stuff,” not sufficient to impute knowledge of harassment or liability to employer); Kilgore v. Thompson Management, 93 F.3d 752 (11th Cir. 1996), rehearing denied, 105 F.3d 673 (11th Cir. 1997) (employer was not put on notice of sex harassment, as complaint to manager of local pizza restaurant was not the same as lodging a complaint to upper management); Kouri v. Liberian Services Inc., 1991 WL 50003 (E.D. Va. 1991), aff’d, 960 F.2d 146 (4th Cir), cert. denied, 113 S. Ct. 189 (1992) (claims of plaintiffs dismissed because they failed to complain of harassment to management).

b. The Employer’s Prompt and Effective Remedial Measures

A number of courts have held that where an employer took prompt and effective remedial action upon learning of sexual harassment by a co-worker, the employer was not liable for the offending conduct. The promptness and adequacy of an employer’s response will often
be a question of fact for the fact-finder to resolve. Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, or termination, and whether or not the measures ended the harassment. See, e.g., Carter v. Chrysler Corporation, 1999 U.S. App. LEXIS 7701 (8th Cir. April 20, 1999).

In order to fulfill its duty to take prompt remedial action upon learning of sexual harassment, an employer must take remedial action which is “reasonably calculated to end the harassment,” and which is also of a disciplinary nature. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997) (employer took prompt and effective remedial action where it immediately initiated an investigation into plaintiff’s allegations of a sexually hostile work environment, interviewed all staff members, prepared a detailed summary of findings, and took disciplinary action against alleged harasser); Hirras v. National R.R. Passenger Corp., 95 F.3d 396 (5th Cir. 1996) (holding that defendant’s response to the discriminatory conduct was sufficient as a matter of law despite the fact that the offending party who had left vulgar notes, phone calls and graffiti for plaintiff was never identified); Blankenship v. Parke Care Centers, Inc., 123 F.3d 868 (6th Cir. 1997) (holding that negligence in taking corrective action after a complaint of harassment is not enough to create liability under Title VII and finding that the defendant’s good faith effort at corrective action, including reassignment and increased monitoring of the alleged harasser and his later discipline, was sufficient), cert. denied, 118 S. Ct. 1039 (1998). The reasonableness of an employer’s response depends in part on the gravity of the allegations. Baskerville v. Culligan Int’l. Co., 50 F.3d 428 (7th Cir. 1995); Turner v. Reynolds Ford, Inc., 145 F.3d 1346 (10th Cir. 1998) (the fact that remedial actions taken by the employer were not immediately successful does not necessarily mean that they were not adequate).

In Kilgore v. Thompson Management, 93 F.3d 752 (11th Cir. 1997), the Eleventh Circuit held that the plaintiffs could not establish a case of sex harassment, as the employer had taken prompt and effective remedial action. Plaintiffs, employees at a pizza restaurant alleged that they were sexually harassed by one of the company’s pizza delivery men, and lodged a complaint with the local manager and the complaint was in turn filed with upper management. Within two business days of receiving the complaint, the employer began conducting investigatory interviews of the employees involved. The court held that the company’s response to plaintiffs’ complaint was both prompt and effective, therefore, the company was not liable for the alleged misconduct of the employee.

In McKenzie v. Illinois Dept. of Transportation, 92 F.3d 473 (7th Cir. 1996), the plaintiff lodged a complaint with her employer alleging that one of her co-workers had created a hostile environment based on three sexually suggestive comments made over a three month period. In response to plaintiff’s complaint, her supervisor initially responded by asking the alleged harasser to talk with plaintiff in an attempt to “work things out.” In addition, the supervisor reported the complaint to his supervisor and within ten days, a meeting was held to discuss the complaint. It was determined that the alleged harasser would have no further contact with the plaintiff and a memo would be issued to all employees regarding the company’s policy against sexual harassment. The court held that, even if it found that plaintiff’s allegations
amounted to harassment (which they did not), the employer’s prompt and effective response to her complaint, prevented recovery by plaintiff in this action.

Similarly, the Fourth Circuit Court of Appeals also held in favor of an employer on the basis that it had taken prompt and effective remedial action. Spicer v. Commonwealth of Virginia Dept. of Corrections, 66 F.3d 705 (4th Cir. 1995). In this case, the plaintiff worked as a rehabilitation counselor at an all male prison. In 1991, prison officers received complaints about Spicer’s manner of dress. After having been brought to his attention, the warden drafted a memorandum on inappropriate dress, citing as an example Spicer wearing “short dresses with a split in the back and blouses that are so revealing that you can see her breast nipples outlined in plain view.” The warden forwarded the memorandum to the Center’s supervisors with instructions to “take appropriate action.” Two supervisors read the memorandum aloud at staff meetings and the memo was found posted in an area accessed by personnel.

Shortly thereafter, several of Spicer’s co-workers subjected her to sexually offensive remarks, such as “this is nipple check day,” “Which one is bigger, the one on the left or the one on the right?” and “Where are you going to put them?” Spicer subsequently complained to the Center’s EEO officer about the content of the memorandum and the resulting misconduct. The officer promptly contacted the warden who immediately initiated efforts to remove any remaining copies of the memorandum from public areas. The warden met privately with Spicer to discuss her concerns and later reprimanded those responsible for the offensive conduct. The Center also conducted two sexual harassment training sessions.

The Fourth Circuit held that the Correctional Center had taken prompt and effective remedial action and, therefore, could not be held liable. The court pointed to the steps taken by the defendant to remove the memo from public areas, to reprimand those responsible for the harassment, and to prevent future harassment through training and education. The court explicitly held that an employer is not required to “make the most effective response possible.” Rather, an employer may only be held liable where “no adequate remedial action is taken” at all. The court held that the fact that the harassment ceased after Spicer complained, supports the finding that measures taken by the Center were, in fact, effective.

In Dees v. Johnson Controls World Services, Inc., 938 F. Supp. 861 (S.D. Ga. 1996), the court held that the employer was not liable for harassment by the plaintiff’s co-workers based on the employer’s prompt response to plaintiff’s harassment complaint. In this case, the plaintiff was given a temporary new assignment on the very day she submitted her complaint and was given a permanent transfer at the first available opportunity. The court held that it “could not imagine a quicker and more prompt response to plaintiff’s complaint.” See also Carmon v. Lubrizol Corp., 17 F.3d 791, 794-95 (5th Cir. 1994) (employer not liable for sex harassment where supervisors and the personnel manager met with plaintiff on the day she made her complaint, reprimanded the co-worker in writing, transferred him to another shift within three days, and distributed a memorandum to all employees prohibiting foul language and horseplay at work). But see Harris v. L&L Wings, Inc., 132 F.3d 978 (4th Cir. 1997) (upholding an award of compensatory and punitive damages totaling more than $200,000 to each of two plaintiffs due in large part to the employer’s inaction in the face of the plaintiff’s earlier complaints of

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harassment, and failure to implement any sexual harassment or grievance policy for the protection of its employees); Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993) (court reversed summary judgment finding a dispute of fact as whether hospital responded sufficiently to complaints of gender based harassment); Stewart v. Weis Markets, 890 F. Supp. 382 (M.D. Pa. 1995) (holding that the prompt action by District supervisor to end harassment does not nullify liability for the months that the situation was tolerated by on-site management), aff’d sub nom, 1996 U.S. App. LEXIS 14998 (3d Cir. 1996); Shoemaker v. National Management Resources Corporation, 141 F.3d 1185 (10th Cir. 1998) (reversing district court’s finding of no liability for employer where employer took no remedial action because it was easier to replace the plaintiff than her harassing manager); Wixted v. DHL Airways, Inc., 1998 WL 164922 (N.D. Ill. 1998) (refusing to grant employer summary judgment on liability issue where employer took no remedial action and failed to conduct investigation despite plaintiff’s complaints to her immediate supervisor for a period of eight months); EEOC v. Cooper Aerobics Center, 1998 WL 204688 (N.D. Tex. 1998) (finding that a genuine issue exists for trial where plaintiff presented evidence of verbal complaints for a period of six weeks prior to her written complaint which was finally investigated by employer); Dorricott v. Fairhill Center For Aging, Inc., 2 F. Supp. 2d 982 (no liability for employer where evidence showed that employer directed plaintiff to turn in a written report regarding alleged sexual harassment consistent with established policy, and immediately began an investigation); McGhee v. Treasure Chest Casion, LLC, 1998 WL 187699 (E.D. La. 1998), (employer who instituted investigation into sexual harassment complaint one day after plaintiff’s report, took disciplinary action against harasser, notified plaintiff in writing of actions taken and revised workplace policy as a result of incident could not be held liable for sexual harassment).

An employer is not required to take steps beyond what is required by Title VII simply because plaintiff requests different or more severe remedial action. For example, the court in Larkin v. Baylor Medical Center of Irving, 1999 U.S. Dist. LEXIS 7106 (N.D. Tex. May 7, 1999), granted judgment as a matter of law because the plaintiff had failed to raise a fact issue as to whether the employer took prompt remedial action. Specifically, within days of complaining about a comment made by her co-worker, the company took steps to preclude interaction between the plaintiff and the alleged harasser, the harasser received a verbal reprimand, and the plaintiff acknowledged that the offensive comments ceased. Although the plaintiff disparaged the employer’s remedial action as simply having the two “try to avoid each other,” the court stated that while the plaintiff “may disagree with [the employer’s] choice of remedial action, her opinions and beliefs are not sufficient to raise a fact issue on this element of her claim.” See also Maples v. General Motors, Corp., 1999 U.S. Dist. LEXIS 7576 (E.D. Mich. April 29, 1999)(The effectiveness of response “is measured not by the extent to which the employer disciplines or punishes the alleged harasser, but rather if the steps taken by the defendant halt the harassment.” (citing Stacy v. Shoney’s Inc., 955 F. Supp. 751, 756 (E.D. Ky. 1997), aff’d, 142 F.3d 436 (6th Cir. 1998); Hedberg v. Rockfor Stop-n-Go, Inc., 1999 U.S. Dist. LEXIS 7007 (N.D. Ill. April 27, 1999)) (“the test is not whether the employer’s remedial steps satisfied the plaintiff’s expectations but, rather, whether such steps were reasonably likely to stop the harassment.”); Knabe v. Boury Corp., 114 F.3d 407 (3rd Cir. 1997)(although employer did not reprimand alleged harasser, it did talk with him about the alleged sexually harassing conduct—punitive action is not necessary where employer’s action was reasonably calculated to end the harassment); Besso v. Cummins
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Intermountain Inc., 885 F. Supp. 1516 (D.C. Wyo. 1995) (no basis for imputing liability to employer where employer took prompt and effective corrective action, despite fact that plaintiff felt that remedial action should have been more severe; employer’s action deemed sufficient since it completely “cured the problem” and plaintiff was no longer subjected to harassment).

2. Harassment by Third Parties

Similar to the issue of co-worker liability, an employer may be liable for the harassment of its employees by a third party if the employer knew or should have known about the harassing conduct. Menchaca v. Rose Records, 1995 WL 151847 (N.D. Ill. 1995). In Menchaca, the court held that an harasser’s status as a non-employee does not automatically shield the employer from liability of harassment. In reaching this conclusion, the court relied upon the EEOC’s guidelines, which indicate that an employer may also be responsible for the acts of a non employee where the employee knew or should have known about the harassing conduct and failed to take appropriate remedial steps.

Similarly, in Crist v. Focus Homes, 122 F.3d 1107 (8th Cir. 1997), the Eighth Circuit held that female employees of a residential program for developmentally disabled individuals stated an actionable claim where they alleged that program operators failed to adequately respond to complaints about misconduct by residents. According to the plaintiffs, program operators even asked one plaintiff to participate in an exercise that would permit patients to grab her in a sexually suggestive manner so that the conduct could be observed. The court rejected arguments that Focus Homes lacked control over the actions of its patients, and thus should not be held liable, stating that Focus Homes “clearly controlled the environment in which [the patients] resided and . . . had the ability to alter those conditions to a substantial degree.” See also Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998) (holding that employer could be liable under Title VII under quid pro quo theory for not only acquiescing in the customer’s unwanted sexual advances, but explicitly telling the employee to give in to those demands in order to satisfy an important customer, and under harassment theory for failing to do anything about the customer’s advances).

3. Potential Liability To Independent Contractors

At least one court has held that an independent contractor can recover for a racially-hostile environment under 42 U.S.C. § 1981. In Danco, Inc. v. Wal-Mart Stores, Inc., 1999 WL 333 406 (1st Cir. May 12, 1999), Wal-Mart was held liable for the racially hostile conduct of its employees to an independent contractor who cleaned its parking lot. The court found that, because corporations typically carry out their activities through their employees, work site discrimination against the contractor’s employees could amount to discrimination against the contractor itself. However, the employees of the contractor could not collect damages on their own behalf, and the suffering of the employee was not necessarily damage to the independent contractor itself. Notwithstanding these reservations, the court affirmed an award of $300,000 to an independent contractor on the theory of hostile work environment. While liability for sex harassment could not be found under Section 1981, which applies only to race, it arguably could be raised under a breach of contract theory.
IV. Avoiding Sexual Harassment Claims

An ounce of prevention is worth a pound of cure. This is especially so when it comes to sexual harassment. Management counsel should encourage clients to adopt the following measures to help reduce the risk of sexual harassment charges and lawsuits from being filed in the first place.

A. Establish and Implement a Comprehensive Sexual Harassment Policy

An employer should create and implement a comprehensive sexual harassment policy. The policy should clearly articulate:

- The behavior which may constitute sexual harassment.
- That any person found to be in violation of the policy will be appropriately disciplined, including possible termination.
- Several accessible avenues for employees to file complaints.
- The importance of adhering to the policy and stress the company’s commitment to maintaining a harassment-free working environment.
- That employees filing harassment complaints and employees participating in investigations of complaints will not be retaliated against.

The sexual harassment policy should be disseminated to all employees by:

- Posting the policy in several conspicuous locations throughout the workplace--including the employment office where applicants will see it.
- Placing the policy in all employee handbooks or policy manuals.
- Distributing the policy separately during new employee orientation programs.
- Re-distributing the policy each year to emphasize its importance.

The sexual harassment policy should also be made known to any customers or other individuals who regularly do business in the company’s facilities or frequently come into contact with employees.

The following annotated sample policy, annotated with notes regarding the rationale behind the various provisions, may be helpful as a starting point.

SAMPLE POLICY AGAINST HARASSMENT WITH ANNOTATIONS FOR THE EMPLOYER’S CONSIDERATION

...
Our Policy Against Harassment, Including But Not Limited to Sexual Harassment

Our Firm does not tolerate any type of harassment of our employees, including harassment based on characteristics protected by local, state or federal law, such as sex, race, color, national origin, religion, age, disability, marital status, or status as a Vietnam Era Veteran. This specifically includes, but is not limited to sexual harassment.\(^2\) Thus, regardless of whether the harassment in question amounts to a violation of the law, it may amount to a violation of our policies.\(^3\)

In other words, harassment is absolutely prohibited at our Firm. We will not condone any situation where an employee’s submission to harassment is made either explicitly or implicitly a term or condition of employment; is used as a basis for employment decisions; or where harassment has the effect of creating an intimidating, hostile or offensive working environment.

Our prohibition against harassment applies to everyone at our Firm, from top management on down. We will not permit our employees to be harassed by managers, co-workers or third-parties over whom we have control, such as vendors, clients or customers. None of our employees, including our officers, top management officials, supervisors, or any other employees, are authorized to engage in conduct that amounts to harassment.\(^4\) Our policy is to exercise reasonable care to prevent any harassment and, if such misconduct occurs, to investigate and take prompt remedial action--no matter whom it involves. In cases where high-level managers or officers are accused of harassment, the Firm will take all reasonable steps to ensure the fairness and evenhandedness of its investigation, including bringing in outside investigators if appropriate.\(^5\)

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\(^2\) Although the primary focus at the EEOC and before the Supreme Court has been on sexual harassment, it is clear from the language of the Court’s decisions this year that harassment on the basis of any characteristic protected by Title VII or other federal anti-discrimination laws is equally illegal (and presumably the same would be true under state and local anti-discrimination laws as well). Accordingly, a policy addressing harassment with respect to all legally protected characteristics is advisable.

\(^3\) Prohibiting harassment broadly in this manner, and encouraging employees to report any type of harassment, illegal or not, has two advantages. First, it increases the probability that the Company will learn of any illegal harassment through the complaint procedure, and lessens the chances that the employee will be able to argue that they reasonably failed to complain because they were not sure the policy covered what happened to them. Second, it leaves the employer free to conclude that a violation of the policy occurred without necessarily also making the admission that a violation of the law also occurred. The only downside of such a broad prohibition is that the company is taking on an obligation that is broader than that legally required. However, it is unlikely that this would substantially increase the number of harassment complaints, since employees frequently complain to management about conduct that does not amount to illegal harassment. Further, such a general policy is unlikely to be deemed to create additional contractual liability for violations, particularly if it is published in a handbook that makes clear that it is not intended to create any contractual liability or change the status of the employees as “at will” employees.

\(^4\) Although this statement may seem redundant, specifying that no managers are authorized to engage in harassment helps preclude employees from contending that the top level manager who harassed them had the “apparent authority” to do so, or so was so high up in the managerial chain that he was in effect a “proxy” for the company about whom it would do no good to complain.

\(^5\) Including this statement helps to assure employees that harassment by managers will be taken seriously, and will not be “white-washed” or investigated by someone who could be intimidated by the alleged harasser.
The Way To Stop Harassment - Our Complaint Procedure

We remind you that one way to stop harassment is to let the harassers know that their conduct is offensive to you, that you believe their behavior constitutes harassment, and that you want them to stop it. Even if you do not take this step, however, or if you do and the harassing behavior does not immediately cease, it is your responsibility to promptly bring to management’s attention any incidents that you believe amount to harassment against you or anyone else.

You can make a complaint or report about harassment in two different ways. The choice is yours.

1. You can complain or make a report about harassment to [name a supervisory level to which complaints may be made].

2. You can complain or make a report about harassment to the Vice President of Human Resources. The dedicated, toll-free telephone number available for you to easily and directly contact Human Resources is (800) ________.

These alternative ways for making a complaint allow you to avoid using the ordinary chain of command and to bypass anyone whom you believe has caused or is responsible for the harassment.

What The Company Will Do In Response To Your Complaint

Upon receiving your complaint, the Human Resources Department will conduct a prompt and thorough investigation of your allegations. We request that you cooperate with our investigation, and we will make all reasonable attempts to protect the confidentiality of your complaint and our investigation process.

In some cases, designating the employee’s front line supervisor as one of the appropriate persons to receive complaints may not be a good idea. First, such a designation may undercut the company’s ability to argue that it should not be held strictly liable for the supervisor’s actions or inaction. Secondly, front line supervisors in some companies may not have received sufficient training and exposure to ensure that they are sensitive to the problems of sexual harassment and know what to do with a complaint, and the company will incur liability if they are a designated recipient of complaints but fail to take the proper steps when they receive one. Some courts have held that, where the employee has suffered no tangible job detriment and is only complaining of a hostile work environment, a company can avoid liability if the employee fails to take her complaint to the company officials specifically authorized in the complaint procedure to receive it, and instead complains to a front-line supervisor (who was not a designated recipient) who fails to do anything about it. Of course, regardless of whether they are the designated recipient of complaints, all supervisors should be trained on how to recognize sexual harassment, and on their special obligation to report it immediately to human resources if they receive a complaint (whether oral or written), observe it, or even hear significant rumors. But as a general principle, it may be advisable to designate a higher level of management as the appropriate recipient of complaints in your policy (i.e., as the alternative to the human resources director).
If we find that our policy has been violated, regardless of who the harasser may be--from a rank and file employee to the highest managers or officials of our Firm, to our most important client or customer--we will take appropriate corrective and remedial action, up to and including the discharge of any employee who violates our policy.

We will also take into consideration the interests of confidentiality both in investigating and remedying your complaint.7

**Our Commitment To Protect You**

Our Firm also strictly prohibits retaliating against anyone because they filed a complaint of harassment. If you have made a complaint of harassment and if you believe that you have been retaliated against for making this complaint, please let the Human Resources Manager know about this as soon as possible.8 You may choose to use any of the methods referred to above for making a complaint about retaliation. We will act promptly to assure compliance with our policy prohibiting retaliation.

If you have any questions about this policy, please contact the Human Resources Manager.9

I hereby acknowledge that I have received and read a copy of the Firm’s Policy Against Harassment.10

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Employee Signature

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7 It is not advisable to guarantee confidentiality because the alleged harasser will have to be told enough about the complaint to allow himself or herself to defend himself, and the complaint could become public if litigation arises. However, employers should take all reasonable steps possible to ensure confidentiality about the complaint, the identity of the alleged victim and the identity of the alleged harasser.

8 As a separate matter, we note that establishing an appeals procedure through which employees may contest any adverse employment actions, such as discipline, decisions to demote or transfer or failure to promote, that they might later contend were retaliatory is a good idea. Employees who fail to use this type of appeals procedure may be hard pressed to explain why they failed to do so if they truly believed they were being retaliated against.

9 The Firm should specify the names of the individuals in the Human Resources Department to whom questions may be addressed, and to whom complaints should be sent. One way of doing this is to send out a special memo to all employees each year, giving the names and phone numbers (and/or e-mail addresses) of the appropriate persons.

10 Having the Employee sign off on an acknowledgement that he/she has received and read the policy helps prevent the possibility that employees might argue that they reasonably failed to complain in-house about harassment because they were unaware of the complaint procedure. To make sure that even new employees, or job applicants, are aware of the policy, post it in a prominent place in the employment office.
B. Other Policies That May Be Helpful in Preventing And Minimizing Liability for Sexual Harassment Claims

In order to help prevent and minimize liability for sexual harassment claims, employers should consider implementing the following policies:

1. **Principles of Appropriate Office Conduct**

   This policy should prohibit unprofessional behavior, including, but not limited to, use of foul language in the workplace, telling crude or off-color jokes, and use of threatening or abusive language toward any employee.

2. **Conflict of Interest**

   In addition to prohibiting other conduct which could potentially create a conflict of interest (i.e., accepting large gifts from clients), a conflict of interest policy can also deal with dating between supervisors and subordinates. While a complete ban on fraternization in the workplace may be both undesirable, and impossible to enforce, employers must monitor supervisor conduct as a means of protecting both the company and the supervisor from potential sex harassment claims.

   Thus, a conflict of interest policy might require a supervisor to notify upper-level management of the existence of a personal relationship between him/her and a subordinate that could be regarded by others as susceptible of creating favoritism, whether the personal relationship be parent/child, sibling, in-law, spousal, the share of living quarters, or a serious dating relationship. Such notification provides the employer with the opportunity to take effective protective measures, such as transferring the supervisor so that he/she does not have control over the individual with whom he/she is involved. Under such a policy, supervisors would be informed that failure to notify management of personal relationships may result in disciplinary action. If a company is reluctant to have a written policy dealing with supervisor/subordinate fraternization, an alternative is to publicize the requirement to notify upper-level management of romantic involvements during the supervisors’ sexual harassment training session (see, infra).

3. **Dress Policy**

   In order to minimize the risk of inappropriate comments regarding clothing, the company may implement a dress code that requires maintaining a “professional” appearance for all employees.

4. **Office Decoration Policy**

   Such a policy might prohibit hanging any materials not pre-approved by a management-level employee. In this manner, employers can prevent creating a hostile environment due to “pin-ups,” inappropriate comics or any other sexually oriented material.
C. **Training**

All employees should receive training in sexual harassment issues. In this manner employees are: (1) made aware of the employer’s sexual harassment policy; (2) alerted to inappropriate workplace conduct; and (3) put on notice that the company wants to be notified of inappropriate conduct so as to provide it the opportunity to investigate and take corrective action.

Employers should keep accurate records as to the training measures undertaken, including, but not limited to, keeping an agenda of what is discussed and a list of individuals in attendance. If possible, employees should be required to personally sign attendance forms.

In addition to general meetings to remind employees of the company’s harassment policy, employers should also hold more specific training for supervisors and EEO employees responsible for implementing the sexual harassment policy. It should be stressed to these individuals that all claims should be taken seriously and treated with sensitivity and confidentiality (as much as possible) and investigated thoroughly and professionally.

D. **Create a System of Review**

In order to minimize the risk of sexual harassment claims, employers should create safety mechanisms to ensure that policies are enforced in a fair and non-discriminatory manner. In other words, employers should adopt “checks and balances” procedures. For example, in order to ensure that investigations of sexual harassment complaints are completed in a thorough and unbiased manner, a policy for independent review by a manager to check the investigators’ mode of investigation and conclusions should be implemented.

A similar review process should also be implemented to ensure that employees filing sexual harassment complaints are not retaliated against in any manner. For example, after filing a claim of harassment, any employment decisions affecting the complaining party (including performance appraisals, pay changes, transfers, demotions, etc.) should require (1) review by the human resources department, (2) approval by a second, independent manager and (3) exclusion of the alleged harasser from the decision making process. The same procedures should also be followed for all employees participating in the investigative process.

V. **Enforcing the Anti-Harassment Policy Through an Appropriate Investigation**

A prompt and thorough investigation of a sexual harassment complaint obviously is a critical mechanism for enforcing an anti-harassment policy, and is an essential element of the affirmative defense under Faragher and Ellerth. Only by responding promptly and effectively can the employer ensure relief from liability.

To accomplish this, the investigation team should be well trained in the law of sexual harassment and in proper investigative techniques. While the makeup of an appropriate investigative team, the steps to an appropriate investigation, and the various issues that can arise
during its course are beyond the scope of this paper, no employer should venture into this process without thoroughly familiarizing itself with the pitfalls that can occur, and the means for avoiding them.

Because of recent developments, this paper will address one potential issue that can arise during the investigation of a sexual harassment claim, or any other claim in which discipline against the offender could be the eventual outcome— the applicability of the Federal Fair Credit Reporting Act.

**The Fair Credit Reporting Act: Disclosure of “Investigative Consumer Reports” and Potential Implications for Claims of Privilege**

On October 1, 1997, an amendment to the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq., took effect and substantively altered the procedure that an employer must follow in order to obtain a consumer credit report on a prospective or current employee. The amendment also imposed disclosure requirements on employers who want to use consumer reports as a basis for adverse employment actions.

It is clear that the FCRA does not prohibit employers from conducting their own investigations of harassment or other complaints. Previously, these amendments have had no effect on an employer’s ability to use outside counsel to do the same, and research indicates no case in which counsel’s investigation was found to fall within the FCRA. However, on April 5, 1999, an advisory letter from a staff attorney of the Federal Trade Commission—the agency charged with enforcing the FCRA—issued in response to inquiries from Judi A. Vail, Esquire, potentially altered the status of attorney investigations.

In that advisory letter[^11] (hereinafter the “Vail letter”), the staff attorney took the position that corrective or disciplinary action resulting from an investigation of allegations of sexual harassment in the workplace could reasonably be defined as an adverse employment decision under 15 U.S.C. § 1681a(k)(1)(B)(ii). More importantly, however, the letter took the position that the investigation of allegations of sexual harassment is subject to the various notice and disclosure requirements of the FCRA when that investigation is undertaken by a “consumer reporting agency.”

The FCRA defines a consumer reporting agency as any person which, for monetary fees “regularly engages in whole or in part in assembling or evaluating credit information or other information” on consumers for the purposes of furnishing “consumer reports” to third parties. 15 U.S.C. § 1681a(f). A “consumer report” is, in turn, defined as a report containing information bearing on an individual’s “character, general reputation, personal characteristics, or mode of living” that is used or expected to be used for certain, designated

[^11]: The Vail letter states that its analysis is merely “advisory in nature,” and does not “necessarily reflect the views of the Commission or of any particular Commissioner.” On its face, therefore, it is not binding on the Commission, let alone a court construing the FCRA.
purposes including “employment purposes.” 15 U.S.C. § 1681a(d)(1)(B). An “investigative consumer report” is a consumer report “in which information on consumer . . . is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with who he is acquainted or who may have knowledge concerning any such items of information.” 15 U.S.C. § 1681e.

The Vail letter took the position that “outside organizations” utilized by employers to assist in their investigations of harassment claims “assemble or evaluate” information. Moreover, harassment investigations for employers are most likely “investigative consumer report;” thus, heightened disclosure requirements apply, including the possibility of making a “complete and accurate disclosure of the nature and scope of the investigation” to the individual being investigated. See 15 U.S.C. § 1681d(b).

From the Vail letter it arguably could be inferred that attorneys who perform sexual harassment investigations for employers may be considered consumer reporting agencies under the Act. If this is the case, those attorneys would be subject to the various notice and disclosure requirements the FCRA imposes upon such agencies.

Research has indicated that no court has applied the analysis offered by the Vail letter following its issuance, or prior to the same. The Vail letter itself makes clear that its analysis is “advisory in nature,” and does not “necessarily reflect the views of the Commission or of any particular Commissioner.” Thus, the letter has little, if any, precedential value. However, if the analysis of the letter is applied, employers and their counsel should be aware of the duties and responsibilities which the FCRA imposes.

The FCRA can best be understood as a “notice” statute that requires the employer to take certain steps to ensure that the information that the employer might discovery is not unfairly injurious find to a given applicant. A consumer reporting agency may furnish a consumer report for employment purposes only if: (A) a clear and conspicuous disclosure has been made in writing to the individual to be investigated at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and (B) the individual has authorized in writing the procurement of the report by that person.

The FCRA imposes certain other notice requirements for employers seeking to procure “investigative consumer reports.” Specifically, the person employer must clearly and accurately disclose to the consumer that an investigative consumer report, including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made. The disclosure must be mailed, or otherwise delivered, to the consumer, not later than 3 days after the date on which the report was first requested. The disclosure also must include a statement informing the consumer of his right to request certain additional disclosures and a written summary of the consumer’s rights. 15 U.S.C. § 1681d(a)(1)(B).
Upon written request made by the consumer within a reasonable period of time of receiving the initial disclosure statement described above. The employer must make a complete and accurate disclosure in writing of the nature and scope of the investigation requested. 15 U.S.C. § 1681d(b).

If an employer decides to take an adverse action based on the individual’s report, the FCRA requires that the individual be provided with a copy of the same before such action is taken. 15 U.S.C. § 1681b(b)(2)(A). Thus, information provided to the employer by counsel arguably is subject to disclosure to the individual subject to investigation. Moreover, the Vail letter made clear that information cannot be redacted from a consumer report provided to the individual investigated pursuant to the FCRA. In addition to disclosing their report to the individual investigated, upon the request of that individual, counsel also could be required to “clearly and accurately disclose . . . the nature and substance of all information [individual’s] files at the time of the request.” 15 U.S.C. § 1681g(a) (emphasis added). Courts have held that the disclosure of information in the files of the consumer reporting agency is not limited to the report itself and may include a review of the entirety of the agency’s files. See Heath v. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980).

The breadth of the disclosures required by the FCRA, including divulgence of the final report and potentially allowing an investigated individual to review the all of the files of the investigating attorney, strongly suggests that the Vail letter’s strict construction of the FCRA expands the reach of that statute beyond recognition.12 The fact that the employer also must get the written authorization of the individual to be investigated prior to securing the report, further underscores the incongruity of the Vail analysis.

Notwithstanding the potentially sweeping impact of its analysis, the Vail letter leaves several essential questions unanswered. Specifically, although the inquiries to which the FTC staff attorney was responding were propounded by an attorney, the letter does not mentions attorneys nor specifically address the issue of whether a lawyer or law firm can be considered consumer reporting agency. Rather, the letter uses only the more general phrase of “outside organizations that regularly engage in assisting employers with investigations for a fee.”

This failure of the letter to specifically identify and discuss attorneys raises two immediate avenues of response to a claim that attorney investigations fall within the FCRA. First, the letter—as well as all other available authority—does not define the term “regularly;” thus, a law firm which provides assistance only in specific, isolated incidences and not in the course of its usual practice, might argue that it is not a consumer reporting agency as defined by the FCRA. 15 U.S.C. § 1681a(f). In addition, in confining its analysis to “outside organizations,” the advisory letter fails to address, or even mention, the issue of privilege and its

12 The Vail letter’s analysis plainly is far afield from the original, express focus of the FCRA on the banking system which is “dependent upon fair and accurate credit reporting” and the purpose of insuring that consumer reporting agencies “adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which his fair and equitable to the consumer.” 15 U.S.C. § 1681(a) & (b).
Assuming *arguendo* that the Vail letter analysis will be followed and applied, it is difficult to see how a credible claim for attorney-client or attorney work-product privilege could be made following the inspection of attorney files to which an investigated individual may be entitled under the statute. 15 U.S.C. § 1681g(a). However, as previously noted, **no judicial authority has interpreted the FCRA to apply to a law firm’s investigation of sex harassment or other complaint.**

Given the utter lack of authority supporting the Vail letter’s analysis and the evisceration of privilege it entails, it does not appear that the state of the law would suggest attorneys immediately cease performing such investigations for their clients. At most, employment attorneys may be wise to inform their clients that, while the overwhelming weight of authority suggests that investigations of internal sex harassment complaints will be privileged, there is the possibility that the FTC could take an adverse position under the FCRA.