

CHAPTER 1

OVERVIEW OF THE LAW OF WORKPLACE HARASSMENT

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I. Introduction

Employees who are harmed by actionable workplace harassment can seek relief under a variety of federal and state antidiscrimination statutes, and under state statutes and common law. The federal laws prohibiting workplace harassment include Title VII of the Civil Rights Act of 1964, as amended,¹ § 1981,² the Age Discrimination in Employment Act of 1967 (ADEA),³ and the Americans with Disabilities Act of 1990 (ADA).⁴ The Equal Employment Opportunity Commission (EEOC) has issued guidelines interpreting the scope of prohibited sexual harassment,⁵ as well as enforcement guidance on employer liability for harassment by supervisors.⁶ This array of laws and guidelines covers a wide range of actionable

1. 42 U.S.C. §§ 2000e *et seq.*

2. 42 U.S.C. § 1981.

3. 29 U.S.C. §§ 621 *et seq.*

4. 42 U.S.C. §§ 12101 *et seq.*

5. EEOC, Policy Guidance on Current Issues of Sexual Harassment, 29 C.F.R. §§ 1604 *et seq.*, available at <http://www.eeoc.gov/policy/docs/currentissues.html>. The EEOC's 1993 proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993), were withdrawn after criticism of the religion guidelines by some members of Congress and the public, 58 Fed. Reg. 51,396 (Oct. 11, 1994).

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

* The authors wish to thank The Labor Law Group for permission to use copyrighted materials in this chapter from Robert Belton, Dianne Avery, Maria L. Ontiveros & Roberto L. Corrada, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* (The Labor Law Group, 7th ed. 2004), and from Dianne Avery, Maria L. Ontiveros, Roberto L. Corrada, Michael L. Selmi & Melissa Hart, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* (The Labor Law Group, 8th ed., 2010). They also gratefully acknowledge research assistance from Anet Castro.

workplace conduct, including much harassment that is sexual in nature or is non-sexual but is motivated by sex, race, national origin, religion, age, and disability. The conduct that gives rise to actionable harassment claims may vary, however, depending on the applicable federal or state statute. Employer retaliation against applicants, employees, or former employees who complain about, report, or resist harassing conduct in the workplace is also prohibited by most federal antidiscrimination statutes and state fair employment laws. Many forms of workplace harassment are also actionable under state tort law. Tort theories that may be available include assault, battery, false imprisonment, intentional or negligent infliction of emotional distress, defamation, invasion of privacy, loss of consortium, negligent hiring and retention, failure to provide a safe workplace, wrongful termination in violation of public policy, and breach of the implied covenant of good faith and fair dealing.⁷ In public sector employment, harassment “under color of law” may be actionable as “constitutional torts” under equal protection and substantive due process claims brought against state actors pursuant to § 1983 and the Fourteenth Amendment of the Constitution.⁸ Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity that receives federal financial assistance.⁹

Workplace harassment law under Title VII originated in the early 1970s in cases arising from racial and ethnic harassment. In *Rogers v. EEOC*, the sole “Spanish-surnamed” employee in an optometrist’s office alleged that she was abused by her Caucasian female co-workers and then fired because of the “friction.”¹⁰ She also claimed that the employer discriminated against her by segregating the patients according to their ethnic origin. The Fifth Circuit recognized that these employment practices could violate Title VII because “the [statutory] phrase ‘terms, con-

7. *Maksimovic v. Tsogalis*, 687 N.E.2d 21 (Ill. 1997) (permitting claims of assault, battery, and false imprisonment to go forward in case involving co-worker sexual harassment); *Schuster v. Derocili*, 775 A.2d 1029, 1036 (Del. 2001) (allowing claim for breach of implied covenant of good faith and fair dealing when plaintiff alleged she was discharged for refusing to submit to sexual advances by her supervisor); *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990) (holding that California fair employment law does not preempt common law claims of sexual harassment and allowing a claim for wrongful discharge in violation of public policy).

8. *See, e.g., Woerner v. Brzeczek*, 519 F. Supp. 517 (D.C. Ill. 1981) (finding cause of action in § 1983 suit for sexual harassment of female police officer); *see also Jones v. Clinton*, 990 F. Supp. 657, 668 (E.D. Ark. 1998) (collecting sexual harassment cases brought under Equal Protection Clause of Fourteenth Amendment).

9. The scope and remedies available under Title IX for sexual harassment of employees are somewhat uncertain. *See infra* Section II.A.6. The only court of appeals that has considered the issue of whether employees have a private right of action under Title IX for harassment by co-workers concluded that the remedial scheme of Title VII, in effect, preempts private employment discrimination claims under Title IX seeking money damages. *See Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995). There is substantial disagreement among the district courts on this question, *see Kemether v. Penn. Intersch. Athletic Ass’n, Inc.* 15 F. Supp.2d 740, 768 (E.D. Pa. 1998) (collecting cases).

10. 454 F.2d 234, 236 (5th Cir. 1971).

ditions, or privileges of employment’ . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”¹¹

After *Rogers*, some federal district courts initially rejected Title VII claims that sexual harassment constitutes sex discrimination, expressing concern that “holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another,”¹² and concluding that the statute did not cover disputes over personal relationships in the workplace.¹³ Beginning in 1976 with the case of *Williams v. Saxbe*, however, federal courts began to recognize that sexual harassment, like racial and ethnic harassment, can be actionable under Title VII.¹⁴ *Williams* involved a claim by a woman that her male supervisor had retaliated against her when she rejected his sexual advances. In finding a violation of Title VII, Judge Richey held that “the conduct of the plaintiff’s supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated.”¹⁵ The following year, in *Barnes v. Costle*, the Court of Appeals for the District of Columbia Circuit held that an employer was liable for sex discrimination under Title VII when a male supervisor abolished a female plaintiff’s job after she refused his sexual advances.¹⁶

By the late 1970s and early 1980s, the federal courts¹⁷ and the EEOC¹⁸ began to adopt the framework—and often the terminology—that Professor Catharine MacKinnon used for analyzing workplace sexual harassment. In 1979, MacKinnon wrote:

Women’s experiences of sexual harassment can be divided into two forms. . . . The first I term the *quid pro quo*, in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity. The second arises when sexual harassment is a persistent *condition of work*.¹⁹

11. *Id.* at 238–39.

12. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

13. *See, e.g., Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 555 (D.C.N.J. 1976) (“An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time.”), *rev’d*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (D.C. Cal. 1976) (“The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions.”), *rev’d*, 600 F.2d 211 (9th Cir. 1979).

14. 413 F. Supp. 654 (D.D.C. 1976).

15. *Id.* at 657–58.

16. 561 F.2d 983 (D.C. Cir. 1977).

17. *See, e.g., Henson v. Dundee*, 682 F.2d 897, 908–09 n.18 (11th Cir. 1982).

18. *See* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604 (1980).

19. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 32 (1979).

Both the *Williams* and *Barnes* cases fell within the quid pro quo paradigm. *Bundy v. Jackson*²⁰ was the first case to endorse the hostile work environment theory of sexual harassment.

Harassment doctrine based on the federal civil rights statutes is entirely judge-made. In the 1980s and 1990s, when the federal courts were developing the doctrines and analytic categories of workplace harassment jurisprudence, most of the reported opinions—and virtually all of the significant United States Supreme Court opinions—involved claims of harassment based on gender and, in particular, harassment that was sexual in nature. As a consequence, much of the doctrine was designed to explain why and when harassing sexual conduct could constitute actionable discrimination “because of . . . sex” under Title VII, and the quid pro quo and hostile work environment frameworks proved to be very significant in the development of this law. At the turn of the twenty-first century, faced with a growing number of claims involving harassment based on other protected statuses, such as race, religion, age, and disability, the federal courts began to apply to different factual contexts the hostile work environment theory of discrimination that was first articulated in *Rogers* and fully developed in sexual harassment cases. The differences between proving and defending harassment claims based on these other protected statuses will be explored after the elements of a sexual harassment claim are explained in the following sections.

II. Harassment Because of Sex

Sexual harassment has been shown to be a pervasive feature of work life in the United States since surveys of it began in the 1970s. In one of the first surveys, published in *Redbook* magazine in 1976, 92 percent of the 9,000 respondents listed sexual harassment as a “serious” problem, and nine out of 10 respondents reported personal experiences with sexual harassment in the workplace.²¹ In 1988, *Working Woman* magazine reported that almost 90 percent of the Fortune 500 companies surveyed had acknowledged receiving complaints of sexual harassment from employees.²² Over a decade later, a survey of adults found that 21 percent of women and 7 percent of men said they had experienced sexual harassment in the workplace.²³ A 1994 survey of federal government employees reported that 44 percent of women and 19 percent of men experienced some form of workplace sexual harass-

20. 641 F.2d 934 (D.C. Cir. 1981).

21. Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217. See also BARBARA GUTK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* (1985).

22. Ronni Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69.

23. The survey was conducted by the Employment Law Alliance. See 20 Hum. Res. Rep. (BNA), No. 7, at 191 (Feb. 18, 2002).

ment.²⁴ Workplace harassment that is not sexual or obviously targeted at employees because of sex also appears to be pervasive. A 2001 survey conducted by researchers at Wayne State University found that one in six employees reported having been bullied at work and that half of the bullies were women.²⁵ A 2007 survey conducted by Zogby and the Workplace Bullying Institute found that 37 percent of workers report having been bullied at work; 13 percent reported the bullying was occurring at the time of the survey and 24 percent reported bullying had occurred in the past.²⁶ The EEOC reports that, in conjunction with the state fair employment practices agencies with which it has work-sharing arrangements, it has received a combined average of roughly 14,000 charges of sexual harassment annually during the 13 years from 1997 to 2009.²⁷ In 2009, sexual harassment charges filed with the EEOC and state and local fair employment agencies composed over 40 percent of all charges filed in which harassment based on any protected status was an issue.²⁸

A. THE ELEMENTS OF A TITLE VII SEXUAL HARASSMENT CLAIM: THE PRIMA FACIE CASE

Early in the development of sexual harassment law, the two factual scenarios that Professor Catharine MacKinnon believed best described the phenomenon of workplace sexual harassment—quid pro quo and hostile work environment—became the dominant paradigms for framing and proving allegations of sexual harassment.²⁹ In 1980, the EEOC issued Guidelines on Sexual Harassment that recognized sexual harassment as a violation of Title VII and adopted the quid pro quo and hostile work environment paradigms.³⁰ The Guidelines provided:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or impliedly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such

24. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* vi, 13 (1995).

25. *Bullying in the Workplace, While Legal, Hurts Productivity, Recruitment, and Retention*, 19 Hum. Res. Rep. (BNA) No. 42, at 1153, 1153–54 (Oct. 29, 2001).

26. See <http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html>.

27. See EEOC, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1997–FY 2009*, available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm.

28. Compare *id.* (reporting 12,696 sexual harassment charges filed with the EEOC and FEPAs combined in 2009), with EEOC, *Harassment Charges, EEOC & FEPAs Combined: FY 1997–FY 2009* (reporting 30,641 harassment charges filed with the EEOC and FEPAs combined in 2009), available at <http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm>.

29. See MACKINNON, *supra* note 19.

30. 29 C.F.R. § 1604.11.

conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.³¹

In its 1986 decision in *Meritor Savings Bank v. Vinson*, the Supreme Court cited the EEOC Guidelines and used the terms *quid pro quo* and *hostile work environment* to describe the two categories of sexual harassment that are actionable under Title VII.³² Clauses (1) and (2) in the Guidelines excerpt above describe *quid pro quo* claims where the plaintiff can show that a supervisor made unwelcome demands for sexual conduct that the plaintiff either submitted to or refused. Clause (3) describes a hostile work environment scenario. Today, hostile work environment is the more significant of the two harassment paradigms because it can be used in claims of harassment that involve abusive and hostile workplace conduct other than a supervisor's explicit or implicit demands for sexual favors from a subordinate in exchange for receiving job benefits or avoiding adverse employment actions. Because hostile environment claims are more common than *quid pro quo* claims, and the structure is more generally applicable to all forms of workplace harassment, most of the discussion that follows focuses on this kind of claim.

Meritor was the Supreme Court's first Title VII harassment case. In *Meritor*, the plaintiff, a young woman, alleged that her male supervisor, the vice president and manager of the bank branch where she worked as a teller, had demanded sexual favors from her, fondled her, and even raped her several times over a period of several years. The supervisor denied that the conduct occurred. Following a bench trial, the district court concluded that even if the conduct had occurred as the plaintiff alleged, it was a "voluntary" sexual relationship unrelated to her employment or promotions at the bank.³³ The Supreme Court disagreed and held that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII.³⁴

First, the Court acknowledged that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination" and that "[t]he EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII."³⁵ Citing the Fifth Circuit's decision in *Rogers v. EEOC* and its progeny as support for the proposition that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" based on their race, religion, and national origin, the Court concluded that "a hostile environment based on discriminatory *sexual* harassment" should be "likewise prohibited."³⁶

31. 29 C.F.R. § 1604.11(a).

32. 477 U.S. 57, 65 (1986).

33. *Id.* at 61.

34. *Id.* at 66.

35. *Id.* at 65.

36. *Id.* at 66.

Second, the Court held that “the gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”³⁷ The question was whether the plaintiff “by her conduct indicated that the alleged sexual advances were unwelcome. It is not whether her actual participation in sexual intercourse was voluntary.”³⁸ Thus, on remand, in determining whether the alleged sexual advances were “unwelcome,” the district court would have discretion to admit relevant evidence regarding the plaintiff’s behavior or responses to the harassment.³⁹

Meritor articulated the elements of a prima facie case of sexual harassment based on a hostile work environment paradigm: (1) that the employee belongs to a protected class; (2) that the employee was subjected to unwelcome sexual harassment, including sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition, or privilege of employment, and (5) that there is some basis for establishing employer liability.⁴⁰ The first four elements will be discussed in this section (Sections A.1–A.5). Next, Section B will compare the elements of a prima facie sexual harassment case with harassment claims on the basis of race and national origin. Section C discusses harassment on the basis of religion, and Section D discusses the elements of claims of harassment based on age and disability. Part III examines the requirement, applicable in any harassment prima facie case, that the plaintiff establish a basis for imposing liability on the employer for the harassing conduct of supervisors, co-workers, or customers.

Establishing the first element of a prima facie case of harassment—that the plaintiff belongs to a class protected by the relevant statute—is generally not in issue in most Title VII discrimination cases because every person is presumed to have a definable race, gender, color, and a national origin, and all races, genders, colors, and national origins are—at least arguably—protected under Title VII. Nevertheless, courts have denied discrimination claims when the plaintiff’s asserted protected class was found not to fall within the ambit of the statutory class. For example, the lower courts have consistently ruled that an employee’s sexual orientation—whether the individual is gay, lesbian, or bisexual—is not a protected status under the prohibition of “sex” discrimination in Title VII,⁴¹ but courts have disagreed whether Title VII protects transgender individuals from discrimination

37. *Id.* at 68.

38. *Id.*

39. *Id.* at 69. In particular, the Court held that evidence of the plaintiff’s sexually provocative speech or dress was relevant. *Id.* This holding in *Meritor* has subsequently been undermined by amendments to the Federal Rules of Evidence and cases questioning the relevance of evidence of a plaintiff’s dress, speech, and private sexual conduct to prove whether the plaintiff welcomed harassment at work. See *infra* Section II.A.1.

40. *Id.* at 65–66.

41. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (recognizing that “sexual orientation is not a prohibited basis for discriminatory acts under Title VII”); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (same).

“because of sex.”⁴² An employee who claimed that his national origin was “Confederate Southern American” failed to convince the Chief Judge of the Court of Appeals for the Third Circuit that his status was a “protected national origin classification” under Title VII.⁴³ Moreover, because of First Amendment concerns, establishing that one has a sincere religious belief is generally not difficult, and an employee can be harassed on the basis of religion under Title VII even if—and sometimes particularly if—he has no religion.⁴⁴ Harassment claims based on age or disability, however, require proof that the plaintiff is in the protected class defined by the ADEA and the ADA respectively.⁴⁵ The other elements of the plaintiff’s prima facie case have remained relatively unchanged as courts have applied the hostile work environment framework developed in sexual harassment cases to harassment claims based on race, religion, national origin, age, and disability, and to harassing workplace conduct that is not sexual in nature, such as abusive language, racial epithets, or the display of nooses or swastikas in the workplace. Many hostile work environment claims are based on more than one protected status—such as race and national origin, or race and sex, or national origin and religion—and more than one statute—such as Title VII and § 1981, or Title VII and the ADEA. As discussed below, plaintiffs in all hostile work environment cases must prove that the harassment was sufficiently severe or pervasive to alter the terms and conditions of the plaintiff’s employment and that the harassment was based on a protected sta-

42. Compare *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (finding that a transsexual is protected under Title VII based on allegations that he was discriminated against because of his gender-nonconforming behavior), with *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir. 1984) (holding that transsexuals are not protected from discrimination on the basis of sex under Title VII).

43. *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 766 (3d Cir. 2004) (Scirica, C.J., concurring) (agreeing with the district judge that plaintiff “failed to satisfy the first prong [of a prima facie discrimination case] because ‘Confederate Southern-American’ is not a legitimate national origin classification for Title VII purposes” and collecting “the few court[]” cases that “have rejected ‘national origin’ claims based on Confederate or Southern American heritage”).

44. For example, atheism is treated as a religion under Title VII. *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988); *Young v. Sw. Sav. & Loan Ass’n* 509 F.2d 140 (5th Cir. 1975). Also, in a so-called reverse religious discrimination claim under Title VII, the plaintiff is not required to show that he or she is a member of a protected class. *Shapiola v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (“Where discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate.”).

45. See 29 U.S.C. § 631(a) (“The prohibitions in [the ADEA] shall be limited to individuals who are at least 40 years of age.”), and 42 U.S.C. § 12111(8) (defining a “qualified individual” [under the ADA] as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”). The definition of “disability” under the ADA was broadened by the ADA Amendments Act of 2008 (ADAAA), which was enacted to reverse judicial interpretations that had narrowed the scope of coverage of the ADA. Pub. L. No. 110-325, 122 Stat. 3553 (2008). Significantly for purposes of harassment claims, the ADAAA broadens the scope of the “regarded as having such an impairment” prong of the definition of “disability” to include being “subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3)(A).

tus, and plaintiffs alleging sexual harassment must prove that the conduct alleged to constitute sexual harassment was unwelcome.⁴⁶

1. Proving Unwelcomeness

Unwelcomeness requires proof that the conduct was unsolicited or uninvited.⁴⁷ The purpose of this requirement, as the EEOC explained in its amicus brief in *Meritor*, is to “ensure that sexual harassment charges do not become the tool by which one party to a consensual relationship may punish the other.”⁴⁸ Although proof of unwelcomeness was considered to be necessary to distinguish consensual workplace romances and innocuous flirtation and sexual banter between employees from actionable sexual harassment, the unwelcomeness requirement came under criticism from many legal scholars and plaintiffs’ lawyers.⁴⁹ The controversy stems, in part, from the holding in *Meritor* that evidence of the plaintiff’s “sexually provocative speech or dress” was *not* irrelevant as a matter of law on the question of whether the plaintiff “found particular sexual advances unwelcome.”⁵⁰ Because the fact finder must consider “the totality of circumstances” in light of “the record as a whole” in determining whether sexual harassment has occurred, trial courts would have to weigh “the applicable considerations” about admitting this type of evidence.⁵¹

The unwelcomeness element initially seemed to invite defendants to argue that a female plaintiff who had engaged in certain behavior at work (such as using crude sexual language⁵²) or away from the workplace (such as posing nude for magazine

46. See, e.g., *Ladd v. Grand Trunk W. R.R.*, 552 F.3d 495, 500 (6th Cir. 2009) (requiring that a plaintiff claiming racial and sexual harassment needs to show, as one of the elements of her prima facie case, that “she was subjected to unwelcomed harassment”); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009) (in case alleging racial and sexual harassment, court discusses unwelcomeness).

47. *Henson v. City of Dundee*, 682 F.2d 897, 903 (1982) (holding that the “conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive”).

48. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae [Supporting Petitioner], *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162, at *15.

49. See, e.g., Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. Rev. 499 (1994).

50. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986) (“While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.”).

51. *Id.* (citing EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(b) (1985)).

52. *Compare Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 736–37 (8th Cir. 2000) (holding that plaintiff could not establish that her supervisor’s use of sexually vulgar and demeaning language was unwelcome because she used offensive language herself), *with id.* at 729–30 (Lay, J., dissenting) (arguing that plaintiff’s occasional use of crude language can be evidence that she did not find her supervisor’s constant use of crude sexual language unwelcome, but it does not establish welcomeness as a matter of law), *and Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010–11 (7th Cir. 1994) (holding that pervasive and severe language and conduct directed at plaintiff was not welcomed simply because plaintiff herself was “unladylike” and used crude language).

photos⁵³) might be the kind of woman who welcomed sexual overtures or sexual language at work. Courts now generally recognize that individuals who use sexual language and innuendo in the workplace or who engage in sexual conduct away from work do not, as a matter of law, waive their right to a work environment free from sexual harassment.⁵⁴ The age of the plaintiff may have a bearing on the issue of welcomeness in harassment cases involving teenage plaintiffs. For example, the Seventh Circuit ruled that an adolescent female plaintiff who was below the age of consent under the statutory rape laws in the state where she worked was incapable, as a matter of law, of “welcoming” sexual advances from an older man.⁵⁵

Defendants attempting to rebut the plaintiff’s evidence of unwelcomeness with evidence of the plaintiff’s provocative dress, vulgar language, or prior sexual history also now face discovery and evidentiary hurdles. Nearly eight years after *Meritor*, Congress amended the Federal Rules of Evidence (FRE) to extend the protections of the “rape shield law,” developed for criminal cases, to limit the admissibility of certain types of evidence in civil cases.⁵⁶ Under Rule 412(b)(2), in “a civil case” that involves “alleged sexual misconduct,” “evidence offered to prove that any alleged victim engaged in other sexual behavior,” or “evidence offered to prove any alleged victim’s sexual pre-disposition” is “generally inadmissible,” unless it is “otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”⁵⁷ In addition, “[e]vidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.”⁵⁸ The courts, in agreement with the Advisory Committee Notes to the 1994 Amendments, have recognized that Rule 412 extends to sexual harassment cases.⁵⁹

For example, in *Wolak v. Spucci*, the court prohibited introduction of evidence of a plaintiff’s sexual behavior under Rule 412 in a sexual harassment case, explaining that “[w]hether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive does not turn on the private sexual behavior of the alleged victim, because a woman’s expectations

53. See *Burns v. McGregor Elec. Indus.*, 989 F.2d 959 (8th Cir. 1993).

54. See, e.g., *Rahn v. Junction City Foundry*, 152 F. Supp. 2d 1249, 1257 (D. Kan. 2001) (holding that where plaintiff, inter alia, “wore a sexually suggestive shirt, brought to work a collection of ‘dirty jokes,’ . . . and laughed at dirty jokes on several occasions,” she did not waive her “legal protections against unwelcome harassment”); *Dobrich v. Gen. Dynamics Corp.*, 106 F. Supp. 2d 386, 391 (D. Conn. 2000) (“Even though Plaintiff is herself no shrinking violet and occasionally used foul language on the job, that does not undercut her legal protections against unwelcome sexual harassment in the workplace.”).

55. *Doe v. Oberweis Dairy*, 456 F.3d 704, 713–14 (7th Cir. 2007).

56. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1919.

57. FED. R. EVID. 412(a)–(b)(2).

58. FED. R. EVID. 412(b)(2).

59. See *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1104 (9th Cir. 2002) (collecting cases and citing FED. R. EVID. 412 advisory committee’s notes to 1994 Amendments).

about her work environment cannot be said to change depending upon her sexual sophistication.”⁶⁰

Whether defendants in federal court can obtain discovery of a plaintiff’s prior sexual behavior to show that a plaintiff welcomed the alleged sexually harassing conduct or to show that he or she was not subjectively offended by the conduct is a separate question that is governed by the discovery rules of the Federal Rules of Civil Procedure (FRCP). To obtain discovery of the plaintiff’s prior sexual history, a defendant must overcome two hurdles. First, whether characterized as evidence of motive or “habit,” the information sought must be within the broad scope of permissible discovery under FRCP Rule 26(b). This rule permits discovery of “any matter, not privileged, . . . relevant to the claims or defenses” or that “appears reasonably calculated to lead to the discovery of admissible evidence.” Although FRE Rule 412 does not control the scope of discovery, courts may be reluctant to grant the defendant’s motion to compel discovery on evidence of the plaintiff’s past sexual behavior because of the fact that Rule 412 will limit or bar its admissibility.⁶¹ Second, courts are likely to grant the plaintiff’s cross-motion for a protective order pursuant to FRCP Rule 26(b). Even if the information the defendant seeks is within the scope of Rule 26(b), the plaintiff may demonstrate “good cause” for issuance of a protective order under Rule 26(c) barring discovery into her past sexual history.

2. *Proving That Harassment Is “Severe or Pervasive”*

The Supreme Court has held that in a Title VII hostile work environment case a plaintiff must prove that workplace harassment is “severe” or “pervasive” in order to show that the employer has “otherwise discriminate[d] against [the plaintiff] with respect to his [or her] compensation, terms, conditions, or privileges of employment.”⁶² In *Harris v. Forklift Systems, Inc.*, the Supreme Court stated that severity and pervasiveness are measured both objectively and subjectively.⁶³ The Court articulated the standard as follows:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.⁶⁴

In *Harris*, plaintiff Teresa Harris worked as a manager for an equipment rental company. Her supervisor, company president Charles Hardy, “often insulted

60. 217 F.3d 157, 160 (2d Cir. 2000).

61. *Macklin v. Mendenhall*, 257 F.R.D. 596, 600-04 (E.D. Cal.2009) (discussing effect of Rule 412 on scope of discovery in sexual harassment cases and analyzing case law).

62. 42 U.S.C. § 2000e-2(a)(1).

63. 510 U.S. 17, 22 (1993).

64. *Id.* at 21-22.

her because of her gender and often made her the target of unwanted sexual innuendos.”⁶⁵ Despite her complaints, the abusive verbal harassment continued until she resigned. Harris then brought a Title VII suit against her employer, claiming that Hardy’s conduct had created a hostile work environment. The Supreme Court rejected the defendant’s contention that a plaintiff must show that her psychological well-being was seriously affected or that she suffered an injury and ruled that “concrete psychological harm” is not an element of a hostile environment claim: “So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”⁶⁶ Rather, the Court explained:

[W]hether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.⁶⁷

Thus, a hostile work environment claim can be based on a range of “severe” and/or “pervasive” behaviors, from severely abusive physical conduct, such as rape or other sexual assault,⁶⁸ to frequent “sexually suggestive” or “sexually demeaning” comments over a short period of time.⁶⁹ A single incident involving offensive remarks and suggestive looks unaccompanied by any physical contact or threats, however, is not severe enough to be actionable.⁷⁰

Although *Harris v. Forklift* rejected the view that psychological harm is an indispensable element of a hostile work environment claim, a plaintiff may nevertheless seek damages for mental anguish or emotional distress caused by sexual harassment. Recovery for compensatory damages in a Title VII case, however, is subject to statutory caps, as discussed in Section III.D below. Testimony from a physician or psychologist about the physical or psychological harms caused by the harassment

65. *Id.* at 19.

66. *Id.* at 22.

67. *Id.* at 23.

68. *See, e.g., Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001) (finding that a single act of rape is “sufficiently egregious” to “satisfy the first prong of employer liability under a hostile work environment theory”).

69. *Cadena v. Pacesetter Corp.*, 18 F. Supp. 2d 1220 (D. Kan. 1998).

70. In *Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001), the female plaintiff’s male supervisor and another male employee met with the plaintiff to review the psychological evaluation reports of four job applicants. The report for one of the applicants disclosed a sexually explicit remark the applicant had once made to a co-worker. The plaintiff’s supervisor looked at plaintiff and said, “I don’t know what that means,” and the other male then said, “I’ll tell you later.” Because reviewing job applications was part of plaintiff’s job, and because she conceded that merely reading the statement did not bother her and that only her supervisor and co-worker’s commentary about it offended her, the Supreme Court concluded that “no reasonable person could have believed that the single incident . . . violated Title VII.” *Id.*

is not required in a Title VII case.⁷¹ The plaintiff's testimony about her feelings of stress, humiliation, and embarrassment, and about physical effects, such as nausea, headaches, weight loss, and insomnia, may be sufficient to support compensatory damages.⁷² If a plaintiff alleges that sexual harassment caused psychological, emotional, or mental distress, the defendant may be allowed, through discovery, to compel the plaintiff to submit to psychological testing or other mental examinations.⁷³ Discovery requests for such evidence are controlled by a "good cause" provision in FRCP Rule 35. As a general rule, discovery of psychological evidence is likely to be allowed only when a plaintiff places his or her mental or emotional condition in controversy.⁷⁴

Distinguishing between flirtatious or boorish behavior and illegal sexual harassment in the workplace often turns on the perspective of the alleged victim. In *Harris v. Forklift*, the Supreme Court adopted a "reasonable person" standard to determine whether a work environment is objectively hostile or abusive.⁷⁵ In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that "the objective severity of sexual harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."⁷⁶

In assessing the degree of severity and pervasiveness, courts are required to consider the totality of the harassing incidents, not each incident in isolation.⁷⁷ Because this is a fact-intensive inquiry, many courts have denied hostile work environment claims on the grounds that there is insufficient evidence that the harassing conduct was severe or pervasive.⁷⁸

3. Proving That Harassment Occurred "Because of . . . Sex"

In the early racial and sexual harassment cases, the content or context of the harassment made it reasonably obvious that the plaintiff had been targeted for harassment because of his or her membership in a protected class and, therefore, that the harassment was discrimination in terms of employment *because of* a status

71. See *Farfaras v. Citizens Bank & Trust*, 433 F.3d 558, 566 (7th Cir. 2006).

72. See also *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 472-74 (6th Cir. 2009) (analyzing—in a racial hostile work environment claim brought under Michigan law—Title VII cases on the sufficiency of non-expert testimonial evidence of mental distress and citing *Carey v. Phipus*, 435 U.S. 247, 263-64 n.20 (1978), regarding the requirement for proof of mental distress by "competent evidence").

73. See, e.g., *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (holding that because the plaintiff had placed her mental state in issue, she had waived the psychotherapist-patient privilege).

74. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

75. 510 U.S. 17, 21 (1993).

76. 523 U.S. 75, 81 (1998) (internal punctuation omitted).

77. *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 107 (10th Cir. 1999).

78. See, e.g., *Corbitt v. Home Depot U.S.A., Inc.*, 589 F.3d 1136, 1152-56 (11th Cir. 2009) (denying sexual harassment claim for failing to meet the threshold of "severe or pervasive" conduct), *reh'g en banc granted, opinion vacated* by 598 F.3d 1259 (11th Cir. 2010); *Mendoza v. Borden*, 195 F.3d 1238, 1246-49 (11th Cir. 1999) (en banc) (denying a hostile work environment claim and collecting cases where courts have found the conduct does not satisfy the "severe or pervasive" element of the prima facie case).

protected by Title VII. But when individuals began to bring Title VII claims alleging that they had been sexually harassed by persons of the same sex, some courts thought that the plaintiff was not targeted because of his sex, finding, instead, that the harassment was just bullying but not discrimination because of sex.⁷⁹ In other cases, the court thought the harassment was based on the victim's sexual orientation, rather than sex, and thus not on the basis of a Title VII-protected status.⁸⁰ Courts adopted a variety of approaches, from denying all same-sex claims, to permitting them only if the harasser was homosexual, to permitting them only if the conduct was sexual.⁸¹ Finally, in 1998, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex workplace harassment claims are actionable sex discrimination under Title VII, but the Court left some questions open as to how plaintiffs can prove that same-sex harassment is "discrimination . . . because of . . . sex."⁸²

In *Oncale*, the plaintiff, a roustabout on an eight-man crew working on an offshore drilling platform, alleged that he quit because his supervisors and co-workers had subjected him to sex-related physical assaults and threats of rape.⁸³ The defendant argued that recognizing claims for same-sex harassment would "transform Title VII into a general civility code for the American workplace," but the Court disagreed.⁸⁴ Noting that "Title VII does not prohibit all verbal or physical harassment in the workplace," but only discrimination "because of . . . sex,"⁸⁵ the Court reasoned that regardless of the gender of the parties, harassment with sexual content or connotations" is not "automatically" discrimination "because of sex"; rather, the "critical issue" is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁸⁶

The Court rejected some of the lower courts' approaches to same-sex harassment, including "that such claims are actionable only if the plaintiff can prove that the harasser is homosexual (and thus presumably motivated by sexual desire)" and "that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."⁸⁷ The Court suggested three examples of same-sex harassment that could create an inference that the conduct occurred "because of sex": (1) where there is "credible evidence

79. See, e.g., *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994).

80. See, e.g., *Vanadventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995).

81. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

82. *Id.*

83. *Id.* at 77.

84. *Id.* at 80.

85. *Id.*

86. *Id.* (quoting *Harris v. Forklift*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

87. *Id.* at 79.

that the harasser was homosexual,” suggesting that the harassment was “motivated by sexual desire”; (2) where a woman is harassed by another woman with “sex-specific and derogatory language” indicating “general hostility to the presence of women in the workplace”; and (3) where “direct comparative evidence” shows different treatment of men and women in a mixed-sex workplace.⁸⁸

Because all three of these suggested “evidentiary route[s]” share a requirement that the plaintiff establish that the conduct would not have occurred “but for” the plaintiff’s sex, some courts have interpreted *Oncale* to provide the foundation for an “equal opportunity harasser” or “bisexual harasser” defense to same-sex harassment claims where, for example, the alleged harasser treats workers of both sexes in an equally demeaning manner using “sex-specific and derogatory terms.”⁸⁹ Where a supervisor was “indiscriminately vulgar and offensive . . . , obnoxious to men and women alike,” the court found no Title VII liability.⁹⁰ And when a male supervisor solicited sex from two employees, a man and a woman who were married to each other, the court held that the harassment was not “because of” sex.⁹¹ Thus, evidence that the alleged harasser abuses or seeks to coerce sexual favors from both men and women may provide the employer with a potential defense or negate one of the elements of the plaintiff’s claim, unless the evidence shows that the harassment is targeted at a specific worker even though others witness it and are offended by it.

In *Oncale*, the Court stressed the importance of “the social context in which particular behavior occurs and is experienced by its target” in evaluating the “objective severity” of workplace harassment.⁹² As an example, the Court suggested that some conduct that could not reasonably be considered “severely or pervasively abusive” between a professional football coach and a player could reasonably be found abusive when it occurs between the coach and “the coach’s secretary (male or female) back at the office.”⁹³ Thus, if a same-sex case were to go to trial, the fact finder would have to determine whether the plaintiff experienced “simple teasing or roughhousing among members of the same sex” as opposed to a hostile work environment.⁹⁴ After *Oncale*, this inquiry must be made from the perspective of

88. *Id.* at 80–81.

89. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 262 (4th Cir. 2001).

90. *Id.* See also *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 724 (8th Cir. 2000); *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 847 (E.D. Va. 2002) (ruling that vulgar sexual comments directed at one man in a primarily male workforce are not actionable where harasser made similar comments to the only two women in the workplace); *but see Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003) (*en banc*) (ruling that vulgar comments directed at one female worker were actionable despite the fact that they could be heard by many other workers and were offensive to men as well as to the female plaintiff).

91. *Holman v. Ind.*, 211 F.3d 399, 403 (7th Cir. 2000).

92. *Id.* at 81.

93. *Id.*

94. *Id.* at 82.

“a reasonable person in the plaintiff’s position,” considering all the circumstances including the social context.⁹⁵

Although *Oncale* held that same-sex harassment may be actionable under Title VII regardless of the sexual orientation of the harasser or the victim, but the harassment must still be because of sex and not because of the victim’s sexual orientation. Although sexual orientation and gender identity are not, at the time of publication of this book, protected statuses under federal antidiscrimination statutes,⁹⁶ a number of states and municipalities extend antidiscrimination protections under laws, ordinances, and executive orders, to gay, lesbian, bisexual, and transgender (GLBT) individuals. Moreover, Congress has for a number of years considered legislative reform that would extend federal antidiscrimination laws to GLBT employees,⁹⁷ and Executive Order 11,487 was amended in 1998 to extend antidiscrimination protections on the basis of “sexual orientation” to federal employees.⁹⁸ In the meantime, several Title VII lawsuits involving harassment of gay plaintiffs have gone forward under the theory that gender stereotyping—harassment because of the plaintiff’s gender nonconformance—satisfies the “because of sex” element of a *prima facie* hostile work environment claim.⁹⁹

Although courts have recognized claims for racial or other status-based harassment even if the harasser and the victim share the same race or ethnicity,¹⁰⁰ the plaintiff must still prove that he or she was singled out *because of* the protected trait. If the alleged harassment is motivated by a personal grudge but not by hostility to that person’s gender, race, ethnicity, or other protected trait, it is not action-

95. *Id.*

96. See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

97. The bill—the Employment Non-Discrimination Act (ENDA)—has been introduced to Congress since 1975, but as of the summer of 2010, it had not been passed. The House Report on the version of ENDA introduced in 2007 describes the legislative history from 1975 to 2007. H.R. REP. NO. 110-406, pt. 1, at 2–7 (2007).

98. Exec. Order No. 13,087, 3 C.F.R. § 191 (1998).

99. See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009), which held:

There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that the harassment or discrimination occurred “because of sex,” the case is not appropriate for summary judgment.

See also *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874 (9th Cir. 2001); *but see Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (denying hostile work environment claim under a gender stereotyping theory because plaintiff failed to allege that he did not conform to traditional gender stereotypes in any observable way at work; he alleged harassment based on “perceived homosexuality” but not his “appearance or mannerisms on the job”).

100. See, e.g., *Ross v. Douglas County*, 234 F.3d 391 (8th Cir. 2000).

able.¹⁰¹ On the other hand, some courts have held that it is not necessary that every incident in a pattern of harassment be explicitly linked to the plaintiff's protected trait: When evidence (such as repeated sexist or racist remarks) shows that the plaintiff was targeted because of the protected trait, evidence of generally rude, offensive, or cruel treatment that is not explicitly sexist or racist may be used to show the severity and pervasiveness of the harassment.¹⁰²

4. *Sexual Favoritism as a Form of Sexual Harassment*

When sexual favoritism toward some employees causes other employees to suffer adverse employment consequences, the conduct may give rise to harassment claims under either a quid pro quo or a hostile work environment paradigm. Although an early decision of the Court of Appeals for the District of Columbia suggested that Title VII would permit a disparate treatment discrimination action based on the workplace consensual sexual relationship of third parties,¹⁰³ subsequently many courts disagreed and held that third parties who are disadvantaged or offended by a workplace consensual relationship between a supervisor and a co-worker cannot sue their employer.¹⁰⁴ In 1990 the EEOC issued its Policy Guidance on Employer Liability under Title VII for Sexual Favoritism.¹⁰⁵ The policy covers three situations: isolated favoritism toward a "paramour," favoritism based on "coerced sexual conduct," and "widespread favoritism."¹⁰⁶ Agreeing with most courts, the EEOC's view is that "isolated instances of preferential treatment based upon consensual

101. *Davis v. Coastal Int'l Sec.*, 275 F.3d 1119, 1123 (D.C. Cir. 2002) (harassment that was sexual in nature was motivated by a personal grudge not related to plaintiff's sex or gender); *Brown v. Henderson*, 257 F.3d 246, 256 (2d Cir. 2001) (harassment that was sexual in content was not sex-based because both men and women were harassed and female plaintiff was targeted because of a dispute with her union).

102. *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1102 (10th Cir. 1999); *accord Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) (permitting plaintiffs to rely on "a substantial amount of arguably gender-neutral harassment to bolster a smaller amount of gender-based conduct on summary judgment"). *But see Corbett v. Home Depot U.S.A., Inc.*, 589 F.3d 1136, 1153 n. 10 (11th Cir. 2009) (refusing to consider nonsexual conduct along with sexual conduct in assessing the severity or pervasiveness of workplace harassment), *reh'g en banc granted, opinion vacated by* 598 F.3d 1259 (11th Cir. 2010); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 464 (6th Cir. 2000) (holding that a female dean's intimidation, ridicule, and mistreatment of male instructor were not actionable because her conduct was not of a sexual nature and was not "anti-male"); *Penry v. Fed. Home Loan Bank*, 155 F.3d 1257 (10th Cir. 1998) (concluding that supervisor's "gender-neutral antics" over a four-year period made the plaintiff's work environment merely "unpleasant," and the "gender-based" incidents were "too few and far between" to establish that the sexual harassment was severe or pervasive).

103. *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985).

104. *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 307 (2d Cir. 1986) (denying male employees' "reverse discrimination" or "paramour preference" claim under Title VII that a male supervisor had given favorable treatment to a female employee with whom the supervisor had a romantic sexual relationship); *accord Preston v. Wis. Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005) (collecting cases).

105. EEOC Policy Statement No. N-915.048, 2 EEOC Compliance Manual § 615 (Jan. 12, 1990), available at <http://www.eeoc.gov/policy/docs/sexualfavor.html> [hereinafter EEOC Guidance on Sexual Favoritism].

106. *Id.*

romantic relationships” does not violate Title VII.¹⁰⁷ When an employee is coerced into submitting to a supervisor’s sexual advances in exchange for a job benefit, however, the EEOC may consider the discrimination claims of other employees who are thereby disadvantaged to be actionable under the theory that the favorable treatment was extracted through an unlawful quid pro quo.¹⁰⁸ Where supervisors exhibit “widespread favoritism” toward their subordinates who grant sexual favors—whether the relationships are consensual or coerced—the EEOC Policy Guidance, agreeing with lower court decisions, would find employer liability under either a hostile work environment or an implicit quid pro quo theory.¹⁰⁹ In *Miller v. Department of Corrections*, the California Supreme Court followed the EEOC Guidance on Sexual Favoritism to uphold a sexual harassment claim under the California Fair Employment and Housing Act against a prison warden who had promised and granted employment benefits to three different employees with whom he was having sexual relationships while he simultaneously denied similarly favorable treatment to two other employees.¹¹⁰ The court held:

[A]lthough an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as “sexual playthings” or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.¹¹¹

5. *Bystander or Nontargeted Harassment*

The lower courts have adopted conflicting views on whether employees can sue under Title VII based on the claim that they have been harmed by harassment that is targeted at their co-workers. Sometimes referred to as “bystander,” “ambient,” or “secondhand” harassment, such conduct has been addressed by some courts as a question of standing if the bystander is not in the same protected class as the target of the harassment. For example, *Childress v. City of Richmond* held that white male police officers do not have standing to sue under Title VII based on their

107. *Id.* The EEOC views favoritism toward a “paramour” the same as favoritism toward a spouse or friend, which “may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.” *Id.*

108. *Id.*

109. *See id.* (citing, inter alia, *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), which found that widespread sexual favoritism at the Securities and Exchange Commission constituted an actionable hostile work environment under Title VII).

110. *Miller v. Dep’t of Corrs.*, 115 P.3d 77 (Cal. 2005).

111. *Id.* at 80.

supervisor's alleged racial and sexual harassment of black and female officers.¹¹² Where the plaintiff bystander belongs to the same protected class as the target of harassing language and conduct, the courts have adopted differing approaches. Some courts have held that harassing comments that the plaintiff overhears, but that are not directed at her, may be considered in assessing the “totality of the circumstances” to determine whether there is an actionable hostile work environment.¹¹³ Other courts, however, require the plaintiff to be the target or “within the target area” in order for the harassing conduct to be actionable.¹¹⁴ The EEOC Guidance on Sexual Favoritism discussed above suggests the following framework for analyzing bystander harassment “in a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes”: “Even if the targets of the humor ‘play along’ and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them.”¹¹⁵

a. Free Speech Issues

The defense of constitutionally protected free speech has been raised in some harassment cases in which the nature of the harassing conduct was primarily verbal and not specifically directed at an individual, such as sexual comments and pornographic pictures posted in the workplace. Although a number of law review articles have considered the possibility that the First Amendment offers a viable defense to harassment claims based entirely on speech, no case has rejected a Title VII claim on First Amendment grounds. A leading case rejecting the free speech defense is *Robinson v. Jacksonville Shipyards, Inc.*, in which the District Court for the Middle District of Florida held that injunctive relief limiting discriminatory workplace speech does not violate the First Amendment.¹¹⁶ Although one court cautioned in dictum that “[w]here pure expression is involved”—such as “verbal insults, pictorial or literary matter”—“Title VII steers into the territory of the First Amendment,”¹¹⁷ in most cases the statutory requirements that harassment be targeted at an individual in order to be deemed severe or pervasive will eliminate the possibility of a First Amendment defense to liability under Title VII. Moreover, because both private and governmental employers have and typically exercise broad authority to prohibit offensive speech in the workplace, courts are unlikely to have

112. 134 F.3d 1205 (4th Cir. 1998) (en banc) (per curiam).

113. See *Reeves v. C. H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (en banc); *Ladd v. Grand Trunk W. R.R.*, 552 F.3d 495, 500–01 (6th Cir. 2009); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 176 (4th Cir. 2009).

114. See *Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007) (“The fact that one’s coworkers do or say things that offend one, however deeply, does not amount to harassment if one is not within the target area of the offending conduct. . .”).

115. EEOC Guidance on Sexual Favoritism, *supra* note 105.

116. 760 F. Supp. 1486 (M.D. Fla. 1991).

117. *De Angelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596 (5th Cir. 1995).

the occasion to rule that Title VII is unconstitutional because it provides employers with an additional incentive to regulate hostile workplace speech. In addition, in *R.A.V. v. City of St. Paul*, Justice Scalia's opinion for the Court suggested that sexually derogatory "fighting words" that violate Title VII's general prohibition against sexual discrimination in the workplace are not protected by the First Amendment.¹¹⁸

b. Electronic Harassment

In the age of the Internet, employees have ready access to a large number of databases, including those containing pornographic literature and digitalized pornographic photographs. Through e-mail, employees can send and receive sexually, racially, or religiously offensive jokes, as well as highly personal information about coworkers. Employers often prohibit such uses of e-mail for business reasons apart from fears of Title VII liability. Nevertheless, such workplace communications, if sufficiently severe and pervasive, may form the basis of a claim for hostile work environment.¹¹⁹

6. Title IX Claims Relating to Sexual Harassment

Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in federally-funded educational programs or activities.¹²⁰ The statute has no express private right of action for damages for gender-based employment discrimination in federally funded programs, nor does it state that employees can bring a private cause of action for gender-based discrimination such as workplace harassment. The only express remedy for noncompliance of an institution with the mandates of Title IX is withholding of federal funds by means of enforcement through an administrative procedure.¹²¹ Nevertheless, the Supreme Court has held that students have an implied private right of action to sue their schools under Title

118. 505 U.S. 377, 389-90 (1992).

119. See, e.g., *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 176 (4th Cir. 2009) (plaintiff created triable issue on whether harassment was severe and pervasive based on evidence of employee's offensive statements and viewing of pornographic Web sites, along with his display of a Playboy desk calendar and computer screensaver and pornographic alteration of office Halloween decorations) (collecting cases); *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007) (ruling that a supervisor's alleged conduct of requiring a secretary to handle his pornographic videos and of using pornographic Web sites on her computer, which she subsequently discovered, constituted an objectively hostile work environment under Title VII); *but see* *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 633 (8th Cir. 2000) (ruling that, even if the display of pornographic images on a coworker's computer would be actionable sexual harassment under Title VII, the employer was not liable when it immediately removed the computer and checked all of the company's computers for pornographic content); *Curtis v. DiMaio*, 46 F. Supp. 2d 206, 213-14 (E.D.N.Y. 1999) (holding that sending a single offensive e-mail message on company-wide e-mail system does not establish an actionable hostile work environment claim for racial and ethnic harassment under § 1981 as a matter of law, particularly where the e-mail message was not directed at the plaintiff), *aff'd mem.*, 205 F.3d 1322 (2d Cir. 2000).

120. 20 U.S.C. §§ 1681 *et seq.*

121. 20 U.S.C. § 1682.

IX in cases of teacher-on-student and student-on-student sexual harassment,¹²² but these doctrinal developments are beyond the scope of this book, which focuses solely on workplace harassment. In 2005, in *Jackson v. Birmingham Board of Education*, the Supreme Court held that Title IX provides an implied private right of action for damages for employees at federally funded educational institutions who claim that they have been subjected to retaliatory employment actions for complaining about the institution's failure to comply with Title IX.¹²³ This holding, however, only protects employees at these educational institutions who complain about gender-based discrimination against their students and does not directly apply to employees who are attempting to bring claims under Title IX asserting that they, themselves, are injured by gender-based employment discrimination.

The federal courts have not yet definitively determined whether employees in federally funded programs have an implied private right of action for damages for gender-based employment discrimination under Title IX. The Fifth Circuit is the only court of appeals to consider the issue directly, and it held in *Lakoski v. James* that Title VII is the exclusive remedy for employees seeking damages for discriminatory sex-based employment policies in federally funded programs and activities.¹²⁴ The court in *Lakoski* was "not persuaded that Congress intended that Title IX offer a bypass of the remedial process of Title VII," which has "a carefully balanced remedial scheme for redressing employment discrimination."¹²⁵ Although some lower courts have disagreed with this view, many have followed the preemption rule articulated in *Lakoski*.¹²⁶ Arguably, the Supreme Court's analysis in *Fitzgerald v. Barnstable School Committee*,¹²⁷ which held that Title IX does not preclude a student's § 1983 action against a school for gender discrimination, would seem to support the rationale of *Lakoski*. The Court in *Fitzgerald* noted that Title IX, like § 1983,

122. *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979), held that students have an implied private right of action for sex discrimination under Title IX, and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), held that victims of discrimination prohibited by Title IX may recover monetary damages. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), held that school districts are vicariously liable for teacher harassment of students under Title IX only when the school has actual notice of the harassment and is deliberately indifferent to it. For a discussion of Title IX jurisprudence, see *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795–97 (2009).

123. 544 U.S. 167 (2005).

124. 66 F.3d 751 (5th Cir. 1995), *cert. denied sub nom.* *Lakoski v. Univ. of Tex. Med. Branch at Galveston*, 519 U.S. 947 (1996).

125. *Id.* at 753, 754.

126. For an analysis of the post-*Lakoski* case law in two Title IX hostile work environment cases, see *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2973463, at *11–15 (E.D. Ark. Oct. 9, 2007) (following *Lakoski*); *Towers v. State Univ. of N.Y. at Stony Brook*, No. CV-04-5243 (FB) (RML), 2007 WL 1470152, at *3–4 (E.D.N.Y. May 21, 2007) (same).

127. 129 S. Ct. 788 (2009). *Fitzgerald* held: "[W]e conclude that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools." *Id.* at 797.

does not have an administrative exhaustion requirement or notice provisions, and plaintiffs “can file directly in court and can obtain the full range of remedies.”¹²⁸ The Court thus concluded that “parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.”¹²⁹ According to *Lakoski*, however, Title IX actions by employees for workplace gender discrimination would circumvent the procedures and remedies of Title VII, suggesting that the Supreme Court would agree with *Lakoski* if it were to address the question. In the meantime, the law remains in conflict in this area.

7. Section 1983 Claims Relating to Harassment

State and municipal employees can use the Fourteenth Amendment and 42 U.S.C. § 1983 to challenge governmental classifications or intentional disparate treatment on the basis of race, sex, alienage, or national origin.¹³⁰ Federal courts have ruled that intentional sexual harassment of employees by government officials acting “under color of state law” is actionable under § 1983 as a violation of equal protection or substantive due process under the Fourteenth Amendment.¹³¹ In general, the courts will look to Title VII cases to determine whether the conduct was “unwelcome” and “severe or pervasive.”¹³²

Because a public official sued in his or her individual capacity under § 1983 can assert a defense of qualified immunity, the threshold of actionable harassment in a substantive due process claim has been held to be “whether conduct amounts to an abuse of governmental power that is so brutal and offensive that it was conscience shocking.”¹³³ For example, it did not shock the conscience of the court for a male sheriff to grab or touch the “clothed erogenous zones or other sensitive areas” of the

128. *Id.* at 795–96.

129. *Id.* at 796.

130. *See* *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that governmental classifications based on race, alienage, or national origin are subject to strict scrutiny under the Fourteenth Amendment); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728, 728–30 (2003) (noting that governmental classifications based on sex are subjected to “heightened scrutiny” under the Fourteenth Amendment and recounting the history of equal protection jurisprudence regarding gender classifications). *See also* *Hibbs*, 538 U.S. at 729–30 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which sustained Congress’s abrogation of states’ Eleventh Amendment sovereign immunity in Title VII).

131. *See, e.g.*, *Jones v. Clinton*, 990 F. Supp. 657, 668 (E.D. Ark. 1998) (collecting sexual harassment cases brought under Equal Protection Clause); *Hawkins v. Holloway*, 316 F.3d 777, 785 (8th Cir. 2003) (finding that a male sheriff’s repeated unwelcome sexual touching of his female subordinate constituted “a violation of her bodily integrity sufficient to support a substantive due process claim” under § 1983).

132. *See* *Cross v. Alabama*, 49 F.3d 1490, 1507–08 (11th Cir. 1995) (holding that the elements of a Title VII and equal protection claim are identical); *Jones*, 990 F. Supp. at 668–69 (comparing sexual harassment claims brought under Title VII lawsuits with § 1983 actions for denial of equal protection).

133. *Hawkins*, 316 F.3d at 784 (internal quotation marks omitted).

bodies of his male subordinates while he made “sexually suggestive comments.”¹³⁴ Also, because there is no respondeat superior liability under § 1983, in order to recover damages in a § 1983 suit against a municipality the plaintiff must prove not only that the alleged harasser was acting “under color of law,” but also that the governmental entity had a “policy or custom” condoning a hostile work environment. For example, in a case in which a city manager raped his subordinate employee in her home following a Rotary Club meeting attended by city officials, the victim sued the municipality for sexual harassment under Title VII and § 1983.¹³⁵ Following a trial on her § 1983 sexual harassment claim, the jury awarded \$2 million to the plaintiff. On appeal, the Court of Appeals for the Eleventh Circuit ruled that the manager was acting under color of law when he raped the plaintiff.¹³⁶ Nevertheless, despite the fact that the municipality had a workplace culture that “tolerated and condoned” sexual harassment of women, it did not have a custom or policy that tolerated rape.¹³⁷ Thus, the court of appeals reduced the jury award by \$1.5 million because the municipality could not be held liable for the rape but only for its custom of tolerating a sexually hostile work environment. Harassment claims brought under § 1983, unlike claims brought under Title VII, do not require administrative exhaustion and are not subject to limitations on damages.¹³⁸

B. HARASSMENT ON THE BASIS OF RACE, COLOR, OR NATIONAL ORIGIN

1. Title VII Claims Based on Race, Color, or National Origin

The Supreme Court has recognized that “hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.”¹³⁹ As noted earlier, *Rogers v. EEOC*, a national-origin harassment

134. *Id.* at 784–85 (finding no § 1983 substantive due process violation on these facts because “the sheriff engaged in his offensive behavior in the context of junior high locker room style male horseplay”). Compare *Hawkins with Downing v. Bd. of Trs. of Univ. of Ala.*, 321 F.3d 1017, 1023 (11th Cir.2003) (opinion withdrawn 2004) (relying on *Oncale* to hold that the Equal Protection Clause protects state employees from same-sex discrimination).

135. *Griffin v. City of Opa-locka*, 261 F.3d 1295 (11th Cir. 2001), *cert. denied*, 535 U.S. 1033 & 1034 (2002).

136. *Id.* at 1303 (“This Court has previously recognized that under certain circumstances, a rape of a person by a state actor or official could violate the Constitution and serve as the basis for a suit under § 1983.”).

137. *Id.* at 1311–12. (“We believe it fair to say that the City’s tolerance of gross sexual harassment, its failure to take remedial action despite actual and constructive knowledge of the problem and its complete lack of any sexual harassment policy or complaint procedure taken together clearly constitute a ‘moving force’ behind the rampant sexual harassment at the City. As such, we uphold the jury’s conclusion that the City had a policy or custom of ignoring or tolerating gross sexual harassment.”).

138. See *infra* Section III.D.

139. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002).

case cited with approval in *Meritor*,¹⁴⁰ is considered the first case to recognize a hostile work environment as a form of discrimination under Title VII. Unlike a sexual harassment case, however, “unwelcomeness” is generally not considered a required element of a hostile work environment claim based on race and/or national origin. Although plaintiffs in racial or national origin harassment cases will often allege that certain workplace verbal or physical conduct was “unwelcome,” it is generally presumed that racial and ethnic slurs and epithets, graffiti, and symbols such as nooses or swastikas in the workplace are unwelcome.¹⁴¹ With regard to the severity or pervasiveness of the alleged harassing conduct, the plaintiff must meet both the subjective and objective prongs, just as in cases of a hostile work environment based on sex. For example, in *Daniels v. Essex Group, Inc.*, the Seventh Circuit found that the plaintiff, the sole black man in his workplace, had met his burden of proof under the subjective standard with evidence that he was “profoundly upset and affected by the racial harassment that he withstood” over the course of his 10 years of employment.¹⁴² Moreover, he met his burden under the objective prong with proof at trial that he was subjected to graffiti such as “KKK” and “All niggers must die,” as well as having a black dummy hung in the doorway near his workstation.¹⁴³ Numerous cases have found liability for a racially hostile work environment when nooses were hung in the workplace.¹⁴⁴ A workplace environment in which racial or ethnic slurs and jokes are frequent and pervasive over a period of time may be actionable

140. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). See *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 66 (1986) (noting with approval that lower courts had held that harassment based on race, religion, or national origin violates Title VII).

141. In its amicus brief in *Meritor*, the EEOC observed that “[w]hereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendos are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.” Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, at E-6, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979). See Radford, *supra* note 49, at 529 n.187 (citing and quoting EEOC amicus brief); Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 585 & 585 n.57 (1997) (observing that “commentators have observed that the unwelcome nature of harassment is presumed where it is based on racial grounds”).

142. 937 F.2d 1264, 1272–73 (7th Cir. 1991).

143. *Id.* at 1274 (“We agree . . . that the racial incidents described by [the plaintiff] were immediately threatening to him and that ‘they would have adversely affected the work performance and well-being of a reasonable person.’”).

144. See, e.g., *Porter v. Erie Foods Int’l, Inc.*, 576 F.3d 629, 635–36 (7th Cir. 2009) (discussing the noose as a symbol of terror for African-Americans); *Brown v. Nucor Corp.*, 576 F.3d 149 (7th Cir. 2009) (reversing the district court’s denial of class certification in a case alleging plant-wide racial harassment, including broadcast of racial epithets, displays of the Confederate flag, and depictions of nooses in e-mails sent to employees); *Tademy v. Union Pac. Corp.* 520 F.3d 1149, 1162 (10th Cir. 2008) (finding actionable hostile work environment where plaintiff alleged “a series of acts of harassment, ‘culminating in the life-sized lynching noose[,]’ an incident that affected him so profoundly that he did not return to work”) (collecting racial harassment cases involving nooses).

even though no single incident is severe.¹⁴⁵ Certain racial and ethnic epithets, such as “nigger,” “kike,” “spic,” or “wetback,” depending on the frequency and context of their use, may be found to be severe or pervasive.¹⁴⁶ The Supreme Court in a brief per curiam opinion ruled that even use of the word “boy” without an explicit racial indicator (such as “black boy”) could be evidence of racial animus because “[t]he speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom and historical usage.”¹⁴⁷ Relying on *Oncale*, a court of appeals recognized a same-race hostile work environment claim under Title VII when a black correctional officer alleged that his black supervisor called him “black boy” and “nigger.”¹⁴⁸ Even use of facially neutral “code words” that imply racial animus has been found to provide the basis for a Title VII claim for a racially hostile work environment.¹⁴⁹

2. Section 1981 Claims Relating to Harassment

Section 1981 of the Civil Rights Act of 1866 guarantees “all persons” the same right as white citizens “to make and enforce contracts.”¹⁵⁰ In *St. Francis College v. Al-Khazraji*, the Supreme Court interpreted § 1981 broadly to protect classes of persons on the basis of their “race” as the concept was originally understood in the nineteenth century to include “ancestry and ethnic characteristics.”¹⁵¹ The statute protects persons of all races, including white persons.¹⁵² Unlike Title VII, it does not apply to discrimination on the basis of sex or religion.¹⁵³ Although § 1981 prohibits governmental discrimination on the basis of alienage,¹⁵⁴ there is disagreement in the lower courts regarding whether § 1981 covers alienage discrimination between private parties.¹⁵⁵ Congress amended § 1981 in the Civil Rights Act of 1991 by

145. See, e.g., *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 683 (10th Cir. 2007) (permitting plaintiff to go to trial where it was a “close question” on the issue of pervasiveness, where the plaintiff “presented evidence of racially derogatory treatment, well beyond being sworn at and joked with, that was specifically directed at [him] because of his national origin”).

146. See, e.g., *Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (“While there is no ‘magic number’ of slurs that indicate a hostile work environment, we have recognized before that an unambiguously racial epithet falls on the ‘more severe’ end of the spectrum.”).

147. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006).

148. *Ross v. Douglas County*, 234 F.3d 391, 396 (8th Cir. 2000).

149. See *Aman v. Cort Furniture Rental Corp.* 85 F.3d 1074, 1081, 1083 (3d Cir. 1996).

150. 42 U.S.C. § 1981(a).

151. 481 U.S. 604, 613 (1987).

152. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

153. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976).

154. *Graham v. Richardson*, 403 U.S. 365, 377 (1971) (holding that § 1981 prohibits discrimination against aliens by state governments). See also *Sagana v. Tenorio*, 385 F.3d 731, 740 (9th Cir. 2004) (discussing the different treatment of § 1981 claims brought by aliens in cases of governmental versus private discrimination), *cert. denied*, 543 U.S. 1149 (2005).

155. Compare *Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998) (holding that § 1981 prohibits private discrimination on the basis of alienage), *cert. dismissed sub nom.* *United Bhd. of Carpenters & Joiners of Am. v. Anderson*, 527 U.S. 1030 (1999), with *Bhandari v. First Nat’l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (en banc) (holding that § 1981 does not cover discrimination against aliens by private parties).

adding a new subsection (b), which defines the phrase “make and enforce contracts” to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”¹⁵⁶ Courts have interpreted this language to permit hostile work environment claims under § 1981.¹⁵⁷ Such claims are treated the same as claims brought under Title VII in terms of the required elements.¹⁵⁸ An issue that may arise in a § 1981 harassment claim is whether the plaintiff is in the class protected by the statute. Plaintiffs attempting to assert a § 1981 claim solely on the basis of national origin are likely to face a motion to dismiss on the authority of *Saint Francis College v. Al-Khazraji*.¹⁵⁹ But some courts have been willing to permit an allegation of national origin—not racial—discrimination to go to trial where there is a factual dispute as to whether the alleged harassment was based on the plaintiff’s ethnic characteristics as opposed to the nation where he or she came from.¹⁶⁰

C. HARASSMENT ON THE BASIS OF RELIGION

Religious harassment claims generally fall into one of two types: (1) harassment directed at employees because of their religious beliefs or practices; or (2) harassment directed at employees because of their failure to adhere to the religious beliefs of the harasser—sometimes called “nonadherence” or reverse religious discrimination claims. The first type of claim was recognized as actionable harassment under Title VII in *Compston v. Borden, Inc.*,¹⁶¹ an early religious harassment case that the Supreme Court cited with approval in *Meritor Savings Bank v. Vinson*.¹⁶² *Compston* held that “[w]hen a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee’s professed religious views, such activity necessarily will have the effect of altering the conditions of his employment.”¹⁶³ The courts generally apply the analytical framework and employer liability rules developed in sexual harassment

156. 42 U.S.C. § 1981(b) (overturning *Patterson v. McLean Credit Union*, 491 U.S. 164, 179–80 (1989), which held that a hostile work environment claim is not actionable under § 1981).

157. See *Manatt v. Bank of Am.*, 339 F.3d 792, 797 & n.4 (9th Cir. 2003) (agreeing on this point with all other circuits that had decided the issue at the time and citing cases from the First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits).

158. See, e.g., *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 n.3 (9th Cir. 2008); *El-Hakem v. BJB, Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005); *Manatt*, 339 F.3d at 797–98 (collecting cases).

159. 481 U.S. 604 (1987).

160. See, e.g., *Manatt*, 339 F.3d at 798 (permitting the § 1981 hostile work environment claim of a woman of Chinese national origin with Asian ethnic characteristics to go to trial based solely on her allegations of national origin discrimination); *Arumbu v. Boeing Co.*, 112 F.3d 1398, 1411 n.10 (10th Cir. 1997) (recognizing that § 1981 does not protect individuals on the basis of national origin but that plaintiff’s hostile work environment claim based on his Mexican-American ancestry falls within § 1981’s prohibition of racial discrimination).

161. 424 F. Supp. 157 (S.D. Ohio 1976).

162. 477 U.S. 57, 66 (1986).

163. 424 F. Supp. at 160–61.

cases to claims of religious harassment.¹⁶⁴ Thus, the plaintiff “must demonstrate that the harassment was (1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer.”¹⁶⁵ For example, evidence that co-workers used religious epithets and derogatory terms regarding the plaintiff’s religion or religious-based appearance, such as calling a Muslim employee “towel head” or “Taliban,” can be used to prove that the harassing conduct was “because of religion.”¹⁶⁶ Likewise, the severity and pervasiveness of the conduct can be established with evidence that co-workers repeatedly used harsh and demeaning terms to ridicule the plaintiff on the basis of his religion.¹⁶⁷ As with sexual harassment claims, whether employer liability for the harassing conduct can be established based on vicarious liability or negligence depends on whether the alleged harasser was a supervisor, co-worker, or third party such as a client or customer.¹⁶⁸

The second type of religious harassment claim—the “nonadherent” case—raises the question whether the plaintiff is a member of the “protected class” under Title VII, as well as whether the conduct is “unwelcome.” These are typically cases where the plaintiff alleges that a co-worker or supervisor is proselytizing the plaintiff to participate in the harasser’s religious beliefs or practices. The “protected class” issue has arisen in so-called reverse disparate treatment cases where an employee has suffered an adverse employment action because he or she did not belong to the supervisor’s religion.¹⁶⁹ Noting that an employer “has no legal obligation to suppress any and all religious expression merely because it annoys a single employee,” the court in *Powell v. Yellow Book USA, Inc.*, concluded that a co-worker’s posting of religious messages in her own cubicle, which the plaintiff

164. *Abramson v. William Patterson Coll. of N.J.*, 260 F.3d 265, 276–77, 276 n.5 (3d Cir. 2001) (“[W]e apply the well-established framework for hostile work environment claims with respect to other protected categories to our analysis of a hostile work environment claim made on account of religion.”).

165. *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313 (4th Cir. 2008).

166. *Id.* at 314.

167. *Id.* at 315–19 (discussing the sufficiency of allegations of severe and pervasive co-worker harassment of a Muslim employee); *see also id.* at 318 (noting that “we cannot regard as ‘merely offensive,’ and thus ‘beyond Title VII’s purview,’ constant and repetitive abuse founded upon misperceptions that all Muslims possess hostile designs against the United States, that all Muslims support jihad, that all Muslims were sympathetic to the 9/11 attack, and that all Muslims are proponents of radical Islam”) (citations omitted).

168. *See, e.g., id.* at 318, 319.

169. *See, e.g., Noyes v. Kelley Servs.*, 488 F.3d 1163, 1168–69 (9th Cir. 2007); *Venters v. City of Delphi*, 123 v. F.3d 956, 974–77 (7th Cir. 1997) (discussing Title VII hostile work environment claim based on religion); *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993). *See also Winspear v. Cmty. Devel., Inc.*, 574 F.3d 604, 609 n.2 (8th Cir. 2009) (Smith, J., dissenting) (discussing reverse religious discrimination—or “nonadherence”—cases and observing that the “‘protected class’ showing required in race or sex discrimination cases does not apply . . . because ‘it is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim.’”) (citations omitted).

found “inappropriate and distracting,” was not actionable religious harassment.¹⁷⁰ On the other hand, one court of appeals concluded that quid pro quo harassment “is not limited to gender discrimination” and that an employer could be found liable for a supervisor’s attempt to require that an employee engage in particular religious practices as a condition of keeping her job.¹⁷¹ In public employment, religious harassment claims can be based on the First Amendment’s free expression and establishment clauses.¹⁷²

The EEOC issued proposed guidelines on harassment in 1993 that attempted to clarify the line between protected religious speech and unlawful harassment in the workplace.¹⁷³ Religious groups, in particular, expressed concerns that some employees and employers might rely on the guidelines to justify suppressing religious expression in the workplace. Because of opposition to the proposed guidelines, the EEOC withdrew them in 1994.¹⁷⁴ In 2008, the EEOC issued a new compliance manual for Title VII claims of religious discrimination, which includes a discussion of the scope of prohibited religious harassment and the bases for finding employers liable.¹⁷⁵

D. HARASSMENT ON THE BASIS OF AGE OR DISABILITY

A claim of harassment on the basis of age or disability proceeds largely in the same manner as a claim of hostile environment harassment based on any other protected category.¹⁷⁶ One difference is that in an age or disability harassment case, as in any age or disability discrimination case, the plaintiff must prove that he is in the protected class. While everyone has a race, color, gender, national origin, or some type of religion (or lack thereof) that is a protected class under Title VII, only those age 40 or over are in the class protected by the ADEA.¹⁷⁷ Under the Ameri-

170. 445 F.3d 1074, 1078 (8th Cir. 2006).

171. *Venters*, 123 F.3d at 976–77.

172. *See generally id.*

173. 29 C.F.R. § 1609 (proposed Oct. 1, 1993).

174. 59 Fed. Reg. 58,312 (1994).

175. *See* EEOC, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), available at http://www.eeoc.gov/policy/docs/qanda_religion.html. *See also* EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace, available at http://www.eeoc.gov/policy/docs/best_practices_religion.html.

176. *See* *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (hostile environment harassment claim is actionable under ADA); *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 232–35 (5th Cir. 2001) (same); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 175–77 (4th Cir. 2001) (same); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229 (2d Cir. 2007) (hostile environment harassment claims are cognizable under ADEA); *Terry v. Ashcroft*, 336 F.3d 128, 148–49 (2d Cir. 2003) (finding plaintiff had adduced sufficient evidence of hostile environment harassment on basis of age to withstand summary judgment); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004) (hostile environment claims cognizable under ADEA); *see also* *Suarez v. Pueblo Int'l Inc.*, 229 F.3d 49 (1st Cir. 2000) (recognizing availability of claim of constructive discharge under ADEA); *Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675 (7th Cir. 2005) (assuming but not deciding that hostile environment claims are available under ADEA and citing two previous Seventh Circuit cases that assumed but did not decide the same).

177. 29 U.S.C. § 631(a).

cans with Disabilities Act, only “qualified” individuals with a statutorily recognized “disability,” or those with a history of having a statutorily recognized disability, or those “regarded as” or “perceived as” having a disability are in the protected class.¹⁷⁸ Age- or disability-based harassment targeted at someone who is not in the class protected by federal statutes might nevertheless be actionable under state tort law or a state fair employment law with a more capacious definition of the protected class. The scope of the protected class under the ADA is a complex issue beyond the scope of this chapter, but the basic concept is that one must have, or be perceived as having, or have a history of having, a mental or physical condition that is a “substantial impairment of a major life activity.”¹⁷⁹ In several harassment cases in which the plaintiff was targeted by co-workers because of a condition that the harassers apparently believed made the worker unfit or undesirable as a colleague, the courts nevertheless considered it possible, and in some cases held, that the harassment was not actionable under the ADA because the condition that led to the harassment was not a statutorily defined disability.¹⁸⁰

Assuming a victim of harassment is within the protected class, the elements of a claim of harassment are the same as under Title VII.¹⁸¹ The plaintiff must show that the harassment was targeted at her “because of” her age or the actual, perceived, or past disability and that the harassment was severe or pervasive.¹⁸² Although some cases state that unwelcomeness is an element of the plaintiff’s claim, others do not, and as in racial harassment cases, it would be the rare circumstance in which a court could find that a plaintiff welcomed harassment on the basis of age or dis-

178. 42 U.S.C. § 12102. The statutory definition of disability was expanded by the ADA Amendments Act of 2008. Pub. L. No. 110-325, 122 Stat. 3553 (2008). The new definition partially overrules some Supreme Court and lower court cases narrowly defining both disability and when an employee is covered by the statute because she is regarded as disabled. The ADA amendments will necessitate changes in section 902 of the EEOC Compliance Manual. The changes are explained at http://www.eeoc.gov/ada/amendments_notice.html.

179. 42 U.S.C. § 12102.

180. See *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75 (1st Cir. 2006) (noting it would be a difficult question whether an employee with a penile dysfunction was disabled or even in the protected class as being perceived as disabled, but concluding that the employer had not preserved the issue for appellate review and thus upholding a jury verdict for the plaintiff under the ADA); *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (employee with history of epilepsy who had brain surgery to treat epilepsy and was teased by co-workers on account of the metal plate in his skull is within protected class under ADA); *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 508 (5th Cir. 2003) (emergency room physician who contracted hepatitis C is not “disabled” or “regarded as” disabled, even though she was harassed because of her condition, because having hepatitis C is not a “substantial impairment of a major life activity,” though it is a significant impairment on the ability to practice emergency room medicine); *Rohan v. Networks Presentations LLC*, 375 F.3d 266 (4th Cir. 2004) (actor suffering from posttraumatic stress disorder not disabled or perceived as disabled).

181. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996).

182. Thus, a former employee who alleged disability harassment based on being called “platehead” by co-workers and supervisors after someone revealed to co-workers that he had epilepsy and had had brain surgery failed to establish that the harassment was sufficiently severe to be actionable, although the name-calling was pervasive. See *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 721–22 (8th Cir. 2003).

ability.¹⁸³ The plaintiff must also establish a basis for employer liability,¹⁸⁴ and the *Ellerth/Faragher* defense is available as in Title VII cases.¹⁸⁵ As with other harassment cases, an employee may also bring a successful retaliation claim under the ADEA or the ADA even if his claim of harassment fails so long as he can establish, under the same standards as applied to other retaliation claims, that he was retaliated against for opposing the harassment or filing a charge about it.¹⁸⁶

III. Liability and Damages

A. EMPLOYER LIABILITY FOR HARASSMENT

Although the Supreme Court in *Meritor* concluded that sexual harassment in the workplace violates Title VII, the Court did not provide a standard for determining when an employer should be held liable for such conduct. Instead, the Court concluded that courts should use traditional common-law agency principles to resolve questions about employer liability.¹⁸⁷ The Court noted that by defining “employer” in Title VII to include any “agent” of an employer, Congress “surely evince[d] an intent to place some limit on the acts of employees for which employers under Title VII are to be held responsible.”¹⁸⁸ The Court held that “employers are [not] always automatically liable for sexual harassment by their supervisors” and that “absence of notice to an employer does not necessarily insulate that employer from liability.”¹⁸⁹

After *Meritor*, the courts of appeals adopted conflicting standards for holding employers liable for the harassing conduct of their supervisory employees.¹⁹⁰ Some courts imposed liability on employers for sexual harassment by supervisors only if the employer knew or should have known of the harassment; some imposed vicarious liability unless the employer had an effective grievance procedure; other courts considered whether the supervisor was acting within the scope of employment; and the EEOC position was that employers should be held liable for supervisory harassment “regardless of whether the specific acts complained of were authorized

183. Compare *Crawford*, 96 F.3d at 834–35 (omitting unwelcomeness in the list of elements of plaintiff’s case), with *Bass v. E.I. du Pont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (listing unwelcomeness as an element of plaintiff’s prima facie case alleging race, age, and gender harassment).

184. See *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056–57 (8th Cir. 2004) (discussing whether an alleged harasser in age-based harassment case is a supervisor for purposes of employer liability under the *Ellerth/Faragher* framework).

185. *Arrieta-Colon v. Wal-Mart P.R., Inc.*, 434 F.3d 75, 85–86 (1st Cir. 2006).

186. See *Shaver*, 350 F.3d at 724.

187. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

188. *Id.*

189. *Id.*

190. See generally Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for “Hostile Work Environment” Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 673–86 (1995) (collecting and analyzing post-*Meritor* cases).

or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”¹⁹¹ In addition, several courts imposed strict liability on employers for the conduct of employees who possessed authority to hire, fire, promote, discharge, or determine other terms and conditions of employment.¹⁹² With respect to nonsupervisory employees, courts and the EEOC Guidelines generally agreed that the employer was liable under a negligence standard, that is, only when it had “actual or constructive notice of the harassment” and failed to take immediate and appropriate corrective action.¹⁹³

It was this welter of approaches that led the Supreme Court in 1998 to decide two companion cases, *Burlington Industries, Inc. v. Ellerth*¹⁹⁴ and *Faragher v. City of Boca Raton*,¹⁹⁵ to resolve the conflict in the circuits and with the EEOC over the standard for determining employer liability for a supervisor’s sexual harassment of employees. In both cases, the Court took the principles articulated in *Meritor* as the starting point, recognizing that, under agency principles laid out in Section 219(1) of the Restatement (Second) of Agency, an employer is liable for torts of his employees “committed while acting in the scope of their employment.”¹⁹⁶ The Court concluded, however, that a supervisor who harasses employees is not acting within the scope of his or her employment.¹⁹⁷ Nevertheless, under agency principles, employers may be liable for torts committed by employees outside the scope of employment when the employer intended the conduct or negligently or recklessly permitted it to occur (this is *direct* liability).¹⁹⁸ Thus, an employer is directly liable under Title VII for its own negligence in permitting harassment when “it knew or should have known about the conduct and failed to stop it.”¹⁹⁹ Alternatively, an employer may be *vicariously* liable when a supervisor is aided in committing actionable harassment by the existence of his agency relationship with the employer.²⁰⁰

In the aftermath of *Meritor*, lower court decisions were also in conflict over whether an employer could be held strictly liable for its supervisor’s unfulfilled threats of retaliation against an employee who denies the supervisor’s demands for sexual favors. Because some courts had ruled that proof of quid pro quo harass-

191. See *id.* at 673–86; and *id.* at 677 n.52 (quoting EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604(11)(c) (1994)).

192. *Id.* at 683.

193. *Id.* See also EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604(d).

194. 524 U.S. 742 (1998).

195. 524 U.S. 775 (1998).

196. RESTATEMENT (SECOND) OF AGENCY (1957), quoted in *Ellerth*, 524 U.S. at 756, and in *Faragher*, 524 U.S. at 793 (internal quotation marks omitted).

197. *Ellerth*, 524 U.S. at 757 (“The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.”); *Faragher*, 524 U.S. at 793–801 (analyzing scope of employment issue and concluding that supervisory harassment is outside the scope of employment).

198. *Ellerth*, 524 U.S. at 758 (citing and quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(a)–(b)).

199. *Id.* at 759 (“Negligence sets a minimum standard for employer liability under Title VII. . .”).

200. *Id.* at 759–60; *Faragher*, 524 U.S. at 802.

ment (which by definition is committed by a supervisor) always results in strict liability, many plaintiffs—like the plaintiff in *Ellerth*—attempted to fit their sexual harassment claims into the quid pro quo paradigm. *Ellerth* involved a female salesperson working in a small marketing office of a large corporation where her immediate supervisor’s boss, a company vice president, allegedly made numerous threats to retaliate against her “if she denied some sexual liberties.”²⁰¹ The plaintiff never submitted to the supervisor’s alleged demands for sexual favors and never complained about the conduct; the supervisor’s threatened reprisals never materialized (in fact, the plaintiff was promoted); and the plaintiff resigned, claiming in her subsequent Title VII lawsuit that she was the victim of quid pro quo harassment. In denying summary judgment for the employer, the Court of Appeals for the Seventh Circuit, sitting en banc, produced no majority opinion but seven opinions with a range of conflicting views on whether the supervisor’s alleged conduct qualified as quid pro quo harassment and, if so, whether the employer was subject to vicariously liability for the conduct or was liable only if it could be shown to have been negligent.²⁰² The court expressed hope that “perhaps the Supreme Court will bring order to the chaotic case law in this important field of practice.”²⁰³ The Supreme Court answered the challenge in *Burlington Industries, Inc. v. Ellerth*, addressing the question “whether, under Title VII . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions.”²⁰⁴

In *Ellerth*, in an opinion by Justice Kennedy, the Supreme Court acknowledged that the terms quid pro quo and hostile work environment—“to the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general”—“are relevant when there is a threshold question of whether a plaintiff can prove discrimination in violation of Title VII,” but the Court concluded that “the labels . . . are not controlling for purposes of establishing employer liability.”²⁰⁵ Instead, the Court held that Title VII imposes vicarious (strict) liability on employers “[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands.”²⁰⁶ Hence, when the plaintiff resists sexual overtures and is fired, demoted, passed over for hiring or promotion, or otherwise suffers a tangible employment action, the

201. *Ellerth*, 524 U.S. at 751.

202. *Jansen v. Packaging Corp. of Am.*, 123 490 (7th Cir. 1997) (en banc), *aff’d sub nom.* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

203. *Id.* at 494–95.

204. *Ellerth*, 524 U.S. at 746–47.

205. *Id.* at 753, 765; see also *id.* at 751 (“The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.”).

206. *Id.* at 753.

employer is strictly liable. But, “[f]or any sexual harassment preceding the employment decision to be actionable, . . . the conduct must be severe or pervasive.”²⁰⁷ Thus, all other proven claims of supervisory sexual harassment will result in vicarious liability for the employer unless the employer proves the affirmative defense, which is described below. Because the plaintiff in *Ellerth* did not suffer from a tangible employment action, but “only unfulfilled threats,” her attempt to label the conduct as quid pro quo harassment had no bearing on the question of employer liability; rather, the Court ruled, her claim “should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.”²⁰⁸

Ellerth’s companion case of *Faragher v. City of Boca Raton*²⁰⁹ involved a female ocean lifeguard who worked at a city beach during the summers while she was in college. Two of her immediate supervisors repeatedly subjected her and other female lifeguards to lewd remarks and uninvited, offensive sexual touching. Faragher eventually resigned and sued the city under Title VII for the conduct of her supervisors that, she alleged, had created a hostile work environment. After a bench trial ruling in her favor, which awarded her nominal damages, the Eleventh Circuit reversed, holding that there was no basis for imposing liability against the city on these facts under a theory of either vicarious liability or direct liability (negligence).²¹⁰ The Supreme Court reversed, holding that where a supervisor’s “sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination,” the employer is “vicariously liable, but subject to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of [the] plaintiff victim.”²¹¹ In an extensive analysis of agency law, Justice Souter’s opinion in *Faragher* agreed that vicarious liability could be imposed on the city under the “aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement” where a supervisor’s harassing conduct of his subordinate was “made possible by abuse of his supervisory authority.”²¹² In order to accommodate the holding in *Meritor* that “an employer is not ‘automatically’ liable for harassment by a supervisor who creates the requisite degree of discrimination,” the Court adopted the affirmative defense to employer liability, as articulated in *Ellerth*, for actionable supervisory harassment that does not culminate in a tangible employment action.²¹³

Ellerth and *Faragher* used identical language to state the rule of employer liability in cases of supervisory harassment and the elements of the employer’s affirmative defense:

207. *Id.* at 754.

208. *Id.* at 755.

209. *Faragher*, 524 U.S. 775 (1998).

210. *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

211. *Faragher*, 524 U.S. at 780.

212. *Id.* at 802.

213. *Id.* 804, 807–08.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.²¹⁴

1. *Proving and Defending Harassment by Supervisors*

To summarize: In *Ellerth* and *Faragher*, the Court held that employers are vicariously liable when their supervisors engage in actionable sexual harassment, regardless of whether the conduct is characterized as quid pro quo or hostile work environment. When the harassment culminates in a tangible employment action, the employer is strictly liable. On the other hand, in the absence of a tangible employment action, if the employee is able to prove that the supervisor subjected the employee to an actionable hostile work environment, the employer is vicariously liable but is permitted to assert an affirmative defense to liability or damages.

In applying the so-called *Ellerth/Faragher* rule of employer liability, courts follow the steps outlined by the Supreme Court.²¹⁵ First, in determining whether vicarious liability will be imposed on the employer for harassment by a supervisor, the court must ascertain the status of the harasser—whether he or she is a supervisor in the chain of command over the plaintiff.²¹⁶ If the harasser is a such a supervisor, the next question is whether the harassment culminated in a tangible employment action, such as where the employment decision “resulted from a refusal to submit to a supervisor’s sexual demands.”²¹⁷ If so, the employer is strictly liable, including for any actionable (severe or pervasive) harassing conduct leading up to the tangible employment action. If there was no tangible employment action, the court must determine whether the plaintiff has established the elements of an actionable hostile work environment claim. If so, the employer is permitted to assert the *Ellerth/Faragher* affirmative defense with its two “necessary elements,” which the Court describes in the quoted paragraph above, to limit its liability or damages.

214. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

215. See, e.g., “Supervisor Sexual Harassment Roadmap,” *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 n.5 & 288 app. (5th Cir. 2000).

216. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2d Cir. 2003) (“The starting point for analyzing employer vicarious liability in a Title VII hostile work environment action is to determine whether the person who allegedly created that environment is properly characterized as having been the plaintiff’s ‘supervisor.’”).

217. *Ellerth*, 524 U.S. at 753.

a. Distinguishing “Supervisors” from “Nonsupervisors”

An employer will be subject to vicarious liability for actionable workplace harassment if the harasser was a “supervisor with immediate (or successively higher) authority over the employee.”²¹⁸ The term “supervisor” does not appear in Title VII, but the statute includes in the definition of an “employer” “any agent” of the employer.²¹⁹ Under agency law, supervisors with sufficient delegated authority are “agents” of their employers.²²⁰ In the absence of a statutory definition of “supervisor,” the courts will continue to address the issue on a case-by-case basis.²²¹ The EEOC’s 1999 Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors is instructive: “An individual qualifies as an employee’s ‘supervisor’ if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) the individual has authority to direct the employee’s daily work activities.”²²² If the harasser is “outside the supervisory chain of command” over the plaintiff, with no real authority to make employment decisions or direct the plaintiff’s work activities, the employer may be vicariously liable for his or her harassment if “the employee reasonably believed that the harasser had such power.”²²³ In addition, the Court observed in *Faragher* that if the harassing supervisor is “within that class of an employer organization’s

218. *Id.* at 765; *Faragher*, 524 U.S. at 807.

219. 42 U.S.C. § 2000e(b).

220. *See Mack*, 326 F.3d at 123–27 (examining agency law and applying *Ellerth* and *Faragher* to find that mechanic in charge of elevator mechanics at work site was a “supervisor” for purposes of imposing vicarious liability on the employer for sexual harassment).

221. To determine whether an individual is a “supervisor,” the EEOC Guidelines on Sexual Harassment, adopted before *Meritor*, stated that the EEOC “will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.” 29 C.F.R. § 1604.11(c). This continues to be the approach that courts take. *See, e.g., Merrit v. Albemarle Corp.*, 496 F.3d 880, 884 (8th Cir. 2007) (finding that a “team leader” who could not assign the plaintiff “significantly different duties” and who “lacked the authority to take such tangible employment actions as hiring, firing, or promoting” the plaintiff was not a supervisor). *Compare Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004) (finding that higher ranked co-workers who “managed plaintiff’s work assignments” were not Title VII supervisors because they lacked authority “to make any decisions affecting the terms and conditions” of plaintiff’s employment), *with Phelan v. Cook County*, 463 F.3d 773, 784 (7th Cir. 2006) (finding that the harassers’ supervisory status created a material question of fact and noting: “It would be an odd result if an employer could escape the possibility of strict liability for supervisor harassment simply by scattering supervisory responsibilities amongst a number of individuals, creating a Title VII supervisory Hydra.”).

222. Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 at III. A (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> [hereinafter EEOC Guidance on Employer Liability].

223. *Id.* at III.B. *See also Ellerth*, 524 U.S. at 759 (“If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim’s mistaken conclusion must be a reasonable one.”); *Llampallas v. Mini-Circuit Lab, Inc.*, 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) (“Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee’s action.”).

officials who may be treated as the organization’s proxy,” liability will be automatically imputed to the employer and it will not be entitled to raise the affirmative defense, even in the absence of a tangible employment action.²²⁴ Citing examples provided in *Faragher*, the EEOC’s Guidance on Employer Liability lists the following company officials whose status would make them qualify as an “alter ego” or “proxy” of the employer: its president, owner, partner, or corporate officer.²²⁵

b. Tangible Employment Actions

When a supervisor takes a tangible employment action against an employee because of his or her resistance to sexual harassment, the employer is vicariously liable for discrimination and there is no affirmative defense. This category of case is sometimes known as a quid pro quo case: The employer made sex-based harassment a quid pro quo for getting or keeping a job or avoiding adverse job consequences. The key inquiry is whether there was a tangible employment action, not whether the fact pattern can be labeled as some form of quid pro quo harassment.

i. Defining a Tangible Employment Action

The Court in *Ellerth* defined a tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”²²⁶ Generally a tangible employment action “inflicts direct economic harm” and is the type of injury that “only a supervisor, or other person acting with the authority of the company, can cause.”²²⁷ Because a tangible employment action “requires an official act of the enterprise, a company act” and the decision is “documented in official company records, and may be subject to review by higher level supervisors,” it “becomes for Title VII purposes the act of the employer.”²²⁸ Some courts have found reassignment of duties without any economic consequence to be tangible.²²⁹ On the other hand, one court of appeals determined that a series of minor job detriments, none of which standing alone would be considered a tangible job detriment, could not be aggregated.²³⁰

224. *Faragher*, 524 U.S. at 789–90.

225. EEOC Guidance on Employer Liability VI.

226. *Ellerth*, 524 U.S. at 761.

227. *Id.* at 762.

228. *Id.*

229. *Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996) (a tenured professor’s loss of administrative title and committee work can be tangible employment action as they were important to professional advancement).

230. *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (plaintiff’s evidence that she was assigned extra work and suffered other harm as a result of rejecting her supervisor’s sexual advances does not establish that she suffered a tangible employment action).

ii. Fulfilled and Unfulfilled Promises or Threats

The Supreme Court implied in *Ellerth* that a tangible employment action would include a supervisor's conferral of job benefits in exchange for sexual favors from employees: The Court stated, "We assumed [in *Meritor*], and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit."²³¹ If a plaintiff receives job benefits—such as a promotion or a substantial raise—that were implicitly promised in exchange for the plaintiff silently enduring sexual advances, the plaintiff may have difficulty proving that the benefits were an unlawful quid pro quo as opposed to a routine employer practice of conferring promotions and raises on all employees.²³² Moreover, if a supervisor does not fulfill an express or implied promise to a subordinate of a job benefit in exchange for a sexual demand, the employee may have difficulty proving that he or she suffered a tangible employment action even if he or she resisted the demand. In either scenario, however, the plaintiff may still bring a hostile environment claim, and the employer is entitled to assert its *Ellerth/Faragher* affirmative defense. When the employer makes threats, whether explicit or implicit, but does not carry them out, the Court made clear in *Ellerth* that an employee may bring a hostile environment claim, subject to the employer's affirmative defense.²³³ The Court in *Ellerth*, however, "express[ed] no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment."²³⁴

iii. Submission Cases

Quid pro quo cases in which the plaintiff submitted to the sexual demands of a supervisor in order to avoid a threatened adverse employment action generally have been analyzed as a species of hostile environment case. Lower courts have disagreed as to whether or not a plaintiff's allegedly coerced submission to sexual relations is a "tangible employment action" that imposes strict liability on the employer. On the one hand, if the employer has an anti-harassment policy and the plaintiff submitted to sex rather than filing an internal complaint, some courts would find

231. *Ellerth*, 524 U.S. at 752.

232. See *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 267–68 (4th Cir. 2001).

233. 524 U.S. at 765 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages"). See also *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054–55 (9th Cir. 2007) (finding that, when plaintiff did not acquiesce to her supervisor's implicit demands for sex in exchange for keeping her job and the implied threat was not fulfilled, she had not made out a claim of quid pro quo harassment with a tangible employment action but still could rely on a theory of hostile work environment to support her Title VII action).

234. *Ellerth*, 524 U.S. at 754.

that the employer should not be liable for the rogue supervisor's conduct.²³⁵ On the other hand, some courts have found that an employee who is too afraid to risk losing a job and therefore is forced to have unwanted sex has been seriously harmed on the basis of sex and should have a claim under Title VII. As one court explained: "Requiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment" and "this type of conduct—a classic quid pro quo for which courts have traditionally held employers liable—fits squarely within the definition of a 'tangible employment action.'"²³⁶

c. Employer's Affirmative Defense

Following the holding in *Meritor* that liability for supervisory harassment cannot be "automatic," the Court in *Ellerth* and *Faragher* created a rule of vicarious liability for supervisory harassment that permits the defendant to present an affirmative defense to liability or damages even when a supervisor has created the actionable hostile work environment. As discussed above, however, "[t]he affirmative defense is unavailable if the employee suffers a tangible employment action."²³⁷ To prevail on the affirmative defense, the employer has to prove both elements of the defense by a preponderance of the evidence.²³⁸ The elements are "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."²³⁹ Although most courts require defendants to meet their burden of proof regarding *both* prongs of the affirmative defense,²⁴⁰ some courts have allowed defendants to prevail on the basis of satisfying only the first prong because they cannot prove that the plaintiff acted unreasonably.²⁴¹ This situation can arise in a case of a one-time instance of sudden-onset, serious harassment by a supervisor, which neither the employer nor the employee could have reasonably anticipated.

235. In *Lutkewitte v. Gonzales*, 436 F.3d 248, 251 (D.C. Cir. 2006) (per curiam), the employee submitted to her supervisor's sexual demand because she feared losing her job. In a concurring opinion, Judge Brown explained: "If a supervisor threatens an employee, and she submits in order to avoid adverse consequences, the supervisor has not committed an 'official act' but merely threatened to do so. The employer has no way of knowing that its delegated authority has been brandished in such a way as to coerce sexual submission." *Id.* at 270 (Brown, J., concurring).

236. *Jin v. Metro. Life Ins.*, 310 F.3d 84, 94 (2d Cir. 2002). See also *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1170 (9th Cir. 2002) (following *Jin* and the EEOC Guidance on Employer Liability).

237. *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008).

238. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

239. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

240. See, e.g., *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001) ("Both elements must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements.").

241. See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004) (applying only the first prong of the affirmative defense in a case involving a single, severe instance of supervisory harassment that the employer responded to swiftly and effectively). Some courts now refer to the approach in *McCurdy* as a "modified *Ellerth/Faragher* affirmative defense." *Cottrill v. MFA, Inc.*, 443 F.3d 629, 633 n.2 (8th Cir. 2006).

i. The Employer's Reasonable Care to Prevent and Correct Harassment

The first prong of the employer's affirmative defense has two elements: It requires proof of the employer's reasonable care both to *prevent* harassment and to *correct promptly* harassment that has been brought to its attention. Factors that courts consider in determining whether an employer has taken reasonable care to prevent supervisory harassment include (1) whether the employer has adopted and effectively disseminated to all employees written anti-harassment policies and procedures,²⁴² (2) whether the employer has adequate anti-harassment training for supervisors, (3) whether the employer adequately monitors the workplace conduct of its supervisors,²⁴³ and (4) whether employees are aware of and have access to reasonable procedures for reporting harassment by their immediate supervisors.²⁴⁴ The fact that an employer has an established anti-harassment policy will not necessarily meet the first prong of the employer's burden.²⁴⁵ Nevertheless, after *Ellerth* and *Faragher*, employers will have an incentive to adopt, disseminate, and enforce written anti-harassment policies and procedures and to train and monitor its supervisors.

In *Faragher* a combination of facts compelled the Court to conclude that, as a matter of law, the employer could not establish that it had taken reasonable care to prevent the harassment by its supervisors: (1) supervisors had "unchecked authority" over subordinates they directly controlled on a daily basis, (2) employees were isolated from upper management in geographically remote locations, (3) the employer's sexual harassment policy was not broadly disseminated to employees and supervisors, (4) management did not monitor the conduct of its supervisors, and (5) the employer's sexual harassment policy contained no assurances that employees could bypass harassing supervisors to make complaints.²⁴⁶

242. See *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006) (holding that distributing manual with harassment policy to all employees at beginning of construction season and identifying three officials to whom harassment can be reported met the first prong of the *Ellerth/Faragher* affirmative defense).

243. *Faragher*, 524 U.S. at 808 (finding employer's failure to keep track of its supervisors at remote beach location contributed to its failure to meet the first prong of its affirmative defense as a matter of law).

244. See, e.g., *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007) (holding that the reasonableness of a complaint mechanism depends on "the employment circumstances," including "known vulnerabilitie[s]" and "capabilities of the class of employees in question," and finding that where the employer's business plan is "to employ teenagers [who are] part-time workers often working for the first time," the employer is "obligated to suit its procedures to the understanding of the average teenager").

245. *Ellerth*, 524 U.S. at 765 ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense"). See also *Frederick*, 246 F.3d at 1313 (recognizing that "an employer's showing that it has a sexual harassment policy does not automatically satisfy its burden").

246. *Faragher*, 524 U.S. at 778.

The employer must also show that it has promptly taken reasonable action to correct sexual harassment brought to its attention.²⁴⁷ Factors that have been found to constitute prompt corrective action include (1) an employer's immediate investigation into an employee's sexual harassment complaint, which caused the alleged harasser to resign, and (2) an employer's immediate suspension of the alleged harasser, without pay, pending an investigation of the harassment claims.²⁴⁸ If the employer responds to harassment with corrective or remedial action that is reasonably likely to prevent the conduct from reoccurring, it may not be necessary for the employer to discharge or discipline the alleged harasser. It is important that the investigation be thorough and that the anti-harassment training be serious. A court of appeals held that an employer's "sham" investigation, followed by inadequate anti-harassment training and a failure to discipline any employees, was not a reasonable response to the plaintiff's repeated complaints about verbal harassment.²⁴⁹

The reasonableness of an employer's response to harassment will depend on the adequacy of the employer's notice of the harassment. Even before the plaintiff has brought a harassment complaint to the employer's attention, prior notice of harassment may be inferred from evidence that the employer had previously received complaints from other employees and failed to take corrective action.²⁵⁰ The courts of appeals disagree whether a co-worker's knowledge of harassment can be automatically imputed to the employer where the employer voluntarily adopts a policy requiring all supervisors to report harassment, even if they are co-workers of the plaintiff.²⁵¹ Once an employer has adequate notice of sexual harassment, it has a duty to take prompt corrective action. Generally, an employer's inaction following adequate notice of harassment will result in liability. Even with adequate notice of harassment, however, there may be circumstances when an employer's inaction is not unreasonable.²⁵²

ii. *The Employee's Unreasonable Failure to Avoid Harm*

On the second prong of its affirmative defense, the employer must prove that the plaintiff unreasonably failed to avoid harm. In *Faragher*, the Court observed that the

247. If the employer takes no action at all in response to complaints of actionable supervisory harassment, it is not entitled to an affirmative defense. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 700 (7th Cir. 2001).

248. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1365–66 (11th Cir. 1999).

249. *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1242 (10th Cir. 1999).

250. *See Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999).

251. *Compare Chalout v. Interstate Brands Corp.*, 540 F.3d 64, 76 (1st Cir. 2008) (finding no imputed knowledge), *with Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005) (finding imputed knowledge when company placed duty on all supervisors and managers to report harassment).

252. *See, e.g., Coates*, 164 F.3d at 1365 (it was reasonable for human resources manager to conclude that no further action was necessary after co-worker discussed the matter with the harassing supervisor and victim had assured manager that everything was fine).

“primary objective” of Title VII “is not to provide redress but to avoid harm.”²⁵³ The *Ellerth/Faragher* rules are designed to create incentives for employers and employees to take steps to avoid or end sexual harassment. For the employer, this means adopting clear and accessible complaint procedures and responding promptly and effectively to harassment claims. These cases also encourage the training of supervisors. For employees, this means using the employer’s complaint procedures and cooperating in reasonable remedial measures. Evidence of the employee’s unreasonable failure to use the employer’s complaint procedure will usually satisfy the employer’s burden under this prong of the affirmative defense.²⁵⁴ But an employer’s grievance procedure may be so inadequate, cumbersome, or intimidating that it would be reasonable for a harassment victim not to use it.²⁵⁵ A failure to avoid harm can also include an employee’s unreasonable refusal to take advantage of any “preventive or corrective opportunities” that the employer offers in order to avoid or remedy workplace harassment.²⁵⁶

It is important to remember that the affirmative defense to employer liability created by *Ellerth/Faragher* applies to Title VII cases of harassment based on race, color, religion, sex, or national origin, and has been extended to cases brought under other federal antidiscrimination laws.²⁵⁷ Some states—by statute or court decision—have refused to adopt an affirmative defense to supervisory harassment under the *Ellerth/Faragher* framework and hold employers strictly liable for a supervisor’s harassment of an employee, even in the absence of a tangible employment action.²⁵⁸

253. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

254. *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 765 (1998). See *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (agreeing that employee’s failure to report alleged harassment to persons listed in sexual harassment policy was unreasonable after her first reports to other management personnel were clearly ineffective to stop harassment); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (agreeing that plaintiff’s unsigned letters to management reporting harassment were unreasonable attempts to put employer on notice). But see *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 105 (2d Cir. 2010) (holding that “an employer is not, as a matter of law, entitled to the *Faragher/Ellerth* affirmative defense simply because an employer’s sexual harassment policy provides that the plaintiff could have complained to other persons as well as the alleged harasser”).

255. See *Hill*, 213 F.3d at 646–47 (Wood, J., dissenting in part) (discussing reasonableness of employee’s failure to complain where it is difficult for employees to obtain copies of anti-harassment policies and complaint procedures are cumbersome).

256. *Compare Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003) (finding that a two-year delay in reporting harassment was unreasonable because it was a “complete failure to use available and adequate procedures”), with *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1057–58 (9th Cir. 2007) (finding that a 19-day delay in reporting harassment was not unreasonable where “an employee in [plaintiff’s] position may have hoped the situation would resolve itself without the need of filing a formal complaint”).

257. See EEOC Guidance on Employer Liability II (“The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers should establish anti-harassment policies and complaint procedures covering all forms of unlawful harassment.”).

258. See, e.g., *Sangamon County Sheriff’s Dep’t v. Ill. Human Rights Comm’n*, 908 N.E.2d 39, 47 (Ill. 2009).

iii. *Constructive Discharge Cases*

In *Pennsylvania State Police v. Suders*, the Supreme Court considered whether a constructive discharge in a case of supervisory sexual harassment could be considered a “tangible employment action.”²⁵⁹ Essentially the Court concluded that an employee’s decision to resign in response to a hostile work environment is not ordinarily a “tangible employment action” under *Ellerth* and *Faragher*. The Court held that a plaintiff can only establish a “constructive discharge” based on a hostile work environment with evidence of the elements of an actionable hostile work environment claim and the “further showing” that “the abusive working environment became so abusive that her resignation qualified as a fitting response.”²⁶⁰ The employer may defend such a claim with the *Ellerth/Faragher* affirmative defense, “by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventative or remedial apparatus.”²⁶¹ The Court also held:

This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.²⁶²

The Court reasoned that “[a]bsent ‘an official act of the enterprise,’ as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the workforce.”²⁶³ The remedial consequences of successfully proving a constructive discharge claim are discussed below in the section on damages.

2. *Harassment by Co-Workers*

In *Ellerth*, the Supreme Court held that “[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”²⁶⁴ The federal courts and the EEOC have uniformly adopted the negligence standard to impose employer liability in cases of co-worker harassment.²⁶⁵

259. 542 U.S. 129 (2004).

260. *Id.* at 133–34.

261. *Id.* at 134.

262. *Id.*

263. *Id.* at 148.

264. *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 759 (1998).

265. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 799–80 (1998) (collecting cases); *see also* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(d) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”); EEOC Guidance on Employer Liability at I.

The Supreme Court recognized in *Ellerth* that “[n]egligence sets a minimum standard for employer liability under Title VII.”²⁶⁶ Thus, regardless of the status of the harasser, the employer can be held liable where it is found to have been negligent. As noted above, the Supreme Court acknowledged the general rule that workplace harassers do not act within the scope of their employment. The Court, however, turned to the principle stated in Section 219(2)(b) of the Restatement (Second) of Agency, which recognizes that when “servants” commit torts “outside the scope of their employment” the “master” can be held liable for its own “negligent or reckless” conduct.²⁶⁷ Thus, the standard for employer liability for harassment by nonsupervisory employees is the same as for employer liability for ordinary torts committed by nonsupervisory employees, which is negligence.²⁶⁸

Establishing that the employer had actual or constructive notice that the harassment was occurring is the first element of a co-worker harassment case. To prove that the employer knew one co-worker was harassing another, the plaintiff must show that an employee of the firm with actual knowledge of the harassment was high enough in the corporate hierarchy that his or her knowledge could be imputed to the firm. That standard was defined by the Third Circuit as “where the employee is sufficiently senior in the employer’s governing hierarchy, or otherwise in a position of administrative responsibility over employees under him, such as a departmental or plant manager, so that such knowledge is important to the employee’s general managerial duties,” or “where the employee is specifically employed to deal with sexual harassment. Typically such an employee will be part of the employer’s human resources, personnel, or employee relations group or department.”²⁶⁹ In addition, an employer may be found to have constructive notice of co-worker harassment where “the harassment was so severe and pervasive that management reasonably should have known of it.”²⁷⁰

In a case of co-worker harassment, the plaintiff bears the burden of proving that the employer was negligent, such as in failing to adopt a reasonable anti-harassment policy, to investigate complaints, or to take immediate and appropriate corrective action.²⁷¹ This distinguishes co-worker harassment cases from cases of supervisory

266. *Ellerth*, 524 U.S. at 759.

267. RESTATEMENT (SECOND) OF AGENCY (1957), quoted in *Ellerth*, 524 U.S. at 756.

268. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787 (8th Cir. 2009). Although the lower courts are uniformly of the view that negligence is the standard, the Supreme Court has never expressly held that negligence is the standard for co-worker harassment. See *Penn. State Police v. Suders*, 542 U.S. 129, 143 n.6 (2004) (“*Ellerth* and *Faragher* expressed no view on the employer liability standard. Nor do we.”).

269. *Huston v. Proctor & Gamble*, 568 F.3d 100, 107–08 (3d Cir. 2009) (finding no employer liability because the employees who knew of the harassment were not sufficiently high up in the corporate hierarchy such that their knowledge could be imputed to the firm).

270. *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008) (internal quotation marks and citations omitted); see also *Sandoval*, 578 F.3d 787.

271. *Swinton v. Potomac Corp.*, 270 F.3d 794, 802–04 (9th Cir. 2001) (discussing liability for negligence in a case of co-worker harassment).

harassment that do not involve a tangible employment action—where the employer has the burden of persuasion, as part of its affirmative defense, to prove that it was not negligent in failing to prevent or remedy harassment. Because co-worker harassment is established under a theory of negligence and not vicarious liability, the employer is not entitled to an *Ellerth/Faragher* affirmative defense.²⁷² Courts have found plaintiffs to have alleged or proved negligence when the employer (1) unreasonably failed to instruct its employees to refrain from harassment (as by failing to adopt an anti-harassment policy or to conduct training);²⁷³ (2) unreasonably employed or continued to employ people it knows or should know to be engaged in harassment of other employees;²⁷⁴ (3) failed to properly supervise its employees to prevent harassment from occurring;²⁷⁵ or (4) failed to respond to complaints that harassment is occurring.²⁷⁶ Although “Title VII does not necessarily require that an employer fire a harasser,” firing the alleged harasser within one month of the plaintiff’s formal complaint of severe co-worker harassment was found sufficient to bar the action.²⁷⁷

3. *Employer Liability for Harassment by Customers or Other Third Parties*

Employers may be liable for actionable harassment of employees by customers and other nonemployees when the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.²⁷⁸ This standard, which is one of negligence, is the same standard used to determine employer liability for co-worker harassment. The theory is that the employer condones or ratifies the unlawful conduct by failing to take appropriate action; employer liability is

272. *Id.* at 802.

273. *Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998) (holding that the City of Boca Raton was negligent, as a matter of law, in not disseminating its anti-harassment policy to its lifeguards at its beach).

274. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008) (“An employer’s responsibility to prevent future harassment is heightened where it is dealing with a known serial harasser and is therefore on clear notice that the same employee has engaged in inappropriate behavior in the past.”); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136–37 (2d Cir. 2001) (holding that reasonable fact finder could conclude that airline was negligent in failing to prevent its male flight attendant’s off-site rape of a female flight attendant when it had actual notice of his “proclivity to rape co-workers”).

275. *Faragher*, 524 U.S. at 808.

276. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787 801–02 (8th Cir. 2009) (finding constructive notice of harassment of the plaintiffs could be based on allegations that “nearly one hundred similar complaints” were made by other employees during the time that the plaintiffs worked for the employer).

277. *Green v. Franklin Nat’l Bank*, 459 F.3d 903, 912 (8th Cir. 2006); *see also Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2008) (finding that an immediate investigation and suspension of alleged co-worker harasser within one week following plaintiff’s complaint were sufficiently “prompt and effective” as a matter of law).

278. *See* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(e); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997); *Folkerson v. Circus Circus Enter., Inc.*, 107 F.3d 754 (9th Cir. 1997). *Cf. Wallace v. Korean Air*, 214 F.3d 293 (2d Cir. 2000) (airline may be liable for a passenger’s in-flight sexual assault of another passenger under Warsaw Convention provision making air carriers liable for “accidents”).

based on the employer's own negligence rather than on proof that the employer had discriminatory intent in causing or failing to address the harassing conduct.²⁷⁹ The third parties whose harassment of employees can lead to employer liability include customers, independent contractors, and employees of independent contractors. Thus, for example, a court of appeals found a hospital could be liable under Title VII for the alleged sexual harassment of a nurse (its employee) by a physician who had staff privileges at the hospital but was not a hospital employee.²⁸⁰ The hospital's potential liability did not depend on its right or ability to control the physician's behavior, but on the allegations that the hospital knew or should have known of the harassment or the risk of harassment and failed to protect its employees.²⁸¹ Whether an employer will be found negligent in exposing its employees to harassing conduct by third parties may depend on the circumstances of the work environment. In a case involving a residential correctional facility for violent youthful offenders, the court concluded that the employer could not reasonably prevent exposing its female employee, a youth-care worker, to its residents' harassing conduct because she worked in a unit for teen sex offenders and the facility encouraged them to verbalize their anger and emotions as part of their rehabilitation.²⁸² The court distinguished the circumstances of this case from the "special circumstances" in other prison cases in which courts have found employers liable for inmate harassment when co-workers condoned or instigated the inmates' harassing conduct.²⁸³

Because employer liability turns on an employer's own negligence in failing to prevent or remedy the harassment of its employees, courts have found no liabil-

279. See *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005) (finding post office liable for customer harassment based on national origin of new Honduran postmaster in small town where customers and other town residents complained about her accent); *Lockard*, 162 F.3d 1062 (finding restaurant liable for sexual harassment of server by patrons where server had previously been harassed by same patrons and had asked her supervisor not to have to serve them but was ordered to wait on their table); and *id.* at 1072-74 (discussing the basis for establishing employer negligence in cases of customer harassment of employees and collecting cases).

280. *Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005).

281. *Id.* at 691 (explaining that the hospital's liability did not depend on whether it could control the alleged harasser who was an independent contractor; the hospital allegedly knew the doctor "made life miserable for women (but not men)," and on this basis it could be held "responsible for the decision to expose women to the working conditions affected by the [alleged harasser]"). *But see* EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Compliance Manual, Introduction, available at <http://www.eeoc.gov/policy/docs/harassment.html#I> (applying the negligence standard for employer liability that is used in cases of co-worker harassment to cases of harassment by nonemployees with the qualification that "the employer's control over such individuals' misconduct is considered").

282. *Vajdl v. Mesabi Acad. of Kidspace, Inc.*, 484 F.3d 546, 551 (8th Cir. 2007) (citing *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 677 (6th Cir. 2000) ("Prisoners, by definition, have breached prevailing societal norms in fundamentally corrosive ways. By choosing to work in a prison, corrections personnel have acknowledged and accepted the probability that they will face inappropriate and socially deviant behavior.")).

283. *Id.* (citing *Slayton*, 206 F.3d at 677, and *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 734 (6th Cir. 2006), which found prison liable for assault of employee by youthful inmates where co-workers sat by and allowed multiple physical assaults on the employee).

ity for customer or third-party harassment when the unlawful conduct continued notwithstanding the employer's reasonable efforts to stop or prevent it. Thus, a casino was not liable for the continuing customer harassment of a professional female mime when the casino took reasonable steps to protect her by warning its patrons not to touch her and assigning a large male employee to accompany her during her performance and to notify security personnel if there were problems.²⁸⁴

B. INDIVIDUAL LIABILITY FOR HARASSMENT

As a general rule, prior to the Civil Rights Act of 1991, the courts held that Title VII did not impose individual liability on supervisors, even though the statute defines “employer” to include “any agent” of an employer.²⁸⁵ At the time, all forms of Title VII relief, including back pay, were considered equitable in nature, and courts reasoned that because the remedies were equitable they operated against the firm, not against the individual.²⁸⁶ This limited remedy rationale for not imposing individual liability on agents of employers was undercut in the Civil Rights Act of 1991, which now provides for compensatory and punitive damages, forms of legal relief for which there is a right to a jury trial.²⁸⁷ Nevertheless, following *Miller v. Maxwell's International, Inc.*,²⁸⁸ the majority of the courts of appeals have held that supervisors are not individually liable under Title VII on the theory that the inclusion of “any agent” in the statutory definition of “employer” is merely a mechanism for incorporating respondeat superior liability into the statute.²⁸⁹ Courts following *Miller* also have argued that it would be incongruous to impose individual liability on agents

284. *Folkerson v. Circus Circus Enters.*, 107 F.3d 754 (9th Cir. 1997). In 2002, a California intermediate court held that an employer that provides transportation for developmentally disabled clients was not liable under state law for its failure to prevent a rider's sexual assault on the employee bus driver who claimed that other drivers had repeatedly complained about the rider's sexually offensive behavior. *Salazar v. Diversified Paratransit, Inc.*, 126 Cal. Rptr. 2d 475 (Cal. Ct. App. 2002), *review granted & opinion superseded by* 63 P.3d 215 (Cal. 2003), *cause transferred by* 79 P.3d 1199 (Cal. 2003). The California legislature subsequently repudiated *Salazar* and clarified that the state antidiscrimination law imposes liability on employers for sexual harassment of their employees by nonemployees under a negligence standard. CAL. GOV'T CODE § 12940(j)(1) (Act of Oct. 3, 2003, 2003 Stats., ch. 671 (A.B. 76), §§ 1, 2). *See Salazar*, 11 Cal. Rptr. 3d 630 (Cal. Ct. App. 2004) (remanding case under negligence standard).

285. 42 U.S.C. § 2000e(b).

286. *See Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 406 (6th Cir. 1997) (collecting cases and explaining this history).

287. 42 U.S.C. § 1981a(b), (c). For a comprehensive analysis of which persons or entities constitute employers for which purposes under federal employment discrimination law, *see* Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137 (2010).

288. 991 F.2d 583 (9th Cir. 1993).

289. *See Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006); *Wathen*, 115 F.3d at 404 (collecting cases); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–16 (2d Cir. 1995); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279–81 (7th Cir. 1995); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380–81 (8th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 651–53 (5th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993).

when Congress excluded employers of 14 or fewer employees from the definition of employer in Title VII to protect the limited resources of small employers.²⁹⁰

Tort law imposes liability on individuals. As noted above, under Title VII, individuals are not deemed “agents” of the employer and therefore cannot be sued under that statute. In addition, tort law imposes liability on employers regardless of the size of the firm (assuming the state tort rules for vicarious liability are satisfied), whereas Title VII and ADA coverage is limited to employers of 15 or more employees and ADEA coverage is limited to employers of 20 or more employees.

As discussed earlier, individuals can be held liable for actionable harassment under § 1981 or § 1983.²⁹¹ Moreover, there are no statutory limits on damages for claims brought under these federal statutes.

C. WHO MAY SUE

Title VII, along with most employment discrimination laws, protects employees (including former employees) as well as applicants for employment.²⁹² Whether a plaintiff who is in the class protected by the statute (i.e., an alleged victim of harassment on the basis of race, religion, sex, national origin, disability, or age) can sue is generally not controversial if she is an applicant, employee, or former employee.²⁹³ A victim of harassment who is bound by an enforceable agreement to arbitrate all disputes arising out of the employment may be precluded from suing and must instead present his or her claims in arbitration.²⁹⁴

Issues tend to arise in cases involving workers who are arguably independent contractors or proprietors of the employer rather than employees. In the case

290. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995).

291. 42 U.S.C. §§ 1981 & 1983. *See supra* Section II.B.2.

292. *See* 29 U.S.C. § 632(a)(1); 42 U.S.C. § 2000e-2(a)(1); *id.* § 12112(a).

293. Both Title VII and the ADEA make it unlawful for an employer to discriminate (on specified grounds) against an “individual” in hiring, firing, or terms of employment. 42 U.S.C. § 2000e-2(a)(1) (Title VII); 29 U.S.C. § 623(a)(1) (ADEA). Neither statute defines the term “individual,” but the case law holds that the term refers to employees or applicants for employment. *See, e.g.*, *Mangram v. Gen. Motors Corp.*, 108 F.3d 61, 62 (4th Cir. 1997) (ADEA); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 746–47 (9th Cir. 2003) (Title VII and ADEA). The ADA makes it unlawful for an employer to discriminate against a “qualified individual” on the basis of a disability, 42 U.S.C. § 12112(a), and a “qualified individual” is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,” *id.* § 12111(8). Thus, the limitation to employees or applicants for employment is expressly built into the statute by the phrase “employment position that such individual holds or desires.”

The statutes also prohibit discrimination, which could include harassment, by entities other than employers. *See, e.g.*, 42 U.S.C. §§ 12111(2), 12112(a) (providing that the ADA prohibits discrimination by any “covered entity,” which includes not only employers but also any “employment agency, labor organization, or joint labor-management committee”); *id.* §§ 2000e(a), 2000e-3(b) (providing that Title VII prohibits various forms of discrimination by “labor unions” and “employment agenc[ies]”).

294. *See Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (an employee’s agreement to arbitrate disputes arising out of employment validly waives the employee’s right to bring statutory claims, including Title VII claims, to court); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (collective bargaining agreement that clearly and unmistakably waives an individual’s right to file statutory discrimination claims is enforceable).

of workers who are nominally independent contractors, or partners or director-shareholders of the firm, the courts apply the multifactor, common law agency test to determine if they are “employees” for purposes of applying the antidiscrimination statutes.²⁹⁵ In adopting the common law test for employee status, with a focus on the element of control, the Supreme Court endorsed the EEOC Guidelines to aid in determining whether “partners, officers, members of boards of directors, and major shareholders qualify as employees.”²⁹⁶ The Court concluded that the following six factors listed in the guidelines are relevant (though not exhaustive) for determining employee status in this context: (1) “Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work”; (2) “Whether and, if so, to what extent the organization supervises the individual’s work”; (3) “Whether the individual reports to someone higher in the organization”; (4) “Whether and, if so, to what extent the individual is able to influence the organization”; (5) “Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts”; and (6) “Whether the individual shares in the profits, losses, and liabilities of the organization.”²⁹⁷ In the case of persons who hold the title of partner in the employer organization, courts have examined the facts to determine whether the plaintiff has the authority associated with the status of an employee or of a proprietor/partner.²⁹⁸ It is important to note that some states have specific provisions stating that independent contractors are covered by the employment discrimination law.²⁹⁹ In addition, several courts of appeals have held that independent contractors can bring discrimination claims under § 1981 against entities with whom they enter into contracts.³⁰⁰ The theory is that because § 1981 is not limited to employment contracts, but

295. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003). *Clackamas* arose under the ADA, but the Court suggested that its analysis should apply to Title VII and the ADEA. *Id.* at 445, 448. *Clackamas* did not raise the issue of whether the putative employee was a proper plaintiff but rather whether the employer had enough “employees” to be an entity covered by the statute. But lower courts have generally used the same test of employee status for all purposes. See *Menetrez*, *supra* note 287. See, e.g., *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256 (4th Cir. 1997) (a doctor who contracted to perform medical services at hospital emergency room was an independent contractor not an employee under Title VII).

296. *Clackamas*, 538 U.S. at 448. See 2 EEOC Compliance Manual §§ 605:0008–605:00010 (2000), available at <http://www.eeoc.gov/laws/guidance/compliance.cfm>.

297. *Clackamas*, 538 U.S. at 449–50 (quoting 2 EEOC COMPLIANCE MANUAL § 605:0009 (2000)).

298. Compare *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996) (holding that an accountant who had title of partner but lacked authority usually associated with partnership status was an employee), with *Serapion v. Martinez Odell & Calabria*, 119 F.3d 982 (1st Cir. 1997) (holding that a former law partner was a proprietor not an employee under Title VII).

299. See CAL. GOV’T CODE § 12940.

300. See, e.g., *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009) (agreeing with decisions from the First, Seventh, and Eleventh Circuits that “an independent contractor may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship” and citing cases).

“embraces all contracts,” it covers “contracts by which a[n] . . . independent contractor . . . provides service to another.”³⁰¹

D. DAMAGES

1. Generally

Since the Civil Rights Act of 1991, remedies for successful plaintiffs in intentional discrimination lawsuits brought under Title VII and the ADA have included back pay and, in appropriate circumstances, front pay, as well as compensatory and punitive damages up to a statutory cap that depends on the size of the employer’s firm.³⁰² Back pay and front pay are not subject to the statutory caps.³⁰³ In harassment cases, compensatory and punitive damages are typically sought to compensate the plaintiff for emotional distress and to deter future violations. Recovery of punitive damages under the Civil Rights Act of 1991, however, requires the plaintiff to prove both that the employer acted with “malice” or “reckless indifference” to the “federally protected rights” of the plaintiff and that there is a basis for imputing liability to the employer on the basis of agency principles.³⁰⁴ In harassment cases under Title VII and the ADA that culminate in a tangible employment action such as a discharge, suspension without pay, or a demotion, plaintiffs can seek equitable remedies, including reinstatement and back pay up to two years before the filing of the discrimination charge with the EEOC, subject to mitigation for “[i]nterim earnings or amounts earnable with reasonable diligence.”³⁰⁵ For age harassment claims brought under the ADEA, the remedial scheme permits recovery of “legal and equitable relief” and liquidated damages for willful violations.³⁰⁶ There is no cap on damages for racial and ethnic harassment claims brought under § 1981³⁰⁷ or constitutional claims brought under § 1983.

301. *Id.* (citations and internal quotations omitted).

302. *See* 42 U.S.C. § 1981a(a)(1) (providing for recovery of compensatory and punitive damages in Title VII actions based on “unlawful intentional discrimination”); 42 U.S.C. § 1981a(a)(2) (providing for same relief for disability actions); 42 U.S.C. § 1981a(b)(3) (providing for compensatory and punitive damages subject to a minimum cap of \$50,000 for employers with more than 14 and fewer than 101 employees and a maximum cap of \$300,000 for employers with more than 500 employees as defined in the statute). *See also* 42 U.S.C. § 12117(a) (providing for ADA “powers, remedies, and procedures” to be the same as those provided under Title VII).

303. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

304. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

305. 42 U.S.C. § 2000e-5(g)(1) (providing for equitable relief, including reinstatement and back pay).

306. 29 U.S.C. § 626(b) (providing for legal and equitable relief including reinstatement and promotion); 29 U.S.C. § 216(b) (incorporating the Fair Labor Standards provisions that provide for recovery of liquidated damages—a doubling of the back pay award—in cases of willful violations).

307. The caps on compensatory and punitive damages in the Civil Rights Act of 1991, 42 U.S.C. § 1981a, do not “limit the scope of, or the relief available under, section 1981.” 42 U.S.C. § 1981a(b)(4). *See also* *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975) (permitting recovery of compensatory and punitive damages under § 1981).

Generally, tort law provides for both economic damages (such as lost wages) and noneconomic damages (such as compensatory damages for emotional harms), as well as for punitive damages when the plaintiff can prove the conduct was reckless or malicious. It is important to remember that the limitations on compensatory and punitive damages under Title VII do not apply to most state tort claims. There is no statutory limit on the amount of tort damages, whereas Title VII limits compensatory and punitive damages for intentional discrimination to a maximum of \$300,000 for large employers (with more than 500 employees) and less for smaller employers.³⁰⁸

2. Remedies for Constructive Discharge

Questions sometimes arise as to whether a plaintiff who quits in response to workplace harassment can recover lost wages or other remedies. In *Pennsylvania State Police v. Suders*, a Title VII hostile work environment case discussed earlier, the Supreme Court held that “Title VII encompasses employer liability for constructive discharge.”³⁰⁹ The Supreme Court observed that “[u]nder constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes,”³¹⁰ permitting a prevailing plaintiff who quits rather than continuing to endure unlawful supervisory harassment to seek recovery for “all damages available for formal discharge.”³¹¹ The Court noted that the standard for a constructive discharge, originating in the 1930s in National Labor Relations Board rulings, had been recognized by the Court in the labor-law field, and it has also long been recognized by the federal courts of appeals and the EEOC in Title VII cases.³¹² The Court held that to establish “constructive discharge” in a hostile work environment case, the plaintiff must prove that the harassment was “severe or pervasive” and that “the abusive working environment became so intolerable that her resignation qualified as a fitting response.”³¹³

Although the Court in *Suders* recognized that “constructive discharge is functionally the same as an actual termination in damages-enhancing respects,”³¹⁴ the Court held that “when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer.”³¹⁵ As the Court pointed out, “Unlike an actual termination, which

308. 42 U.S.C. § 1981a(b)(3).

309. *Id.* at 143. See *supra* Section III.A.1.c.

310. 542 U.S. 129, 141 (2004).

311. *Id.* at 147 n.8 (The prevailing constructive discharge plaintiff “may recover postresignation damages, including both backpay and, in fitting circumstances, front pay, as well as the compensatory and punitive damages now provided for Title VII claims generally.”).

312. *Id.* at 141–43.

313. *Id.* at 134.

314. *Id.* at 148.

315. *Id.*

is *always* effected through an official act of the company, a constructive discharge need not be.”³¹⁶ The Court therefore concluded that the *Ellerth/Faragher* affirmative defense should be available to employers in supervisory harassment cases involving constructive discharge unless “the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or position in which she would face unbearable working conditions.”³¹⁷ As an example of this latter kind of case, the Court discussed a case in which the plaintiff complained about sexual harassment by the judge for whom she worked. The presiding judge of the same court said he would transfer her to another judge but warned that her first six months in the new chambers “most probably would be hell” and that it was “in her best interest to resign.”³¹⁸ The Court remarked that the presiding judge’s behavior was the kind of discriminatory official act for which the affirmative defense should not be available.³¹⁹

After *Suders* some lower courts have adhered to their prior law that the plaintiff must prove not only that “a reasonable person in her situation would find the working conditions intolerable,” but *also* that “the employer intended to force the employee to quit.”³²⁰ Other courts, however, do not require the plaintiff to prove that the employer intended to force the employee to resign, but that resignation was a reasonably foreseeable response to the harassment.³²¹ The Court’s opinion in *Suders* did not mention anything about proof of the employer’s intent; rather, the opinion focused only on proof that the working conditions were intolerable under an objective standard.³²² In his dissent in *Suders*, Justice Thomas noted that “a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement” in Title VII constructive discharge cases.³²³

IV. Retaliation

Retaliation claims often arise in workplace harassment cases when an employer takes adverse action against an employee who has opposed discriminatory harassment or participated in government proceedings to enforce antidiscrimination laws. A plaintiff who alleges causes of action for both retaliation and discriminatory harassment may be able to prevail on the retaliation claim even though the

316. *Id.*

317. *Id.* at 133.

318. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003).

319. *Suders*, 542 U.S. at 149–50.

320. *Tatum v. Ark. Dep’t of Health*, 411 F.3d 955, 960 (8th Cir. 2005).

321. *See, e.g., Brennehan v. Famous Dave’s of Am., Inc.*, 507 F.3d 1139, 1144 n.3 (8th Cir. 2007) (noting “circuit’s requirement that the plaintiff demonstrate the employer’s intent, or the reasonably [sic] foreseeability, that the employee quit,” and citing cases).

322. *Suders*, 542 U.S. at 147–50.

323. *Id.* at 153 (Thomas, J., dissenting).

underlying harassment claim itself is not actionable.³²⁴ Section 704(a) of Title VII provides that it is an unlawful employment practice for an employer to discriminate against employees or applicants for employment because they have *opposed* any practice that is unlawful under Title VII or *participated* in proceedings to enforce Title VII.³²⁵ In 1997, the Supreme Court held that the term “employees” in § 704(a) includes former employees.³²⁶

Other federal statutes also provide anti-retaliation protection. In language that is nearly identical to the anti-retaliation section of Title VII, § 623(d) of the Age Discrimination in Employment Act of 1967 (ADEA) prohibits employer reprisals against “employees or applicants” who oppose unlawful age discrimination or participate in “an investigation, proceeding, or litigation” under the ADEA.³²⁷ Section 503(a) of the Americans with Disabilities Act of 1990 (ADA) prohibits retaliation by “any person” against “any individual” for protected opposition or participation conduct.³²⁸ In addition, § 503(b) of the ADA makes it unlawful to “coerce, intimidate, threaten, or interfere with” any individual based on the exercise of rights under the ADA or because an individual has “aided or encouraged any other individual in the exercise or enjoyment of” rights granted under the ADA.³²⁹ The Supreme Court has held that employees may bring retaliation claims under several federal statutes that do not contain an express anti-retaliation provision, such as 42 U.S.C. § 1981,³³⁰ the federal-sector provisions of the ADEA,³³¹ and Title IX of the Education Amendments of 1972.³³² Many state fair employment laws also contain express anti-retaliation provisions.³³³ Because courts interpreting retaliation claims under other federal and

324. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (“[T]he standard for [actionable retaliation] is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.”).

325. 42 U.S.C. § 2000e-3(a). Section 704(a) also prohibits retaliatory discrimination by an employment agency or apprenticeship training program against “any individual” or by a labor organization against “any member” or “applicant for membership.” *Id.*

326. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

327. 29 U.S.C. § 623(d). Like Title VII, the ADEA also prohibits retaliatory discrimination by employment agencies and labor organizations against specified individuals. *Id.*

328. 42 U.S.C. § 12203(a).

329. 42 U.S.C. § 12203(b).

330. *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

331. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1963 (2008) (holding that “the statutory phrase ‘discrimination based on age’ includes retaliation based on the filing of an age discrimination complaint” by a federal employee under the federal-sector provisions of the ADEA, 29 U.S.C. § 633a(a)).

332. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (holding that employees at federally funded educational institutions who have been subjected to retaliation for complaining about sex discrimination that violates Title IX have a private right of action under 20 U.S.C. § 1681(a), the broad antidiscrimination provision of the statute).

333. See, e.g., CAL. GOV’T CODE § 12940(h) (contains language similar to Title VII anti-retaliation provision).

state statutes have often relied on the doctrinal developments in Title VII retaliation cases, the discussion below will focus primarily on Title VII.

A. THE PRIMA FACIE CASE

Most retaliation claims are based on circumstantial evidence because the plaintiff rarely has direct evidence of an employer's retaliatory motive. To establish a prima facie case of retaliation under § 704(a) of Title VII based on circumstantial evidence, the plaintiff must produce credible evidence that shows (1) that he or she was engaged in statutorily protected activity, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal link exists between the protected activity and the adverse action.³³⁴ These three prongs of the prima facie case will be discussed further below. Some circuits specifically require a fourth element, that the defendant has knowledge of the protected activity, whereas others include this evidence as part of the first element or, implicitly, as part of the plaintiff's evidence of causation.³³⁵ The Court of Appeals for the Second Circuit observed that “[n]either this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than general corporate knowledge that the plaintiff has engaged in a protected activity.”³³⁶

Once the prima facie case is established, a retaliation case follows the burden-shifting framework of an individual case of disparate treatment.³³⁷ The plaintiff's evidence establishing the elements of the prima facie case creates a rebuttable presumption of retaliatory motive for the employer's adverse action. The burden of producing evidence then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for taking adverse action against the plaintiff. The plaintiff then has the ultimate burden of proving pretext, that is, that the adverse action was—more likely than not—motivated by retaliatory animus.³³⁸

334. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

335. *Compare* *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523 (6th Cir. 2008) (listing four separate elements of the prima facie case of retaliation, with a requirement of employer knowledge as the fourth prong), *with* *Patane v. Clark*, 508 F.3d 106, 115 (2d Cir. 2007) (listing the first of three elements as requiring the plaintiff “to show that . . . she participated in a protected activity known to the defendant”), *and* *McCullough v. Univ. of Ark. for Med. Sci.*, 559 F.3d 855, 864 (8th Cir. 2009) (listing the elements of the prima facie case without expressly mentioning employer knowledge: “a plaintiff must show that he engaged in statutorily protected conduct, that defendants took an adverse employment action against him, and that there was a causal link between the two actions”).

336. *Patane*, 508 F.3d at 115 (citations and internal quotation marks omitted).

337. *See, e.g., Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) (noting that “[w]here the plaintiff seeks to prove a Title VII retaliation claim through indirect or circumstantial evidence, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies”); *see also* *McCullough*, 559 F.3d at 864 (describing the plaintiff's prima facie showing and the burden-shifting framework in a Title VII retaliation case).

338. *See, e.g., Richey v. City of Independence*, 540 F.3d 779, 784–85 (8th Cir. 2008) (discussing plaintiff's burden of proving pretext in order to avoid summary judgment in a retaliation case where the employer proffered evidence of a good faith belief that the employee engaged in misconduct).

B. MIXED-MOTIVE RETALIATION CASES

The Civil Rights Act of 1991 amended Title VII by codifying portions of the mixed-motive proof scheme in *Price Waterhouse*³³⁹ in § 703(m), which provides that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a *motivating factor* for any employment practice even though other factors also motivated the practice.”³⁴⁰ Subsequent to the 1991 Act, most courts have held that the Act does not apply to anti-retaliation claims;³⁴¹ they have ruled instead that plaintiffs can use the pre-1991 Act mixed-motive proof scheme of *Price Waterhouse* if there is evidence of both a lawful motive and an unlawful motive behind the adverse employment decision.³⁴² Under this framework, once the plaintiff proves, with direct evidence, that an unlawful reason was a motivating factor in the employer’s adverse employment action, the defendant must meet its burden of persuading the fact finder that it would have taken the same action in the absence of the unlawful motive in order to prevail. In *Desert Palace v. Costa*,³⁴³ however, the Supreme Court rejected the distinction between direct and indirect (or circumstantial) evidence for purposes of obtaining a mixed-motive jury instruction in a Title VII case under § 703(m). This then raised the question whether *Desert Palace* applies to anti-retaliation cases being litigated under the old *Price Waterhouse* framework, and courts have adopted conflicting approaches to the issue.³⁴⁴ The picture is made even more confusing by the potential implications for retaliation cases of a 2009 Supreme Court opinion: In *Gross v. FBL Financial Services, Inc.*, the Court held that a mixed-motive jury instruction is “never proper in an ADEA case,” and “the Court’s interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.”³⁴⁵ Moreover, the Court held that the “because of” language in the ADEA requires the plaintiff “to retain the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action.”³⁴⁶ Litigants who request or oppose a mixed-motive jury instruction in a retaliation case should examine circuit precedents carefully and be prepared to make arguments distinguishing or applying the reasoning of *Gross*.

339. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

340. 42 U.S.C. § 2000e-2(m) (emphasis added).

341. See Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 648 n.22 (2008) (citing decisions that refused to apply the 1991 Act to retaliation cases), *but see id.* at 650 n.31 (citing decisions and EEOC Enforcement Guidance that applied the 1991 Act to retaliation claims under Title VII).

342. See, e.g., *Funai v. Brownlee*, 369 F. Supp. 2d 1222, 1227–28 (D. Haw. 2004) (citing circuit decisions that “have unanimously applied the mixed-motive proof scheme to retaliation claims”).

343. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

344. Compare *Smith v. Xerox Corp.*, 602 F.3d 320, 330–32 (5th Cir. 2010), with *Vailpando v. Johanns*, 619 F. Supp. 2d 1107, 1114–15 (D. Colo. 2008).

345. 129 S. Ct. 2343, 2346, 2349 (2009). See, e.g., *Smith*, 602 F.3d at 328–30 (deciding that *Gross* does not control the analysis of a Title VII retaliation case and approving a mixed-motive jury instruction).

346. *Id.* at 2351.

C. PROTECTED ACTIVITY

The two clauses of Title VII's retaliation provision—the participation clause and the opposition clause—protect different types of employee conduct. The participation clause, which covers an employee, former employee, or applicant who has “made a charge, testified, assisted, or participated *in any manner* in an investigation, proceeding, or hearing” under Title VII,³⁴⁷ has been held to provide very broad protections for employees engaged in these activities. The opposition clause, which covers an employee, former employee, or applicant “because he [or she] has opposed any practice made an unlawful employment practice” by Title VII,³⁴⁸ has been construed to provide a lesser degree of protection. For this reason, it is important for a plaintiff to determine whether her claim arises under the participation or the opposition clause, or perhaps under both.

1. *The Participation Clause*

Employees, applicants, or former employees who file discrimination charges with the EEOC or a state agency, or who participate in EEOC or state investigations, proceedings, or hearings, are protected from retaliation regardless of the merits of the underlying claim.³⁴⁹ Therefore, employees who believe they are victims of unlawful harassment and file discrimination charges with a government agency, as well as employees who cooperate in proceedings initiated by other employees, are protected under the participation clause from employer reprisals. For example, an employee whose employer learned that she intended to testify voluntarily in support of her co-worker's harassment claim was held to have engaged in protected activity under the participation clause.³⁵⁰ The protections of the participation clause are so broad that some courts of appeals have found that even filing false and malicious charges³⁵¹ or giving unreasonable deposition testimony³⁵² is protected from employer retaliation. More recently, however, the Seventh Circuit held that the filing of a sexual harassment charge that was both unreasonable and “made with a bad faith purpose” was not protected under Title VII.³⁵³ And the Eighth Circuit observed that while “[i]t cannot be the case that any employee who files a Title VII claim and is disbelieved by his or her employer can be legitimately fired, . . . it also cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees simply because the investigation

347. 42 U.S.C. § 2000e-3(a) (emphasis added).

348. *Id.*

349. *See* Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

350. Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 175 (2d Cir. 2005).

351. *Pettway*, 411 F.2d at 1007.

352. Glover v. S.C. Law Enf., 170 F.3d 411, 413–16 (4th Cir. 1999).

353. Mattson v. Caterpillar, Inc., 359 F.3d 885, 889–90 (7th Cir. 2004).

was about sexual harassment.”³⁵⁴ Under this rationale, although such an employee may have satisfied the prima facie case of retaliation by showing he filed a charge and was fired shortly thereafter, the employer would be able to rebut the presumption of retaliatory motive with evidence of a legitimate, nonretaliatory reason.³⁵⁵

The participation clause does not prevent an employer from disciplining employees for harassment, only from retaliating against them for participating in formal investigations or proceedings concerning the alleged unlawful harassment.³⁵⁶ Conduct by alleged harassers that courts have found protected from retaliation under the participation clause, however, includes an alleged harasser’s involuntary testimony in a Title VII sexual harassment lawsuit³⁵⁷ and an accused harasser’s testimony defending himself in an EEOC investigation of sexual harassment charges.³⁵⁸

2. *The Opposition Clause*

The opposition clause of § 704(a) of Title VII prohibits retaliation for a broad range of activities by an employee, former employee, or applicant opposing or protesting discrimination that is unlawful under the statute.³⁵⁹ A formal complaint to the employer about workplace harassment would be protected, but “opposition” conduct also includes “writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.”³⁶⁰ The Supreme Court in 2009 held that an employee was protected against retaliation under the opposition clause of Title VII when she merely responded—involuntarily—to her employer’s questions during an internal investigation of a co-worker’s sexual harassment complaint.³⁶¹ The opposition clause, however, protects only reasonable conduct of employees that does not interfere with their job performance and does not violate work rules or disrupt the workplace.³⁶² For example, without deciding “whether violence in opposition to Title VII-prohibited behavior might, in some circumstances, be protected under Title VII’s retaliation provision,” the Second Circuit held that “[s]lapping one’s harasser, even assuming arguendo that [the plaintiff] did so in response to Title VII-barred harassment, is not protected activity” when the plaintiff had “many options for resisting.”³⁶³ Other opposition activity that has been found not protected includes an employee

354. *Gilooly v. Mo. Dep’t of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005).

355. *Id.*

356. *Deravin v. Kerik*, 335 F.3d 195, 205 (2d Cir. 2003) (“Title VII only protects the specific act of participating in administrative proceedings—not the underlying conduct which is being investigated.”).

357. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997).

358. *Deravin*, 335 F.3d at 204–05.

359. 42 U.S.C. § 2000e-3(a).

360. *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

361. *Crawford v. Metro. Gov’t*, 129 S. Ct. 846 (2009).

362. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

363. *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000).

disclosing the employer's confidential, proprietary documents during discovery,³⁶⁴ and an employee sexually harassing co-workers and then filing untruthful complaints with his employer that he was himself a victim of harassment.³⁶⁵

Some courts of appeals have adopted the view that the opposition clause protects employees who oppose employer practices on the basis of an objectively reasonable, good faith belief that the practices are unlawful even though they may not, in fact, be unlawful.³⁶⁶ In *Clark County School District v. Breeden*, the Supreme Court had the opportunity to decide whether § 704(a) of Title VII protects an employee's opposition not only to employment practices that are in fact unlawful under Title VII, "but also to practices that the employee could reasonably believe to be unlawful."³⁶⁷ In a brief per curiam opinion, however, the Court declined to decide the issue, finding that no reasonable employee could believe that the single workplace incident that she reported to her employer, which allegedly triggered retaliatory discipline, was unlawful harassment.³⁶⁸ During a meeting, the plaintiff's supervisor allegedly had looked at the plaintiff while making a single off-color comment to a male co-worker who was present, and then both men "chuckled."³⁶⁹ The Court's holding makes it clear that, at a minimum, a plaintiff's opposition conduct based on an *unreasonable* belief that an employer has violated Title VII will not be protected from employer retaliation. Distinguishing *Breeden*, the Ninth Circuit ruled the "if a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which he or she has been subjected" in order to be protected against retaliation for opposition conduct.³⁷⁰ Opposing an employment practice that is lawful in the plaintiff's circuit—and that a majority of circuits would find lawful—may be treated as unprotected regardless of the reasonableness of the plaintiff's belief. For example, the Tenth Circuit ruled that an employee who complained that his supervisor was giving preferential treatment to an employee with whom he was having an affair was not engaged in protected opposition to an employment practice that is unlawful under Title VII as interpreted in that circuit and by a majority of the circuits.³⁷¹ Employees who oppose employment practices in good faith thus run the risk that they may not be protected from

364. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008).

365. *McCullough v. Univ. of Ark. for Med. Sci.*, 559 F.3d 855, 864–65 (8th Cir. 2009).

366. See cases from the Seventh and Eighth Circuits discussed in *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part).

367. 532 U.S. 268, 270 (2001).

368. *Id.* at 271.

369. *Id.* at 269.

370. *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 964 (9th Cir. 2009), *pet. for cert. filed*, 78 U.S.L.W. 3549 (U.S. Mar. 4, 2010)(No. 09–1071).

371. *Anderson v. Okla. State Univ. Bd. of Regents*, 342 Fed. Appx. 365 (10th Cir. 2009).

employer reprisals because they are simply mistaken about or have an unreasonable understanding of a question of law.

D. MATERIALLY ADVERSE ACTIONS

Discharge or a demotion accompanied by a pay cut have long been recognized as adverse employment actions that can trigger a retaliation claim.³⁷² But for many years the courts of appeals reached conflicting conclusions about whether other, less obviously harmful, employment actions, such as harassment, reprimands, suspension, transfers, or unfavorable work assignments, were actionable.³⁷³ Moreover, because the prohibition of discrimination in the anti-retaliation provision in § 704(a) of Title VII does not expressly prohibit discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment,” as the substantive provision in § 703(a) does, the courts were in disagreement about whether an adverse action had to be work-related to be actionable. In 2006, in *Burlington Northern & Santa Fe Railway v. White*, the Supreme Court resolved the circuit split over the question of how serious the employer’s retaliatory action must be in order to be actionable under § 704(a) of Title VII and whether it must be work-related.³⁷⁴ The Court held “the [anti-retaliation] provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.”³⁷⁵ The Court also held that “the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.”³⁷⁶ The Court cited with approval two court of appeals cases in support of this part of its holding: first, a case in which an employer filed criminal charges against a former employee who complained about discrimination,³⁷⁷ and second, a case involving allegations that a law enforcement agency intentionally failed to investigate death threats against an employee and his spouse.³⁷⁸

In *Burlington*, the lone female employed in a department of a rail yard complained of sex discrimination after her supervisor repeatedly told her that women should not be working in the department and made other insulting and inappropriate remarks to her in front of male co-workers.³⁷⁹ Shortly after her complaint, she was reassigned from the job of driving a forklift to a less desirable track laborer task. The person who made the reassignment informed her that a “more senior

372. See, e.g., *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232 (10th Cir. 1999) (upholding retaliation claim where plaintiff was terminated following her complaints to supervisors about sexual harassment).

373. See, e.g., *Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

374. 548 U.S. 53 (2006).

375. *Id.* at 57.

376. *Id.*

377. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996).

378. *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006).

379. *Burlington*, 548 U.S. at 58.

man” should have the “less arduous and cleaner job” of forklift operator. After she filed two charges with the EEOC complaining about the reassignment and about her supervisor monitoring her daily activities, she was suspended without pay for 37 days for insubordination. The employer argued that the job reassignment was not actionable retaliation because the track laborer tasks were in the same job description as driving a forklift and the suspension was not actionable retaliation because the plaintiff ultimately received back pay after she filed a grievance. The Supreme Court rejected both contentions, holding that the jury had adequate evidence to conclude that some tasks within the same general job category were sufficiently less desirable than others. The Court ruled that, in the context of this case, the test of material adversity “means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”³⁸⁰ Although “reassignment of job duties is not automatically actionable,” a reasonable employee could well conclude that track laborer duties are “more arduous and dirtier” and less prestigious than driving a forklift.³⁸¹ Moreover, the prospect of an indefinite unpaid suspension would be sufficiently adverse to dissuade a reasonable employee from filing a discrimination claim.³⁸²

Lower courts applying the *Burlington* standard of “materially adverse” actions in retaliation cases have held that placing a police officer on paid administrative leave can qualify,³⁸³ as can the filing of formal disciplinary charges without pay loss.³⁸⁴ In cases involving reprisals that are not work-related, an employer’s threats to publicize false rumors of an employee’s sexual activity was found to be materially adverse, as was the employer’s opposition to an employee’s application for unemployment benefits.³⁸⁵ A transfer unaccompanied by a loss of pay was held to be actionable when the new position was “objectively less prestigious.”³⁸⁶ But an increase in an employee’s case assignments, causing her to receive a lower performance rating that disqualified her from earning a merit bonus, was not actionable.³⁸⁷

1. Retaliatory Harassment

Sometimes employees who have participated in discrimination proceedings or opposed discriminatory employment practices have been harassed by their supervisors or co-workers. This has led the courts to face the question of whether

380. *Id.* at 57.

381. *Id.* at 71.

382. *Id.* at 73.

383. *McCoy v. City of Shreveport*, 492 F.3d 551, 560–61 (5th Cir. 2007).

384. *Uddin v. City of N.Y.*, 316 Fed. Appx. 4, at *5–6 (2d Cir. 2008) (per curiam).

385. *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079 (10th Cir. 2007).

386. *Billings v. Town of Grafton*, 515 F.3d 39, 53–54 (1st Cir. 2008); *but see Stephens v. Erickson*, 569 F.3d 779, 791 (7th Cir. 2009) (finding that a reassignment without “a significant alteration to the employee’s duties” is not materially adverse).

387. *Lapka v. Chertoff*, 517 F.3d 974, 985–86 (7th Cir. 2008).

retaliatory workplace harassment is an adverse employment action for purposes of establishing a prima facie case of retaliation. Before *Burlington* was decided, a majority of the courts of appeals held that retaliatory harassment that was “severe or pervasive” was sufficient to trigger a retaliation claim and that an “ultimate employment decision” was not required.³⁸⁸ In the aftermath of *Burlington*, other courts of appeals agreed that co-worker harassment could be actionable, but they disagreed on whether *Burlington* required the plaintiff to meet the “severe or pervasive” threshold of a hostile work environment claim or some lower standard appropriate for a retaliation case. The Court of Appeals for the Sixth Circuit recently concluded, “*Burlington Northern* made clear [that] the tests for harassment and retaliation are not coterminous.”³⁸⁹ The court articulated a somewhat lower standard for retaliatory harassment tailored to the requirements of *Burlington*, holding:

[A]n employer will be liable for the coworker’s actions if (1) the coworker’s retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker’s retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff’s complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.³⁹⁰

2. Third-Party Reprisals

Plaintiffs have brought retaliation claims based on allegations that their employer retaliated against them for the protected activity of their co-worker who is a spouse or other close relative. Although several district courts have found such third-party retaliation actionable under Title VII, the courts of appeals that have addressed the issue have rejected such claims.³⁹¹ The Court of Appeals for the Sixth Circuit, sitting en banc, observed that “no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity.”³⁹²

E. THE CAUSAL LINK

Some courts have held that the third element of the prima facie case—the causal link between the employee’s protected activity and the employer’s retaliatory

388. *Jensen v. Potter*, 435 F.3d 444, 448 (3d Cir. 2006).

389. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347 (6th Cir. 2008).

390. *Id.*

391. *See Thompson v. N. Am. Stainless, L.P.*, 567 F.3d 804, 811 n.6 (6th Cir. 2009) (en banc) (collecting cases), *cert. granted*, 78 U.S.L.W. 3113 (U.S. June 29, 2010)(No. 09-291).

392. *Id.* at 811.

action—can be established with evidence of “very close” temporal proximity between the protected conduct and the adverse action.³⁹³ Courts of appeals following this approach have found that plaintiffs established a causal link with evidence of a temporal gap of from a few days or weeks up to a few months,³⁹⁴ but anything longer than two months may be insufficient in the absence of additional circumstantial evidence.³⁹⁵ In *Breedon*, the Supreme Court held that a 20-month gap between the filing of a complaint and an adverse employment action was “no causality at all.”³⁹⁶ Other courts of appeals have held that temporal proximity alone is never sufficient to establish causation for purposes of meeting the prima facie case.³⁹⁷ Moreover, even where the plaintiff meets the minimal burden of establishing a causal nexus for the prima facie case, evidence of even very close temporal proximity may not be sufficient by itself to meet the heavier burden of proving that the employer’s proffered reasons for the adverse action are pretextual.³⁹⁸

V. Procedural and Evidentiary Issues

A. RIGHTS OF THE ALLEGED HARASSER

If an employee accused of harassment is employed at will, the employer may fire the employee without fear of liability because the essence of the at-will doctrine allows employment to be terminated without notice for good, bad, or no reason. Jurisdictions that have statutory or common law exceptions to employment-at-

393. See *Clark County Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001) (recognizing that “[t]he cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close’”); see also *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 524 (6th Cir. 2008) (noting that “one could read the Supreme Court [in *Breedon*] as having accepted that temporal proximity may be sufficient in a narrow set of cases”).

394. See *Mickey*, 516 F.3d at 525 (finding causality where the employee was laid off the same day his employer learned that he had filed an EEOC charge); *Upshaw v. Ford Motor Co.*, 576 F.3d 576 (6th Cir. 2009) (finding causation established for the prima facie retaliation case where an employee was subjected to heightened scrutiny within days of filing an EEOC charge).

395. *Arendale v. City of Memphis*, 519 F.3d 587, 606 (6th Cir. 2008) (finding that two months is too long); but see *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428 (6th Cir. 2009) (finding that the combination of the supervisor’s heightened scrutiny of the employee’s work with a temporal gap of less than three months between the filing of an EEOC charge and adverse action was sufficient to establish the element of causation for a prima facie retaliation case).

396. *Breedon*, 532 U.S. at 274.

397. See *Mickey*, 516 F.3d at 523–24 (analyzing “recent case law [that] presents as settled the proposition that temporal proximity alone may not establish a causal connection”).

398. *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1066 (10th Cir. 2009) (finding that evidence of a temporal gap of a few days is insufficient, by itself, to create a genuine issue of fact on the question of pretext).

will, however, may provide procedural or substantive protections to employees who are disciplined for sexual harassment. For example, in *Cotran v. Rollins Hudig Hall International*, an employee who had been terminated for sexual harassment brought an action for breach of an implied-in-fact contract not to be discharged without just cause, alleging that he had not in fact engaged in the harassment. The California Supreme Court held that the plaintiff could not prove his claim simply by proving that he had not engaged in the conduct for which he had been disciplined. Rather, the issue was whether the employer reasonably believed that the harassment had occurred and conducted a fair investigation of the facts before terminating the alleged harasser.³⁹⁹

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES AND LIMITATIONS

Exhaustion of available administrative remedies is a prerequisite to bringing a lawsuit under Title VII. Before filing a Title VII suit in federal court, a “person aggrieved” under the statute must first exhaust administrative remedies by filing a timely charge with the EEOC or with a state fair employment agency.⁴⁰⁰ The time requirement for filing an EEOC charge is 300 days or 180 days after the alleged “unlawful employment practice occurred,” depending on whether the claim arises in a deferral or a nondeferral jurisdiction.⁴⁰¹ A deferral jurisdiction has a state or local agency that is authorized “to grant or seek relief” from employment discrimination or “to institute criminal proceedings” against such practices.⁴⁰² In those states, the plaintiff is required to wait for 60 days after proceedings commence in the state or local agency before filing a charge with the EEOC.⁴⁰³ After the EEOC investigates the charge, it will either dismiss the charge or, if it has “reasonable cause to believe the charge is true,” attempt “informal methods of conference, conciliation, and persuasion” to eliminate the unlawful employment practice.⁴⁰⁴ Upon dismissal of the charge or failure to enter into a conciliation agreement within 180 days of the filing of the charge, the EEOC will notify the “person claiming to be aggrieved,” who then has 90 days to file a civil action.⁴⁰⁵ The ADA enforcement procedures are the same as those provided in Title VII.⁴⁰⁶ Under the ADEA, a civil

399. 948 P.2d 412 (Cal. 1998). *See also* *McCullough v. Univ. of Ark for Med. Sci.*, 559 F.3d 855, 861–62 (8th Cir. 2009) (concluding that the critical question is “not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge”).

400. Title VII, § 706(e), 42 U.S.C. § 2000e-5(e)(1).

401. *Id.*

402. Title VII, § 706(c), 42 U.S.C. § 2000e-5(c).

403. *Id.*

404. Title VII, § 706(b), 42 U.S.C. § 2000e-5(b).

405. Title VII, § 706(f), 42 U.S.C. § 2000de-5(f)(1).

406. ADA § 107, 42 U.S.C. § 12117(a).

action cannot be filed until 60 days after a charge has been filed with the EEOC.⁴⁰⁷ In workplace harassment cases, as in other discrimination cases, the EEOC or the state fair employment agency conducts an investigation or other proceeding in only a small fraction of the many cases filed.⁴⁰⁸ In most cases, the EEOC simply issues a right-to-sue letter, and the plaintiff then has 90 days from receipt of the letter to file an action in court.⁴⁰⁹

A critical issue in many Title VII discrimination cases is determining when “an unlawful employment practice” has “occurred” for purposes of filing a timely charge with the EEOC. In *National Railroad Passengers Corp. v. Morgan*, the Supreme Court distinguished between discrete acts of discrimination (such as discharge or failure to hire), retaliation, hostile work environment claims, and pattern-or-practice claims.⁴¹⁰ The Court held that a hostile environment harassment claim is not a single act but is instead a series of acts that occur “over a series of days or perhaps years” and that “collectively constitute one ‘unlawful employment practice.’”⁴¹¹ The Court held: “Provided that an act contributing to the claim occurs within the charging period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”⁴¹²

Even if there is a substantial gap in time between the act as to which a charge is timely and the earlier alleged acts of harassment, they will be considered a single unlawful employment practice “so long as each act is part of the whole.”⁴¹³ Courts have held that even an employee’s physical absence from work is not, per se, a bar to considering, as part of the actionable hostile environment, conduct before the employee left work or incidents that occurred during his or her absence.⁴¹⁴ Nevertheless, the *Morgan* Court observed that where, due to an “intervening action by the employer,” a timely act of harassment has no relation to earlier acts outside the filing period, the plaintiff could not treat the earlier acts as part of the whole unlawful employment practice.⁴¹⁵ Relying on this language in *Morgan*, the Third Circuit in *Watson v. Blue Circle* concluded that an employer’s prompt “intervening action” to stop the harassing conduct of one employee barred consideration of his actions as part of the plaintiff’s claim.⁴¹⁶ If a plaintiff unreasonably delays filing

407. ADEA § 7, 29 U.S.C. § 626(d).

408. See *supra* note 28. See EEOC statistics, available at <http://www.eeoc.gov/eeoc/statistics/>.

409. 42 U.S.C. § 2000e-5(f)(1).

410. 536 U.S. 101, 114–115 (2002).

411. *Id.* at 117.

412. *Id.*

413. *Id.*

414. See, e.g., *Greer v. Paulson*, 505 F.3d 1306, 1313–15 (D.C. Cir. 2007) (discussing *Morgan*); *id.* at 1314 n.3 (collecting cases).

415. *Morgan*, 536 U.S. at 118.

416. 324 F.3d 1251, 1258–59 (3d Cir. 2003).

a harassment charge, however, the defendant can seek equitable relief under the doctrines of waiver, estoppel, and equitable tolling.⁴¹⁷

Exhaustion of administrative remedies, however, is not required for claims brought under 42 U.S.C. § 1981, 42 U.S.C. § 1983, or state tort law.

C. THE UNIONIZED WORKPLACE

Additional issues arise in a unionized workplace in which both the alleged harassment victim and the alleged harasser are covered by a collective bargaining agreement (CBA). When the alleged harasser is covered by a CBA, both the investigation of the allegations and any discipline imposed are likely to be subject to the grievance-arbitration provisions of the CBA. If the discipline imposed by the employer for the harassment is excessive, an arbitrator may determine that it violates the progressive discipline and proportional penalty rules that typically govern the just cause provision of a CBA.⁴¹⁸

Under the Supreme Court's 2009 decision in *14 Penn Plaza LLC v. Pyett*, when the harassment victim is covered by a CBA that contains a nondiscrimination clause (as most collective bargaining agreements do), the victim may be obligated to file a grievance challenging the harassment rather than filing a suit in federal or state court.⁴¹⁹ Prior to *Penn Plaza*, the Supreme Court had held that statutory discrimination claims were not covered by CBA arbitration agreements and, thus, the victim of discrimination had the option of filing a grievance alleging a violation of the CBA's nondiscrimination clause or a suit alleging a violation of Title VII and state antidiscrimination law, or both.⁴²⁰ In *Penn Plaza*, the Court held that a collective bargaining agreement that "clearly and unmistakably" waives an individual employee's right to file statutory discrimination claims is enforceable.⁴²¹ The Court did not explain when a CBA will be found to waive such claims, or when a CBA antidiscrimination provision will be construed to cover statutory claims. Because statutory claims have not previously been subject to CBA grievance and arbitration procedures, historically unions have had the ability to decide which grievances to investigate and to prosecute all the way through arbitration and which grievances to settle. The union's discretion in the management of grievances and arbitration

417. *Morgan*, 536 U.S. at 113.

418. For example, in *Westvaco Corp. v. United Paperworkers International Union, Local 1014*, 171 F.3d 971 (4th Cir. 1999), the court held that the public policy against workplace sexual harassment does not bar an arbitrator from reinstating an employee who was fired for sexually harassing a coworker. The arbitrator had found that discharge was not an appropriate sanction. The harasser was a 20-year employee, with no prior record of discipline for sexual harassment. He had received no progressive discipline, counseling, or supervision for harassing conduct of which the company was aware.

419. 129 S. Ct. 1456 (2009).

420. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

421. 129 S. Ct. at 1474.

is subject to the duty of fair representation, which prohibits a union from acting arbitrarily or discriminatorily toward the members of the bargaining unit. The open issues after *Penn Plaza* are whether a conventional nondiscrimination clause in a CBA will be held to cover statutory claims and, if so, whether the union is obligated to grieve every discrimination claim and whether a union's failure to process a claim through arbitration bars an employee from arbitrating the claim herself under the CBA or from filing suit.