§ 3.09 Strategies of Prevention, Avoidance, and Defense

The EEOC has established Guidelines to encourage employers to take steps that are necessary and appropriate to reduce and eliminate incidents of sexual harassment in the work place.[1]

The EEOC has stated that prevention is the best tool for the elimination of sexual harassment. It recommended that employers should take all steps necessary including affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and that employers develop methods to sensitize all concerned.[2]

The EEOC recommends that an effective program should include an explicit policy against sexual harassment. This policy should be clearly communicated to all employees and effectively implemented. Management has an affirmative duty to introduce and discuss the subject with supervisory and nonsupervisory personnel. Sanctions may be imposed if a violation of the policy and the law occurs. These sanctions must be explained and delineated in advance of any violation and must be enforced in the event there is deemed to be an infraction.

The program and policy proscribing sexual harassment must include procedures for resolving sexual harassment complaints. The program need not require that victims must first complain to the offending supervisor.[3] The policy should, however, ensure confidentiality and protection of victims and witnesses against retaliation.[4]

The Supreme Court in *Faragher v. City of Boca Raton* noted that the purpose of Title VII was not only to provide redress but to also avoid harm.[5] The Supreme Court provided employers with an affirmative defense to sexual harassment and hostile environment claims. An employer that fulfills its obligation to prevent violations should be credited for making a reasonable attempt to discharge its duty under Title VII. "Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employer with some such incentive."[6]

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[1] EEOC Guidance: Policy Guidance on Current Issues of Sexual Harassment (N-915-050) (Mar. 19, 1990) (hereafter, EEOC Guidance Policy N-915-050).

[2] 29 C.F.R. § 1604.11(f).

[3] Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998).

[4] EEOC Guidance Policy N-915-050, N. 1 *supra.*

[5] Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998); 29 C.F.R. § 1604.11(f) (1998).

[6] Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998).

The employee has a duty to use means as are reasonable under the circumstances to avoid or minimize damages. The Supreme Court reasoned that an employer that has provided a proven and effective mechanism for reporting and resolving complaints of sexual harassment puts the burden on the employee to come forward to complain. If the employee unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so. In other words, if the employee could have avoided harm, no liability should be found against the employer who had taken reasonable steps to protect the employee under the circumstances. As long as the employer or its supervisor did not take action against the employee for the harassment or complaining, the employer may raise an affirmative defense to liability or damages. This defense comprises two essential elements: first, that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and second, that the 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 tangible employment action, such as discharge, demotion, or undesirable reassignment.[7]

[1]—First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care

Practitioners and human resource personnel will find the EEOC Guidance on affirmative defenses informative for prevention, protection, and resolving hostile environment claims. Moreover, the EEOC's discussion on affirmative defenses and its suggestions on procedures and policies are a guide for advocates and the courts in resolving legal and factual issues related to litigation, discovery, and case resolution.

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate and enforce an anti-harassment policy and complaint procedure and to take reasonable steps to prevent and correct harassment. The Second Circuit considered that an anti-harassment policy and complaint procedure in every instance is not necessary as a matter of law. That is, the need for a stated policy suitable to the employment circumstances may be appropriately addressed in any case when litigating the first element of the defense. "[T]he existence of an anti-harassment policy with complaint procedure is an important, if not dispositive, consideration."[8] The Guidance identifies steps that are not

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[7] *Id.*

[8] Caridad v. Metro-North Commuter Railroad, 191 F.3d 283, 80 F.E.P. Cases

mandatory but are suggested. The issue as to whether or not an employer can prove that it exercised reasonable care depends on the facts and circumstances on a case by case basis. For example, small employers may be able to effectively prevent and correct harassment through informal means, whereas larger employers may have to institute more formal mechanisms.[9]

Written content of policies and procedures are not alone a "safe harbor" for employers. The employer must act reasonably, and therefore any policy by the employer must be both reasonable and "effectual."[10] Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of the claim, the employer failed to implement its process effectively.[11] If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.[12] Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out the responsibility to conduct an effective investigation of the harassment complaint, the employer has not discharged its duty to exercise reasonable care. The Commission points out that, alternatively, lack of formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

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627 (2d Cir. 1999). See also Fierro v. Saks Fifth Avenue, 13 F.Supp.2d 481, 491 (S.D.N.Y. 1998).

[9] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002) (June 18, 1999) (hereafter, EEOC Enforcement Guidance 915.002). See Section V(C)(3) for a discussion of preventive and corrective care by small employers.

[10] Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998); Brown v. Perry, 184 F.3d 388, 80 F.E.P. Cases 567 (4th Cir. 1999).

[11] See Hurley v. Atlantic City Police Dept., 174 F.3d 95, 79 F.E.P. Cases 808 (1999), *cert. denied* 528 U.S. 1074 (2000). "*Ellerth* and *Faragher* do not . . . focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort. . . ." The employer failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.

[12] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.57 (June 18,1999).

[a]—Policy and Complaint Procedure

Employers must establish, publicize and enforce anti-harassment policies and complaint procedures. The Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." The court noted that it "is not necessary in every instance as a matter of law."[13] Failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.[14]

The Guidance suggests that an employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. The employer should take other measures to ensure effective dissemination of the policy and complaint procedure. This may include posting them in central locations and incorporating them into employee handbooks, and, where feasible, providing training to all employees to ensure that they understand their rights and responsibilities.

Moreover, the employer should demonstrate that it has a policy, and that under that policy, its response to sexual harassment complaints is vigorous. For example, the Fifth Circuit held that in Scrivner v. Socorro Independent School District[15] the employer began an investigation into the charged party's behavior. The employer then interviewed of all of the employees in the division, and warned the charged party to curtail certain conduct. After a second complaint was made, the employer removed the charged party from his position and accepted his resignation.

The EEOC Guidance provides that an anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:[16]

(1) a clear explanation of prohibited conduct;

(2) assurance that employees who made complaints of harassment or provide information related to such complaints will be protected against retaliation;

(3) a clearly described complaint process that provides accessible avenues of complaint;

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[13] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633, 77 F.E.P. Cases 1 (1998).

[14] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.58 (June 18, 1999).

[15] Scrivner v. Socorro Independent School District, 169 F.3d 969, 79 F.E.P. Cases 429 (5th Cir. 1999).

[16] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.1. (June 18, 1999).

(4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

(5) a complaint process that provides a prompt, thorough, and impartial investigation; and

(6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by anyone in the workplace: supervisors, co-workers, or non-employees.[17]

The EEOC suggests that management should convey the seriousness of the prohibition. One way to do that is for the mandate to come from upper management.

The policy should encourage employees to report harassment before it becomes severe or pervasive. Although the EEOC noted that isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.[18] An anti-harassment policy and complaint procedure will not be effective without such an assurance.[19]

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[17] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.58 (June 18, 1999). "Although the affirmative defense does not apply in cases of harassment by co-workers or non-employees, an employer cannot claim lack of knowledge as a defense to such harassment if it did not make clear to employees that they can bring such misconduct to the attention of management and that such complaints will be addressed."

[18] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.1.b (June 18, 1999).

[19] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002) (June 18, 1999). The Guidance states that surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. See, e.g., Fitzgerald & Swan, "Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," J. Soc. Issues 117, 121-122 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id.* at 123-124. See also, Frazier,

Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management should also scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to insure that such decisions are not based on retaliatory motives.

The Guidance emphasizes that an employer's harassment complaint procedure should be designed to encourage victims to come forward. It should clearly explain the process and insure that there are no unreasonable obstacles to complaints. The complaint procedure should not be rigid, since rigid procedures could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether the complaint conforms to a particular format or is made in writing.

The first element of the affirmative defense may be met if the employer can demonstrate that it had a sexual harassment policy that was posted, the policy was instructive as to how to report sexual harassment, the employer investigated complaints of sexual harassment, and the employer promptly sought to remedy the problem. In Savino v. C. P. Hall Company,[20] the Seventh Circuit noted that "Title VII does not require that the employer's responses to the plaintiff's complaints of supervisory sexual harassment successfully prevent subsequent harassment, only that the employer's actions were reasonably likely to check future harassment."

The complaint procedure should provide accessible points of contact for the initial complaint.[21] A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.[22] Employers may construct multiple mechanisms for

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"Overview of Sexual Harassment from the Behavioral Science Perspective," paper presented at the American Bar Association National Institute on Sexual Harassment at B-17 (1998), reviewing studies that show frequency of retaliation after victims confront their harasser or file formal complaints.

[20] Savino v. C. P. Hall Company, 199 F.3d 925, 933, 78 F.E.P. Cases 1245 (7th Cir. 1999). See Caridad v. Metro-North Commuter Railroad, 191 F.3d 283, 295, 80 F.E.P. Cases 627 (2d Cir. 1999) (An employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct.).

[21] EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.60 (June 18, 1999).

[22] See Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998), holding as matter of law that the

complaining about, detecting, and correcting harassment. This would include distribution of the policy and regular training sessions on sexual harassment.[23] The policy may provide a definition of sexual harassment, identify contacts who should be advised of sexual harassment behavior or conduct, describe disciplinary measures that the company may take if it finds harassment, and include a statement that retaliation will not be tolerated.[24] Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.[25]

The Guidance advised that an employer designate at least one official outside the employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass the chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by the supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.[26]

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.[27] While a prompt complaint process should make it feasible for an employee to delay

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City did not exercise reasonable care to prevent the supervisors' harassment. The Supreme Court took note of the fact that the City's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints." Citing to Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49, 40 F.E.P. Cases 1822 (1986).

[23] Shaw v. AutoZone, Inc., 180 F.3d 806, 76 F.E.P. Cases 1185 (7th Cir. 1999), Madray v. PUBLIX Supermarkets, 208 F.3d 1290, 52 F.E.P. Cases 1071 (11th Cir. 2000).

[24] Montero v. AGCO Corporation, 192 F.3d 856, 80 F.E.P. Cases 1658 (9th Cir. 1999).

[25] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.62 (June 18, 1999).

[26] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.1.b (June 18, 1999).

[27] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.63 (June 18, 1999). It is particularly important for federal agencies to explain the statute of limitations for filing formal EEO complaints, because the regulatory deadline is only forty-five days and federal employees may otherwise assume they can wait whatever length of time it takes for management to complete its internal investigation.

deciding whether to file a charge until the complaint to the employer is resolved, the employee is not required to do so.[28]

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.[29]

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs the supervisor about alleged harassment, but asks the supervisor to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. Although it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.[30] One mechanism to help avoid such conflicts would be for the employer to set up an informational telephone line which employees can use

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[28] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.64 (June 18, 1999). If an employer actively misleads an employee into missing the deadline for filing a charge by dragging out its investigation and assuring the employee that the harassment will be rectified, then the employer would be "equitably estopped" from challenging the delay. See Currier v. Radio Free Europe/RadioLiberty, Inc., 159 F.3d 1363, 1368, 333 U.S. App. D.C. 50, 78 F.E.P. Cases 513 (D.C. Cir. 1998). "[A]n employer's affirmatively misleading statements that a grievance will be resolved in the employee's favor can establish an equitable estoppel [citing]":

Third Circuit: Miller v. Beneficial Management Corp., 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling applies where employer's own acts or omission has lulled the plaintiff into foregoing prompt attempt to vindicate his rights.).

Eleventh Circuit: Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1531 (11th Cir. 1992) (tolling is appropriate where plaintiff was led by defendant to believe that the discriminatory treatment would be rectified).

[29] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.65 (June 18,1999). The sharing of records about an harassment complaint with prospective employers of the complainant could constitute unlawful retaliation. See Compliance Manual 614:0005, § 8(II)(D)(2) (Retaliation) (BNA) (May 20, 1998).

[30] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.66 (June 18, 1999) ("One court has suggested that it may be permissible to honor such a request, but that when the harassment is severe, an employer cannot just stand by, even if requested to do so."). See Torres v. Pisano, 116 F.3d 625 (2d Cir.), *cert. denied* 522 U.S. 997 (1997).

to discuss questions or concerns about harassment on an anonymous basis.[31]

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary.[32] For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If the employer considers a fact-finding investigation is necessary, it should be started immediately, understanding that the amount of time to complete the investigation will depend on the particular circumstances.[33] For example, if multiple individuals were allegedly harassed, that it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. For example, the employer could schedule changes to avoid contact between the parties, transfer the alleged harasser, or place the alleged harasser on nondisciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.[34]

[b]—Investigation

An employer will be deemed to have violated Title VII by failing to investigate and correct sexual harassment when the employer is on notice that such harassment may have existed. An employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law.[35] For example, where a direct

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[31] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.67 (June 18, 1999).

[32] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.1.e (June 18, 1999).

[33] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.68 (June 18, 1999).

[34] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.1.e. (June 18, 1999).

[35] *Second Circuit:* Richardson v. New York State Department of Corrections, 180 F.3d 426, 80 F.E.P. Cases 110 (2d Cir. 1999). Evidence that there were incidents in which the employer took no action may be sufficient to defeat a motion for summary judgment. See Distasio v. Perkin Elmer Corp., 157 F.3d 55, 78 F.E.P. Cases 531 (2d Cir. 1998), holding that, if a direct supervisor who had knowledge of harassment and failed to act against it, the plaintiff has no further obligation to bring it to the employer's attention.

supervisor who had knowledge of harassment failed to take action against it, the plaintiff has no further obligation to bring the harassment to the employer's attention. It is sufficient for a plaintiff to give notice to someone who should reasonably be expected to stop the harassment or refer it up the chain of command to someone who could stop it. Employers would not be insulated from liability simply because the employer established internal complaint and review procedures.[36]

An employer could not however, satisfy its affirmative defense, as a matter of law, if in the first instance its anti-harassment policy is "otherwise defective or dysfunctional."[37] For example, a policy statement that addresses sexual harassment but makes no mention of non-sexual gender harassment and stereotyping may be insufficient. Moreover, employers cannot satisfy the affirmative defense standard if its management-level employees discourage the use of the employer complaint procedures, or if their response to employee complaints is inadequate,[38] or reasonably prompt.[39] Even if an employment policy could obviate constructive knowledge of sexual harassment, a policy which does not sufficiently or specifically inform victims that sexual harassment is prohibited, or that an offending supervisor has no real or apparent authority to discharge an employee when the threat is linked to harassing conduct will not obviate the imposition of liability on the employer

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Third Circuit: Hurley v. The Atlantic City Police Department, 174 F.3d 95, 79 F.E.P. Cases 808 (3d Cir. 1999). Evidence that the employer had a policy that provided for five alternative methods of complaining, and complainant did not take advantage of any of the alternatives, was not a sufficient shield to liability where there was strong evidence that the employer failed to implement its anti-harassment policies or to inquire into harassing conduct of which its supervisor was aware; Tompkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1049, 16 F.E.P. Cases 22 (3d Cir. 1977).

Seventh Circuit: Young v. Bayer Corp., 123 F.3d 672, 675 (7th Cir. 1997), holding that it is sufficient for a plaintiff to give notice to someone who should reasonably be expected to stop the harassment or refer it up the chain of command to someone who could stop it.

District of Columbia Circuit: Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981).

[36] Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283, 292, 68 F.E.P. Cases 727 (E.D. Pa. 1991).

[37] Walker v. Thompson, 214 F.3d 615, 83 F.E.P. Cases 243 (5th Cir. 2000); Smith v. First Union National Bank, 202 F.3d 234, 81 F.E.P. Cases 1391 (4th Cir. 2000).

[38] Jackson v. Quanex Corp., 191 F.3d 647, 83 F.E.P. Cases 1281 (6th Cir. 1999).

[39] Sims v. Health Midwest Physician Services Corp., 196 F.3d 915, 81 F.E.P. Cases 1658 (8th Cir. 1999).

for such harassment.[40]

Once an employer learns of claims of discriminatory acts, it cannot rest idly on hopes that such acts will not be repeated, whether by the same employee or any other. It has an obligation to investigate whether acts conducive to the creation of an atmosphere of hostility did in fact occur and, if so, it must attempt to dispel workplace hostility by taking prompt remedial steps.[41]

Employers have a duty to conduct an investigation and take steps to end the alleged harassment once the employer knew or should have known of the offending conduct.[42] This may include interviewing the harasser, witnesses and complainants. An expeditious investigation and remedy will establish the employer's defense; its absence may lead to liability for the company.[43] For example, a federal district court in New Jersey found that the employer met its obligation under Title VII where the employer interviewed the alleged harasser and took statements from the complainant the same day the employee informed superiors of the harassment; advised the complainant of the right to press criminal charges against her harasser; interviewed the alleged harasser's mother and sister; met individually with each woman whom the harasser supervised; and told them they suspected that the alleged

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[40] *Second Circuit:* Karibian v. Columbia University, 14 F.3d 773 (2d Cir. 1994), *cert. denied* 512 U.S. 1213 (1994).

Fourth Circuit: Spencer v. General Electric Co., 697 F.Supp. 204, 218, n.16, 51 F.E.P. Cases 1696 (E.D. Va. 1988).

[41] Watts v. New York City Police Department, 724 F.Supp. 99, 108 (S.D.N.Y. 1989).

[42] See, e.g., Barrett v. Omaha National Bank, 726 F.2d 424, 427, 35 F.E.P. Cases 593 (8th Cir. 1984). Immediate investigation into alleged sexual harassment claim and censure of those held responsible was deemed reasonable and appropriate corrective action.

[43] See, e.g.:

Second Circuit: Babcock v. Post Master General, 783 F.Supp. 800, 809, 59 F.E.P. Cases 410 (S.D.N.Y. 1992). The court held that as soon as plaintiff complained, the employer immediately conducted an investigation and reported both incidents to the Postal Inspection Service, effectively insulating itself from liability.

Fifth Circuit: Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 44 F.E.P. Cases 1604 (5th Cir. 1987). "Malibu's handling of the problem was decisive. Ordinarily an organization requires time to respond to embarrassing emotional and often litigation spawning claims of sexual harassment . . . . Malibu speedily evaluated Mrs. Dornhecker's complaint."

Sixth Circuit: Davis v. McNea Allied Signal, Bendix Automotive North America, 1997 U.S. App. LEXIS 5413 (6th Cir. March 18, 1997). The defendant did not unreasonably delay the investigation thereby effectively preventing further harassment.

harasser acted improperly towards women in the office.[44] A federal district court in Alabama[45] granted an employer's motion for summary judgment where the employer had shown that it interviewed the alleged harasser and witnesses and made written accounts of these interviews; advised the alleged harasser of the complaint and gave a written warning to the alleged harasser stating that "this sort of conduct will not be tolerated . . . and must never happen again."[46] An employer's response should be expeditious and adequate to assure its employee that this sort of conduct will not be tolerated.

The timing of the investigation and the remedial scheme, if unduly prolonged unnecessarily and unreasonably, leaves the employee exposed to continued hostility in the workplace. Such a process, in reality, indirectly punishes employees with the temerity to complain about sexual harassment and cannot constitute effective remediation.[47] Once an employer assumes a duty to investigate, that employer must not only be prompt, but must also take reasonable steps to discover and rectify evidence of sexual harassment. In other words "the remedial action must be reasonably calculated to prevent further harassment."[48]

The Seventh Circuit held *in Baskerville v. Culligan International Company*[49] that prompt investigation and immediate censure of the alleged harasser's behavior provided a reasonable affirmative defense to a claim of sexual harassment. The court added, however, that what is reasonable depends on the gravity of the harassment: "an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment."[50]

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[44] Foster v. Township of Hillside, 780 F.Supp. 1026, 64 F.E.P. Cases 190 (D. N.J. 1992).

[45] Ahart v. Host Marriott Corporation, 1996 U.S. Dist. LEXIS 7335 (S.D. Ala. May 24, 1996).

[46] *Id.* See also:

Fifth Circuit: Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 737 F.Supp. 1070, 61 F.E.P. Cases 1595 (E.D. Miss. 1990).

Seventh Circuit: Baskerville v. Culligan International Company, 50 F.3d 428, 67 F.E.P. Cases 564 (7th Cir. 1995); Juarez v. Ameritech Mobile Communications, Inc., 746 F.Supp. 798, 53 F.E.P. Cases 1722 (N.D. Ill. 1990).

[47] Payton v. New Jersey Turnpike Authority, 691 A.2d 321, 328, 73 F.E.P. Cases 1149 (N.J. 1997).

[48] Juarez, v. Ameritech Mobile Communications Inc., 746 F.Supp. 798, 53 F.E.P. Cases 1722 (N.D. Ill. 1990).

[49] Baskerville v. Culligan International Company, 50 F.3d 428, 67 F.E.P. Cases 564 (7th Cir. 1995).

[50] *Id.*, 50 F.3d at 432. See also, Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309, 44 F.E.P. Cases 1604 (5th Cir. 1987).

The Third Circuit[51] agreed that a company who had several meetings with the alleged harasser and made the plaintiff well aware of rights in case of future improper conduct, acted reasonably to prevent further harassment. The court stated in dicta that, "employers would be well advised to establish protocols to ensure careful and complete investigation of sexual harassment complaints."[52]

The employer's attorney who conducts the investigation, for all practical purposes, commingles the roles of the investigator and legal advisor, and by doing so, enables the plaintiff's attorney to discover the nature and extent of that fact witness' investigatory efforts.

Courts have recently held that employers who assert the investigation as a defense in litigation, whose attorney conducted the sexual harassment investigations, may effectively waive any attorney-client privilege in regard to the investigation. Courts have deemed that the attorney may have merged the role of attorney and investigator. The Third Circuit in *Harding v. Dana Transport*[53] held that an attorney who was acting as a fact finder or investigator into a claim of sexual harassment should be compelled to disclose obtained findings: Where an employer has attempted to utilize the results of an attorney's investigation both as a defense to liability and as an aspect of its preparation for the sexual discrimination trial itself, the employer has merged the two roles of investigator and legal advisor.[54] Disclosure of the investigator's findings and notes and files is essential to determine the sufficiency of the investigation. "Without having evidence of the actual content of the investigation, neither the plaintiffs nor the fact finder can discern its adequacy."[55]

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[51] Knabe v. Boury Corp., 114 F.3d 407, 73 F.E.P. Cases 1877 (3d Cir. 1997).

[52] *Id.*, 114 F.3d at 413. For other examples of remedial action found to be sufficient, see:

Sixth Circuit: Davis v. McNea Allied Signal, Inc., Bendix Automotive North America, 1997 U.S. App. LEXIS 5413 (6th Cir. March 18, 1997).

Seventh Circuit: Juarez, v. Ameritech Mobile Communications Inc., 746 F.Supp. 798, 53 F.E.P. Cases 1722 (N.D. Ill. 1990). A suspension of the alleged harasser five days after the complaint and an immediate investigation on the same day was sufficient remedial action reasonably calculated to prevent further harassment.

Eighth Circuit: Barrett v. Omaha National Bank, 726 F.2d 424, 35 F.E.P. Cases 593 (8th Cir. 1984). Informing the alleged harassers that their conduct would not be tolerated and that further misconduct would result in termination of employment was sufficient remedial action.

[53] Harding v. Dana Transport, 914 F.Supp. 1084, 69 F.E.P. Cases 1603 (D. N.J. 1996).

[54] *Id.*, 914 F.Supp. at 1096.

[55] *Id.*

A New York federal district court in *Pray v. The New York City Ballet Company*,[56] relied on *Harding* to hold "where as here, an employer relies on an internal investigation and subsequent corrective action for its defense, it has placed that conduct at issue. Thus, an employer may not prevent discovery of such an investigation based on attorney-client or work product privilege solely because the employer hired attorneys to conduct its investigation."[57] *Harding* and *Pray* stand for the proposition that an employer defendant cannot rely on its investigation as a defense to shield this information from plaintiffs merely because their investigators happen to be their attorneys.

A federal district court held that an attorney's legal advice in a claim of sexual harassment is discoverable when that advice is given during the course of an investigation.[58] The advice that counsel gave during the course of the investigation relating to the investigation was considered clearly relevant and should not be considered privileged. The court emphasized that it is the defendant that has placed the investigation and the advice of counsel with respect to the investigation at issue in the case.[59]

If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and may not stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy.

[c]—Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.[60]

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[56] Pray v. The New York City Ballet Company, 73 F.E.P. Cases 1714, 1997 U.S. Dist. LEXIS 6995 (S.D.N.Y. May 19, 1997), *aff'd in part and rev'd in part*, 1998 U.S. Dist. LEXIS 2010 (S.D.N.Y. Feb. 11, 1998).

[57] *Id.*, 1997 U.S. Dist. LEXIS 6995, at *2.

[58] Johnson v. Rauland-Borg Corp., 961 F.Supp. 208, 76 F.E.P. Cases 1623 (N.D. Ill. 1997).

[59] *Id.*, 961 F.Supp. at 211. See also, Wellpoint Health Networks, Inc. v. The Superior Court of Los Angeles County, 59 Cal. App.4th 110, 68 Cal. Rptr.2d 844, 127, 75 F.E.P. Cases 706 (Cal. App. 1997).

[60] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.69 (June 18, 1999): "Management may be reluctant to release information about specific disciplinary measures that it undertakes against the harasser, due to concerns about potential defamation claims

The Guidance provides that remedial measures should be designed to stop the harassment, correct its effects on the employee, and insure that the harassment does not recur. These remedial measures need not be those that the complainant requests or prefers, as long as the measures are effective.

In determining disciplinary measures, the employer should keep in mind that it could be found liable if the harassment does not stop. It is understandable that the employer may have concerns that overly punitive measures may subject it to claims such as wrongful discharge, and may be inappropriate.

At least one Court has suggested that to balance the competing concerns, disciplinary measures should be proportional to the seriousness of the events.[61] If the harassment was minor such as a small number of "off color" remarks by an individual with no prior history of similar misconduct, then counseling and oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.[62]

Remedial measures should not adversely affect the complainant. For example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise).[63] Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.[64]

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by the harasser. However, many courts have recognized that limited disclosures of such information are privileged. Citing reference to cases addressing defenses to defamation claims arising out of alleged harassment, see:

Second Circuit: Stockley v. AT&T, 687 F.Supp. 764 (E.D.N.Y. 1988) (statements made in course of investigation into sexual harassment charges protected by qualified privilege).

Fifth Circuit: Duffy v. Leading Edge Products, 44 F.3d 308, 311, 67 F.E.P. Cases 97, 10 I.E.R. Cases 491 (5th Cir. 1995) (qualified privilege applied to statements accusing plaintiff of harassment); Garziano v. E. I. DuPont de Nemours & Co., 818 F.2d 380, 43 F.E.P. Cases 1790, 2 I.E.R. Cases 272 (5th Cir. 1987) (qualified privilege protects employer's statements in bulletin to employees concerning dismissal of alleged harasser)."

[61] Mockler v Multnomah County, 140 F.3d 808, 813, 76 F.E.P. Cases 890 (9th Cir. 1998).

[62] EEOC Enforcement Guidance Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.71 (June 18, 1999).

[63] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.72 (June 18, 1999), citing reference to Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied* 513 U.S. 1082 (1995) (employer's remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff's shift to get her away from the supervisor rather than change the supervisor's shift or work area).

[64] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful

The Guidance cautions that remedial measures should correct the effects of the harassment. Such measures should be designed to put the employee in the position the employee would have been in had the misconduct not occurred.[65]

Employers may be deemed to know of sexual harassment that is practiced in the work place or known among employees. This often occurs in cases involving more than one harasser or victim.[66] When an employer either receives a complaint or otherwise learns of claims of sexual harassment, the employer should investigate promptly and thoroughly. The employer should take the steps necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent its reoccurrence. Disciplinary action should be taken against the offender. This may range from a reprimand to dismissal. Generally, the corrective action should reflect the severity of the conduct.[67]

When the EEOC is informed that the employer has taken corrective action, the agency investigates the action of the employer to determine if that action was appropriate and effective. If the Commission finds that the harassment has been eliminated, immediate action was taken, the victim was made whole, and preventive measures were also taken, the agency will close the file on the case.

[d]—Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them,

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Harassment by Supervisors (915.002), n.73 (June 18, 1999).

[65] See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.2 (June 18, 1999), for examples of appropriate disciplinary action.

[66] See: Lipsett v. University of Puerto Rico, 864 F.2d 881, 906, 54 F.E.P. Cases 230 (1st Cir. 1988); EEOC Guidance: Policy Guidance on Current Issues of Sexual Harassment (N-915-050) (March 19, 1990).

[67] See EEOC Guidance Policy Guidance on Current Issues of Sexual Harassment (N-915-050) (March 19, 1990). See also:

Fifth Circuit: Dornhecker v. Malibu Grand Prix Corporation, 828 F.2d 307, 44 F.E.P. Cases 1604 (5th Cir. 1987). In *Dornhecker,* the victim was assured within hours of a harassing incident that she would not need to work further with harasser.

Eighth Circuit: Barrett v. Omaha National Bank, 726 F.2d 424, 35 F.E.P. Cases 593 (8th Cir. 1984). In *Barrett,* the employer acted within four days of a female employee's complaint of offensive touching and talk of sexual activities.

train them, and monitor their performance."[68]

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they were officially designated to take complaints[69] and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures.[70] For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should start an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint or not, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.[71]

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Training should explain the types of conduct that violates the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct, for example, in employee evaluations, to make sure that the supervisors and managers carry out their responsibilities under the organization's anti-harassment program.[72]

Reasonable preventive measures may include screening job applicants for supervisory jobs to see they have a record of engaging in harassment. It may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

The Commission considers it advisable for an employer to keep records of all complaints of harassment. Such records may

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[68] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.2 (June 18, 1999).

[69] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.75 (June 18, 1999).

[70] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.76 (June 18, 1999).

[71] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.77 (June 18, 1999).

[72] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.78 (June 18, 1999).

demonstrate a pattern of harassment by the same individual. A pattern would be relevant to the employer's credibility assessments and disciplinary measures.[73]

[e]—Small Businesses

It may not be necessary for an employer of a small workforce to implement the type of formal complaint process described above. If it puts into place an effective, informal mechanism to prevent and correct harassment, a small employer could still satisfy the first prong of the affirmative defense to a claim of harassment.[74] As the Court recognized in *Faragher*, an employer of a small workforce might informally exercise sufficient care to prevent harassment.[75]

A small business employer's failure to disseminate a written policy against harassment on protected bases would not undermine the affirmative defense if it effectively communicated the prohibition and an effective complaint procedure to all employees at a staff meeting. An owner of a small business who regularly meets with all of his or her employees might tell them at the monthly staff meetings that he or she will not tolerate harassment and that anyone who experiences harassment should bring it "straight to the top."[76]

If the complaint is made, the business, like any other employer, must conduct a prompt, thorough, and impartial investigation and undertake swift and appropriate corrective action where appropriate.

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[73] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.79 (June 18, 1999).

[74] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), n.80 (June 18, 1999).

[75] Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662, 77 F.E.P. Cases 14 (1998).

[76] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (915.002), § V.C.3 (June 18, 1999).