

HARASSMENT IN THE WORKPLACE^{1, 2}

I. Introduction

A recent article in *The Desert Sun*, a newspaper based in Palm Springs, California, suggests that despite the fairly comprehensive development of the law prohibiting harassment in the workplace, particularly sexual harassment, instances of it are as outrageous now as they were ten years ago or more. For example, the *Desert Sun* reports that fifty-seven female farm-workers charged their employer, Riviera Vineyards, with a pattern of abusive sex harassment created by their co-workers. The allegations included the touching of females' buttocks, breasts and stomachs; requests for sexual favors in return for a good working environment; derogatory comments; and an allegation of rape. The *Desert Sun*, *Harassment-free Workplace Responsibility of Bosses, Workers*, (July 5, 2005). This case was ultimately settled for over a million dollars.

Apparently, in some industries the prohibitions against this kind of conduct still has not sunk in. However, the actual numbers of charges alleging sexual harassment has decreased slightly,³ the laws prohibiting harassment is evolving as allegations involving different kinds of harassment make their way to the courts. In our research we have found an increasing number of cases involving harassment based on national origin, religion, disability, and age. In this paper we examine the state of the law involving harassment cases. An effort has been made to point out where the law is different in cases involving non-sexual harassment.

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³In 1994, 14,420 sexual harassment charges were filed with the EEOC, and in 2004, 13,136 sexual harassment charges were filed with the EEOC, a decrease of approximately nine percent (9%). U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined FY 1992-2004*, <http://eeoc.gov/stats/harassment.html> (last updated Jan. 27, 2005). In 1980, the EEOC received one complaint of harassment based on race, one complaint of harassment based on sex, and no complaints of harassment based on national origin. U.S. E.E.O.C., *Trends in Harassment Charges Filed with the EEOC*, <http://www.eeoc.gov/stats/harassment.html>, (updated July 22, 2004). Ten years later, in 1990, over 3,000 race harassment complaints, over 1,000 national origin harassment complaints, and over 2,000 sexual harassment complaints were filed with the EEOC. In 2000, the EEOC received over 6,500 race harassment complaints, over 2,000 national origin harassment complaints, and over 5,000 sex harassment complaints. *Id.* These statistics demonstrate, again, that harassment still exists in the workplace.

II. Federal Statutes Governing Workplace Harassment

Depending on the type of harassment alleged, a plaintiff may bring suit under one or more federal statutes as well as similar state statutes. For purposes of this paper we will focus on the federal statutes providing remedies for harassment.

A. Statutes Governing Racial and Sexual Harassment

Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Civil Rights Act of 1991, makes it unlawful "for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's . . . race . . . [or] sex." 42 U.S.C. § 2000e-2(a)(1). Plaintiffs, in racial harassment as a form of prohibited discrimination cases, may also seek relief under the Civil Rights Act of 1866. 42 U.S.C. § 1981. Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as enjoyed by white citizens." Claims brought pursuant to § 1981 are analyzed in the same manner as analogous claims brought under Title VII. *Williams v. Waste Mgt. of Ill., Inc.*, 361 F.3d 1021, 1028 (7th Cir. 2004) (upholding jury verdict in favor of plaintiff for § 1981 and Title VII claims of racial harassment, but reducing the amount of the awards); *Eliserio v. United Steelworkers of America*, 398 F.3d 1071, 1076 (8th Cir. 2005) (reversing summary judgment for Union on racial harassment and retaliation claims brought by a Hispanic man pursuant to Title VII and § 1981 because a general issue of material fact existed as to whether union demonstrated support for discrimination against plaintiff). Although § 1981 is intended to target only discrimination based on race, courts have defined race broadly enough to include persons of immigrant ethnic groups, so long as the plaintiffs allege that the discrimination is based on their ethnicity rather than their national origin. *E.g. Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004) (finding employee of Hispanic and Guatemalan ethnicity could state a discrimination claim under § 1981); *Manatt v. Bank of America, N.A.*, 339 F.3d 792, 798 (9th Cir. 2003) (finding employee of Chinese descent stated claim of hostile work environment under § 1981).

B. Statutes Governing Religious Harassment

Additionally, recent cases have addressed harassment claims based on Title VII's protection against religious discrimination. Some courts found that the cause of action both existed and the plaintiff provided enough evidence to support the claim. *E.g. Johnson v. Spencer Press of Maine*, 364 F.3d 368 (1st Cir. 2004) (upholding jury verdict for plaintiff on claim of religious based harassment); *Delelegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (denying employer's motion for summary judgment because plaintiff produced enough evidence of religious discrimination to create a triable issue of fact for the jury); *Domb v. Met. Life Ins. Co.*, 2003 WL 21878784 (S.D.N.Y. Aug. 7, 2003) (denying employer's motion for summary judgment because plaintiff provided enough evidence of a hostile work environment in terms of race, gender, and religion). Other courts found that the cause of action existed but the plaintiff could not support the claim. *E.g., Rivera v. Puerto Rico Aqueduct & Sewers Auth.*, 331 F.3d 183 (1st Cir. 2003) (affirming summary judgment for employer because plaintiff failed to

demonstrate she was subjected to a hostile work environment on the basis of her religion). Interestingly, a number of religion-based harassment claims involve facts wherein plaintiffs took issue with their companies' diversity policies because these policies conflicted with the plaintiffs' personal religious beliefs. *E.g. Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employee did not suffer discrimination where company did not allow him to display anti-homosexual Bible verses in his cubicle in response to the company's diversity posters).

C. Statutes Governing Disability Harassment

In addition to Title VII harassment claims, a number of circuits over the last decade have recognized harassment claims brought pursuant to the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131, and the Rehabilitation Act. 29 U.S.C. § 794. *E.g. Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (affirming summary judgment for employer, holding there is a cause of action under the ADA for harassment and the plaintiff demonstrated that he was regarded as disabled, but could not demonstrate that the harassment was sufficiently severe or pervasive); *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001) (holding that harassment claims are cognizable under the ADA, but affirming summary judgment in favor of employer because supervisor's actions were not objectively offensive); *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503 (5th Cir. 2003) (recognizing ADA based harassment claims, but affirming summary judgment for employer because there was no genuine material fact issue concerning whether the employer's actions were harassment); *Mannie v. Potter*, 394 F.3d 977 (7th Cir. 2005) (affirming summary judgment for employer because plaintiff did not provide evidence to demonstrate the environment was hostile; court also assuming without deciding that a hostile work environment claim can be brought under the Rehabilitation Act).

D. Statutes Governing Age Based Harassment

A number of circuits have found that harassment claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, are cognizable though they appear to be quite reticent about finding the claims cognizable in the absence of extremely strong evidence of pervasive or severe conduct. *Brennan v. Metro. Opera Assn., Inc.*, 192 F.3d 310, 318 (2d Cir. 1999) (holding that plaintiff's evidence, three incidents of his supervisor being hostile to him, was insufficient as a matter of law to support an age-based hostile work environment claim); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996) (finding it uncontroversial to extend hostile work environment claims to the ADEA, but affirming summary judgment for employer because plaintiff only had two comments as evidence that the hostility in the work place was based on her age); *Bennington v. Caterpillar Inc.*, 275 F.3d 654 (7th Cir. 2001) (assuming a plaintiff can bring a harassment claim under the ADEA; plaintiff failed to demonstrate that his employer was actually harassing, rather than just rude or unfair); *Reyes Vega v. Pepsi Cola P. R. Dist. LLC*, 371 F. Supp. 2d 21 (D. Puerto Rico 2005) (dismissing age based harassment claim because plaintiffs failed to demonstrate that age-based statements, like supervisors asking when the plaintiffs were going to retire, forced the plaintiffs to retire.); *contra E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (upholding jury verdict in favor of plaintiff for age-based hostile work environment claim because comments about plaintiff entering menopause and suggesting that she was going senile or had Alzheimer's disease were enough to support claim); *Rivera-Rodriguez v. Frito Lay Snacks*

Caribbean, 265 F.3d 15, 24-25 (1st Cir. 2001) (reversing summary judgment for employer on hostile work environment age-based claim because plaintiff provided sufficient evidence of age based remarks); *Sischo-Nownejad v. Merced Community Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991) (reversing lower court because plaintiff's evidence, that she was referred to as an "old warhorse," her students were referred to as "little old ladies," and receiving undesirable teaching assignments, was enough to preclude summary judgment).

III. Update on the Law of Sexual Harassment

As is abundantly clear, sexual harassment cases typically fall into one of two categories: "quid pro quo" or "hostile work environment" fact patterns. The Supreme Court first recognized these categories in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 40 FEP Cases 1822 (1986).

In the classic quid pro quo case, either the employee has been required to provide sexual favors in order to obtain or retain a job, raise or promotion, or she is fired or otherwise penalized for refusing to submit to sexual advances. In these cases, the discrimination explicitly affects the terms or conditions of employment. *Id.* at 64. In contrast, hostile work environment actions do not require a specific demand for sexual favors. Rather, the harassing conduct creates an intimidating, hostile or offensive working environment that constructively alters the employee's terms and conditions of employment by being severe or pervasive. *Id.* at 65-66. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 751-53 (1998), the Supreme Court explained that while quid pro quo and hostile work environment are not two separate cause of actions, the terms are still helpful for distinguishing between cases in which a supervisor carries out his threat to sanction an employee if she does not submit to his sexual demands and circumstances in which the supervisor does not carry out his threats.

A. Quid Pro Quo Harassment- New Development

Under the EEOC Guidelines, quid pro quo sexual harassment occurs where "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11 (a)(1)-(2)(1993). To state a *prima facie* case of quid pro quo sexual harassment, the plaintiff must demonstrate that her harasser "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment, upon [her] acceptance of sexual conduct." *Porter v. Cal. Dept. of Corrections*, 383 F.3d 1018, 1025 (9th Cir. 2004) (reversing summary judgment for employer and holding that the plaintiff provided sufficient evidence to establish a *prima facie* case) (quoting *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir.1995)). If an employee suffers a tangible employment action based on her refusal to submit to a harasser's sexual demands, the employer will be vicariously liable regardless of whether the employer knew of the harassment. *See Hulsey v. Pride Rest., LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004) (finding summary judgment was precluded; plaintiff established employer liability even though she never informed anyone about the harassment until after she was terminated because the harasser was her direct supervisor and he fired her because she refused to have sex with him).

Where the action taken against the plaintiff is not as clear as being hired or fired, disputes can arise as to whether the plaintiff was actually subjected to a tangible employment action. Often, only a relatively narrow sphere of conduct directly tied to an economic detriment to the plaintiff will constitute a tangible action. *Roebuck v. Washington*, 408 F.3d 790, 794 (D.C. Cir. 2005) (finding plaintiff suffered no tangible employment action where plaintiff was offered lateral transfer and other employment actions, though proposed internally, were not ultimately taken and the plaintiff never knew about these proposed actions).

Last year, the Supreme Court, in *Pennsylvania v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004), confirmed that constructive discharge can constitute a tangible employment action. In *Suders*, the plaintiff's supervisors, police officers, subjected her to actionable sexual harassment. 124 S.Ct. at 2347-2348. These men constantly made sexually explicit gestures, talked about sexually explicit subjects, and, after the plaintiff reported the harassing behavior, her supervisors arrested her for theft. The Court stated that the inquiry for whether there was a constructive discharge is simple: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" 124 S.Ct. at 2352 (citations omitted). Ultimately, the Court agreed with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.

B. Hostile Work Environment Claims

Again, to state a *prima facie* case of a sexually hostile work environment, the plaintiff must establish that she was subjected to unwelcome conduct of a sexual nature based on her sex and the harassment was sufficiently severe or pervasive to alter the term or conditions of her employment and create a hostile or abusive environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370-71 (1993); *Chavez v. New Mexico*, 397 F.3d 826, 832-33 (10th Cir. 2005). Where the harasser is a supervisor, that is the end of the inquiry. *Ellerth*, 524 U.S. at 765. If the alleged harasser is a co-worker, the plaintiff must also demonstrate that there is a basis for employer liability. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 2292 (1998). See section C below for a discussion on this point.

1. Identifying Who is a Supervisor

In *Ellerth*, the Supreme Court found that tangible employment actions taken by the plaintiff's supervisor become, for Title VII purposes, the act of the employer, and thus constitute harassment for which the employer will be held strictly liable. 524 U.S. at 765. Therefore, an important threshold issue is whether the harasser was the plaintiff's supervisor.

The more power an individual exerts over key employment decisions regarding the plaintiff, the more likely that individual will be found to be the plaintiff's supervisor, even if the individual was not officially designated as such. Most courts usually require that to be a supervisor the individual must have "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (affirming summary judgment because harasser was not plaintiff's supervisor; while he technically had a higher rank and could direct her daily activities, he could take no tangible action against her and she had direct access to another supervisor in order to complain); *Parkins v. Civ. Constructors of*

Ill., Inc., 163 F.3d 1027 (7th Cir. 1998) (affirming summary judgment; harassers were not supervisors because they had no authority over job assignments and could not even require plaintiff's presence at a particular job site); *Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004) (affirming summary judgment; harasser was not supervisor because he did not have the authority to assign more work to plaintiff and, while he could write her up, he had no power to discipline her); *contra Phillips v. Taco Bell*, 156 F.3d 884 (8th Cir. 1998) (holding that there is no question that the store manager was plaintiff's supervisor and remanding case to district court for further proceedings on whether employer exercised reasonable care to prevent further harassment).

Not all courts, however, follow the narrow framework articulated by the Seventh Circuit in *Parkins v. Civil Constructors of Illinois, Inc.* The Second Circuit, in *Mack v. Otis Elevator*, 326 F.3d 116, 126 (2nd Cir. 2003), specifically rejected the Seventh Circuit's approach. Finding such an approach unduly narrow, the Second Circuit reasoned that an individual who exercises significant control over the plaintiff's daily activities may still qualify as a supervisory employee for whose actions an employer can be held vicariously liable, even if he does not have the power to hire, fire, or discipline the plaintiff. *Id.* at 126-27. In *Mack*, the Second Circuit remanded the plaintiff's hostile work environment claim, holding that the employer could be liable for harassment by the "mechanic in charge" because, as the most senior employee at the work site, the harasser exercised significant control over the plaintiff, such as assigning and scheduling her work. Also favoring this approach, an Alabama district court explained that the Supreme Court's holdings in *Faragher* and *Ellerth* demonstrate that "an analysis of employment relationships involves multifactorial analysis rather than simplistic taxonomy." *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) (noting that the Eleventh Circuit has long used a multi-factor approach to determine who is a supervisor).

2. How Severe or Pervasive?

As an element of her *prima facie* case, the plaintiff must demonstrate that she was subjected to harassment that was so severe or pervasive, that it rose to the level of actionable conduct. *See Ellerth*, 524 U.S. at 752; *Septimus v. U. of Houston*, 399 F.3d 601, 611 (5th Cir. 2005) (stating elements of hostile work environment claim and finding that plaintiff failed to establish claim where she did not personally experience much of the complained-of conduct and the comments targeted at her were collectively insufficient to state a claim); *Porter v. Cal. Dept. of Corrections*, 383 F.3d 1018, 1027 (9th Cir. 2004) (stating elements of claim in finding that plaintiff's hostile work environment claim was not necessarily time-barred; she may be able to relate earlier, more egregious, harassment to less severe, but more recent harassment).

In determining whether conduct is severe or pervasive, courts consider the "totality of the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23; *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 58 (2d Cir. 2004) (upholding grant of summary judgment for employer because a manager telling plaintiff her vacation request would be denied unless she had sex with him, among other sexual requests, was not sufficiently severe or pervasive); *Septimus*, 399 F.3d at 611; *Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005) (finding

numerous episodes of an administrator making sexual comments and sexual innuendos to the plaintiff sufficiently severe or pervasive to allow the plaintiff to survive summary judgment).

Like the other circuits, the Eighth Circuit, focusing on the “totality of the circumstances,” looks at the frequency of the behavior, the severity, whether physical threats are involved, and whether the behavior interferes with the plaintiff’s performance on the job. *Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (8th Cir. 2004). In *Baker*, the court held that there was no doubt the plaintiff was subjected to years of blatant sexual harassment that created an objectively hostile work environment because the plaintiff was subjected to a daily barrage of insults and sexual comments over a seven year period. *Id.* at 820-27. Where the plaintiff refused to see her harassers socially, they would retaliate by throwing forty pound boxes of meat at her and by making her job much more difficult to perform. Even though the plaintiff reported these events repeatedly to her supervisors, nothing was done to the harassers and, after seeking psychological and psychiatric treatment for depression and panic disorder, the plaintiff made an attempt on her own life, finally deciding to find a new job rather than return to work. *Id.* at 823-826. The Eighth Circuit had “little difficulty” finding enough evidence to support the jury’s verdict in favor of the plaintiff’s hostile work environment claim, and rejected out of hand the company’s attempt to minimize the harassment and its suggestion that it was unaware of the harassment. *Id.* at 828-29.

Some courts have recognized situations where a single instance of harassment may be sufficiently severe to create a hostile work environment. For instance, the Ninth Circuit held that sexually propositioning an employee and then retaliating because she resists the advances is sufficiently severe to create a hostile work environment. *Porter v. Cal. Dept. of Corrections*, 383 F.3d 1018, 1027 (9th Cir. 2004) (reversing summary judgment in favor of the employer because, while most of the harassing conduct was time barred, at least one harassing act, even though not the most egregious, continued within the statute of limitations).

Conduct is not severe or pervasive where it does not alter the terms or conditions of the plaintiff’s employment and thereby create an abusive working environment. In *Sandoval v. City of Bolder*, 388 F.3d 1312, 1327 (10th Cir. 2004), the Tenth Circuit held that two sexist remarks, which were not even made by representatives of the defendant, could not support a finding that the plaintiff’s workplace was permeated with sexist abuse. Additionally, in *Duncan v. General Motors Co.*, 300 F.3d 928, 935 (8th Cir. 2002), a single request for a relationship, a few isolated incidents of a co-worker touching the plaintiff’s hand, and a teasing poster did not create an objectively hostile work environment even though they made the plaintiff uncomfortable and may have been boorish, chauvinistic and immature.

C. Key Considerations in Raising or Defeating the Ellerth/Faragher Affirmative Defense

In both *Ellerth* and *Faragher*, the Supreme Court declined to hold employers automatically liable in sexual harassment cases which do not culminate in a tangible employment action. *See* 524 U.S. at 764; and 524 U.S. at 807. The Court ruled instead that where the employee does not suffer a tangible employment action, the employer can avoid liability by establishing an affirmative defense by a preponderance of the evidence. *See Ellerth*, 524 U.S. at

764; *Faragher*, 524 U.S. at 807. The elements of the now-familiar *Ellerth/Faragher* defense are: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. See *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807. Once a plaintiff has met her *prima facie* case where there is no tangible employment action, the case will then turn on whether the employer can establish this defense. As such, litigators should be cognizant of key issues that frequently arise in making and challenging this defense. These issues include: (1) the adequacy of the employer's reporting policies and procedures, (2) the employee's duty to report harassment, and (3) the adequacy of the employer's response once the harassment is reported.

Importantly, it still remains unclear whether the employer must establish both prongs of the affirmative defense in order to have a shield against liability. A recent article in The College of Labor & Employment Lawyers' newsletter thoroughly discusses circuits that have held that an employer can use the *Ellerth/Faragher* defense where it exercised reasonable care to prevent and correct any harassment, even though the employee reasonably reported the harassment. Hope A. Comisky, *Fitting a Square Peg into a Round Hole*, 7 College of Labor & Empl. Laws. 4, 4-6 (2005). The article points out that some circuits, like the Tenth Circuit, applied the affirmative defense as written. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001) (holding employer's prompt corrective action once informed of harassment by a supervisor was not sufficient to protect the employer from vicarious liability because employee reasonably reported the harassment). However, as Comisky points out in her article, the Fifth Circuit is often cited as the first court to recognize that a modified version of the affirmative defense should be used when the employer promptly and effectively responded to the harassment. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999) (finding that employer reasonably reacted to the employee's prompt complaint about harassment by a vice president of the company and allowed company to assert affirmative defense because not allowing it would undermine Title VII's deterrent policy).

1. The Adequacy of the Employer's Policy Against Harassment

First, an employer must have a clear and established anti-harassment policy. As stated in *Faragher*, "while proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance . . . the need for a stated policy suitable to the employment circumstances may appropriately be addressed" by demonstrating that the employer exercised reasonable care to prevent and correct the harassment. 524 U.S. at 807-808. Posters that describe workplace rights in general terms will not suffice to demonstrate that the employer had an established policy of preventing and correcting harassment. See *Koerber v. Journey's End, Inc.*, 2004 WL 723850 *12, 93 Fair Empl. Prac. Cas. 1142 (N.D.Ill. March 31, 2004). In *Koerber*, the court noted that informal mechanisms may be adequate in a small business, if they are effective, but in that case the employer's efforts were insufficient. The employer merely posted an Equal Employment Opportunity poster at a water cooler and used security cameras, which the court found insufficient because the posters did not specifically address sexual harassment and the cameras only served as anti-theft devices. *Id.* at *7.

Further, an employer will not be able to establish this affirmative defense as a matter of law where the evidence conflicts as to whether any policy existed at all and whether any materials on the policy were disseminated. *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 20-22 (1st Cir. 2002) (upholding district court's denial of motion for judgment as a matter of law because question as to whether harassment policy was ever disseminated and whether harassment training was incorporated into employee orientation was better left to the jury).

If the employer has satisfied the minimum requirements of creating a policy and informing its employees about how to use the policy, the next requirement to consider is whether the policy is complete as written because an employer fails to exercise reasonable care in preventing harassment if the policy is too narrow or is misleading. For instance, a policy is incomplete if it only prohibits sexual advances because this misleads the employee into thinking that she has no recourse for derogatory and threatening comments made about women. *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000) (reversing summary judgment; employer's policy was insufficient because it only mentioned sexual harassment but not gender harassment, leading the plaintiff to believe that her supervisor's threatening behavior and derogatory comments did not violate the policy).

Moreover, a written policy, standing alone, may not be enough because “[w]hile the affirmative duty of the employer will often include the requirement that it have some sort of sexual harassment policy in place, the duty does not end there.” *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) (reversing summary judgment; whether the employer's harassment policy was actually implemented was a question for the fact-finder). An employer who ineffectively implements the policy may fail to establish the *Ellerth/Faragher* defense. *See Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1260 (11th Cir. 2003) (finding that plaintiff raised issues of fact as to the effectiveness of employer's policy; a jury could find that the employer failed to adequately respond to complaints).

The Sixth Circuit, drawing on multiple court opinions, suggested a four point test for a policy's effectiveness. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-350 (6th Cir. 2005) (citing *Faragher*, 524 U.S. at 808; *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998)). At a minimum, an effective policy should (1) require supervisors to report instances of harassment; (2) permit complainants to make both formal and informal reports of harassment; (3) offer a means of reporting that allows the complainant to bypass a harassing supervisor; and (4) include training on the policy.

2. Employee's Duty to Report Harassment to Employer

Under *Ellerth* and *Faragher*, in a hostile environment case involving co-worker harassment the employer is not liable for the harassment unless it knew or should have known of the harassment. Where the employer establishes the existence of an explicit and effective anti-harassment policy, the plaintiff must demonstrate that she put her employer on notice of the alleged harassment and insufficient reporting by the plaintiff will defeat her claim. An employee did not put her employer on notice where she failed to name the harasser and failed to ask the employer for a particular action on her complaints. *Courtney v. Landair Transport, Inc.*, 227

F.3d 559, 565 (6th Cir. 2000) (affirming portion of lower court's opinion dismissing hostile environment claim because employer was not on notice where plaintiff did not name her harassers or ask for something to be done in regards to her complaint). In *Courtney*, the court analyzed an Ohio statute prohibiting hostile environment in the workplace using the same analysis as that used in Title VII harassment claims.

It is not enough that the plaintiff argue that fear or embarrassment prevented her from reporting the unwelcome conduct. *Williams v. Mo. Dept. of Mental Health*, 407 F.3d 972, 13-14 (8th Cir. 2005) (citing *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (“inevitable unpleasantness cannot excuse the employee from using the company’s complaint mechanisms”)); see *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267-68 (4th Cir. 2001) (affirming summary judgment for employer because plaintiff’s reasons for not reporting conduct, namely that she was afraid of retaliation, did not excuse her from reporting the harassing behavior); *Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1290-91 (11th Cir. 2003) (affirming summary judgment for employer because plaintiff’s fears of retaliation if she reported harassment were unreasonable; subjective fears may exist in every case).

Also, general threats from the harasser that the plaintiff will be disciplined for complaining or that reporting at all is futile do not *automatically* excuse the plaintiff’s failure to report the harassing conduct. Compare *Matvia v. Bald Head Island Mgt. Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (affirming summary judgment for employer; plaintiff’s fears that co-workers would react negatively if she reported harassment were not sufficient to deprive employer of affirmative defense); with *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 36 (1st Cir. 2003) (reversing summary judgment; the plaintiff was only seventeen years old when she was sexually assaulted by her supervisor, and her supervisor threatened to use his family influence if she reported him and therefore a jury could find that hers was an objectively reasonable response).

Even if the employee notifies the employer, an unreasonable delay in reporting the conduct may bar the employee’s claim. For example, in *Williams v. Missouri Department of Mental Health*, 407 F.3d 972, 974-75 (8th Cir. 2005), one female employee never reported the sexual harassment and another waited five months to report the harassment. The court held that even though the plaintiffs could establish a *prima facie* case of harassment, their delay in reporting the harassment was unreasonable. *Id.* at 977-78.

Nevertheless, a plaintiff may preserve her claim if she can demonstrate that it was not unreasonable for her to delay reporting given the facts in her particular situation. In *Reed v. MBNA*, 333 F.3d 27, 36-37 (1st Cir. 2003), the First Circuit held that since the initial “low-level harassment,” such as making sexual comments and leaving green M & M’s on the plaintiff’s desk, was probably not even actionable, a reasonable jury could find that the plaintiff’s initial delay in reporting made sense. The court further noted that even where the harassment escalated to a sexual assault and the plaintiff still did not report any misconduct until a year later, a reasonable jury could, nevertheless, decide that such delay was permissible given that the plaintiff was only seventeen and the harasser was more than twice her age. *Id.* at 37.

Informal complaints may be sufficient to put an employer on notice of harassment even where the term “sexual harassment” is not used explicitly so long as, taking into account the

overall circumstances, the complaints otherwise gave the employer sufficient notice of the conduct. See *Olson v. Lowe's Home Ctrs., Inc.*, 130 Fed. Appx. 380, 391 n. 22, 2005 WL 1051559 *7 (11th Cir. 2005) (finding employer could have known of harassment prior to receiving a written complaint where, relying on her employer's "Open Door Program," plaintiff complained to a member of management). Verbal complaints, if made to numerous co-workers, the plaintiff's direct supervisor, and the department charged with investigating such claims, could constitute sufficient notice to the employer even before the plaintiff submitted the same complaints in writing. *McCombs v. Meijer, Inc.*, 395 F.3d 346, 353-54 (6th Cir. 2005) (affirming denial of summary judgment for employer; the jury should decide whether the employer should have known about the sexual harassment prior to the plaintiff filing a written report). If an employer has multiple avenues for reporting harassment, then the employer should have known of the alleged conduct once the plaintiff follows at least one avenue of reporting. *Loughman v. Malnati Org.*, 395 F.3d 404, 408 (7th Cir. 2005) (rejecting employer's contention that plaintiff failed to notify upper management according to the employer's policy; employer had sufficient notice given her complaints to her immediate supervisors).

3. Adequacy of Employer's Response

Once the employer has notice of the harassment, the employer must take reasonable steps to correct the conduct or else be held liable for the harasser's conduct. *Fairbrother v. Morrison*, 412 F.3d 39, 52 (2d Cir. 2005) (finding judgment as a matter of law for employer was inappropriate because the trial reflected that the employer took no action in response to the plaintiff's complaints); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968-69 (9th Cir. 2002) (holding it was a triable issue for the jury whether the employer was responsible where a non-employee raped the plaintiff and the employer completely failed to respond to the rape). Where initial attempts to correct harassment do not solve the problem, employers must take further actions. Simply talking to employees will not suffice as an effective corrective measure where it has already failed to correct past conduct. See *Loughman v. Malnati Org.*, 395 F.3d 404, 407-8 (7th Cir. 2005) (citing *Longstreet v. Ill. Dep't of Corrections*, 276 F.3d 379, 382 (7th Cir. 2002) (reversing summary judgment for employer because where harassing conduct included serious physical allegations, and not just inappropriate jokes, the employer's response of talking to the harassers was not effective)).

No matter how good an employer's workplace harassment policy may be, the employer who "drops the ball" in responding to harassment complaints may find itself held liable. For example, in *Ogden v. Wax Works*, 214 F.3d 999, 1004-05 (8th Cir. 2000), the employer disseminated a written harassment policy, but failed to demonstrate it adequately responded to complaints where, among other missteps: management knew of the harasser's history of possible misconduct with other employees; the investigating manager characterized the problem as merely a personality clash; the investigation only focused on the plaintiff's conduct and did not include an interview with the plaintiff herself; and the plaintiff's calls to the company's home office were not returned.

Where employers fail to take complaints seriously and minimize the seriousness of the conduct or the impact of the conduct, they will not avoid liability. *Loughman*, 395 F.3d at 408. (stating that the restaurant's case was not helped by manager's comments that harassment was

inevitable because it was in the “culture” of Hispanic kitchen workers); *Hulsey*, 367 F.3d at 1248 (finding the defendant’s characterization of alleged harassment as “childish horseplay between teenagers” to be “problematic on a number of levels”).

Employers must conduct thorough investigations; inconsistencies as to the depth or sufficiency of the investigation may preclude summary judgment. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252 (11th Cir. 2003). In *Watson*, the investigator did not make the purpose of his interview with the alleged harasser clear and, according to some of the testimony, did not ask him about accusations of inappropriate touching. *Id.* at 1261-62 (summary judgment in favor of the employer reversed).

In contrast, by promptly and effectively responding to allegations of harassment, the employer may well be shielded from liability even if, as in *Williams v. Missouri Department of Mental Health*, the harasser *admits* to the conduct. *See* 407 F.3d 972 (finding employer reasonably responded where immediately after learning of alleged conduct, supervisor promptly notified upper-level official and put accused harasser on administrative leave pending investigation).

D. Same Sex Harassment

Under Title VII, sexual discrimination based on same-sex harassment is actionable through any one of three methods of proof. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). First, a plaintiff can demonstrate that harassment was “because of sex” by presenting evidence that the harasser is a homosexual, the harassment was motivated by sexual desire and the harasser would not have directed the same conduct to someone of the opposite sex. *Id.* at 80. However, the Court noted that same-sex harassment, like the more familiar male/female harassment, need not be motivated by sexual desire. Second, a plaintiff can also demonstrate that harassment was “because of sex” by demonstrating that the harasser was motivated by a general hostility to persons of one gender or by demonstrating that the harasser treated men and women differently. *See e.g. Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088, 1094 (10th Cir. 2005) (affirming award for plaintiff where female supervisor regularly subjected female employees to sexually charged and humiliating comments, pulled open plaintiff’s clothes in front of other employees, and regularly referred to women as “bitches”). Third, the plaintiff may offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. at 80-81.

Proof that the harasser is a homosexual, while helpful, is not always required to demonstrate that harassment was motivated by sexual desire. *See Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1265 (10th Cir. 2005) (finding that the district court unnecessarily required plaintiff to demonstrate that the several female harassers were homosexual in addition to proving that the conduct was motivated by sexual desire). Even a harasser who considers him or herself to be heterosexual may be said to be motivated by sexual desire if the harasser proposes sexual activity with a person of the same sex. Although proof that a harasser is a homosexual may support plaintiff’s claim, this evidence may be difficult to obtain. Consequently, evidence of the conduct itself may be sufficient to demonstrate that the harassment was sexually motivated. *Id.*

In *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 478 (5th Cir. 2002), the Fifth Circuit held that the plaintiff produced enough evidence to prevent summary judgment in favor of the employer on his same-sex sexual harassment claim. Proceeding under the first method outlined in *Oncale*, the court required the plaintiff to: (1) demonstrate that the harasser made explicit or implicit proposals of sexual activity and (2) provide credible evidence that the harasser was homosexual. *Id.*

In *La Day*, the Fifth Circuit considered for the first time just how much evidence is necessary to demonstrate that a same-sex harasser is actually motivated by sexual interest. *Id.* at 478-79. The court compared what happened to the plaintiff to the facts in two other cases from the Seventh and Ninth Circuits. In *Shepherd v. Slater Steels Corp.*, the Seventh Circuit held that there was sufficient evidence of homosexuality to avoid summary judgment where the harasser made comments about the attractiveness of the plaintiff and, when the plaintiff was laying down because of stomach cramps, said the plaintiff should turn over or else he will “crawl on top of [the plaintiff] and fuck [him] in the ass.” *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009-10 (7th Cir. 1999). The Ninth Circuit, in *Rene v. MGM Grand Hotel, Inc.*, held that the plaintiff presented no evidence that his harassers were homosexual or that they were motivated by sexual desire where the harassers grabbed the plaintiff’s crotch, poked him in the anus, and forced him to look at pictures of naked men having sex. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1207 (9th Cir. 2001). The Ninth Circuit held that the harassment was actually based on the plaintiff’s sexual orientation and was not motivated by sexual desire. *Id.*

The Fifth Circuit held that *La Day*’s case fell somewhere in between that of *Shepherd* and *Rene*. *La Day*, 302 F.3d at 479. Unlike the facts in *Shepherd*, *La Day*’s harasser did not explicitly state that he wanted to have sexual relations with the plaintiff, but the harasser did touch the plaintiff. *Id.* at 479. Also, unlike the facts in *Rene*, there is no evidence in *La Day* that the harassment was motivated by the plaintiff’s sexual orientation. *Id.* at 479-80. Ultimately, while the court stated that it is not possible to specify all the ways a plaintiff might prove that an alleged harasser acted out of sexual desire, the court did describe two possible types of evidence that would be sufficient to prove a harasser may be homosexual. *Id.* at 480. First, if a plaintiff can demonstrate that the harasser intended to have sexual contact with the plaintiff, rather than just humiliating the plaintiff for reasons unrelated to sexual interest, this may be sufficient evidence that the harasser is homosexual. Second, if a plaintiff can demonstrate that the harasser made same-sex sexual advances to others, especially other employees, this may be sufficient evidence that the harasser is homosexual. The court reasoned that a harasser might make sexually demeaning remarks to a plaintiff for sex-neutral reasons, but is far less likely to make sexual advances without regard to sex. *Id.*

Regardless of the method the plaintiff uses to prove his case, the Court noted that as in all harassment cases, the behavior must be so objectively offensive as to alter the terms or conditions of employment, which prevents the statute from being converted to a “general civility code” or requiring “asexuality or androgyny in the workplace.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. at 81.

In *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098 (8th Cir. 2005), the Eighth Circuit recently applied this same standard to a claim of same-sex

harassment. The court concluded that the male plaintiff was not subjected to a hostile environment where a priest, who was also one of the employer's board members, invited the plaintiff to watch pornography on several occasions, engage in sexual acts, and also grabbed and kissed him on more than one occasion. *Id.* at 1100, 1102. The court reasoned that such actions could not rise to the level of actionable conduct, and noted that, while "crass," the conduct was not "physically violent or overtly threatening." The three incidents, spread over a nine month period, were not severe or pervasive enough to "poison" the plaintiff's work environment. *Id.* at 1102.

E. "Because of Sex" – Harassment Based on Sexual Orientation and Gender Identity

While the Supreme Court has yet to extend Title VII discrimination protection to claims based on sexual orientation, some states have done so. Fifteen states and the District of Columbia have laws protecting both private and public employees from discrimination based on sexual orientation.⁴ Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217> (accessed July 19, 2005). There are also twelve states which protect public employees from discrimination based on sexual orientation.⁵ Fourteen states do not protect employees from discrimination based on sexual orientation⁶ and there is no information for nine states.⁷ *Id.*

Additionally, a few circuit courts seem to have extended Title VII protection to sexual orientation within the framework of the law articulated in the Supreme Court's decision in *Price-Waterhouse v. Hopkins*. In *Price-Waterhouse*, the Court held that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, establishing that Title VII protected both biological sex differences and gender discrimination, which is discrimination based on a failure to conform to stereotypical gender differences between men and women. *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 1791 (1989). In *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004), the Sixth Circuit reversed summary judgment for the employer and held that the transsexual plaintiff sufficiently plead claims of sex stereotyping and gender discrimination by alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind his employer's adverse employment actions. The court explained that the lower court erred in relying on cases before *Price-Waterhouse v. Hopkins* which held that transsexuals, as a class, were not entitled to Title VII protection. *Id.* (citing *Ulane v. Easter Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984) (declining to extend Title VII protection to transsexuals because Congress' clearly only had traditional notions of sex in mind when drafting the statute); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977)

⁴ California, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin.

⁵ Colorado, Delaware, Indiana, Michigan, Montana, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Washington, and Utah.

⁶ Alaska, Arizona, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Missouri, North Carolina, Texas, Virginia, and West Virginia.

⁷ Alabama, Arkansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, Tennessee, and Wyoming.

(affirming summary judgment because Congress clearly did not intend Title VII protection to extend to gender identity issues).

More recently, the Tenth Circuit in *Medina v. Income Support Division, New Mexico*, --- F.3d ---, 2005 WL 1519061 *3 (10th Cir. 2005) refused to extend Title VII's protection to persons alleging discrimination on the basis of sexual orientation in affirming summary judgment for the employer. While the court in *Medina* recognized that *Price-Waterhouse* allowed a cause of action where a person does not conform to gender stereotypes, it stated that this is not what the plaintiff claimed. The plaintiff claimed that she was discriminated against because she was heterosexual, and all the other women at her job were homosexual. The court held that Title VII does not extend protection to sexual orientation, and therefore affirmed the lower court's dismissal of the plaintiff's claims. *Id.* (citing *Simonton v. Runyon*, 232 F.3d 33, 35-36 (2d Cir. 2000) ("Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation."); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (affirming summary judgment because plaintiff's claim was that he was discriminated against because of his sexual orientation, not because of his sex)). In an unpublished decision, the Third Circuit also emphasized the distinction between a claim brought under the *Price-Waterhouse* framework of discrimination based on sexual stereotypes and a claim brought because of sexual orientation discrimination. *Kay v. Indep. Blue Cross*, 2005 WL 1678816 *2 (July 19, 2005). The court affirmed summary judgment for the employer because comments that the plaintiff was just "so gay," comments that he was not a "real man," and co-workers leaving fliers for a gay phone sex line on his desk, while reprehensible, fell outside of Title VII's protections because they were centered on the plaintiff's sexual orientation. *Id.*

IV. Racial and National Origin Harassment

A. Prima Facie Case

Racially hostile work environment claims may be brought both under Title VII and under 42 U.S.C. § 1981. As discussed in detail in Section I above, the term "race" has been broadly interpreted by a number of courts to include certain ethnicities.

Under both statutes, to state a *prima facie* case of racial harassment, plaintiffs must demonstrate that they were subjected to unwelcome harassment based on their race or ethnicity, the harassment was sufficiently severe or pervasive to alter the terms or conditions of their employment, and the harassment created a hostile or abusive environment. *See e.g. Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (stating the elements of a racial harassment claim). If the alleged harasser is a co-worker, the plaintiff must also demonstrate that there is a basis for employer liability. *See e.g. White v. BFI Waste Servs., LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004) (reversing summary judgment on hostile work environment claim because testimony that plaintiffs were constantly referred to as "boy, jigaboo, nigger, porch monkey, Mighty Joe Young, and Zulu warrior, among other evidence, was enough to create a triable issue for the jury); *Mems v. City of St. Paul, Dept. of Fire and Safety Servs.*, 327 F.3d 771, 785 (8th Cir. 2003) (upholding jury verdict because plaintiffs provided enough evidence to demonstrate that

harassment was severe and pervasive and the defendant knew or should have known about the harassment but failed to take remedial measures).

B. Employer's Liability

The *Ellerth/Faragher* affirmative defense is applicable in race cases. See *White v. BFI Waste Servs.*, 375 F.3d at 299 (applying *Ellerth/Faragher* affirmative defense in race harassment case, but reversing summary judgment for employer because it could not establish that it effectively implemented harassment policy). As *Walker v. Thompson*, 214 F.3d 615, 626-27 (5th Cir. 2000), demonstrates, an inadequate harassment policy or an ineffective implementation of the policy may bar an employer from demonstrating it exercised reasonable care in preventing and/or correcting racial harassment. In *Walker*, the court held that the employer failed to establish, as a matter of law, that it exercised reasonable care where its harassment policy only provided procedures for reporting sexual harassment, but had no complaint procedure in place for racial discrimination complaints. *Id.*

In addition to drafting a comprehensive policy, employers must adequately respond to complaints and must treat complaints seriously. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120-21 (9th Cir. 2004). In *McGinest*, the court reversed summary judgment finding that the employer had not adequately responded to racially harassing conduct of both supervisors and co-workers that occurred over a fifteen year period where it only responded to one act of graffiti and took no further action when the graffiti continued. *Id.* at 1120-21. Furthermore, the court noted that the plaintiff's supervisor made jokes when he was informed about the graffiti. *Id.* Also like sexual harassment cases, an employer is liable for racial harassment where the harassment was perpetrated by customers and the employer failed to adequately respond to the harassment.

In *Galdamez v. Potter*, --- F.3d ---, 2005 WL 1653618 *4-5 (9th Cir. July 15, 2005), the court held that the lower court erred as a matter of law and fact when it refused to instruct the jury that the employer could be responsible for a hostile environment created by customers. The plaintiff was a Postmaster General who endured years of insults about her race, accent, and national origin, including threats to kill her, from customers of the post office. However, there was a question as to whether the post office reasonably responded to the plaintiff's complaints, therefore the court remanded the case for a new trial. *Id.* at 7.

C. How Severe or Pervasive need the conduct be?

No bright line test exists to determine just how severe or pervasive racially intimidating conduct must be to give rise to a claim. Thus, it is important to consider what has and has not been deemed as actionable in recent case law.

To be actionable, as in sexual harassment cases, conduct must be sufficiently severe *or* pervasive; not severe *and* pervasive. The Seventh Circuit this year in *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 950 (7th Cir. 2005), took the opportunity to drive home this distinction. In *Cerros*, the plaintiff claimed that because he was Hispanic, he was subjected to harassment that included racial epithets by employees and supervisors, and offensive bathroom

graffiti, such as “go back to Mexico” and “white power.” Remanding the case for the second time, the Seventh Circuit criticized the district court for failing to appreciate that “even one act of harassment will suffice if it is egregious.” *Id.* at 950 (quoting *Hostetler v. Quality Dining, Inc.*, 218 F. 3d 798, 808 (7th Cir. 2000)). Moreover, even if the numerous individual epithets occurred in isolation, offensive epithets could still be actionable given their cumulative effect. *Cerros*, 398 F.3d at 951.

Similarly, the Eighth Circuit, on rehearing, reversed summary judgment for an employer and held that, while the case was on the “cusp of submissibility,” the environment the plaintiff was subjected to could be objectively hostile. *Jackson v. Flint Ink N. Am. Corp.*, 382 F.3d 869, 870 (8th Cir. 2004). In this case, the plaintiff provided evidence of one drawing of bathroom graffiti of a burning cross and six racial epithets from managers and co-workers over the course of one year. The court stated that an objective observer would regard the combination of the drawing and epithets as a threat of serious bodily harm, if not death, to the plaintiff, and where that threat was combined with all the other incidents the plaintiff complained about, the case should go to the jury. *Id.* at 870.

Where the plaintiffs have only alleged verbal conduct, courts have been unwilling to find the claim actionable where the events were isolated and infrequent. For example, in *George v. Leavitt*, 407 F.3d 405, 416-17 (D.C. Cir. 2005), multiple confrontations and repeated name-calling or shouting from numerous co-workers over the course of two months did not rise to the level of actionable harassment. (remanding plaintiff’s discrimination claim but finding that harassment was, at best, a number of isolated incidents). In *George*, the comments to the plaintiff included statements that she “go back to where she came from” and yelling at her to “shut up.” *Id.* This is in direct contrast to *Cerros*, which found that numerous written epithets, even if written in isolation, could be harassment given the cumulative effect. 398 F.3d at 951.

Similarly, in *Sallis v. University of Minnesota*, 408 F.3d 470, 476-77 (8th Cir. 2005), the court viewed the harassing conduct as too infrequent where the plaintiff recounted being referred to with terms such as “tan,” “dark,” and “a particular person.” The *Sallis* court called these comments “insensitive,” but not actionable. *Id.* However, in *Elmahdi v. Marriott Hotel Service*, 339 F.3d 645, 653 (8th Cir. 2003), the Eighth Circuit held that being called “boy” and “black boy” on occasion over several years was enough for a hostile work environment claim.

Like the plaintiff’s in *Sallis* and *George*, in *Baloch v. Norton*, 355 F. Supp. 2d 246, 260 (D.D.C. 2005), the plaintiff failed to establish a hostile work environment claim. The plaintiff complained about harassment allegedly occurring over a period of three years, but the court found that no harassing incidents occurred during an entire year of the period the plaintiff complained about.

Finally, at least in the Ninth Circuit, the “severity of the conduct varies inversely with its pervasiveness and frequency.” *Galdamez v. Potter*, --- F.3d ---, 2005 WL 1653618 *5 (9th Cir. July 15, 2005) (holding comments made over the course of three years including offensive remarks, racially charged references, threats of mob violence, indirect threats to physical safety, and property damage were obviously severe and pervasive); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1003, 1113 (9th Cir. 2004) (holding that it was clear plaintiff was subjected to severe and

pervasive racial harassment where he was barraged with insults, forced to work in dangerous situations, and was not paid for overtime he worked, among other things).

V. Disability Harassment

While most harassment cases derive from Title VII, increasing attention is being given to disability-based harassment claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (Rehab Act). *Walton v. Mental Health Assn.*, 168 F.3d 661, 666 (3rd Cir. 1999) (assuming without deciding that a hostile work environment claim would be cognizable under the ADA, but affirming summary judgment because environment here was not severe and pervasive); *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999) (proceeding on the assumption that a hostile work environment claim would be cognizable under the ADA, but affirming summary judgment because there was no support for the plaintiff's claim). The Southern District of Georgia, in *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092 (S.D.Ga. 1995), became the first court to recognize a disability harassment claim under the ADA.

But, as in the *Haysman* decision, while implicitly recognizing the cause of action, a number of circuits have been unwilling to find sufficient evidence supports the cause of action in the case before them. *E.g. Walton v. Mental Health Assn.*, 168 F.3d at 666; *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001) (finding no case law barring hostile environment claims from being brought under the ADA); *Flowers v. Southern Regl. Phys. Servs., Inc.*, 247 F.3d 229 (5th Cir. 2001) (holding that disability harassment is cognizable under the ADA); *Coulson v. The Goodyear Tire & Rubber Co.*, 31 Fed. Appx. 851, 858, (6th Cir. 2002) (unpublished opinion acknowledging, without deciding, that the Sixth Circuit recognizes that hostile environment claims could arise under the ADA); *Silk v. City of Chicago*, 194 F.3d 788, 804 (7th Cir. 1999) (assuming without deciding that a hostile work environment claim is cognizable under the ADA and Rehab Act); *Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (joining Fourth and Fifth Circuits finding that disability harassment is a cognizable claim); *Lanman v. Johnson County, Kan.*, 393 F.3d 1151, 1155 (10th Cir. 2004) (joining Fourth, Fifth and Eighth Circuits' previous findings that disability harassment is a cognizable claim).

Similarly, without specifically holding that disability harassment is a cognizable claim, the Ninth Circuit has suggested in *dicta* that something other than a Title VII-type harassment claim may exist under the ADA's provisions prohibiting interference with an individual's exercise of his ADA rights. *Brown v. City of Tucson*, 336 F.3d 1181, 1190 (9th Cir. 2003). In this case, the plaintiff, a police detective, could not be on call at night because it would disrupt her sleep patterns too much, which would cause her depression to worsen. *Id.* at 1183. The plaintiff brought a claim that the defendants interfered with her rights under § 503(b) of the ADA. 42 U.S.C. § 12203(b). The court pointed out that when the Seventh Circuit recognized, without deciding, that hostile work environment claims may arise under the ADA, it stated that they would arise under 42 U.S.C. § 12112(a), which provides that it is unlawful to discriminate against a disabled employee in regard to any term, condition or privilege of employment. 336 F.3d at 1190. The plaintiff in *Brown*, however, relied on the language from § 503(b), which bars coercion, threats, intimidation and interference. The court therefore reasoned that the analysis

for hostile work environment is inapplicable to claims brought under § 503(b); this section gives rise to something other than a Title VII hostile environment claim. *Id.*

A claim of disability harassment parallels harassment claims derived from Title VII. To state a claim of disability harassment, the plaintiff must demonstrate (1) that she is covered under the ADA; (2) that she suffered unwelcome harassment; (3) the harassment was based on her disability; (4) the harassment was severe or pervasive; and (5) employer liability. *Fox*, 247 F.3d at 177; *Casper v. Gunito Corp.*, 221 F.3d 1338 (Table) 2000 WL 975168 (7th Cir. July 11, 2000) (affirming summary judgment for employer because plaintiff did not demonstrate that environment was objectively hostile, explicitly using methodology developed under Title VII to analyze disability hostile work environment claim).

As in garden variety ADA claims, plaintiffs in disability harassment claims must first satisfy the threshold question as to whether they are protected under the ADA. *Lanman v. Johnson County, Kan.*, 393 F.3d at 1156. To do this, plaintiffs must demonstrate (1) that they have a disability as defined under the ADA, (2) that they are regarded by their employer as having a disability, or (3) that they have a history of a disability. *Id.* While most cases typically involve a situation where the plaintiff has an actual disability, some do involve claims based on the “regarded as” prong or the history of a disability. *Fox*, 247 F.3d at 276-78 (affirming jury verdict in plaintiff’s favor, plaintiff adequately demonstrated he was actually disabled for hostile work environment claim); *Casper*, 2000 WL 975168 at *3 (holding that there was a triable issue about whether plaintiff was disabled because of his mental retardation, satisfying the first prong of an ADA hostile work environment claim). For instance, in *Shaver*, the court determined that the plaintiff satisfied the first prong of a hostile environment claim because he was either regarded as disabled or because he had a record of a disability. 350 F.3d at 720-21 (holding plaintiff’s history of epilepsy was enough for a record of a disability and co-worker’s comments that he was “stupid” and “not playing with a full deck” was enough to demonstrate they regarded him as disabled); *but see Shannon v. Henderson*, 275 F.3d 42 (5th Cir. 2001) (affirming summary judgment of hostile work environment claim under ADA because plaintiff failed to demonstrate that he was disabled or, alternatively, that he was regarded as disabled); *Roberts v. Dimension Aviation*, 319 F.Supp.2d 985, 988-89 (D.Ariz. 2004) (granting summary judgment for employer on hostile environment claim under the ADA because plaintiff’s evidence of a learning disability from over twenty years ago failed to demonstrate he was either disabled or regarded as disabled).

Additionally, even while recognizing the existence of the cause of action for harassment under the ADA, the courts are still establishing the standards for what conduct is sufficiently severe or pervasive enough to be actionable. In *Flowers*, the Fifth Circuit held a disability based harassment claim was actionable where the plaintiff demonstrated that the harassment was sufficiently severe or pervasive to satisfy her claim. 247 F.3d at 237. The plaintiff was a medical assistant whose supervisors, upon learning that the plaintiff was HIV positive, shunned her, suddenly began disciplining her, refused to shake her hand, and required her to undergo four drug tests in one week. *Id.* at 236-37.

In contrast, and relying on the standard set in *Flowers*, the Fifth Circuit determined that the plaintiff’s claim in *Gowesky v. Singing River Hospital System*, was not actionable. 321 F.3d 503, 509-11 (5th Cir. 2003). In *Gowesky*, an employee who had been cured of Hepatitis-C filed

suit based on her supervisor expressing doubts as to allowing her to work at the emergency room; telling her that she would have to inform staff and patients that she had been treated for Hepatitis-C; and telling her that she would be required to submit weekly blood samples. *Id.* at 510.

In *Fox v. General Motors Corp.*, 247 F.3d 169, 179 (4th Cir. 2001), the Sixth Circuit held that the plaintiff, whose back problems limited him to light-duty assignments and restricted his lifting, presented sufficient evidence of actionable harassment where he demonstrated that his supervisors repeatedly ordered him to do work beyond his physical limits, shouted profanities at him when he would not comply with such orders, and reassigned the plaintiff to a hazardous area. Additionally, the plaintiff and others testified that disabled workers were subjected to constant verbal harassment at meetings, referred to by one supervisor disabled employees as “hospital people,” and ostracized by co-workers who also refused to bring needed materials to the light-duty work area. *Id.* In contrast, in *Shaver* the Eight Circuit held that constant name-calling over two years by both supervisors and co-workers was not objectively offensive, as the name-calling did not cause the plaintiff to seek psychological treatment nor was he subjected to threatening or physically violent conduct. 364 F.3d at 721-23 (affirming grant of summary judgment to employer on hostile environment claim).

VI. Harassment Based on Religion

Courts recognize a cause of action under Title VII for harassment based on religion, and analyze it as other harassment claims: (1) the plaintiff is a member of the protected class; (2) she was subject to uninvited harassment; (3) the offending conduct was because of her religion; (4) the harassment was sufficiently severe or pervasive to affect the terms and conditions of her employment; (5) the offending conduct was both objectively and subjectively offensive; and (6) there was a basis for employer liability. *Rivera v. Puerto Rico Aqueduct and Sewers Auth.*, 331 F.3d at 189 (affirming motion for summary judgment because no reasonable fact-finder could conclude that the incidents were based on an antipathy towards the plaintiff’s religious convictions). Additionally, an environment that is offensive to someone because of strong religious sensibilities, rather than one that is offensive because of hostility to the underlying religion, is not actionable. *Id.* at 190. For example, a custodian had a viable claim for a religion based hostile environment because his supervisor constantly commented that the plaintiff must be Catholic because he did not want to do certain things, called the plaintiff a religious freak, and told the plaintiff that he did not want the plaintiff to talk about “religious bullshit.” *Johnson v. Spencer Press of Maine*, 364 F.3d 368, 376 (1st Cir. 2004).

However, religious institutions are exempt from the ban on religious discrimination in the workplace. 42 U.S.C. § 2000e-1(a). Under this statutory provision, the following organizations are exempt for the ban on religious discrimination under the specified circumstances:

Religious “corporation[s], association[s], educational institution[s], or societ[ies] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a); *See also Tran v. New Orleans Baptist Theological Seminary*, 2004 WL 253459 (E.D. La. Feb. 10, 2004) (upholding the dismissal of plaintiff's claim of religious discrimination because, even though the Seminary discriminated against the plaintiff because she was Buddhist, religious institutions are exempt from this provision of Title VII). When the employee is a minister, the First Amendment prohibits the application of any of the protections of Title VII. Allowing ministers to be protected by Title VII would result in the encroachment of the state into an area of religious freedom, which is prohibited by the free exercise clause of the First Amendment. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 702 (7th Cir. 2003) (holding that as Hispanics Communication Manager, plaintiff served in a ministerial function for the church and her Title VII claims were therefore barred by the First Amendment).

VII. Age Based Harassment

A number of courts recognize age-based harassment under the ADEA though the issue as to whether they find it in a particular case seems to have come out all over the board. Some courts, while denying the plaintiff's claim, noted that harassment claims are cognizable under the ADEA. *Brennan v. Metro. Opera Assn., Inc.*, 192 F.3d 310, 318 (2d Cir. 1999) (affirming summary judgment for employer because the three incidents of hostility the plaintiff pointed to were not based on age, but noting that age-based harassment cases are cognizable under the ADEA); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996) (upholding summary judgment for employer because plaintiff failed to demonstrate that the harassment was age-based and the conduct was not sufficiently severe or degrading); *Bennington v. Caterpillar Inc.*, 275 F.3d 654 (7th Cir. 2001) (upholding the lower court's grant of summary judgment for the employer on the plaintiff's age-based hostile work environment claim, but noting that this claim is cognizable under the ADEA); *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005) (holding that a supervisor regularly using the phrase "old ladies" and denying the plaintiff access to training because it was "too hard to train old ladies" was not actionable age-based harassment); *Reyes Vega v. Pepsi Cola P. R. Dist. LLC*, 371 F. Supp. 2d 21 (D. Puerto Rico 2005) (holding that while the plaintiffs pointed to many age-biased statements, the plaintiffs failed to demonstrate how these comments forced them to resign).

However, other circuits not only recognized the cause of action, but also found that the plaintiff had sufficient evidence to support the claim. *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 24-25 (1st Cir. 2001) (reversing lower court's grant of summary judgment because the many derogatory comments were made by supervisory employees to the plaintiff about his age were enough to state a claim of harassment under the ADEA); *See supra, Sicho-Nownejad v. Merced Community College Dist.*, 934 F.2d at 1109 (9th Cir. 1991) (lower court erred in granting summary judgment in favor of employer because of plaintiff's evidence that she was referred to as an "old warhorse" and he students were referred to as "little old ladies," in addition to giving her undesirable teaching assignments was enough to support claim); *E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th Cir. 1997) (upholding jury verdict in favor of plaintiff on age-based harassment claim, and explicitly declining to decide whether the plaintiff could bring a hostile work environment claim under the ADEA since neither party questioned whether this cause of action actually existed).

In order to establish a claim of age-based harassment, a plaintiff must demonstrate that: (1) she belongs to a protected group; (2) she was subject to unwelcome harassment because of her age, (3) the harassment affected a term, condition, or privilege of her employment, (4) her employer knew or should have known about the harassment; and (5) the employer failed to take proper action. *Peterson*, 406 F.3d at 523-24 (citing *Okruhlik v. U. of Ark.*, 395 F.3d 872, 881 (8th Cir.2005)). The same standards as addressed in Title VII harassment claims are applied to age-based harassment claims. The harassment must be both objectively and subjectively offensive, a standard that will not be met by occasional jokes or teasing. *Id.* at 524 (quotations and citations omitted) (holding that a supervisor regularly using the phrase “old ladies” and denying the plaintiff access to training because it was “too hard to train old ladies” was not actionable age-based harassment).

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