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Sexual Harassment Update
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I. Introduction

For FY 1990 - 1999 - 47,175 charges of race harassment, representing 6.0% of all charges filed with the agency. For the same period, 37,725 charges of sexual harassment representing 4.8% of all charges filed with the agency.

II. Statutory Definitions

Racial and sexual harassment claims in the workplace are derived from discrimination claims based on race and sex respectively. Title VII of the 1964 Civil Rights Act ("Title VII"), as amended by the Civil Rights Act of 1991, provides, inter alia, that it is "[a]n unlawful employment practice 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).

Additionally, racial harassment cases may be brought by individuals against public and private employers under Section 1981 of the Civil Rights Act of 1866. Specifically, 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&." 42 U.S.C. §1981. In Patterson v. McLean Credit Unions, 491 U.S. 164 (1989), the Supreme Court ruled that employment claims were excluded from the protections of Section 1981. However, by enacting the Civil Rights Act of 1991, Congress specifically included employment cases under Section 1981 by adding additional sections to the section and by affirming the applicability of Section 1981 to private employers. P.L. 102-166.

As the agency charged with enforcing Title VII, the Equal Employment Opportunity Commission has promulgated guidelines regarding sex discrimination. See EEOC Sex Discrimination Guidelines, 29 C.F.R. Part 1604 reprinted in 403 FEP Manual 209 (BNA 1999). The EEOC guidelines define sexual harassment under Title VII as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature..." 29 C.F.R. §1604.11(a).

To date, the EEOC has not issued any guidelines for the enforcement of Title VII's prohibitions against racial harassment.

III. Sexual Harassment

Traditionally, cases brought under Title VII and similar state statutes have been analyzed as falling into one of two categories: "quid pro quo" or "hostile work environment" causes of action. These categories were first recognized by the Supreme Court in Meritor Sav. 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/he is fired or otherwise penalized for refusing to submit to sexual advances. In these cases, the discrimination with respect to the terms or conditions of employment is explicit. *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 altering the employee's terms and conditions of employment by being severe or pervasive. *Id.* at 65-66.

However, in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753, 118 S.Ct. 2257, 2261, 77 FEP Cases 1 (1998), the Supreme Court stated that the distinction between quid pro quo and hostile environment may be of limited utility "except to the extent that it distinguishes between cases of threats which are carried out and offensive cases in general." The Court further added that "[t]he principle significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive." 524 U.S. at 761-763.

A. Quid Pro Quo Sexual Harassment

Under the EEOC Guidelines, quid pro quo sexual harassment occurs when "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). In Ellerth, the Supreme Court explained that the terms "quid pro quo" and "hostile work environment" 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 ("*quid pro quo*") and circumstances in which the

supervisor does not carry through on his threats ("*hostile environment*"). 524 U.S. at 751-53.

As the Second Circuit recently explained: "[t]o establish a prima facie case of quid pro quo sexual harassment, a plaintiff must present evidence that she was subjected to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." Fitzgerald v. Henderson, No. 99-6124, 2001 WL 588961 at *5 (2d Cir. May 31, 2001) citing Karibian v. Columbia University, 14 F.3d 773, 777 (2d Cir. 1994) cert. denied 512 U.S. 1213, 114 S.Ct. 2693 (1994). The court went on to add that it is enough for a plaintiff to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for such an employment decision. 2001 WL 588961 at *5; see also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281-82, 82 FEP Cases 464 (3d Cir. 2000)(reversing summary judgment for the employer on plaintiff's quid pro quo claim and finding that the plaintiff "need not show that the submission [to advances] was linked to compensation, etc., at or before the time when the advances occurred," only after).

Additionally, the plaintiff need not provide evidence of a direct or express sexual demand to make out a quid pro quo sexual harassment claim. For example, in Frederick v. Sprint/United Manag. Co., 246 F.3d 1305, 1312, 85 FEP Cases 1332 (11th Cir. 2001) the Eleventh Circuit disagreed with the district court's finding that the plaintiff's supervisor sexual advance was too vague. Specifically, Frederick had requested a promotion and transfer to another department, partly because she was offended by her supervisor's sexually-charged conduct towards her. When she asked when she could transfer, her supervisor (Moore) stated that she "needed to do more things" before he would grant her transfer. Rejecting Frederick's claim, the district court stated that: "[h]ad Moore been attempting to signal to plaintiff that she needed to perform some sexual act in order to receive a promotion, one would reasonably conclude that he might have tried to communicate more clearly that particular job requirement; ambiguity is rarely a trait of the quid pro quo seducer." *Id.* However, the Eleventh Circuit disagreed stating that "sexual asides and insinuations are the well-worn tools of a sexual harasser." *Id.* citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 19, 63 FEP Cases 225 (1993). Importantly, the court stated that cases like Harris show that a supervisor may simply intimate that a subordinate's career prospects will suffer if she does not submit to his advances, with the hope of concealing his harassment if the statements are repeated to a third party. 246 F.3d at 1312. See also Ogden v. Wax Works, Inc., 214 F.3d 999, 1006, 82 FEP Cases 1821 (8th Cir. 2000)(holding plaintiff presented sufficient evidence to support jury verdict in her favor on her quid pro quo claim where she testified that her submission to her male supervisor's unwelcome advances was a condition for receiving her raise).

B. Hostile Work Environment Sexual Harassment

A claim of "hostile work environment" Title VII sexual harassment is demonstrated when the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive enough to alter the conditions of the victim's employment and create an abusive working environment." Harris, 510 U.S. at 21.

In order to prove a case of hostile work environment sexual harassment, the plaintiff must demonstrate that: (1) he/she was subjected to unwelcome harassment, including verbal or physical conduct of a sexual nature; (2) the harassment was based on sex; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment; and (4) the employer knew or should have known of the harassment and failed to take prompt, remedial action. Meritor, 477 U.S. at 66-68, 71-72.

1. Unwelcomeness - How Is It Defined?

An issue which is hotly contested is whether the complained of conduct was unwelcome. As one court stated, "[w]elcome sexual harassment is an oxymoron." Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1008, 65 FEP Cases 688 (7th Cir. 1994). The proper inquiry is whether the plaintiff indicated by his/her conduct that the alleged harassment was unwelcome. Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 966, 80 FEP Cases 239 (8th Cir. 1999) citing Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996).

However, if the conduct is welcome, it does not meet the definition of sexual harassment. Some courts have suggested that in order to conclude that the alleged conduct was welcome, there must be a finding that the plaintiff enjoyed or appeared to enjoy her coworkers' treatment of her. See Reed v. Shepard, 939 F.2d 484, 491, 56 FEP Cases 997 (7th Cir. 1991) (confirming that the standard for establishing welcomeness is whether the plaintiff manifested "enthusiastic receptiveness" to her coworkers' sexual conduct).

Other courts have held that a plaintiff cannot prove that the complained of conduct was unwelcome when he/she engages in the conduct complained of. See e.g. Hocevar v. Purdue Frederick Co., 223 F.3d 721, 736, 83 FEP Cases 1196 (8th Cir. 2000) (finding that plaintiff could not prove unwelcomeness where she used the same offensive language she accused the alleged harasser of using); Scusa, 181 F.3d at 966 (finding the plaintiff engaged in behavior similar, to that which she complained was offensive and unwelcome, including using sexual expletives).

However, other courts have held that the fact that a plaintiff participated in the general office environment does not mean that she or he invited or welcomed the hostile and abusive environment. See e.g. Gray v. Tyson Foods, Inc., No. 97-4036-CV-C-9, 1999 WL 221568 (W.D. Mo. March 23, 1999) (upholding jury verdict in favor of plaintiff even though Tyson presented evidence that Gray participated in complained of activity and enjoyed it, because a reasonable jury could conclude that she had to appear to enjoy the conduct "in order to maintain any status in the workplace"); Nuri v. PRC, Inc., 13 F.Supp.2d 1296, 77 FEP Cases 1451 (M.D. Ala. 1998) (holding employee's participation in general office banter, including foul language and circulation of dirty jokes, and her statement that she did not object to such banter, did not preclude the determination that she was subjected to unwelcome conduct).

2. Subjectively and Objectively Offensive

In Harris, the Court held that in analyzing a hostile environment claim, courts need to consider both objective and subjective reasonableness standards stating: [c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment, an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. 510 U.S. at 21-22.

Similar to the standard required to prove that the complained of conduct was unwelcome, the plaintiff's conduct also manifests whether he/she subjectively viewed the conduct as offensive. See Hostetler v. Quality Dining, Inc., 218 F.3d 798, 806, 83 FEP Cases 513 (7th Cir. 2000) (making "short work" of the subjective inquiry where plaintiff's actions, including leaving work abruptly after the first attempted kiss and deflecting the second attempted kiss, clearly indicated that she perceived her co-worker's conduct as offensive); Cooke v. Stefani Manag. Servs., Inc., 250 F.3d 564, 85 FEP Cases 1295 (7th

Cir. 2001)(rejecting the employer's defense that, because the bartender plaintiff came to the restaurant on his days off to eat and went on social group outings where the alleged harasser was present, plaintiff did not find the alleged harasser's conduct subjectively offensive because the court recognized that the alleged harassment took place during working hours where the plaintiff and his harasser were alone and that plaintiff found conduct during that period offensive).

In Wolack v. Spucci, 217 F.3d 157, 160-61, 83 FEP Cases 253 (2d Cir. 2000), the defense attempted to introduce evidence that the plaintiff voluntarily viewed pornography at home to show that she did not find that alleged harasser's conduct subjectively offensive. Applying Rule 412 of the Federal Rules of Evidence, the Second Circuit ruled that the district court's admittance of that evidence was improper because Rule 412's exclusion of evidence of the victim's sexual conduct applies to civil sexual harassment cases. *Id.* Moreover, the court stated that even if Rule 412 was inapplicable, the proffered evidence had, at best, marginal relevance to the subjectivity issue because "whether an alleged victim & perceived the environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication." *Id.* at 160.

In deciding whether conduct alleged to be harassment was objectively severe and pervasive, a critical issue has been from whose perspective the conduct should be judged. In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 118 S.Ct. 998 (1998), a unanimous Supreme court provided additional guidance by confirming the ruling in Harris that what was objectively reasonable under the circumstances had to be judged from the perspective of a "reasonable person in Plaintiff's position." 118 S.Ct. at 1003. The Court stated, "that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target...." *Id.*

In Oncale, the Court also reminded that what was "reasonable under the circumstances" had to be analyzed on a case by case basis. See *id.* There could be no hard and fast rule, since the conduct had to be considered in its social context. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances which are not fully captured by a simple recitation of the words used or physical acts performed." *Id.*

Interestingly, the Ninth Circuit continues to examine hostile environment claims from the perspective of "a reasonable person of the victim's gender." See Fielder v. UAL Corp., 218 F.3d 973, 985, 83 FEP Cases 493 (9th Cir. 2000)(applying a reasonable woman standard in that case because the plaintiff was female) citing Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991). See also Spain v. Gallegos, 26 F.3d 439, 447, 65 FEP Cases 141 (3d Cir. 1994), (applying the "reasonable person of the same sex" test).

By contrast, the Seventh Circuit has used the "reasonable employee in the plaintiff's position" test. See, e.g., Saxton v. American Telegraph & Telephone Co., 10 F.3d 526, 534, 63 FEP Cases 625 (7th Cir. 1993). In dicta, the court stated that its analysis would be the same under either a reasonable woman or a genderless reasonable person standard. *Id.* at 534 n.13.

Those courts which adopted the reasonable woman standard recognize that conduct which men may find harmless could be offensive to women because each gender is vulnerable in different ways. See Ellison, 924 F.2d at 878. For example, because women

are more often the victims of sexual crimes, even mild forms of sexual harassment may lead to the fear that sexual assault is imminent. *Id.* at 879. The Ellison court further stated:

[w]hile many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or setting of ostensible equality can be an anguishing experience.

Id. at 879 n.9 (quoting Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989)).

3. Pervasive or Severe - How Bad Does it Have to Get?

In many hostile environment cases, the central issue concerns the nature of the conduct and whether it is sufficiently pervasive or severe to satisfy the standard set out in Meritor. See 477 U.S. at 67. In its determination of whether an environment is hostile or abusive, a court may consider the following factors: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether the conduct is physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance. Harris, 510 U.S. at 23. While psychological harm may be taken into account, proof of such injury is not needed to prevail in a sexual harassment claim. *Id.*

In some cases, the lower federal courts have wrongly converted this standard into a "severe *and* pervasive standard," and the appeals courts have stepped in to clarify the law. [Emphasis added]. See Abeita v. Transamerica, 159 F.3d 246, 252, 78 FEP Cases 364 (6th Cir. 1998) (reversing summary judgment for the employer because the facts were sufficient to "permit a jury to find objectively severe and pervasive harassment"); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 196-97, 84 FEP Cases 111 (4th Cir. 2000) (examining the "totality of the circumstances" and concluding that the plaintiff had firmly established the pervasiveness and severity of the alleged harasser's conduct where she presented evidence of daily tainting and disparate treatment that was objectively severe).

In addition, the incidents must occur with sufficient frequency to establish that the workplace is "permeated" with discriminatory behavior. See e.g. Penry, et al v. Federal Home Loan Bank of Topeka, 155 F.3d 1257, 1263 (10th Cir. 1998) (finding four gender-based incidents over a period of more than three years insufficient to establish hostile work environment). *But see* EEOC v. R & R Ventures, 244 F.3d 334 (4th Cir. 2001) (reversing summary judgment for the employer where there was sufficient testimony from the plaintiffs that the alleged harasser's sexual comments and jokes were a "daily event"); White v. New Hampshire Dept. of Corr., 221 F.3d 254, 83 FEP Cases 851 (1st Cir. 2000) (affirming jury verdict in favor of plaintiff where she had proven that she had to endure daily sexual comments and jokes from her co-workers and that her supervisor consistently treated her differently than he treated her male co-workers).

Additionally, the post-Meritor cases suggest that the required showing of severity for the harassing conduct will vary inversely with the pervasiveness or frequency of the conduct. See Ellison, 924 F.2d at 878. However, in virtually all cases, unless the conduct involves an extremely egregious incident, such as a sexual assault, repeated incidents are required; isolated acts or occasional episodes will generally not merit relief. See Courtney v. Landair Transport Inc., 227 F.3d 559, 83 FEP Cases 1529 (6th Cir. 2000)(holding single isolated incident where plaintiff's supervisor warned her that her workplace attire was inappropriate was not sufficiently severe or pervasive to establish hostile environment). *But see* Raniola v. Bratton, 243 F.3d 610, 85 FEP Cases 882 (2d Cir. 2001)(finding sufficient proof of sexual harassment where in a span of 2 years, plaintiff officer was subjected to frequent sex-based remarks, disproportionately burdensome assignments, workplace sabotage, and one serious threat of physical harm by police captain).

However, in some cases, a single incident has found to be sufficiently severe to establish hostile environment sexual harassment. In Moring v. Arkansas Dept. of Corr., 243 F.3d 452, 456 (8th Cir. 2001), the Eighth Circuit affirmed a jury's verdict for the state employee on her Section 1983 sexual harassment claim based on a single incident of harassment at a hotel where she and her supervisor were on an overnight business trip. Moring presented testimony that while at the hotel, her supervisor suggested to her that she might not be safe in her hotel room because she may be the object of animosity from others staying at the hotel; he came to the door of her room in his boxer shorts, told her that she "owed him" for her job, refused to leave her room, and sat on her bed, touched her thigh and attempted to kiss her. *Id.* The court found that there was sufficient evidence to support the jury's verdict that the incident was severe enough to alter the terms and conditions of Moring's employment stating: "we are unaware of any rule of law holding that a single incident can never be sufficiently severe to be hostile-work-environment sexual harassment." *Id.* See also Howley v. Town of Stratford, 217 F.3d 141, 83 FEP Cases 293 (2d Cir. 2000)(holding single incident where male firefighter subjected female firefighter lieutenant to verbal harassment in front of her male subordinates at a union meeting could be viewed as sufficiently severe to alter her work conditions to the extent it severely damages her ability to command respect from her subordinates in life-threatening situations and fostered gender-based animosity towards her).

It is important to stress that the instances of harassing conduct must be looked at as a whole, for to do otherwise would present an unrealistic picture of the work environment. See Bowman v. Shawnee State University, 220 F.3d 456 (6th Cir. 2000)(examining plaintiff's allegations that her supervisor referred to her as "honey" combined with his requests that she perform personal tasks were not severe or pervasive, but when considered in the context of his repeated propositions for sex and his explanations of his sexual desires and encounters could constitute sexual harassment); see also Gallagher v. Delaney, 139 F.3d 338, 342, 76 FEP Cases 700 (2nd Cir. 1998) (stating the recognition of an employee's heightened sensitivity due to the totality of the conduct may require standards "higher than those of the street").

C. Tangible Employment

Action With their decisions in Ellerth and Faragher, the Supreme Court made proof of a "tangible employment action" a pivotal factor in considering employer liability in both quid pro quo and hostile work environment cases. See 524 U.S. at 754 and 524 F.3d at 787, respectively. In Faragher, the Court described tangible employment action as "actions with a tangible result, like hiring, firing, promotion, compensation, and work assignment." 524 U.S. at 787. Similarly, in Ellerth, the Court defined tangible employment actions as constituting "a significant change in

employment status, such as firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 754.

Since Ellerth and Faragher were decided, the lower federal courts have been applying the "tangible employment action" requirement with varying results. In Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153, 78 FEP Cases 1434 (3d Cir. 1999), the court held that the plaintiff proved a tangible employment action where she presented evidence that she was deprived of an office, her secretary and the files she needed to perform her job and was assigned undesirable accounts. Importantly, the court stated that economic harm is not the "sine qua non" for finding tangible employment action if "an employer's act substantially decreases an employee's earning potential and causes significant disruption in his or her working conditions, a tangible employment action may be found." *Id.* at 153. *See also* Molnar v. Booth, 229 F.3d 593, 83 FEP Cases 1756 (7th Cir. 2000) (affirming jury verdict for female teacher-intern who presented sufficient evidence of tangible employment action where, after she rejected the school principal's advances, he confiscated art supplies she needed to do her job and gave her a negative performance evaluation that severely impacted her ability to continue as an intern). *But see* Savino v. C.P. Hall Co., 199 F.3d 925, 932, 82 FEP Cases 1245 (7th Cir. 1999) (holding plaintiff's transfer to another department away from the alleged harasser did not constitute a tangible employment action because such transfer did not cause "a substantial detriment to the employee's employment relationship").

In proving that he/she suffered a tangible employment action, plaintiff's must be mindful to connect the employment action(s) to the alleged sexual harassment or to the harasser. For example, in Murray v. Chicago Transit Authority, No. 99-3774, 2001 WL 493433 at *5, 85 FEP Cases 1231 (7th Cir. May 10, 2001), the plaintiff alleged that she was subjected to tangible employment actions including being passed over for an interview for a job opening, being deprived of her cell phone, being denied travel plans to a concert, having her company car reassigned, and having her phone bills scrutinized. Not only did the court deem these actions as "isolated, and relatively minor," but it also concluded that Murray failed to tie these actions to the alleged harassment by her supervisor (Mosena). *Id.* at *5. Even though Murray argued that Mosena's "close personal relationship" with other supervisors supported an inference that they worked with Mosena to "make her life intolerable," the court found that Murray's argument was based on "mere speculation." *Id.* *But see* Bowers v. Radiological Society of North America, Inc., 101 F.Supp.2d 691, 83 FEP Cases 479 (N.D. Ill. 2000) (denying the employer's motion for summary judgment where the plaintiff created a genuine issue as to whether her alleged harasser participated in the decision to terminate her and outsource her position where she offered evidence that the alleged decision-maker had no first hand knowledge of her performance, discussed the decision with the alleged harasser, and that the alleged harasser was involved in the drafting of plaintiff's termination letter).

D. Employer Liability

As stated, the Supreme Courts decisions in Ellerth and Faragher have established new standards for imposing employer liability for sexual harassment.

Importantly, the Court ruled that where the discrimination in employment, with respect to the terms and conditions, is explicit, i.e. a supervisor subjects his or her subordinate to a significant, tangible employment action, the employer will be held vicariously liable for the supervisor's conduct. *See* Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

The Court declined, however, to automatically hold an employer vicariously liable in sexual harassment cases which do not culminate in a tangible employment action, regardless of whether

the agency relation aided in the commission of the harassment. Rather, the Court ruled, where there has been no tangible employment action, as in a hostile environment, whether created by a supervisor or by co-employees, the defending employer can avoid liability by proof of an affirmative defense as described below. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

1. Harassment by Supervisory Employees

As noted, the Court held in Ellerth that tangible employment actions taken by the supervisor becomes, for Title VII purposes, the act of the employer, and thus constitutes harassment for which the employer will be held strictly liable. 524 U.S. at 765.

In cases where there has been no tangible employment detriment, the employer can still be held vicariously liable where the supervisor is aided in accomplishing the tort by the supervisory authority or otherwise misuses the supervisory authority. See Faragher, 524 U.S. at 806.

Recognition of employer liability where discriminatory misuses of supervisory authority alters the terms and conditions of a victim's employment, underscored by the fact that 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, train them and monitor their performance. *Id.*

Recognizing that there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship, the Court nonetheless refused to overrule Meritor's ruling to hold that an employer is "automatically" liable for the harassment. Faragher, 524 U.S. at 806. The Court also rejected a broad reading of agency principles to include acts of sexual harassment within the scope of employment of supervisors. *Id.* Rather, "in order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Court adopted its holding in Ellerth, discussed above. *Id.* at 807.

Thus, the issue of "Who is a supervisor?" has become critically important as a threshold question in determining the scope of employer liability in current sexual harassment cases. Although the Court has declined to announce a firm definition of "supervisor," they did provide certain guidelines in Faragher by stating that a supervisor is someone who the power to "hire and fire, and to set work schedules and pay rates." 524 U.S. at 803.

The lower federal courts who have ruled on this issue have often applied agency principles to determine whether the alleged supervisor had sufficient authority such that their actions could be imputed to the employer. See Parkins Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032-34, 78 FEP Cases 1329 (7th Cir. 1998)). (applying agency principles to distinguish between supervisors who carry such title only from those who "manifest & the essence of supervisory status" by affecting the terms and conditions of the plaintiff's employment and finding that the alleged harassers did not exert sufficient authority over plaintiff to be considered "supervisors") see also Savino, 199 F.3d at 932 (finding no question as to whether the alleged harasser was the plaintiff's supervisor where her hired her and apparently had the power to terminate her).

While proof of "actual authority" is often the simplest way to show that the alleged harasser was the plaintiff's supervisor, proof of "apparent authority" may serve just as well to impute liability to the employer. See Llampallas v. Mini-Circuit Lab, Inc., 163 F.3d 1236, 1247, 78 FEP Cases 1104 (11th Cir. 1998). See also Mikels v. City of Durham, 183 F.3d 323, 327 (4th Cir. 1999)(stating that the clearest indicator of a supervisory relationship "lies in [the harasser's] authority" to take tangible employment actions against the victim, but where the harasser's authority is unclear, the victim's perception of that authority is relevant).

2. Harassment by Co-Workers

Although Ellerth and Faragher did not directly address harassment by non-supervisory employees, dicta found in both cases captures the idea that if the employer ratifies the harasser's acts, the harassment is said to become that of the employer, without further inquiry or application of the affirmative defense. See Ellerth, 524 U.S. at 755; Faragher, 524 U.S. 785.

In the absence of a clear ruling from the Supreme Court on this issue, the lower federal courts generally apply a negligence standard when the harassment is caused by a co-worker of the victim, i.e. the employer is liable if it knew or should have known of the alleged sexual harassment and failed to implement prompt and appropriate corrective action. See White, 221 F.3d 254, 261 (imposing employer liability for co-worker harassment where there was ample evidence that the employer knew of the harassing conduct to which plaintiff was subjected by her co-workers and inmates because plaintiff had complained several times to her supervisors, and finding that the employer failed to take any corrective action because the harassment continued even after the plaintiff made her complaints to the Department of Corrections); see also Fielder, 218 F.3d at 985 (reversing summary judgment where plaintiff presented sufficient evidence that the employer's management knew about the harassment to which she was subjected by her co-employees).

Where the employer's response to known harassment is effective at ending the actionable conduct, it is likely that there will be no employer liability. For example, in Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267, 78 FEP Cases 1527 (5th Cir. 1999), the court found declined to hold the employer vicariously liable for the supervisor's creation of a hostile work environment because of the employer's prompt response to the plaintiff's complaints. In that case, the employer promptly punished the supervisor by imposing verbal and written reprimands, suspending him without pay for a week, and banishing him from his own sales meetings. See 164 F.3d at 266. The court found that this response ended the harassment, therefore, imposing employer liability would be improper. See *id.* at 267. See also Scusa, 181 F.3d at 967-68 (affirming summary judgment where undisputed facts showed that employer's response to plaintiff's allegations of sexually harassing conduct against her co-worker and supervisor were remedied to her satisfaction, including, the employer's granting of her request to transfer to a different department, and that the incidents of harassment ceased).

However, an employer may be liable even where it attempts to remedy known harassment, where its remedial action is considered unreasonable. For example, in Smith v. Sheahan, 189 F.3d 529, 531-32, 80 FEP Cases 1071 (7th Cir. 1999), the plaintiff, an officer in the sheriff's department alleged sexual harassment against her fellow officer, Gamble. After she first complained about the harassment to her lieutenant, he suggested that she and Gamble "kiss and make up," and did not even investigate Smith's

allegations. After Smith made additional complaints, including presenting affidavits from other female officers who witnessed Gamble's sexually offensive conduct, the lieutenant separated Smith from Gamble and placed her on a less desirable duty, guarding inmates with psychiatric problems. In reversing summary judgment for the employer, the Seventh Circuit reminded the lower court that just as an employer can escape liability where harassment recurs despite its best efforts, so it can also be liable if the harassment stops, but the jury deems its remedy to have fallen below a level of due care. *Id.* at 535. See also Hostetler, 218 F.3d at 811-12 (holding fact issues existed as to whether employee's transfer after her harassment complaints of co-worker harassment left her worse off than before the harassment occurred, thus, constituting an unreasonable remedial measure by the employer).

Additionally, employers may be held directly liable for co-worker harassment where the employer's negligence causes the actionable work environment. See Baty v. Willamette Industries, Inc., 172 F.3d 1232, 1241-43, 79 FEP Cases 1451 (10th Cir. 1999) (affirming jury verdict for plaintiff where she had presented sufficient evidence for a reasonable jury to find that her employer's complicity in the face of multiple complaints of sexually harassing conduct by her co-workers, including management's condoning and even encouraging the offensive behavior, helped to create the actionable environment).

3. The Affirmative Defense to Employer Liability

In both the Ellerth and the Farragher cases, the Supreme Court declined to automatically hold an employer vicariously liable in sexual harassment cases which do not culminate in a tangible employment action, regardless of whether the agency relation aided in the commission of the harassment. See 524 U.S. at 764; and 524 U.S. at 807 (respectively). Rather, the Court ruled, where there has been no tangible employment action, the defending employer can avoid liability by proof of an affirmative defense by a preponderance of the evidence. See Ellerth, 524 U.S. at 764; Farragher, 524 U.S. at 807.

Importantly, the affirmative defense comprises two elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. See Ellerth, 524 U.S. at 764-65; Farragher, 524 U.S. at 807.

Under the first prong, the Ellerth and Farragher cases noted that while proof that an employer had in place an explicit anti-harassment policy with a complaint procedure suitable to the employment circumstances is not necessary in every case, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. See Ellerth, 524 U.S. at 765; Farragher, 524 U.S. at 807; see also Corcoran v. Shoney's Colonial, Inc., 24 F.Supp.2d 601, 606, 78 FEP Cases 311 (W.D. Va. 1998) (finding employer established first prong of the affirmative defense where its sexual harassment policy was express, appropriate and posted in all locations where employees could view it).

However, where a sexual harassment policy has been promulgated but has not been properly implemented or is deficient as to a particular employee's claim, it will not satisfy this element of the defense. See Farragher, 524 U.S. at 808 (finding employer's policy inadequate as a matter of law where it did not include a mechanism by which the employee could bypass the harassing supervisor when logging a complaint and those responsible for city operations could not reasonably believe the precautions adequate

without communicating them to all locations). See also Smith v. First Union Nat'l Bank, 202 F.3d 234, 244 (4th Cir. 2000)(reversing summary judgment for employer because plaintiff created genuine issue of fact as to whether employer's policy was adequate where policy did not include a prohibition against gender discrimination); Frederick, 246 F.3d at 1314-15 (reversing summary judgment where fact issues existed as to whether employer's sexual harassment policy and complaint procedures were adequately communicated to employees and effectively carried out at the time of the alleged harassment); Harrison v. Eddy-Potash, Inc., 248 F.3d 1014, 85 FEP Cases 990 (10th Cir. 2001)(holding that a reasonable jury could conclude that the employer failed to exercise reasonable care where the evidence indicated that non-supervisory personnel (including the alleged harasser) were not provided with copies of the company's sexual harassment policy; no copies of the policy were posted on any of the bulletin boards in the mine; and the evidence indicated that the policy was largely ignored by management).

Lastly, the employer must establish that it fulfilled its duty to take prompt effective corrective action. See Ellerth, 524 U.S. at 764-65; Faragher, 524 U.S. 807-08. In Ogden, 214 F.3d at 1007, the Eight Circuit upheld a jury verdict for the plaintiff and considered whether the employer's response to her complaints of harassment constituted prompt corrective action. Specifically, the court found that there was substantial evidence indicating that Wax Works "neither conducted [a] 'thorough investigation' nor took [an] 'appropriate action' as promised by its sexual harassment policy. Id. According to the testimony of Ogden and others, the employer "minimized" her complaints, performed a cursory investigation which focused on her performance, rather than her harasser's conduct, and forced Ogden to resign while imposing no discipline on the harasser for his conduct. Id. But see Coates v. Sundor Brands, Inc., 164 F.3d 1361, 78 FEP Cases 1553 (11th Cir. 1999) (ruling that employer's actions were reasonable where upon learning of harassment, the harasser was immediately suspended without pay pending completion of the investigation).

Under the second prong of the Ellerth-Faragher affirmative defense, the employer is required to demonstrate is that the employee unreasonably failed to avail him/herself of any corrective or preventive opportunities provided by the employer. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808. See Savino, 199 F.3d 925, 933 (holding that plaintiff unreasonably failed to take advantage of opportunities to prevent or correct harassment where her own testimony indicated that she did not complain to anyone except the alleged harasser for four months; that when she did finally complain to managers, she neglected to mention several incidents of harassment that had already occurred; and she failed not follow the complaint procedures set up by management for levying additional complaints).

Additionally, an employee's failure to report sexual harassment can be considered reasonable if there is a significant risk of retaliation. See Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999)(finding female police officer plaintiff's failure to complain was reasonable where she presented significant evidence that making such a complaint was effectively forbidden under the officer's "code of silence" and that if she made such a complaint, she would be subjected to intolerable social ostracism and professional ridicule that her career would be, for all intents and purposes, over). But see Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266, ___ FEP Cases ___ (4th Cir. 2001)(applying the Ellerth-Faragher affirmative defense and stating that "[a] generalized fear of retaliation does not excuse a failure to report sexual harassment").

IV. Race Harassment

A. General Issues

While the EEOC's statistics indicate that between 1990 and 1998, there were actually a greater percentage of race harassment charges filed than sexual harassment (8.1% versus 6.2%), there is substantially less case law in this area than in the sex harassment cases.

However, the analysis the lower federal courts have applied in race harassment cases has been virtually the same as that applied in hostile sexual environment claims, with the exception of quid pro quo harassment, which is obviously inapplicable in the race context. While there is no specific statutory or regulatory definition of what constitutes a racially hostile environment, the EEOC regulations defining the claim have indicated that the principles involved ... continue to apply to race, color, religion or national origin. 29 C.F.R. § 1603.11. n.1 (1999) (need).

Importantly, to state a case of racially hostile environment, a plaintiff must demonstrate: (1) that he/she has a contractual relationship (Section 1981) or an employment relationship (Title VII); (2) that he/she was exposed to comments, jokes or acts of a racial nature; (3) that the conduct had the purpose or effect of interfering with his/her work performance or created an intimidating, hostile or offensive work environment; and (4) where the harassment is committed by low-level employees, employer will only be liable where management level employees knew or should have known about the conduct and failed to take prompt effective remedial action. See Harris, 510 U.S. at 20-22; Burrell v. Starr Nurswery, Inc., 170 F. 3d 951, 955, ___ FEP Cases ___ (9th Cir., 1999) (NEED)

Moreover, as in sexually hostile environment cases, to establish a claim, the plaintiff must show both that the conduct to which he or she was subjected was "severe or pervasive enough to create & an environment that a reasonable person would find hostile or abusive" and that he or she "subjectively perceive[d] the environment to be abusive." Harris, 510 U.S. at 21.

Additionally, in cases of racial harassment, the courts have applied the standards for employer liability articulated in Ellerth and Faragher. See Hill v. American General Finance, Inc., 218 F. 3d 639, 82 FEP Cases 1438 (7th Cir. 2000) Need Other jurisdictions?

B. Section 1981

One major difference between claims of sexually hostile environment and racially hostile environment is that race harassment cases may be brought both under Title VII and under Section 1981 of the Civil Rights Act of 1866. In contrast, Section 1981 does not cover sex harassment cases.

As stated above, in 1989, the Supreme Court interpreted Section 1981 as excluding claims arising during the employment context from its protection. See Patterson, 491 U.S. at 171. However, with the passage of The Civil Rights Act of 1991, Congress expressly amended Section 1981 to include Sections (b) and (c) which bar racial discrimination as follows: All persons&..shall have same right to make and enforce contracts& as&enjoyed by white citizens& & (b) For purposes of this section, the term "make and enforce contacts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. (c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law. P.L. 102-166.

To establish a claim under Section 1981, a plaintiff must establish that he or she was subjected to intentional discrimination based upon race, rather than solely on the basis of the place or nation

of his/her origin or religion. See St. Francis College v. Al-Khazraji, 481 U.S. 604, 613, 107 S. Ct. 2022 (1987) (holding that Congress intended for this statute to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"). See also Pavon v. Swift Transportation Co., Inc., 192 F. 3d 902, 80 FEP Cases 1557 (9th Cir. 1999)(affirming jury verdict for plaintiff where discrimination against Hispanic employee, e.g. calling him a "wet back" and telling him to "go back to Columbia," was on account of his Hispanic race, not his national origin, and thus actionable under Section 1981, where co-worker considered himself to be of a different race than employee and chose to harass employee based on his ancestry and ethnic characteristics).

While the statute appears to require a contractual relationship, in some jurisdictions, even an "at-will" employee has a contract for purposes of Section 1981. See Lauture v. IBM, 216 F. 3d 258, 83 FEP Cases 286 (2d Cir. 2000)

Whidbee v. Garzarelli Food Specialties, Inc., 223 F. 3d 62, 83 FEP Cases 1115 (2d Cir. 2000) (holding an at-will employee may maintain a claim for hostile work environment under Section 1981 where evidence showed that plaintiff was subjected to, or at the very least aware of, a stream of racially offensive comments over the span of two to three months, including one comment that was physically threatening, even where all but one of the remarks were made with reference to other Black employees). See also Perry v. Woodward, 188 F.3d 1220, 80 FEP Cases 1077 (10th Cir. 1999), cert denied ___U.S. ___, 120 S.Ct. 1964, 83 FEP Cases 96 (2000)

But see Gonzales v Ingersoll Milling Machine Co., 133 F.3d 1025, 1034-35, 75 FEP Cases 1624 (7th Cir. 1998)(refusing to address the issue of whether at-will employees can bring Section 1981 claims and affirming summary judgment against the plaintiff on other grounds).

Otherwise, the analysis of racially hostile environment cases under Section 1981 is the same as the analysis under Title VII. See Allen v. Michigan Dept. of Corr., 165 F. 3d 405, 410, 78 FEP Cases 1578 (6th Cir. 1999) citing Ellerth, 118 S.Ct. at 2265 (holding that in order to establish a racially hostile work environment violative of Section 1981 the plaintiff must demonstrate that the harassment consisted of "severe or pervasive" conduct).

Also see: Issues unique to Sec. 1983

1. Eleventh Amendment Issues

In Haffordv. Seidner, 183 F. 3d 506, need pin cite, 80 FEP Cases 801 (6th Cir. 1999), the Sixth Circuit held that the correctional officer's Section 1981 claim against Ohio Department of Correction and Rehabilitation was barred by the 11th Amendment. However, his Title VII claims were not. See also

2. Cap on Damages

While under under Title VII, as amended by the Civil Rights Act of 1991, compensatory and punitive damages are capped at \$300,000, no damages cap applies to claims brought under Section 1981. See Pavon v. Swift Transportation Co., Inc., 192 F. 3d 902, 80 FEP Cases 1557 (9th Cir. 1999). In that case, the Ninth Circuit ruled that the jury's entire damages award was not subject to a statutory cap of \$300,000 that is applicable to Title VII. Court refused to reduce the award inasmuch as plaintiff's damages in excess of \$300,000 could be attributed to his success on other claims including his claim under Section 1981. PIN CITE

3. Statute of Limitations
C. Title VII

In order to recover on a claim of a racially hostile environment in violation of Title VII, the plaintiff must establish that his or her workplace was permeated with instances of racially discriminatory conduct, such as "discriminatory intimidation, ridicule, and insult" such that "the environment would reasonably be perceived and is perceived as hostile or abusive." Harris, 510 U.S. at 21-22 citing Meritor, 477 U.S. at 65.

1. Pervasive or Severe Conduct

See e.g. Hafford v. Seidner, 183 F. 3d [first page], 506, ___ FEP Cases ___ (6th Cir. ___year___) (finding African-American correctional officer's claim of racial harassment was sufficient to submit to a jury where his supervisors and fellow correction officers engaged in a pattern of racial harassment consisting of not only racial slurs, but also physical threats, including what he understood to be a threat of a lynching); Ross v. Douglas County Nebraska, 234 F. 3d 391, PIN CITE, 84 FEP Cases 791 (8th Cir. 2000) (affirming jury verdict for Black correctional officer who claimed, inter alia, a racially hostile work environment, even though his supervisor was Black, where the supervisor continuously referred to him as "nigger," "black boy," and occasionally referred to his wife who is white, as "Whitey"). See also Carter v. Chrysler Corp., 173 F. 3d 693, 79 FEP Cases 1253 (8th Cir. 1999)(reversing summary judgment with regard to African-American plaintiff's racially hostile environment claim where plaintiff suffered a "host of indignities" over the course of two years including verbal abuse and sexual and racial epithets; fact finder could find the harassment sufficiently severe or pervasive to create liability under Title VII).

Conduct insufficiently pervasive or severe See e.g. Barbour v. Browner, 181 F.3d 1342, 1347 (D.C. Cir. 1999)(reversing jury verdict for plaintiff in case where African-American plaintiff relied on only two incidents to support her claim for racial harassment: a meeting at which a co-employee turned her back on plaintiff and an incident where a supervisor's response to one of her requests for information was intentionally slow, to support her claim of harassment; harassment not sufficiently pervasive or severe to alter conditions of employment, thus defeating Title VII claim); Bradley v. Widnall, 232 F. 3d 626, 630-631, 84 FEP Cases 552 (8th Cir. 2000)(affirming summary judgment for U.S. Air Force in African-American's claim of race harassment where allegations that her supervisory duties were curtailed, that she was left out of the decision-making process, treated with disrespect, and subjected to false complaints, were found insufficiently pervasive and severe as to have affected a term, conditions or privileges of her employment).

2. Employer Liability;

Second Circuit: Whidbee v. Garzarelli Food Specialties, 223 F. 3d at 72. (Issue of fact precludes summary judgment on at will employees' claim of racially hostile environment where employees must show not only severe or pervasive harassment but also a specific basis for imputing the conduct that created the hostile environment to the employer. Where harassment is by a co-worker, employees must demonstrate that the employer either provided no reasonable avenue for complaint or knew of the harassment and did nothing about it.)

Sixth Circuit: Hafford v. Seidner 183 F. 3d at 513-514. (Case remanded here genuine issue of fact existed as to employer liability both in terms of employer's alleged failure to

"implement prompt and appropriate corrective action" in response to the conduct of plaintiff's co-workers and its vicarious liability for the alleged harassing behavior of its supervisors and failure to "exercise [] reasonable care to prevent and correct promptly the behavior.")

Eighth Circuit: Robinson v. Valmont, 238 F. 3d 1045, 84 FEP 1624 (8th Cir. 2001) (Even where harassment of African-American included death threats by anonymous co-employees, where employer promptly investigated each reported incident, installed a surveillance camera in the locker room to try to catch the offender and warned that further incidents would result in terminations.) Also see: Ross v. Douglas County, Nebraska 234 F. 3d at 396. (Employer liability where harassment committed by a supervisor;) Carter v. Chrysler Corporation 173 F. 3d 693, 79 FEP 1253 (8th Cir. 1999) (Summary judgment reversed with regard to African American's racially hostile environment claim where district court did not analyze the record on the issue of the adequacy of Chrysler's response to harassment, the promptness and effectiveness of its responses in light of the information known to it and available options for remedial actions.

V. Cutting Edge Issues in Harassment

A. Inappropriateness of Summary Judgement in Harassment Cases

In harassment cases where the emphasis is on the alleged conduct of the plaintiff and the alleged harasser, many courts have noted that summary judgment may be a particularly inappropriate resolution of the case. For example, in Gallagher, the Second Circuit rejected a summary judgment for an ex-employer in a sexual harassment case and warned of the dangers of "robust use of summary judgment to clear trial dockets" in sex discrimination cases. 139 F.3d at 341. The court noted that "whatever the early life of a federal judge, he or she usually lives in a narrow segment of the & American socioeconomic spectrum, generally lacking the real-life experience required in interpreting subtle sexual dynamics of the workplace." Id.

Recently, the same sentiment was expressed in Matute v. Hyatt Corp., No. 98 CIV. 1712(AGS), 1999 WL 135204 (S.D. N.Y. March 11, 1999). In Matute, the court denied Hyatt's summary judgment on both of plaintiff's sexual harassment claims because it believed that Matute had presented evidence which would be better evaluated by a jury. See id. at *3 (finding Matute's allegations that his manager touched him on his penis and tried to kiss him were sufficient to reject summary judgment). The court stated that "[t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation." Id. at *4 citing Gallagher, 139 F.3d at 342.

See also DiLaurenzio v. Atlantic Paratrans, Inc., 926 F.Supp. 310, 314, 73 FEP Cases 1205 (E.D.N.Y.1996) (holding that the determination of whether a workplace is hostile or not is "the sort of issue that is often not susceptible of summary resolution"). But see Meiri v. Dacon, 759 F.2d 989, 998, 37 FEP 756 (2d Cir. 1985) (holding that the salutary purposes of summary judgment ... apply no less to discrimination cases than to commercial or other areas of litigation").

B. Same Sex Harassment

In Oncale, the Supreme Court held that sexual discrimination based on same sex harassment is actionable under Title VII. 118 S.Ct 1003. While recognizing this protection, the Court stated that

the requirement in all Title VII hostile environment sexual harassment cases, i.e. that the behavior be so objectively offensive as to alter the terms or conditions of employment, would prevent the statute from being converted to a "general civility code" or requiring "asexuality or androgyny in the workplace." Id. at 1002-03.

The Court noted that same sex harassment, like the more familiar sex harassment, was not necessarily motivated by sexual desire, but rather, a general hostility to persons of one gender or the other. Id. at 1002. However, the Court also noted that proof that the harasser was motivated by sexual attraction would be a method of proving that the harassment was "because of sex." Id.

In recent decisions, the lower federal courts have attempted to interpret the "because of sex" and "gender hostility" facets of *Oncale*, with varying outcomes.

For example, in *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865, 80 FEP Cases 1022 (8th Cir. 1999), the court reversed the dismissal of the plaintiff's complaint finding that the male plaintiff had sufficiently alleged that the hostile work environment sexual harassment by his male and female co-workers was "because of sex." In his complaint, Schmedding alleged inter alia that he was patted on the buttocks, asked to perform sexual acts, given derogatory notes referring to his anatomy, called names such as "homo" and "jerk off," and was subjected to exhibitions of sexual behavior such as unbuttoning of clothing, rubbing of crotches and buttocks and humping the door frame to his office. Id. The district court dismissed Schmedding's complaint because it perceived his allegations of harassment to be premised on sexual orientation rather

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