Mitigating the Employer's Exposure to Third Party Claims of a Hostile Work Environment

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I. INTRODUCTION

Romance in the workplace environment is common and may increase employers' exposure to liability. According to a recent survey, fifty-nine percent of employees admit to participating in a romantic relationship while at work.[1] When asked what type of romance they participated in, forty-one percent stated that the romance was an ongoing but casual relationship and thirty-five percent stated that it was a spontaneous office hook-up.[2] Based on their experiences, sixty-four percent stated that they would participate in the office romance again.[3] However, even when the romantic relationship is consensual, the sexual nature of the office romance between employees may lead to litigation based on claims of sexual harassment.[4]

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1. *Office Romance Survey 2010*, VAULT BLOGS, Feb. 12, 2010, http://blogs.vault.com/blog/workplace-issues/office-romance-survey-2010/ (last visited Feb. 10, 2015).

2. *Id.*

3. *Id.*

4. *See Sexual Harassment Charges EEOC and FEPA Combined: FY 1997–FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/sexualharassment.cfm (stating that in 2010, 11,717 cases alleging sexual harassment and hostile work environment were filed with the EEOC. The direct monetary benefits paid by companies to settle sexual harassment and hostile work environment claims through the EEOC have averaged $48.1 million annually for the past fourteen years). *See also* Sara Bliss Kiser, Tyne Coley, Marsha Ford, & Erica Moore, *Coffee, Tea, or Me? Romance and Sexual Harassment in the Workplace*, 31 S. BUS. REV. 35 (2006) (noting that the largest monetary payments—which are in addition to these amounts—are determined separately

"Third-party sexual harassment," as these claims are called, occurs when employees are victims of either (1) an unreasonable interference in their work environment, or (2) an intimidating, hostile, or offensive working environment.[5] In 2014, JPMorgan Chase agreed to pay $1.45 million to settle charges by the U.S. Equal Employment Opportunity Commission on behalf of a group of sixteen female mortgage bankers.[6] The plaintiffs alleged that a "sexually hostile work environment" existed at the company.[7] The sex discrimination lawsuit charged that the women faced "sexually charged behavior and comments from the supervisory staff and participating mortgage bankers, which resulted in a sexist and uncivil atmosphere."[8] The lawsuit also alleged that the female mortgage bankers who "didn't embrace and participate in these circumstances became ostracized and suffered economic consequences by being deprived of lucrative sales calls, being deprived of training opportunities, and being denied other benefits of employment."[9] In addition to the cash payments, the bank agreed to revise its call data retention system record so that future sales calls can be analyzed to assure that they are more equally distributed among all mortgage bankers.[10]

Although the frequency and severity of sexual harassment in the workplace is widely acknowledged and well documented, the legal community is only beginning to understand the impacts of workplace sexual harassment on third parties. One reason for this lack of understanding is due to the limited amount of cases that have been litigated in this area.[11] A second reason is that a third party case is extremely

through litigation or through arbitration that is commonly advocated by employers to reduce the corporate costs of litigation and to minimize public disclosures. The U.S. Department of Labor reports that seventy-one percent of working women cope with some form of sexual harassment during their careers); Tiffani L. McDonough, *Navigating Office Romances and Avoiding Litigation*, 247 (30) THE LEGAL INTELLIGENCER 5, Feb. 13, 2013; Nolan C. Lickey, Gregory R. Berry & Karen S. Whelan-Berry, *Responding to Workplace Romance: A Proactive and Pragmatic Approach*, 8 J. BUS. INQUIRY, 106 (2009); Maureen S. Binetti, *Romance in the Workplace: When "Love" Becomes Litigation*, 25 HOFSTRA LAB. & EMP. L.J. 153 (2007).

5. *See* Grace v. USCAR, 521 F.3d 655 (6th Cir. Mich. 2008). *See also* Deb Lussier, *Oncale v. Sundowner Offshore Services Inc. and the Future of Title VII Sexual Harassment Jurisprudence*, 39 B.C. L. REV. 937, 941–42 (1998); Jamie C. Chanin, *What Is It Good For? Absolutely Nothing: Eliminating Disparate Treatment of Third Party Sexual Harassment and All Other Forms of Third Party Harassment*, 33 PEPP. L. REV., 385, 401–02 (2006).

6. Press Release, U.S. Equal Emp't Opportunity Comm'n, JPMorgan Chase Will Pay $1,450,000 to Resolve EEOC Class Sex Discrimination Lawsuit, (Feb. 2, 2013), http://www.eeoc.gov/eeoc/newsroom/release/2-3-14.cfm.

7. Saabira Chaudhuri, *J.P. Morgan Agrees to Pay $1.45 Million to Settle Sex-Discrimination Lawsuit*, WALL ST. J., Feb. 4, 2014, http://online.wsj.com/news/articles/SB10001424052702304626804579362860949961116.

8. *Id*.

9. *Id*.

10. *Id*.

11. Courts have found sexual favoritism to constitute a cause of action under Title VII in the following four cases: Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988); Priest v.

difficult to prove because to prevail, the plaintiff must provide evidence of sexual harassment in the course of the litigation.[12] In the realm of third-party sexual harassment claims, plaintiff must prove that sexual advances, requests for sexual favors, or other conduct of sexual nature were so severe and pervasive that they affected and unreasonably interfered with an individual's job performance or created an intimidating, hostile, or offensive working environment.[13]

One developing trend in sexual harassment law is that of lawsuits initiated by third-party co-workers against the employer, based on consequences of workplace romance. Courts recognize two forms of sexual harassment: a quid pro quo theory, or a hostile work environment theory.[14] Quid pro quo third-party sexual harassment occurs where employees who are not personally harassed lose job benefits to other employees who are direct recipients of such harassment.[15] Often referred

Rotary, 634 F. Supp. 571 (N.D. Cal. 1986); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983); and King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985).

12. *See* Cross v. Prairie Meadows Racetrack & Casino, Inc., 615 F.3d 977, 981 (8th Cir. Iowa 2010) (noting that "[t]he standard for demonstrating a hostile work environment on the basis of sexual harassment is a demanding one."). *See also* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, EEOC NOTICE N-915-050, Jan. 12, 1990, *available at* http://www.eeoc.gov/policy/docs/currentissues.html (hereinafter "EEOC NOTICE N-915-050") (noting that the EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment" and that "both types of sexual harassment are actionable under section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), as forms of sex discrimination."). *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2004) (noting that EEOC Guidelines state, "[h]arassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–66 (1986); Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (supporting the same).

13. *Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d. at 981; EEOC NOTICE N-915-050, *supra* note 12.

14. EEOC NOTICE N-915-050, *supra* note 12.

15. *See* Liebovitz v. New York City Transit Auth., 4 F. Supp. 2d. 144, 148 (E.D.N.Y. 1998); Glen Gomes, James M. Owens, & James F. Morgan, *The Paramour's Advantage: Sexual Favoritism and Permissibly Unfair Discrimination*, 18 EMPLOY. RESPONS. RIGHTS J. 73, 77 (2006) (stating that "[i]n contrast to quid pro quo harassment, a hostile or abusive environment does not require the denial (or threat of denial) of any tangible job benefits; rather, the severity and pervasiveness of the harassment was viewed as negatively altering the conditions of employment (and thus was a form of discriminatory behavior.)"); C.M. Hunt, M. J. Davidson, S. L. Fielden & H. Hoel, *Reviewing Sexual Harassment in the Workplace—an Intervention Model*, 39 PERSONNEL REV. 655, 657 (2010) (defining "quid pro quo" as sexual harassment "where an individual will explicitly or implicitly makes sexual requests and/or advances as an exchange for some desired result, for example a promotion").

to as a "something for something" claim,[16] a classic quid pro quo case involves conditions of employment, where a manager offers an employee the option of performing a sexual act in order for the employee to achieve promotion or keep her job. Conversely, the body of hostile work environment sexual harassment law is broader in nature and "comprises discriminatory comments, advances, touching, and the like that make the workplace 'hostile' or 'abusive.'"[17] Hostile work environment jurisprudence permits co-workers who are surrounded by an unwelcomed sexually charged atmosphere to sue the employer for creating or allowing an abusive working environment.[18]

The quid pro quo and hostile work environment theories are not in a strict dichotomy, and may complement each other. For instance, quid pro quo harassment can contribute to a hostile work environment.[19] In this situation, the employer will base employment decisions affecting the employee on the whether the employee will tolerate or reject the employer's conduct.[20] That is, quid pro quo harassment can exacerbate the hostile work environment if a supervisor exceeds his authority in a hiring process by causing someone to tolerate or partake in a sexual act.[21]

This Article consists of five parts that provide an in-depth overview of third-party hostile work environment claims and recommend solutions that employers may utilize to safeguard their employees and decrease risks associated with costly litigation.

After the introduction in Part I of this article, Part II defines and describes the origins of hostile work environment claims. Part III presents specific theories that employees may rely upon to allege third-party hostile environment claims against their employer. Isolated events may not be actionable, but under the sexual favoritism theory of hostile work environment claims, plaintiffs have been successful in proving cases based upon both systematic and individualized quid pro quo sexual favoritism. Recovery may be obtained under traditional hostile work environment theory where the employee, although not subject to direct harassment, must work in an atmosphere where the harassment is endemic and severe. Further, under the emerging sex-plus theory, a plaintiff may seek recovery where gender discrimination occurs in combination with discrimination against an additional characteristic, such as personal relationship status, marital status, pregnancy or fertility, or familial status.

16. Jansen v. Packaging Corp. of Am., 123 F.3d 490, 532 (7th Cir. Ill. 1997) ("The term *quid pro quo* literally means 'something for something.'").

17. Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y. 307, 308 (1998).

18. *See Meritor Sav. Bank*, 477 U.S. at 67.

19. *See* 29 C.F.R. § 1604.11(a) (2004).

20. *Id.*

21. *See* EEOC NOTICE N-915-050, *supra* note 12.

Part IV recommends solutions that employers can implement in order to prevent hostile work environments from arising at their company. Part V concludes this article and makes predictions on the future of the third-party hostile environment claims moving forward.

II. HOSTILE WORK ENVIRONMENT LAW

Hostile work environment law has been evolving and growing for nearly fifty years, based upon a complex combination of statutory law, regulations, and case law. A party prosecuting or defending against a third-party hostile work environment claim will benefit from understanding the law's development and the current legal requirements.

A. HISTORICAL OVERVIEW OF HOSTILE WORK ENVIRONMENT LAW

The origin of hostile work environment law is found in Title VII of the Civil Rights Act of 1964, which makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[22] Equal Employment Opportunity Commission ("EEOC") regulations provide additional guidance and interpreted Title VII to protect against unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[23] Further, EEOC regulations provided that "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity. . . ."[24] State laws, such as California's Fair Employment and Housing Act ("FEHA") and Washington's Law against Discrimination ("WLAD"), afford additional protection for employees against hostile work environments.[25]

22. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2010).

23. 29 C.F.R. § 1604.11(a)(3) (2004).

24. 29 C.F.R. § 1604.11(g) (2004).

25. Under FEHA, an employee may establish an actionable claim of sexual harassment by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile working environment. *See* California Fair Employment and Housing Act, Cal. Gov't Code § 12900, et seq. (West 2015) (noting that California law recognizes that sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon quid pro quo; the law protects employees against an employer's retaliation in the event that the employee files a complaint or protests conduct prohibited by FEHA).

On a case-by-case basis, courts have clarified the definition of hostile work environment and the doctrine's applicability to employer-employee relationships. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court for the first time expressly recognized that Title VII prohibits sexual harassment that creates a hostile work environment.[26] In *Meritor*, a female bank employee brought a claim against her supervisor and employer alleging that she was sexually harassed during her four-year period by her supervisor, which created an unwelcomed offensive and hostile work environment in violation of Title VII.[27] At the district court level, the plaintiff provided testimony that her supervisor invited her out to dinner and suggested to have sexual relations with him at the hotel.[28] Although she has initially refused, the plaintiff has ascended to the advances because she was afraid to lose her job. The plaintiff testified that she had intercourse with her supervisor "some 40 to 50 times," was fondled in front of her co-workers, was raped in the bathroom, and that her supervisor would expose himself in front of her.[29] The plaintiff also alleged that the supervisor fondled other female bank employees.[30] Since the plaintiff was afraid of the consequences of filing a complaint and her supervisor, she has never reported this harassment or followed employer's complaint procedures. Conversely, the supervisor denied these allegations and contended that the allegations were made because of a business-related dispute.[31]

The Supreme Court analyzed the Title VII and EEOC regulations pertaining to sexual harassment and hostile environment. The Court concluded based on evidence presented that the plaintiff's claim of hostile work environment was actionable under Title VII.[32] The Court stated that Title VII "is not limited to 'economic' or 'tangible' discrimination."[33] The phrase "terms, conditions, or privileges of employment" contained in Title VII evidences Congress's intent to "strike at the entire spectrum of disparate treatment of men and women in the employment," which includes requiring employees to work in hostile and abusive environments.[34] Thus, the Supreme Court held that "[w]hen the workplace is permeated with

26. *Meritor Sav. Bank*, 477 U.S. at 66.
27. *Id.* at 60.
28. *Id.*
29. *Id.*
30. *Id.* at 60–61.
31. *Id.* at 61.
32. *Meritor Sav. Bank*, 477 U.S. at 66, 73. (The Supreme Court noted that the EEOC Guidelines state that Title VII is meant to be interpreted to afford "employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Further, the Supreme Courted noted that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.").
33. *Id.* at 64.
34. *Id.* at 65.

'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."[35]

In a subsequent case, *Harris v. Forklift Systems*, the Supreme Court further defined and established standards to for evaluating the scope of hostile work environment.[36] In *Harris*, a female manager filed a suit against her employer, an equipment rental company, claiming that behavior of her male supervisor who was the company's president created "an abusive work environment for her because of her gender."[37] Specifically, the plaintiff alleged that her supervisor made her "the target of unwanted sexual innuendos" in the presence of her co-workers, suggested a trip to Holiday Inn to negotiate her raise, asked to get coins out of his pockets, threw objects on the ground and asked the plaintiff to pick them up, and made sexual comments about the plaintiff's clothing.[38] The District and the Appeals courts held that the supervisor's behavior did not reach a level of severity that would affect plaintiff psychologically.[39] This behavior did not create a hostile work environment for the plaintiff, even though the supervisor's comments would offend a reasonable woman.[40]

The Supreme Court reversed the lower courts, stating that to determine whether harassment in the workplace results in a hostile work environment one should look at the totality of circumstances and consider the frequency and severity of the conduct, whether the conduct is physical, threatening, humiliating, or merely offensive, and whether the conduct "unreasonably interferes with employee's work performance."[41] The Supreme Court noted there is no clear boundary when harassment creates a hostile work environment and becomes actionable. Title VII applies when such behavior may affect employee's job performance, discourage remaining at the job, or keep from advancing in the career.[42] In this case, it was sufficiently hostile that the employee had a nervous breakdown as a result of the harassment at work.

Although not anticipated at the time, both *Meritor* and *Harris* provide guidance for the hostile work environment law's recent expansion to third-

35. *Harris*, 510 U.S. at 21 (citing *Meritor Sav. Bank*, 477 U.S. at 67).

36. *Id.* at 20 (stating that the Supreme Court granted certiorari "to resolve a conflict among the Circuits on whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffer injury.'").

37. *Id.* at 19.

38. *Id.*

39. *Id.* at 19–20.

40. *Id*.

41. *Harris*, 510 U.S. at 23 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.").

42. *Id.* at 22.

party claims. Both decisions remain relevant in showing that Title VII intended to protect against hostile work environment claims, including those currently brought by third-party litigants. Last, the holdings and the underlying analysis in *Meritor* and *Harris* provides for the roadmap the courts should use today in evaluating hostile work environment claims brought by a third party.[43]

B. HOSTILE WORK ENVIRONMENT LAW TODAY

The term "hostile work environment" has evolved to describe a workplace atmosphere in which offensive, hostile, abusive conduct is common,[44] or in which management or coworkers exhibit favoritism towards certain employees at the expense of others[45] caused by management[46] or coworkers.[47] In general, to prove a third-party hostile work environment harassment claim, an employee must prove all of five elements: (1) that he or she meets a definition of an "employee" as defined by Title VII; (2) that the employee was subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on the sex of the employee;[48] (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the harassment is imputable to the employer.[49] Courts have provided additional guidance for these five elements.

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43. *See discussion infra* Part III (discussing hostile work environment law as it pertains to third-party claimants).

44. *See Meritor Sav. Bank*, 477 U.S. at 67.

45. *See* Proksel v. Gattis, 41 Cal. App. 4th 1626 (1996). *See* Miller v. Dept. of Corrections, 36 Cal. 4th 446 (Cal. 2005) (discussing favoritism).

46. *See Miller*, 36 Cal. 4th at 451.

47. *See* Huston v. Procter & Gamble Paper Products Corp., 568 F.3d 100 (3d Cir. 2009). *See also* C.M. Hunt, et al., *supra* note 15, at 657 (defining hostile work environment as "sex-related behaviours which make the victim feel uncomfortable . . . thus producing a hostile work environment."). *See also* Brady Coleman, *Introduction to the Symposium on Workplace Bullying: Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & POL'Y J. 239, 248 (2004) (defining hostile work environment as "conduct of a sexual nature [that] creates an intimidating or abusive work environment"); Alana C. Brown, *Ninth Annual Review of Gender and Sexuality Law: Education Law Chapter: Sexual Harassment in Education*, 9 GEO. J. GENDER & L. 813, 832 n. 25 ("A hostile work environment, in sexual harassment law, is a workplace where an employee, although not denied promotions or other privileges, is treated badly based on a trait protected by Title VII, such as race, color, religion, sex, or national origin.").

48. 29 C.F.R. § 1604.11(a) (2004) (stating that "[h]arassment on the basis of sex is a violation of section 703 of title VII."). *See also* EEOC NOTICE N-915-050, *supra* note 12 (supporting the same). *See also* Michael J. Phillips, *The Dubious Title VII Cause of Action For Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 591 (1994) (noting that to have a viable Title VII claim "it still is necessary for the plaintiff to have been disadvantaged because of his or her own gender").

49. *See* Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 470 (6th Cir. 2012).

1. Element One: "Employee" Defined

The first element requires the plaintiff to be an employee as defined by Title VII. The term "employee" is defined as "an individual employed by an employer."[50] The definition specifically excludes any individuals elected to public office and its appointees, but not employees subject to civil service laws of state government agency, or political subdivisions.[51] Thus, if the plaintiff is not an employee as defined by the statute, he or she will not be protected under this law.[52] The law applies to all employees and does not distinguish between managers and other subordinate employees.[53]

2. Element Two: Unwelcome

The second element requires the plaintiff to have been subjected to some form of sexual harassment. This harassment has to be unwelcomed.[54] The court has defined the term "unwelcomed sexual harassment" as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or unincited and is undesirable or offensive to the employee."[55]

3. Element Three: Gender-Based

The third element requires that the sexual harassment be based on the sex of the employee. Here, the plaintiff must show that but for the employee's gender, he or she would not have been sexually harassed,[56] or stated differently, that the "harassment was gender-based."[57] To prove this element, the plaintiff should present evidence that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[58] If plaintiff fails to present evidence of "some gender-based animus," the claim may be denied even if the comments made toward the aggrieved party were sexual in nature.[59]

50. 42 U.S.C. § 2000e(f) (2010).

51. *Id*.

52. *Id*. *See also* Haynie v. State, 664 N.W.2d 129, 133 (Mich. 2003) (noting that if the plaintiff is an employee, he or she meets the requirement imposed by the first element).

53. *See* Galdamez v. Potter, 415 F.3d 1015, 1022 (9th Cir. 2005) (noting the equal application of the law to all employees).

54. Miller v. Kenworth of Dothan Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (holding that sexual harassment has to be unwelcomed to be actionable).

55. Frensley v. N. Miss. Med. Ctr., Inc., 440 F.App'x 383, 386 (5th Cir. 2011) (citing Marquez v. Voicestream Wireless Corp., 115 F.App'x 699, 701 (5th Cir. 2004) (internal quotation marks omitted)). *See also* Bruno v. Monroe County, 383 F.App'x 845, 847 (11th Cir. 2010) (noting that unwanted sexual conduct includes "sexual advances, requests for sexual favors, and other conduct of a sexual nature.").

56. Hoyle v. Freightliner, LLC, 650 F.3d 321, 331 (4th Cir. 2011).

57. *Kalich*, 679 F.3d at 470.

58. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (internal quotations omitted).

59. *Kalich*, 679 F.3d at 473.

Claims may be brought in cases of same-sex harassment, i.e., harassment between individuals of the same gender.[60] In same-sex cases, the plaintiff may establish the third element by: "(1) showing that the harasser making sexual advances acted out of a sexual desire; (2) showing that the harasser was motivated by general hostility to the presence of men [or women] in the workplace; or (3) offering direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[61] In the same-sex harassment claim, sexual orientation of the parties is irrelevant.[62] Thus, a same-sex harassment claim may exist in circumstances with the heterosexual or homosexual parties.

4. Element Four: Severe or Pervasive

The fourth element requires that behaviors creating a hostile work environment be sufficiently severe or pervasive to interfere unreasonably with an employee's job performance.[63] Courts have developed a test that includes two components, both of which the plaintiff must satisfy to prevail.[64]

a. Subjective Component

Under the first, subjective component, the employee must show that sexual harassment was severe enough to change the conditions of employment, i.e., to create a hostile working environment.[65] To reach a sufficient level of severity, the employer's conduct must be continuous and may not be isolated or trivial,[66] but sexual advances by the employer on the

60. *Oncale*, 523 U.S. at 79–80 (noting that "Title VII prohibits 'discrimination. . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.").

61. *Kalich*, 679 F.3d at 471 (citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 765 (6th Cir. 2006)) (internal citations omitted).

62. *Oncale*, 523 U.S. at 75 (holding that Title VII applies to sexual discrimination consisting of harassment between members of the same gender). *See also* Melnychenko v. 84 Lumber Co., 424 Mass. 285 (1997) (discussing same-sex harassment claims); Smith v. Brimfield Precision, Inc., 1995 Mass. Comm. Discrim. LEXIS 7 (1995) (discussing same).

63. *See Meritor Sav. Bank*, 477 U.S. at 67. *See also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 638 (U.S. 2007) (stating that a hostile work environment claim "comprises a succession of harassing acts, each of which 'may not be actionable on its own' . . . [and] 'cannot be said to occur on any particular day.' In other words, the actionable wrong is the environment, not the individual acts that, taken together, create the environment.") (citations omitted).

64. Smith v. Naples Cmty. Hosp., Inc., 433 F.App'x. 797, 799 (11th Cir. 2011).

65. *Id.* at 799.

66. Proksel v. Gattis, 41 Cal. App. 4th 1626, 1631 (1996) (citing Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989)). *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N POLICY STATEMENT NO. 915-048 (Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html (stating that "[a]n isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than

plaintiff are not required.[67] As part of the claim, plaintiffs are not required to prove any physical manifestations of the harm.[68]

Whether the sexual harassment was severe enough to change the conditions of employment is a question of fact and is determined on a case-by-case basis.[69] For example, in *Blakey v. Continental Airlines*, a female pilot successfully sued an employer airline for creating a hostile work environment after pornographic pictures of her were posted in the cockpits of the aircraft, coworkers and managers made obscene and harassing comments about her, and the employer failed to take appropriate actions to remedy the situation.[70] The airline filed for summary judgment on the hostile work environment claim, but the court denied the motion. They found that a dispute of fact existed, and the airline had a duty to act to prevent harassment of its employees.[71]

There are, however, multiple cases where the courts have held that inappropriate conduct did not rise to the level of severity to create a hostile work environment. For instance, in *Webb-Edwards v. Orange County Sheriff's Office*, the court held that a supervisor's comments about the plaintiff's body shape and her attractive appearance, and his request that she wear tighter clothing, did not constitute a hostile work environment.[72] Similarly, in another case, *Baskerville v. Culligan Int'l Co.*, the court held that no hostile work environment claim existed where the manager called his subordinate a "pretty girl," commented that "there's always a pretty girl giving me something to sign off on," made "a grunting sound" at the plaintiff who wearing a leather skirt, commented on "how hot" the subordinate was, and stated that "all pretty girls should run around naked" in the office.[73]

b. Objective Component

Under the second, objective component, the hostility of the working environment is evaluated in light of the totality of the circumstances from the perspective of a reasonable person in the plaintiff's position.[74] This

their genders."). *See also* Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984) (noting that Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypertensive").

67. *See* Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409, 1414 (1993).

68. *See* Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1089 (8th Cir. 2010) (Bye, J., dissenting) (discussing the physical manifestation requirement of the fourth element).

69. *See* Sharon D. Nelson & John W. Simek, *Mitigating Legal Risks Using Social Media*, INFO. MGMT. J., Sep./Oct. 2011, at HT 10 (discussing factual and legal interpretation dispute); *Harris*, 510 U.S. at 17, 21–23 (noting factual determination); Pucino v. Verizon Commc'ns., Inc., 618 F.3d 112 (2d Cir. 2010) (reversing summary judgment motion and allowing hostile work environment claim to proceed).

70. Blakey v. Continental Airlines, 992 F. Supp. 731, 733 (D.N.J. 1998).

71. *Id.* at 739.

72. Webb-Edwards v. Orange County Sheriff's Office, 525 F.3d 1013, 1027 (11th Cir. 2008).

73. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995).

74. *Harris*, 510 U.S. at 17.

view may be based on the plaintiff's gender, i.e., would a reasonable person of the same gender in the plaintiff's circumstances find the sexual harassment to be abusive or hostile enough to create a hostile work environment.[75] This reasonableness standard considers the defendant's behavior from the plaintiff's perspective.[76]

The courts may rely on the following list of factors in determining if the objective component is met:[77]

(1) The frequency and the severity of the conduct;

(2) "Whether the conduct is physically threatening or humiliating, or a mere offensive utterance;

(3) "Whether the conduct unreasonably interferes with the employee's job performance;"[78]

(4) "The effect on the employee's psychological well-being;"[79]

(5) Social context, the surrounding circumstances, relationships, and the worker's expectations;[80]

(6) "The general work atmosphere, involving employees other than the plaintiff;"[81]

(7) "Whether the alleged harasser was a co-worker or a supervisor;

(8) "Whether . . . others joined in perpetrating the harassment; and

(9) "Whether the harassment was directed at more than one individual."[82]

In applying these tests, the courts have reached several determinations regarding conduct that is not sufficiently severed. For example, by itself, a co-worker's romantic involvement with a supervisor does not create a hostile work environment.[83] For another, sexual flirtation or innuendo, or vulgar language that is trivial or merely annoying, does not establish a hostile work environment.[84] However, unequal treatment of employees, combined with sexually explicit behaviors by the employer, may be

75. *See* Alvarado v. Fed. Express Corp., 384 F.App'x. 585, 588 (9th Cir. 2010).

76. *See* EEOC NOTICE N-915-050, *supra* note 12.

77. *See* Reeves v. DSI Sec. Servs., Inc., 395 F.App'x. 544, 546 (11th Cir. 2010).

78. *Harris*, 510 U.S. at 17. *See Reeves*, 395 F.App'x. at 546 (discussing factors needed to show that sexual harassment was objectively severe).

79. *Harris*, 510 U.S. at 17.

80. *Oncale*, 523 U.S. at 72 (1998) (discussing the totality of circumstances).

81. *See Fisher*, 214 Cal. App. 3d at 610.

82. EEOC NOTICE N-915-050, *supra* note 12.

83. *See* Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992).

84. *See* EEOC NOTICE N-915-050, *supra* note 12. *See also* Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. P.R. 2000) ("The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins—thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world.").

actionable.[85] Manifestations of an alleged affair between the employer and employee, such as sexual horseplay in the office to an egregious and/or frequent degree, or preferential treatment of the co-worker that prevents a co-worker/plaintiff from being evaluated on grounds other than his or her sexuality, help to establish a work situation that may be actionable.[86]

5. Element Five: Employer Liability

Finally, the fifth element requires the plaintiff employee to prove a basis for employer liability.[87] The third-party plaintiff must provide evidence that the employer "knew or should have known" that the harassment occurred, but "failed to take prompt and effective remedial action."[88] One of the means to show employer's knowledge is for employee to provide proof that notice was given to the employer regarding the behavior that is believed to have created a hostile work environment.[89] There are circumstances where the plaintiff does not have a reasonable avenue to complain and provide notice to an employer. For instance, such circumstances may exist where an employer does not provide a reasonable avenue of complaint or employee was afraid to give such notice due to possibility of retaliation or harm. Thus, employer may still have exposure to legal liability if it had knowledge or could have known through an exercise of reasonable care about the harassment but failed to take appropriate remedial action.[90] To show knowledge under this alternative standard, the plaintiff must show that "(1) someone had actual or constructive knowledge of the harassment, (2) the knowledge of this individual can be imputed to the employer, and (3) the employer's response, in light of that knowledge, was unreasonable."[91]

To establish that the employer has failed to act, the employee must provide evidence that he or she took advantage of corrective opportunities

85. *Broderick*, 685 F. Supp. at 1269.

86. Keenan v. Allan, 889 F. Supp. 1320, 1374–75 (E.D. Wash. 1995).

87. *See* Smith v. Naples Cmty. Hosp., Inc., 433 Fed. App'x. 797, 801 (11th Cir. 2011). Some cases use this analysis as a sixth element, having separated the severe or pervasive, and subjectively and objectively unreasonable tests into two elements, but the language is very similar and the tests are generally used interchangeably by courts. *See, e.g.*, Pérez-Cordero v. Wal-Mart P.R., Inc., 656 F.3d 19, 27 (1st Cir. 2011) (identifying and analyzing six elements, including (4) severe or pervasive; (5) objectively and subjectively unreasonable; and (6) employer liability).

88. Smith v. Hy-Vee, Inc, 622 F.3d 904, 907 (8th Cir. 2010). *See also* Blackmon v. Wal-Mart Stores East, L.P., 358 F.App'x. 101, 103 (11th Cir. 2009) (citing and quoting Miller v. Kenworth of Dothan Inc., 277 F.3d 1269, 1278 (11th Cir. 2002) (noting that "when the perpetrator of the harassment is merely a co-employee of the victim, the employer is liable only 'if it knew or should have known of the harassing conduct but failed to take prompt remedial action.'").

89. *See* Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009) (discussing that the employee should provide notice about questionable behavior that is believed to have created a hostile work environment).

90. Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000).

91. *Duch*, 588 F.3d at 763.

provided by the employer, such as timely providing notice to the proper authorities within the company and acting as prescribed by the employee handbook.[92] The employee has a duty to take reasonable action to avoid harm, and thus mitigate damages.[93] To avoid liability, the employer's response to the employee's notice regarding sexual harassment must not be indifferent or "indicate an attitude of permissiveness that amounts to discrimination."[94]

III. THIRD-PARTY HOSTILE WORK ENVIRONMENT CLAIMS AGAINST THE EMPLOYER

Within the framework of a hostile work environment, a third party, commonly a co-worker of the employee romantically involved with or harassed by a supervisor, may sue the employer. The third party may litigate such a claim under either the favoritism[95] or third-party sexual harassment theories.[96]

A. FAVORITISM

Favoritism takes three forms: (1) isolated instances toward an employee paramour, (2) favoritism based on coerced sexual conduct, and (3) widespread favoritism.[97] The first two forms, isolated instances of favoritism or favoritism based on coerced sexual conduct toward a paramour, are unlikely to provide recovery for a third-party plaintiff. Only sexual harassment that is based on widespread favoritism is recognized by the EEOC Policy Guidance,[98] which is often followed by state and federal courts in deciding whether a hostile work environment exists.[99] Accordingly, this Article will show that widespread favoritism can be a basis by which third-party plaintiffs may successfully pursue litigation.

An employer's sexual favoritism or preferential treatment may create a hostile work environment when conducted in an indiscreet manner, causing

92. May v. FedEx Freight East, Inc., 374 F.App'x. 510, 512 (5th Cir. 2010) (describing evidence employee should provide to prove employer's failure to act after the notice was given).

93. *See* Agusty-Reyes v. Dep't of Educ., 601 F.3d 45, 53 (1st Cir. 2010) (noting that employee must reasonably try to avoid harm and an employee's failure to do so constitutes an affirmative defense for the employer).

94. *See* West v. Tyson Foods, 374 F.App'x 624, 632 (6th Cir. 2010) ("When an employer implements a remedy, it can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination.").

95. *See Miller*, 36 Cal. 4th at 451.

96. *See Liebovitz*, 4 F. Supp. 2d. at 144.

97. *See* EEOC NOTICE N-915-050, *supra* note 12.

98. *Id*. (citing *Broderick*, 685 F. Supp. at 1278) (noting that the EEOC denies that third party claims are actionable in cases of isolated sexual harassment).

99. *See Meritor Sav. Bank*, 477 U.S. at 63 (referencing EEOC definitions and guidelines). *See also Proksel*, 41 Cal. App. 4th at 1626; *Miller*, 36 Cal. 4th at 446; *Broderick*, 685 F. Supp. at 1269 (supporting the same proposition).

plaintiffs to believe that favorable treatment may be obtained from the employer in exchange for a romantic or sexual relationship,[100] Co-workers of an employee engaged in a relationship with a superior may perceive that the person in power favors that employee, and thus raise allegations of the existence of the hostile work environment.[101] Under third-party sexual harassment doctrine, this favoritism occurs when a supervisor in such a relationship awards benefits to the employee with whom he or she is having a personal relationship, thereby denying the benefits to similarly qualified third-party employees.[102] For the claim to succeed, the employee must be qualified for the job.[103] Consistently, EEOC regulations define favoritism as a situation "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors . . . ."[104] Additionally according to the regulations, an employer may be liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[105]

1. Isolated Instances of Favoritism toward a Paramour

The first category of favoritism involves isolated instances of favoritism toward a paramour.[106] According to the EEOC, an isolated instance of preferential treatment based on consensual romantic relationships does not violate Title VII.[107] Thus, for example, a female

100. *Miller*, 36 Cal. at 451, 465 (citing *Proksel*, 41 Cal. App. 4th at 1629–30) (The court in dictum suggested that "sexual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him'. . . the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct . . . which created a hostile work environment.'").

101. *See Miller*, 36 Cal. 4th at 468; 29 C.F.R. § 1604.11(g) (2004).

102. U.S. EQUAL EMP. OPPORTUNITY COMM'N NOTICE NO. N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), *available at* http://www.eeoc.gov/policy/docsfsexualfavor.html (hereinafter "EEOC NOTICE N-915.048") (noting that the EEOC Policy Guidance defines sexual favoritism as discrimination "against individuals who are qualified for but are denied an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests."); *see* Phillips, *supra* note 48, at 549, (stating that "[i]n the typical sexual favoritism (or 'paramour') claim, the plaintiff alleges that her employer has violated Title VII by favoring another employee (the paramour) due to a sexual or romantic relationship between a supervisor and the paramour.").

103. Phillips, *supra* note 48, at 556 (noting that in example, EEOC has stated that the charging party, plaintiff, must be qualified for a job from which he or she was denied due to the widespread favoritism).

104. *Id.*

105. *Id.*

106. *See* EEOC NOTICE N-915-050, *supra* note 12.

107. EEOC NOTICE N-915-050, *supra* note 12.

> It is the Commission's position that Title VII does not prohibit instances of preferential treatment based upon consensual romantic relationships. An

plaintiff who is denied an employment benefit because her supervisor awards it to his paramour would not have a viable Title VII claim based on this single, isolated instance of sexual favoritism.[108]

Courts tend to agree with the EEOC's assessment of single instances. At least one case suggests that a plaintiff's allegation of the existence of a hostile work environment must be substantiated by a pattern of repeated, routine, or generalized level of harassing behavior by the defendant.[109] Because of the difficulties inherent in providing these types of evidence, plaintiffs usually fail to prove the existence of a hostile work environment.

For instance, in *Proksel v. Gattis*, a female plaintiff worked as a personal secretary and office manager for a male defendant attorney.[110] During the time of plaintiff's employment, the defendant hired another female employee, Burton, to work full-time as a word processor. The plaintiff noticed events that led her to believe that the defendant was romantically interested in Burton. The plaintiff stated that she observed the defendant employer looking down Burton's low-cut blouse, following her movements as she left the premises, and blowing her kisses across the office.[111] Furthermore, the plaintiff alleged that the defendant and Burton attended a private birthday lunch and had "clandestine meetings" in and out of the office.[112] The plaintiff stated that she overheard the defendant telling Burton during the company Christmas party that she was beautiful.[113] Finally, the plaintiff stated that the defendant gave Burton a Christmas gift and a larger year-end bonus than any other employee.[114] Plaintiff's employment was terminated after she reported the behaviors she observed to the defendant's wife.[115]

> isolated instance of favoritism towards a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both a disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor conversely, was she treated less favorably because she was a woman.

EEOC NOTICE N-915-050, *supra* note 12. *See Proksel*, 41 Cal. App. at 1630 (stating, "where . . . there is no conduct other than favoritism towards paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists.").

108. *See* EEOC NOTICE N-915-050, *supra* note 12 (noting that a "a female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman."); Miller v. Aluminum Co. of America, 679 F. Supp. 495, 499 (W.D. Pa. 1988); King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985).

109. Proksel v. Gattis, 41 Cal. App. 4th 1626, 1630 n. 5 (1996) (citing Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989)).

110. *Proksel*, 41 Cal. App. 4th at 1628.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

The majority of the plaintiff's claims were dismissed by the trial court.[116] Then, during the trial for breach of the implied promise that she would not be terminated except for good cause, the jury found that plaintiff was an at-will employee and entered judgment in favor of the defendant.[117] On appeal, the plaintiff argued that the trial court erred in granting summary adjudication as to her statutory and common law claims of sexual discrimination and sexual harassment based on FEHA and the public policy of the state.[118]

The appellate court disagreed and upheld the lower court's decision, holding that there was insufficient evidence presented of sexual harassment or hostile work environment because the plaintiff produced proof only of isolated instances of favoritism towards the defendant.[119] The plaintiff must show a "concerted pattern of harassment of a repeated, routine, or a generalized nature by the defendant."[120] According to the court, the defendant's flattering remarks about the new coworker, his favoritism towards her, and the kiss she blew at him did not meet the required standard for recovery.[121]

The *Proksel* decision thus reinforces that a plaintiff's recovery depends on an ability to provide evidence of a "repeated, routine, or generalized" level of egregious or frequent romantic behavior between a superior and a subordinate co-worker.[122] Isolated instances, even when they raise the inference of favoritism to the paramour in the office setting, per *Proksel* decision are not enough for a third-party claimant to succeed. Under Title VII and *Proksel* decision isolated favoritism towards a paramour, although may be unfair, "does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."[123]

2. Favoritism Based on Coerced Sexual Conduct

A second category of sexual favoritism, coerced sexual conduct, is also known as quid pro quo sexual harassment. It is actionable under

116. *Proksel*, 41 Cal. App. 4th at 1629 (noting that the plaintiff alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and deceit, sex discrimination and wrongful discharge in violation of public policy. On summary judgment, the court dismissed the plaintiff's sex discrimination and public policy causes of action. Following the plaintiff's opening statements, the defendant's motion for non-suit was granted as to the plaintiff's fraud and deceit cause of action. The trial court dismissed the plaintiff's claim that the defendant acted in bad faith as redundant, and only allowed the plaintiff to pursue her claim for breach of an implied promise that she would not be terminated except for good cause.).

117. *Id*.

118. *Id*.

119. *Id.*

120. *Id.* at 1630 n. 5.

121. *Id.* at 1631.

122. *Proksel*, 41 Cal. App. 4th at 1631. *See also* Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989); Downes v. F.A.A., 775 F.2d 288, 293 (D.C. Cir. 1985) (abrogated on other grounds); *Harris,* 510 U.S. 17.

123. *Proksel*, 41 Cal. App. at 1631.

Title VII.[124] This type of favoritism occurs when an employee is "coerced into submitting to unwelcome sexual advances in return for a job benefit."[125] As a result, other co-workers who were qualified for but did not receive the benefit may be able to establish that the sexual relationship was generally made a condition for receiving the benefit.[126] Evidence of such a precondition may support a claim of a hostile work environment in violation of Title VII.[127]

For example, in *Toscano v. Nimmo*, a Delaware court found a Title VII violation where the granting of sexual favors was a condition for promotion.[128] A female employee alleged that her application for a particular position in the hospital was denied due to unlawful discrimination because the promotion was granted to a co-worker who was having a consensual sexual affair with the supervisor.[129] The plaintiff claimed that the co-worker's affair with the supervisor won the co-worker preferential treatment and promotion.[130]

In rendering its decision, the court considered evidence of sexually suggestive telephone calls made by the supervisor to female employees at their home telephone numbers, descriptions of the supervisor's alleged "sexual encounters" with subordinate female employees, and the supervisor's exhibition of "suggestive behavior at work."[131] The court stated that the supervisor failed to keep his work and private life separate and that the promotion of an employee who had granted him sexual favors was consistent with his documented behaviors. After the complaint was filed charging that the promotion was based on favoritism, the supervisor made harassing telephone calls to plaintiff's work and home numbers asking her to stop complaining about his relationship with the co-worker.[132] Further, the court established that the supervisor withheld from the plaintiff information that she needed to work effectively, that he changed her typical job assignments, and that as a result she was transferred to a lower rank position.[133]

The court ruled in favor of the plaintiff, finding that her co-worker entered into the affair to obtain the promotion. The court further held that sexual favors played a role in promotion selection, that the plaintiff was better qualified for the position, and that the supervisor harassed the

124. *See* EEOC NOTICE N-915-050, *supra* note 12.
125. *Id*.
126. *Id*.
127. *Id*.
128. *Toscano*, 570 F. Supp. at 1204.
129. *Id.* at 1198.
130. *Id.*
131. *Id*. at 1200.
132. *Id*. at 1205.
133. *Id.* at 1206.

plaintiff.[134] This, in the court's view, violated the plaintiff's Title VII rights because the sexual favors appeared to aid the co-worker in receiving a promotion, even if, as the court found, the affair was consensual.[135] *Toscano* thus demonstrates that a third party may bring a claim and prevail against the employer under Title VII when the employer is engaged in a sexual relationship with a co-worker where sexual favoritism is the basis for awarding the co-worker a promotion.[136]

3. Widespread Favoritism Affecting Third Parties

According to EEOC Policy Guidance and case law, if favoritism based upon sexual favors is widespread in a workplace, employees who do not welcome this conduct can bring a hostile environment claim.[137] A party may file a lawsuit without being a direct target of sexual conduct, and without deciding whether those who received favorable treatment willfully provided the sexual favors.[138]

In *Broderick v. Ruder*, a female employee filed a Title VII claim against the Securities and Exchange Commission ("SEC") after five years of employment with the agency.[139] The plaintiff, an attorney in the Enforcement Division, worked at various times for five different supervisors.[140] During the entire period, she received only one promotion, even though she was eligible for two more due to her length of service.[141] During the trial, the plaintiff testified that persons in managerial positions caused an "atmosphere of sexual harassment[,]" which other witnesses corroborated.[142]

In one example of that atmosphere, the plaintiff testified about supervisor conduct. She stated that during her first week on the job, the company Brand Chief repeatedly asked her to accept his offer for a ride home, and another superior kissed her at a company party.[143] However,

134. *Toscano*, 570 F. Supp. at 1200–04.

135. *Id.*

136. *Id*. *See also* Mitchell Poole, *Paramours, Promotions, and Sexual Favoritism: Unfair, but is There Liability*, 25 PEPP. L. REV. 819, 834–35 (1998).

137. *See* EEOC NOTICE N-915-050, *supra* note 12.

138. *Id*. *See* Mary Kate Sheridan, *Just Because It's Sex Doesn't Mean It's Because of Sex: The Need for New Legislation to Target Sexual Favoritism*, 40 COLUM. J. L. & SOC. PROBS. 379 (2007).

139. *See Broderick*, 685 F. Supp. at 1270 (where the Plaintiff asserted that defendant, chairman of SEC, was responsible for creating and refusing to remedy a sexually hostile work environment at the regional SEC office, and that plaintiff's supervisors retaliated against her for opposing the actions of her managers that she considered to be illegal under Title VII.).

140. *Id*.

141. *Id.* (stating that during the Plaintiff's employment at the SEC's Enforcement Division she received one promotion to grade 13, step 1. However, due to the length of her service, the plaintiff met eligibility qualifications for promotion to grades 14 and 15.).

142. *Id*. at 1272.

143. *Id*.

other relevant incidents that occurred during that period were not personally directed at the plaintiff and were not quid pro quo exchange of sexual favors for job benefits.[144]

The court disregarded her superiors' direct approaches, and instead held that the sexually hostile work environment was created by other events that happened during plaintiff's employment.[145] On one occasion, a male Regional Administrator, intoxicated at a work party, untied plaintiff's sweater, kissed the plaintiff, and kissed another female employee.[146] At another work-related occasion, the same Regional Administrator put his hands on the hips of an administrative assistant and made a comment that she had "sexy, wide hips."[147] Additionally, the plaintiff attested that the Regional Assistant and Regional Trial Counsel made sexually themed comments regarding her dress and body.[148]

The second example of an atmosphere of sexual harassment included a married male Branch Chief who admitted to having an affair with his female secretary from December 1981 to June 1984; this affair was known around the department.[149] During the time of the affair, his secretary paramour was promoted three times, received an acclamation, and two cash awards.[150] The Branch Chief noted that although he was not the secretary's supervisor, he provided "direct input" into her performance evaluations.[151] Despite his conduct, the Branch Chief was never disciplined and had his salary increased ten times between October 1983 and January 1987.[152]

A third example of the atmosphere of sexual harassment involved a male Assistant Regional Administrator ("ARA") for the Enforcement Division and his subordinate female employee. Although there was no direct evidence that the two were engaged in a sexual relationship, the plaintiff presented evidence showing that ARA was "noticeably attracted" to his subordinate female employee. Further, evidence was presented that both ARA and the subordinate spent time socializing at and outside of the workplace during business hours. It was undisputed that during a period of just over two years, the ARA significantly advanced the subordinate's career.[153]

Finally, the plaintiff supported her claim by presenting "compelling evidence" of a sexual relationship between the ARA for the Regulation Division ("ARA-RD") and his female associate.[154] Witnesses testified that

144. *Broderick*, 685 F. Supp. at 1273.
145. *Id.*
146. *Id*.
147. *Id*. at 1274.
148. *Id.*
149. *Id.*
150. *Broderick*, 685 F. Supp. at 1274.
151. *Id*.
152. *Id*.
153. *Id*.
154. *Id.*

the ARA-RD and the associate socialized together by having extended lunches, going out for dinner and drinks, and were seen jogging as a pair.[155] During a National Secretaries Week luncheon, the female associate became inebriated and the ARA-RD helped her by accompanying her home.[156] The ARA-RD also traveled on a business trip with his female associate and the two shared a hotel room.[157] During the time of her employment, the female associate quickly advanced with the assistance of the ARA-RD. The associate was promoted twice over the period of a year, received a $300 award, and was highly reviewed with perfect marks in her employee evaluation.[158]

The court concluded that the evidence presented at trial established "conduct of a sexual nature was so pervasive" at the department that it created "a hostile or offensive work environment which affected the motivation and work performance of those who found such conduct repugnant and offensive."[159] The court stated that the plaintiff was obligated to work in a setting where managers, by their actions, mistreated her and other female staff members when they showed favoritism towards other women who engaged in sexual conduct with them.[160] The plaintiff was negatively affected by the favoritism at her workplace, which lowered her motivation and affected her job performance, taking away opportunities for career advancement from her and other female staff members.[161] The case presented to the court distinctly showed that the plaintiff and other female coworkers felt the "sexual conduct and its accompanying manifestations . . . to be offensive."[162]

Miller v. Department of Corrections provides another example where a court held that a superior who showed favoritism towards his subordinate employees created a hostile work environment.[163] Two former employees at the California Valley State Prison for Women, Miller and Mackey, filed a sexual harassment lawsuit[164] alleging that their superior, Kuykendall, who

155. *Broderick*, 685 F. Supp. at 1274.

156. *Id*.

157. *Id*. at 1274–75 (noting that in this circumstance the ARA denied the occurrence of inappropriate sexual behavior and stated that the time was spent discussing female employee's personal life issues and "theological problems.").

158. *Id*. at 1275.

159. *Id.* at 1278.

160. *Id.*

161. *Broderick*, 685 F. Supp. at 1278.

162. *Id.* (noting that "plaintiff and other women were for obvious reasons reluctant to voice their displeasure and, when they did, they were treated with a hostile response by . . . the management team.").

163. *See Miller*, 36 Cal. 4th at 446.

164. *Id.* at 450 (noting that the FEHA expressly prohibits sexual harassment in the workplace. Under FEHA, it is an unlawful employment practice for an employer to harass an employee because of sex.). *See* Cal. Gov't Code §12940(j)(1)-(4)(C) (West 2015) (noting that under FEHA, sexual harassment of an employee by another employee, "other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have

was a chief deputy warden of the prison, showed favoritism towards female employees who had sexual relationships with him.[165]

Testimony showed that, in 1994, Miller overheard from other employees that Kuykendall was having sexual relationship with three different female subordinates: Patrick, Brown, and Bibb.[166] During the time of these relationships, all three received job benefits, including transfers, promotions, special assignments, and other work privileges. Moreover, the women bragged to co-workers about their power to control the warden and their enjoyment of the additional benefits he bestowed upon them.

For instance, Miller was on a committee that assessed Bibb's application for a promotion. Kuykendall conceded that he had sexual relations with Bibb, which was corroborated by other witnesses.[167] If granted, the promotion would have transferred Bibb from a different facility to a position that was under Kuykendall's direct supervision.[168] After Bibb's application for promotion was denied, Miller and other committee members were informed that Kuykendall ordered them to grant Bibb the promotion.[169] As a result, Bibb was awarded the promotion and

known of this conduct and fails to take immediate and appropriate corrective action." The term "'harassment' . . . includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.").

165. *Miller*, 36 Cal. 4th at 450.

166. *Id.* at 452 (Kuykendall was having sexual affairs with his secretary (Bibb), subordinate associate warden (Patrick), and department employee (Brown).). *See id.* at 455 ("Plaintiffs presented evidence that the three women who were having sexual affairs with Kuykendall—Patrick, Bibb, and Brown—squabbled over him, sometimes in emotional scenes witnessed by other employees, including Miller."). *See also id.* at 458 (One correctional employee commented on his wife's difficulties with the employment conditions at her department: "the sexual relationships Kuykendall was having with Bibb and Brown" were creating an "impossible environment" for his wife to work in.).

167. *Id*. at 454–55. ("Kuykendall conceded he had danced with Bibb at work-related social gatherings and there was evidence that he telephoned her at home hundreds of times from his workplace. Employees, including Mackey and Miller, witnessed Bibb and Kuykendall fondling each other on at least three occasions at work-related social gatherings occurring between 1991 and 1998 where employees of the institution were present. One Department employee, Phyllis Mellott, also complained that at such a gathering Kuykendall had put his arms around her and another employee and made unwelcome groping gestures. Kuykendall was present with Bibb in 1998 when she was arrested for driving under the influence of alcohol, a circumstance of which Miller and other employees were aware. Kuykendall failed to initiate an internal affairs investigation concerning the incident or report his own involvement.")

168. *Id*. at 452.

169. *Id*. at 452–453 ("When the interviewing panel did not select Bibb, Miller and other members of the panel were informed by an associate warden that Kuykendall wanted them to 'make it happen.'" Miller declared: "This was . . . the first of many incidents which caused me to lose faith in the system . . . and to feel somewhat powerless because of Kuykendall and his sexual relations with subordinates." Further, "there was evidence Bibb had bragged to plaintiff Mackey of her power over the warden, and a departmental internal affairs investigation later concluded that Kuykendall's personal relationship with Bibb rendered his involvement in her promotion unethical.").

transfer. In addition, Patrick was also awarded a transfer to the facility where Kuykendall was a warden and "enjoyed unusual privileges such as having to report directly to Kuykendall rather than to her immediate superior."[170]

In another occurrence, Brown won promotions over other employees due to her romantic relationship with Kuykendall.[171] In 1995, both Brown and the plaintiff Miller applied for a temporary job as facility captain. Brown announced to Miller that she had an advantage over Miller and would receive the job.[172] Kuykendall served on the interview panel and granted Brown the promotion, "despite Miller's higher rank, superior education, and greater experience."[173] Brown's promotion surprised other employees and officers involved in the selection process because they had recommended Miller: They have referred to Brown's selection as "unfair."[174]

Later, when Miller and Brown competed for promotion to a permanent facility position, and Brown again received the promotion.[175] Within a year and a half, Brown was promoted to the position of associate warden, two ranks above entry level.[176] Kuykendall was on the interview panel during the selection process.[177] The speed of Brown's promotions within the ranks was "unusually rapid" and viewed negatively by other employees.[178]

Employees who attempted to rectify favoritism by reporting the sexual affairs were punished or subjected to an abusive work environment. For instance, plaintiff Mackey worked as a records manager and received

170. *Miller*, 36 Cal. 4th at 453.

171. *Id.* (Brown admitted to having an affair with Kuykendall after Miller confronted her.). *See also id*. at 457 (Plaintiff Mackey was aware of Kuykendall's sexual affairs with Bibb and Brown.).

172. *Id*. 4th at 467 (stating that Brown announced to Miller that Kuykendall would be forced to give her, Brown, the promotion or she would "take him down" with her knowledge of "every scar on his body.").

173. *Id*. at 453–54 (noting that the Departmental Internal Affairs investigation report "later called Kuykendall's conduct unethical because of his sexual relationship with Brown." Further, the internal affairs report noted that, as to Bibb and Brown, "[b]oth relationships were viewed by staff as unethical from a business practice standpoint and one [*sic*] that created a hostile working environment." During his investigation, the internal affairs investigator "encountered several employees who believed that persons who had sexual affairs with Kuykendall received special employment benefits.").

174. *Id*. at 454 (stating that employees attributed Brown's promotion to her sexual affair with Kuykendall and believed that Brown was unqualified for the position); *see also id.* at 458 (stating that "Mackey was certain that Brown was promoted to the position of associate warden not because of merit, but because of her sexual affair with Kuykendall.").

175. *Id.*

176. *Miller*, 36 Cal. 4th at 454.

177. *Id*.

178. *Id*. (noting that other employees were outraged at the pace of Brown's promotions and complained that to achieve higher-ranking positions they would have to "F [their] way to the top.").

inmate pay, which was comprised of enhanced salary benefits.[179] After Mackey complained to Kuykendall about his sexual relations with Brown, Mackey's supplemental pay was withdrawn and she was subjected to demeaning humiliation and verbal abuse in front of the coworkers.[180] Mackey testified that her job responsibilities changed after she complained to an internal affairs investigator that she was denied opportunities for promotion.[181] She further testified that she was eventually forced to resign[182] and that she believed she was not promoted because she did not have sex with Kuykendall.[183]

Similarly, plaintiff Miller's working environment became intolerable after she complained of sexual affairs between Kuykendall and his subordinates.[184] This was evidenced in the reduction of Miller's supervisory responsibilities, imposition of additional duties, added criticism of her performance, cancellation of accommodations that Miller had been granted for her physical conditions, interference with her work, and the physical assault and false imprisonment of Miller by Brown.[185]

In light of these facts, the court concluded that widespread sexual favoritism existed at the correctional facility and caused a hostile working environment for its employees.[186] The court referenced the evidence of widespread favoritism, which included "admissions by the participants

179. *Miller*, 36 Cal. 4th at 458.

180. *Id.* (noting that "Mackey claimed Brown demeaned her in the presence of other employees and impeded the execution of Mackey's duties in various respects, and stating that '[t]his situation created hostility among the employees in [Mackey's] Department.'"). Brown repeatedly interrogated Mackey about her statements to the internal affairs investigator and attempted to contact Mackey outside of work. Stress led to health problems, and as a result, Mackey was unable to work between August 1998 and January 1999. Upon her return to work, Mackey was demoted and suffered further mistreatment and humiliation. *Id.* at 459.

181. *Id*.

182. *Id*. (noting that "Kuykendall subsequently reduced [Mackey's] responsibilities and denied her access to the work experience she needed in order to be promoted to the position of correctional counselor"); *see id*. (noting that "[a] few months later she resigned, finding the conditions of employment intolerable.").

183. *Miller*, 36 Cal. 4th at 459.

184. *Id*. at 455 (stating that according to Miller, after she complained to Kuykendall, chief deputy warden Yamamoto and Brown made criticisms of her work, and threatened her with reprisals when she complained to Kuykendall about their interference).

185. *Id*. at 455–57.

186. *Id*. at 470–71 ("There was evidence of considerable flaunting of the relationships affecting the workplace, consisting of Bibb and Brown's bragging and the jealous scenes between these two women, along with Kuykendall's indiscreet behavior at a number of work-related social gatherings. The favoritism that ensued from the sexual affairs also was on public display, reflected in Kuykendall's permitting Brown to abuse plaintiffs, his directive to the interview committee to promote Bibb, and his repeated admissions that he would not or could not control Brown because of his sexual relationship with her. It may even be inferred that Kuykendall solicited sexual favors in return for employment benefits, in light of Bibb and Brown's boasts, the sequence of promotions awarded by Kuykendall, and his comment to Miller, 'I should have chose[n] you.'")

concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and Kuykendall's admission [that] he could not control Brown because of his sexual relationship with her . . ."[187]

Both *Broderick* and *Miller* suggest that to establish a hostile environment claim as a violation of Title VII, favoritism in the workplace must be widespread, based on sexual favors, and directed toward employees who do not welcome this conduct. These cases suggest that widespread favoritism exists when conduct of a sexual nature is so pervasive as to affect the motivation and work performance of employees, where evidence of public displays of affections is present, and where promotions are awarded for sexual favors.

B. TRADITIONAL THIRD-PARTY SEXUAL HARASSMENT THEORIES

Third-party sexual harassment involves a situation where the plaintiff is not a direct target of the harassment but is subjected to a work atmosphere where such harassment, even if directed towards others, is severe or pervasive.[188] The plaintiff's employment conditions may be affected even if the conduct is not extreme, is welcomed by participants, and is not directed toward the plaintiff. Such a situation could involve a work environment where employees engage in sexual joking or banter that may prove offensive to parties who witness the conversation.[189]

Just because some employees in the workplace do not find the specific conduct objectionable does not insulate the employer from potential liability to an individual employee who is reasonably offended by the conduct.[190] For instance, in *McLaughlin v. Governor's Office of Employee Relations*, a male employee's statements that a female co-worker wanted to be a veterinarian because she was "into dogs" and "screwing animals" supported a viable hostile

187. *Miller*, 36 Cal. 4th at 471.

188. *Meritor Sav. Bank*, 477 U.S. at 67 (noting that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").

189. *See, e.g.*, Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002) *overruled on other grounds by* Hill v. Tangherlini, 724 F.3d 965 (7th Cir. 2013) ("Even if we assume that [plaintiff's] tawdry conduct did not amount to Title VII sexual harassment, [defendant] was still permitted to terminate her. In fact, the company's failure to do so would have most likely constituted a Title VII violation . . . , as well as subjecting the company to future liability if another complaint of harassment was filed against [plaintiff].")

190. *See* Drinkwater v. Union Carbide Corp., 904 F.2d 853, 854–57 (3d Cir. 1990) ("Plaintiff's discrimination claim alleges that her conditions of employment were impermissibly harmed by the open [and consensual] sexual relationship, between her supervisor and one of her co-workers, which created a hostile and sexually-charged work environment from which she suffered because of her sex.").

environment claim.[191] Additionally, the display or dissemination of sexual visual materials in the workplace may create a hostile work environment.[192]

Liability may exist where an employer is aware or should be aware of the hostile work environment caused by a non-supervisor employee.[193] Such knowledge of a hostile work environment may exist where a supervisor or an employer's agent observes or learns of the prohibited behavior.[194] However, lack of direct notification regarding hostile work environment does not mitigate liability.[195] Where employees and supervisors are aware of the harassment, it can be expected that the employer should have had knowledge of the conduct.[196]

Conduct not specifically directed toward the offended employee can have the same consequence as if it was addressed to that person.[197] Courts also consider evidence of other acts of harassment of which a plaintiff becomes aware during the period of his or her employment, even if the other acts were directed at someone other than the plaintiff and did not happen in the plaintiff's presence.[198]

A third-party employee may also have a retaliation claim of action against an employer if the plaintiff complained about an interoffice romance to the employer and the employer took adverse action against the employee.[199] For instance, in *Reginelli v. Motion Industries, Inc.*, the plaintiff was awarded $953,214 in damages for wrongful termination when he was fired after reporting a reasonably suspicious sexual relationship between a male supervisor and a subordinate female employee.[200]

C. EMERGING SEX-PLUS THEORY

Proving the occurrence of sexual harassment has long been considered essential to a successful claim of sexual favoritism.[201] This requirement is

191. *See* McLaughlin v. Governor's Office of Employee Relations, 739 F. Supp. 97, 101–104 (N.D.N.Y 1990).

192. *See* Rhodes v. Ill. Dep't of Transp., 243 F. Supp. 2d 810, 821–22 (N.D. Ill. 2003) (noting that although the claim was dismissed on a summary judgment motion, the court sympathized with the plaintiff because "it appeared" that the plaintiff "worked in a sexually tinged environment that is wholly inappropriate in modern-day workplaces.").

193. BRUCE HARRISON, ET AL., SHAWE & ROSENTHAL, 1-25 EMPLOYMENT LAW DESKBOOK § 25.02(2)(c)(ii) (2008); *Drinkwater*, 904 F.2d at 854; *Rhodes*, 243 F. Supp. at 820; Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. Ohio 1996).

194. EMPLOYMENT LAW DESKBOOK § 25.02(2)(c)(ii); *Fleenor*, 81 F.3d at 50.

195. *Meritor Sav. Bank*, 477 U.S. at 72 (1986) (stating that an "absence of notice to an employer does not necessarily insulate that employer from liability").

196. EMPLOYMENT LAW DESKBOOK § 25.02(2)(c)(ii).

197. EMPLOYMENT LAW DESKBOOK § 25.02(2)(a)(i).

198. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 335 (6th Cir. 2008).

199. Reginelli v. Motion Indus., Inc., 987 F. Supp. 1137, 1138 (1997).

200. *Id.*

201. EEOC NOTICE N-915.048, *supra* note 102 (noting that to bring a claim of sexual favoritism, the plaintiff must provide evidence of either quid pro quo sexual harassment or a hostile work environment based on sexual harassment).

a high hurdle for a plaintiff, because claims are often based on isolated instances of inappropriate behavior that, because they do not represent a pattern of behavior, have been associated with consensual sexual relationships rather than harassment.[202] Consequently, courts have generally precluded recourse on a theory of sexual favoritism, and instead burdened plaintiffs with the extremely high standard of proving that they were denied employment rights because of a sexually charged hostile work environment that was simultaneously damaging to other employees.[203]

A "sex-plus" theory offers plaintiffs an alternative. Under the sex-plus theory, a plaintiff (usually a woman) must show that she was discriminated against because of her gender in conjunction with a second characteristic.[204] Examples of bases for sex-plus claims include discrimination based on sex plus a personal relationship,[205] sex plus marital status,[206] sex plus fertility,[207] sex plus pregnancy,[208] sex plus children,[209] and sex plus gender stereotypes.[210] Under this theory, there is no need to establish the existence of a hostile work environment.

The Supreme Court has ruled that when sex is considered in conjunction with a second characteristic, the sex-plus theory allows additional narrowly defined groups to assert claims that would not otherwise be protected by Title VII.[211] This sex-plus concept was applied in *Phillips v. Martin Marietta Corp.*, where the defendant refused to hire women who had children in pre-school but not men who had children in pre-school.[212] The Supreme Court found no general bias against women by the defendant, specifically pointing to evidence that more than seventy-five percent of open positions had been filled by women.[213] The Court held that the usage of different criteria for hiring men and women for the same job nonetheless violated Title VII.[214]

Under a sex-plus theory, "the threshold question for sexual favoritism would not be whether an individual consented to or was coerced into a sexual

202. *See* Harvey v. Chevron U.S.A., Inc., 961 F. Supp. 1017, 1029 (S.D. Tex. 1997) (stating that "[a]lleged favoritism to a paramour generally has been held not to constitute discrimination in violation of Title VII because the alleged discrimination is not based on the plaintiff's gender.").

203. *See* Perry v. Harris Cherin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997) (noting that the workplace must be "hellish" to be actionable).

204. Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995).

205. Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1202 n.1 (10th Cir. 1997).

206. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

207. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

208. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983).

209. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

210. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

211. *Phillips*, 400 U.S. at 542.

212. *Id.* at 543.

213. *Id.*

214. *Id*.

relationship . . . but were gender and a sexual relationship the motivating factor in the employer's decision to promote one employee over the other?"[215]

IV. MITIGATING RISK AND PREVENTING HOSTILE WORK ENVIRONMENTS

An employer must take affirmative and appropriate action to keep the workplace from deteriorating into a hostile work environment that victimizes employees, damages the company's performance and reputation, and exposes it to lawsuits and large jury awards. Employers may avoid hostile work environments and shield themselves from exposure to legal liability by establishing and implementing a proper plan of action, preventing unacceptable incidents of employee behavior, and acting in a measured and appropriate manner in response to claims of sexual harassment or hostile work environment.[216]

Prevention is the best tool for the elimination of sexual harassment,[217] and employers must initiate preventative measures in an informed way. To prevent sexual harassment from occurring in the workplace and to minimize any harm that does occur, employers should inform employees about the subject of sexual harassment at the work place; express strong and absolute disapproval, establish work policies to address sexual harassment issues that accurately comply with the law; implement appropriate sanctions for breach of policies; and develop methods to sensitize all employees, including supervisors, managers, and officers, to sexual harassment issues.[218] The impact of sexual harassment on third parties requires special attention. It is important that all employees are aware that disruptive behavior in the workplace damages both the individuals directly involved, and other employees who nevertheless experience disruption even if not the intended victims of sexual harassment, widespread favoritism, or sexual discrimination.

In the remainder of this section, we will discuss the central role and importance of an employer's formal statement of its sexual harassment policy. We will give special attention to two related topics for a company to

215. *See* Susan J. Best, *Sexual Favoritism: A Cause of Action Under a "Sex-Plus" Theory*, 30 N. ILL. U. L. REV. 211, 232 (2009). *See also Phillips*, 400 U.S. at 544 (declaring sex-plus a form of sex discrimination under Title VII).

216. *See* 29 C.F.R. § 1604.11(f) (2004).

217. *Id.*

218. *Id. See* C. M. Hunt, *et al*., *supra* note 15, at 661 (stating that organizations should implement policies that are "based on empowerment, encouraging the resistance of sexual harassment through the formal support of victims and the unconditional punishment of perpetrators."); Ashby Jones & Nathan Koppel, *Plenty of Company: Lapses Felled A Long List Of Top Executives*, WALL ST. J., Aug. 2010, at A.10 (noting that "Steven J. Heyer was ousted as chief executive of Starwood Hotels & Resorts Worldwide Inc. in 2007, after the board of directors received an anonymous letter accusing him of creating a hostile work environment. The letter alleged that Mr. Heyer made inappropriate physical contact with a female employee outside a restaurant bathroom, on at least one occasion.").

consider in developing its complaint procedure and in preparing to conduct internal investigations of formal charges of a hostile work environment.

A. POLICY STATEMENT

A policy statement is the cornerstone of an employer's efforts to prevent sexual harassment at the workplace.[219] This written document puts all employees on notice that the employer actively seeks to identify and eliminate all instances of workplace sexual harassment.[220] The EEOC suggests that an effective complaint procedure "encourage[s] employees to report harassing conduct before it becomes severe or pervasive."[221] If an employee promptly utilizes the procedure, the employer can usually stop harassment before actionable harm occurs.[222] A carefully formulated and implemented sexual harassment policy statement helps provide a necessary defense against claims for liability and punitive damages in the event that harassment occurs.[223] The absence of antiharassment policies will make it difficult for an employer to prove in any litigation that it exercised reasonable care to prevent or correct the harassment.[224]

A general policy pledging a nondiscriminatory workplace is insufficient to satisfy the expectation of an employer's reasonable care. To minimize liability and provide meaningful protection for employees, employers should have a sexual harassment policy in place that includes five elements: a clear policy statement, an effective complaint procedure, an effective policy distribution plan, education and training for all employees, and a system for timely investigations and corrective action.

A company's policy statement on sexual harassment must include a bold and direct statement of the company's intolerance and prohibition of any form of sexual harassment. In addition, a company's sexual harassment statement must be clear, emphatic, easily understood, free of

219. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (noting that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.").

220. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC NOTICE NO. 915.002 (Jun. 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html (hereinafter "EEOC NOTICE 915.002").

221. *Burlington Indus*., 524 U.S. at 764.

222. Indest v. Freeman Decorating, Inc., 168 F.3d 795, 803 (5th Cir. 1999) ("this case demonstrates why, as a practical matter, inappropriate sexual conduct will virtually never rise to the level of actionability when an employer takes . . . prompt remedial action").

223. *See* Kolstad v. ADA, 527 U.S. 526 (1999) (noting that in the context of punitive damages, it is insufficient to show that certain individuals have exhibited the malice or reckless indifference required under the Civil Rights Act of 1991. The plaintiff-employee must impute liability for punitive damages to the employer under the principles of agency law, and an employer may not be held vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's good-faith efforts to comply with Title VII.).

224. EEOC NOTICE 915.002, *supra* note 220.

confusing legal terms, and provide examples of conduct targeted for immediate elimination. There should be a full description of behaviors that are covered by the sexual harassment label and a substantial list of specific behaviors that are prohibited. At the same time, the policy should state that the list is only a representative, and not exhaustive, sample of all possible violations.[225]

Since liability for harassment may occur outside of work or regular working hours, employers should extend the policy to include employee activities that are conducted via social media, email, and the Internet, and provide guidelines to shape employee activity therein, which may create a hostile work environment.[226] The inclusion of social media and Internet policy into this statement is important, since forty-three percent of surveyed employees believe that receiving unsolicited and sexually explicit email can be severe or pervasive enough to create a hostile work environment and constitute sexual harassment.[227]

225. EEOC NOTICE 915.002, *supra* note 220 (suggesting that "[t]he policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities. An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements: (1) A clear explanation of prohibited conduct; (2) Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation; (3) A clearly described complaint process that provides accessible avenues of complaint; (4) Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; (5) A complaint process that provides a prompt, thorough, and impartial investigation; and (6) Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred."). *See also* Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999) (stating that "[t]he policy (1) provides a definition of sexual harassment, (2) identifies whom employees should contact if they are subjected to sexual harassment, (3) describes the disciplinary measures that the company may use in a harassment case, and (4) provides a statement that retaliation will not be tolerated.").

226. Tamara E. Russell, *Employment Law Meets Social Media: Advice for Employers*, BNA – HR FOCUS (Oct. 2011), http://www.uslawwatch.com/2011/08/16/privacy/bna-insights-employmentlabor-law-meets-social-media-advice-employers/ (last visited Feb. 17, 2015). *See* Nelson & Simek, *supra* note 69, at HT 11 (stating that a policy should instruct employees to "avoid controversial subjects, use a polite and respectful tone, even when disagreeing, [and] never post anything that could conceivably be construed as discrimination, harassment, or defamation." The author also suggests that "[a] well-crafted policy should: (1) Address all potential pitfalls in a clear and organization-specific manner and be consistent with the other organization policies and procedures; (2) Distinguish between business and personal use (on-the-job and off-the-job conduct); (3) Inform employees of the rules and regulations that state they will have a reduced or non-existent expectation of privacy on any of the organization-provided computers, e-mail systems, mobile devices, and telephone or voice systems; and (4) Encompass what can be said, who can say it, and the manner in which things should be said.")

227. *See* Ben Dahl, *A Further Darkside to Unsolicited Commercial E-Mail? An Assessment of Potential Employer Liability for Spam E-Mail*, 22 J. MARSHALL J. COMPUTER & INFO. L. 179, 192 (2003).

The mere publication of a sexual harassment policy will not insulate the employer from liability.[228] To put employees properly on notice, the policy should be clearly communicated to employees and discussed with supervisory and nonsupervisory personnel.[229] To be optimally effective, any sexual harassment policy should be distributed in writing, to all employees, on multiple occasions, with an acknowledgement from each employee that the policy was received, read, and understood.[230] An employee's written acknowledgement of her receipt of the policy and knowledge of its contents are helpful to rebut harassment claims against the employer.[231]

Furthermore, both supervisory and nonsupervisory employees need to be educated, trained, and reminded about the company's workplace sexual harassment policy. Even when an employee receives a copy of the sexual harassment policy when first hired, subsequent training sessions are important to ensure that employees remain aware of the details of the policy and their roles in preventing and reporting claims.

B. COMPLAINT PROCEDURE

A policy statement may be more effective if employees feel minimally intimidated when reporting violations.[232] The policy statement must

228. Harbison v. Pilot Air Freight, 2001 U.S. Dist. LEXIS 5024, *76 (S.D. Ind. Mar. 16, 2001) (quoting Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2000) ("although the implementation of a written or formal antidiscrimination policy is relevant to evaluating an employer's good faith efforts at Title VII compliance, it is not sufficient in and of itself to insulate an employer from a punitive damages award.")); *see* Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999) ("Ellerth and Faragher do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort.").

229. EEOC NOTICE 915.002, *supra* note 220 (stating that "[a]n employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically.").

230. John A. Pearce II & Samuel A. DiLullo, *A Business Policy Statement Model for Eliminating Sexual Harassment and Related Employer Liability*, 66 S.A.M. ADVANCED MGMT. J. 12–21 (2001) (stating that distribution should take place at the time of initial hiring, with subsequent distributions thereafter. Employee handbooks, annual performance reviews, periodic training sessions, company newsletters, and manuals all provide opportunities to redistribute the policy to ensure awareness by all employees. Permanent and prominent placement of the harassment policy on a bulletin board and the company computer network can also be effective. In addition, employers should appoint knowledgeable individuals generally available in a confidential setting to respond to employee questions concerning the policy. Since some employees may not speak and read English well, the policy should be written in as many languages as will be sufficient to ensure the comprehension of all employees.).

231. *Id*. (suggesting that after it is signed and detached from the employee's copy of the policy statement, the written notice pertaining to the sexual harassment policy should be kept as part of each person's permanent personnel file).

232. EEOC NOTICE 915.002, *supra* note 220 (noting that "[a]n employer's harassment complaint procedure should be designed to encourage victims to come forward.").

explain the complaint process.[233] A written procedure for reporting incidents of harassment should do the following: (1) specify the steps to take to initiate a harassment complaint; (2) refrain from requiring an alleged victim to first bring the complaint to the offending supervisor; (3) encourage the alleged victim to confront the offending person; (4) prohibit retaliation against anyone reporting sexual harassment; (5) encourage employees to report all occurrences of harassment; (6) and promote confidentiality. It is also crucial that the employer's antiharassment policy and complaint procedure contain information pertaining to the timeframe for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies.[234]

In addition, the sexual harassment policy should ensure that there are no unreasonable obstacles to filing a complaint.[235] To the contrary, employers should encourage employees to report all occurrences. Employees must be provided with multiple convenient outlets through which to submit complaints. What might initially appear to be an isolated incident to an employee could actually be a part of a pattern of conduct for which an employer may be found liable. A single incident, when combined with other seemingly harmless incidents or factors, may also rise to the level of severity and pervasiveness necessary to make a claim actionable.

Moreover, policies requiring claimants to report alleged harassment to an immediate supervisor are ineffective because the supervisor himself may be the culprit.[236] Although the sexual harassment policy should require supervisors to report complaints of harassment to appropriate officials,[237]

233. EEOC NOTICE 915.002, *supra* note 220 (suggesting, "[a] complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment.").

234. *Id.* (suggesting that the policy must explain that the deadline runs from the last date of unlawful harassment, not from the date the complaint is resolved). *See* Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1368 (D.C. Cir. 1998) (holding that an employer's affirmatively misleading statements pertaining to the resolution of the grievance in the employee's favor can establish an equitable estoppel claim and thus allow the plaintiff to file the complaint after the statute of limitations has run); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1532 (11th Cir. 1992) (holding that the tolling of statutory time for filing a complaint is allowed where plaintiff was misled by the employer to believe that discriminatory treatment would be resolved); Miller v. Beneficial Management Corp., 977 F.2d 834, 845 (3d Cir. N.J. 1992) (stating that equitable tolling applies where employer's own acts or omissions lured the plaintiff into foregoing a prompt attempt to vindicate his rights).

235. EEOC NOTICE 915.002, *supra* note 220.

236. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (U.S. 1998) (noting that the City of Boca Raton's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints.").

237. Wilson v. Tulsa Junior College, 164 F.3d 534, 541 (10th Cir. 1998) (complaint procedure was deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment); Varner v. National Super Markets Inc., 94 F.3d 1209, 1214 (8th Cir. Mo. 1996) (complaint procedure was not effective if it did not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action).

the EEOC suggests that an employer designate at least one official outside the employee's chain of command to hear complaints of harassment.[238]

Antiharassment policies and complaint procedures must also state that employees are protected from retaliation for reporting harassment or providing information relating to such complaints.[239] Without assurance against retaliation, an antiharassment policy or a complaint procedure can be rendered ineffective.[240] An employer creates legal and financial exposure by failing to shield employees against negative retaliation.[241] Therefore, the employer must safeguard employees against retaliation from its supervisors.[242]

Finally, the employer should make explicitly clear to employees that it will protect the confidentiality of harassment allegations to any extent possible, and deal with any reports in a confidential, need-to-know manner.[243] The employer should also disclose that complete confidentiality cannot always be guaranteed because the employer's duty to investigate presumes sharing and disclosing information with the alleged harasser, witnesses, and others who may become involved.[244]

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238. EEOC NOTICE 915.002, *supra* note 220 ("For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events.").

239. *Id.*

240. *Id.* Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. *See, e.g.,* Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOCIAL ISSUES 117, 122–23 (1995) (citing studies that have shown that a significant proportion of harassment victims are worse off after complaining).

241. *See, e.g.,* The Associated Press, *State Pays Fired KDHR Employee $510,000*, THE TOPEKA CAPITAL JOURNAL, Mar. 29, 1999, *available at* http://cjonline.com/stories/032899/kan_kdhrpayment.shtml.

> In March 1998, the court upheld a jury award to a former employee of the Kansas Department of Human Resources for $300,000. Legal fees and interest brought the total to $510,000. The victim claimed that she had been unlawfully terminated as retaliation for filing a sexual harassment complaint. She alleged her manager had subjected her to sexual harassment for a number of years, including such actions as repeatedly asking her for sex, groping her in the office, and asking to take nude pictures of her. Other managers lobbied her not to file a lawsuit but to let the matter drop, which would be more favorable to her job position. She agreed not to sue, but after the deadline for filing suit expired, she was fired for deficiencies in her work.

Pearce & DiLullo, *supra* note 230, at 17.

242. EEOC NOTICE 915.002, *supra* note 220 ("For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.").

243. *Id.*

244. *Id.*

C. INTERNAL INVESTIGATIONS

If an employee complains to management about alleged sexual harassment, widespread favoritism, or sexual discrimination, the employer is obligated to investigate the allegation.[245] An employer can shield itself from liability by acting reasonably in response to a claim of sexual harassment.[246] Different approaches exist to handling claims and the employer has latitude in deciding what strategies to implement in response to sexual harassment claims.[247] As a result, courts have focused on employers' actions to resolve sexual harassment claims, instead of applying a checklist of proper actions.[248]

EEOC guidelines provide that an employer must take "prompt remedial action" reasonably calculated to end sexual harassment.[249] Once an employer becomes aware of sexual harassment, the guidelines establish a duty for the employer to investigate. To defend against a subsequent claim of a hostile work environment, an employer must prove that they took prompt action to correct harassing behavior.[250]

The investigation should involve a representative committee including men and women, preferably qualified and trained on harassment law and company policy.[251] They should possess the interviewing and critical analysis skills needed to conduct an investigation. They should also be capable of maintaining objectivity and refrain from forming or expressing opinions during the investigation process.[252] The investigating committee must be sensitive to and respectful of the interests of all parties involved, as indicated by consideration of such factors as work schedules, language issues, and hierarchical relationships.

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245. EEOC NOTICE 915.002, *supra* note 220 ("When employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.").

246. Swenson v. Potter, 271 F.3d 1184, 1196 (9th Cir. 2001) ("the employer will insulate itself from Title VII liability if it acts reasonably"). *See Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997) ("[A] good faith investigation of alleged harassment may satisfy the 'prompt and adequate' response standard, even if the investigation turns up no evidence of harassment . . . [and] a jury later concludes that in fact harassment occurred.").

247. United States v. New York City Transit Auth., 97 F.3d 672, 677 (2d Cir. 1996).

248. Jayesh Shah, *Limiting Expert Testimony About Sexual Harassment Policies*, 1999 U. CHI. LEGAL F. 587, 611 (1999).

249. *See* EEOC NOTICE 915.002, *supra* note 220.

250. Justin P. Smith, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace after Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1794 (1999).

251. *See* Pearce & DiLullo, *supra* note 230.

252. *Id.* at 19. *See* K. W. Samuels & S. Leung, *Harassment-Proofed is Liability-Proofed; The EEOC and the Supreme Court Clarify Ways Employers Can Limit or Escape Liability for Supervisory Harassment*, 22 NAT. L. J. B9 (1999).

If a company executive is the focus of the harassment claim, an outside independent investigator should be considered. To avoid charges of favoritism, pre-established guidelines for investigations should be standard but flexible.

Because a false claim of harassment can greatly damage the reputation of the accused, defamation is another real concern.[253] Everyone involved should be informed of the risks of a defamation claim and of the need to keep all information confidential, except as required in to resolve the claim.

V. CONCLUSION

Third-party plaintiffs may have a cause of action based on a hostile work environment when sexual harassment unreasonably interferes in the workplace; when widespread sexual favoritism contributes to an intimidating, hostile, or offensive environment; or when employees who are not personally harassed lose job benefits to less qualified employees who submit to such harassment.

Historically, courts have been slow to elucidate the legal standards that third parties needed to satisfy in order to prevail on sexual harassment claims, such as the expectation that plaintiffs provide compelling evidence of quid pro quo demands or of a hostile work environment. However, recent decisions are bringing clarity to sexual harassment law, and new theories are providing promising options for potential plaintiffs. In particular, because of the viability and increasing public and industry awareness of sex-plus theory, both the number of sexual favoritism claims and the frequency of positive results for claimants may increase in the coming years.

Employers need to respond to ongoing threats of sexual harassment by implementing prevention measures and swiftly investigating employee complaints. Additionally, they need to recognize that some victims of sexual harassment can be found among the untargeted co-workers of the perpetrator. Not only do business policies and managerial action need to protect these third parties from sexual harassment, but employers must also educate employees about their rights and employers' responsibilities in helping to safeguard employees' working environments.

253. *See* Pearce & DiLullo, *supra* note 230 at 19. *See also*, *e.g.*, Stockley v. AT&T, 687 F. Supp. 764, 768–69 (E.D.N.Y. 1988).

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