# Investigating Sexual Harassment Allegations: Getting It Right

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Presented by
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Ogletree Deakins
Employers & Lawyers, Working Together

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Shareholder Phoenix

Nonnie partners with employers and managers in three primary ways: litigation avoidance through proactive counseling and training; investigations and resolutions when pre-litigation concerns arise; and litigating legally complex and factually challenging cases to defend employer's actions.

Nonnie advises and counsels private and public employers in all aspects of employment law, including an emphasis on complex but proactive compliance projects, such as 50-state compliant wage deductions and lawful parental leave programs. Nonnie regularly partners with clients to plan and implement reductions in force, severance plans and agreements, and pre-litigation disciplinary matters. Nonnie regularly conducts high-level internal investigations for clients, including at the executive level and within key departments, and assists in identifying and resolving potential areas of liability and exposure in a proactive but practical way. Nonnie's unique practice also includes providing employment advice for employers doing business within the Navajo Nation's territorial jurisdiction and other tribal lands, including cultural and employment law training on unique tribal code requirements.

Nonnie has successfully defended employers against allegations of discrimination, sexual harassment and wrongful termination in state and federal court, as well as administrative forums. Nonnie has handled hundreds of charges with the U.S. Equal Employment Opportunity Commission and the Arizona Civil Rights Division, as well as claims and appeals filed with the Industrial Commission of Arizona. Nonnie has also litigated whistleblower claims against air carriers under AIR 21 and handled investigations and enforcement actions with numerous other federal agencies, including the U.S. Department of Labor and other employers under SOX.

Nonnie regularly speaks and trains on current and emerging employment law topics, including recent presentations to industry and trade groups on civility in the #MeToo era, gay, lesbian, bisexual and transgender workplace issues, avoidance of retaliation claims, and political expression in the workplace. Nonnie's advanced degree in education and years of experience as an instructor and student affairs professional at Arizona State University help make her training sessions and presentations simultaneously educational and entertaining. Nonnie has also published several scholarly articles focused on employment law, including a book chapter on the impact of reasonable workplace accommodations for employees with disabilities on employers and employees' expectations of privacy for off-duty conduct.

Nonnie has received numerous accolades from clients and legal professionals for her dedicated client focus and problem-solving abilities. Southwest *Super Lawyers* named Nonnie a Rising Star in 2012-2014 and a *Super Lawyer* from 2015 through today. Nonnie also obtained the recognition of the legal community by receiving an AV Preeminent Rating by Martindale-Hubbell beginning in 2014 through today. *Chambers USA* first ranked Nonnie as a Leading Individual in 2015 and *Best Lawyers* added Nonnie to its list of recognized practitioners in 2016. Prior to joining the firm, Ms. Shivers served as a law clerk to the Honorable Patricia K. Norris on the Arizona Court of Appeals.

Education

- J.D., University of Arizona, 2004
- M.Ed., Arizona State University, 1998
- B.A., Kansas State University, 1996

Admittance to Practice

- Arizona
- U.S. District Court, District of Arizona
- U.S. Court of Appeals, Ninth Circuit

# Investigating Sexual Harassment Allegations: Getting It Right

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## Overview

- #MeToo experience and enforcement data points
- Keys to an effective sexual harassment investigation
- Timeliness issues
- Fairness issues
- Thoroughness issues
- Do's and Don'ts for an effective workplace investigation

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## Everywhere We Look…

Bill Cosby convicted on three counts of sexual assault

*Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*

She's 26, and Brought Down Uber's C.E.O. What's Next?

Nike president resigns amid reports of inappropriate behavior

Moonves out; CBS donates $20M to #MeToo efforts

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## Contenders at the cultural turning point?

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## Power is the common theme

power and authority often play a role in gender dynamics and sexual harassment in the workplace.

- Over a third of employees (36%) have seen a person in a position of power take advantage of subordinates of the opposite sex.
- Twenty-nine percent of women have received unwelcome romantic or sexual attention from someone they report to, versus 20 percent of men. This number increases to 35 percent for 18–34-year-olds of both genders.
- Nearly a quarter of women (24%) believe their careers have suffered because they turned down romantic attention from a direct supervisor.

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## Racial and ethnic minorities impacted most

overall, workplace gender discrimination and harassment have a greater impact on racial and ethnic minorities of both genders.

- Diverse employees were more likely to report their careers have suffered because they turned down romantic attention from a direct supervisor (42% of African Americans and 36% of Hispanics, versus 24% of Caucasians).
- Diverse workers are more likely to know a woman who has experienced workplace harassment (65% of Asian American/Pacific Islanders and 59% of African Americans, versus 49% of Caucasians).

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## EEOC's FY 2018 Stats

- Approximately 30% of all charges related to sex discrimination
- Retaliation charges increasing – 48% in 2018
- 12% increase in sexual harassment charges in 2018
- 50% increase in sexual harassment lawsuits by EEOC in 2019
- $23 million more recovered by EEOC in sexual harassment matters (now $70 million)

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## Three Keys To An Effective Investigation

1. Timeliness
2. Fairness
3. Thoroughness

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## Timeliness in a #MeToo Investigation

- EEOC stance
- Balancing due process
  - Evaluating and implementing interim remedial measures (e.g., U.S. Park Service)
- Anticipating unique circumstances
  - Actor(s) no longer employed
  - Complainant no longer employed
  - Historical concerns/events
  - Behavior prior to joining organization
  - Anonymous concerns
  - #MeToo postings

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## Investigating #MeToo postings

*If a company becomes aware of a #MeToo posting from an employee, it should treat this as notice to the company to immediately investigate.*

| | |
|---|---|
| Disagree strongly | 2% |
| Disagree | 15% |
| Neutral | 30% |
| Agree | 37% |
| Agree strongly | 16% |

=53%

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## Fairness in a #MeToo investigation

*Do you think the #MeToo movement has exaggerated how big a problem sexual harassment remains in the workplace?*

| | Men | Women |
|---|---|---|
| Yes | 15% | 15% |
| No | 43% | 55% |
| Don't know | 42% | 30% |

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## Fairness in a #MeToo investigation

*The recent terminations of famous men for sexual harassment suggests there is a serious problem that needs to be stopped.*

| | |
|---|---|
| Disagree strongly | 1% |
| Disagree | 2% |
| Neutral | 13% |
| Agree | 51% |
| Agree strongly | 34% |

=85%

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## Treating superstars differently…

*Management is likely to treat a sexual harassment complaint against a successful supervisor less seriously than a complaint against an unsuccessful supervisor.*

| | |
|---|---|
| Disagree strongly | 4% |
| Disagree | 15% |
| Neutral | 30% |
| Agree | 41% |
| Agree strongly | 9% |

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## Thoroughness in a #MeToo Investigation

## Thoroughness in a #MeToo Investigation

- Manager heard rumors she slept her way to the a promotion
- Initially spread by jealous male subordinate
- Perpetuated by male leadership
- Investigate?
- Investigate if anonymous or no information on source?
- *Parker v. Reema Consulting Services Inc.*, case number 18-1206, in the U.S. Court of Appeals for the Fourth Circuit

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## Identifying and addressing implicit bias

younger employees and male employees are generally less comfortable around the opposite sex at work.

- Thirty-two percent of 25-35-year-olds report feeling more uncomfortable interacting with the opposite sex at work over the past year, versus 23 percent of all respondents.
- While 22 percent of all employees find it more difficult to take direction from a superior of the opposite sex, that difficulty is more pronounced among 25-34-year-olds (39%).

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## Thoroughness as to Remedial Measures

- Temporary or interim remedial measures
- Equal to/suitable to address misconduct
- Tailored to avoid recurrence
- Disclose or not to disclose remedial measures
  - EEOC stance and suggestions
- Disclose or not to disclose report
- Creative outlets (e.g., closure meetings)

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## Refresher: Workplace Investigation Don'ts

- Unexplained delay
- Protecting accused because of position
- Failing to accurately record and document the process/relying on unsigned statements
- Failing to follow applicable employer policy
- Making hasty decisions with inadequate evidence
- Interviewing witnesses in an intimidating manner
- Failing to take remedial action or end unlawful conduct
- Failing to apply policies and remedial measures consistently
- Destroying or altering documents or other evidence

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## Refresher: Workplace Investigations Do's

- Prevention (policy/complaint mechanism/training)
- Right investigator
- Preserve status quo during investigation
- Address confidentiality, including in union context
- Review policies and files of all involved

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## Refresher: Workplace Investigations Do's

- Prevent retaliation (warnings/reporting structure and disciplinary authority changes/direction to report retaliation)
- Have a plan, but follow the evidence
- Document factually, without conclusions or comments
- Ask open-ended questions
- Ask for the outcome sought
- Reach conclusions based on policy, not law
- Take appropriate action

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## New Investigation Do's in the #MeToo Era

- Investigation Team
  - Gender make-up
  - Conflicting agendas
  - Third party investigators
- Assume the investigation will be leaked/scrutinized
- Consider sharing it prospectively (e.g., Uber)
- #TimesUp campaign/funding

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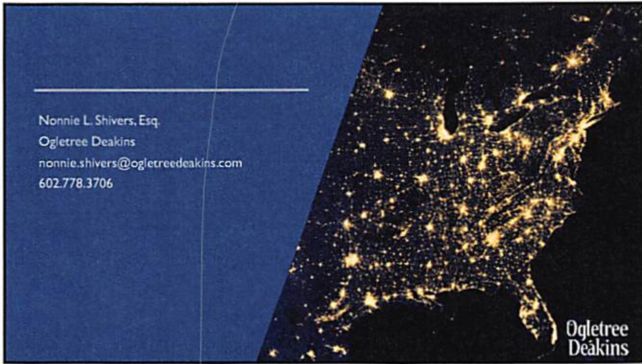
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## CONDUCTING THOROUGH AND EFFECTIVE HARASSMENT INVESTIGATIONS

**Nonnie L. Shivers, Ogletree Deakins**

Harassment charges continue to represent a significant percentage of all charges filed with the Equal Opportunity Employment Commission ("EEOC") against employers. In January 2015, the EEOC created a task force, comprised of 16 members throughout the United States, to study preventing harassment in the workforce. In June 2016, the task force issued a report concerning preventing harassment in the workplace.[1] In sum, the task force found (1) workplace harassment remains a persistent problem; (2) goes unreported; (3) there is a compelling business case for stopping and preventing harassment; (4) it starts at the top - leadership and accountability are critical; (5) traditional, legal-focused training must change – new approaches should be explored. In January 2017, the EEOC issued proposed enforcement guidance that was built on the findings in the report.[2]

Indeed, despite growing awareness of harassment in the workplace, and despite employers' best efforts to prevent and/or remedy harassment, complaints of harassment continue to rise. In 2016, harassment complaints were 30.8% of all complaints received by the EEOC, with sexual harassment comprising 24.0% of all harassment complaints and racial harassment comprising 34.2% of all harassment complaints.[3] Complaints of harassment also have seen a steady increase in recent years, climbing from 26,777 received in 2012 to 28,216 received in 2016.[4] Although these statistics indicate that alleged instances of harassment continue to permeate the workplace, employers who take preventative steps to deter, actively confront, and promptly remedy harassing conduct can decrease their potential liability.

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2, prohibits discrimination and harassment on the basis of several protected characteristics, including sex. Case precedents establish that an employer is strictly liable for harassment by a supervisor that results in an adverse employment action. However, when harassment by a supervisor does not result in an adverse employment action, an employer may raise an affirmative defense to liability by showing: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[5]

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[1] Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of the Co-Chairs Chai R. Feldblum & Victoria A. Lipnic 5-15 (2016), http://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf* (last visited March 20, 2017)

[2] EEOC Proposed EG on Unlawful Harassment for Public Input, https://www.regulations.gov/document?D=EEOC-2016-0009-0001 (last visited March 20, 2017).

[3] *See EEOC All Charges Alleging Harassment FY 1997 – FY 2016,*

https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited March 20, 2017); *EEOC Charge Statistics FY 1997 through FY 2014,* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited March 20, 2017); *EEOC Sexual Harassment Charges FY 2010 – FY 2016,* http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited March 20, 2017); *Race-based Harassment Charges FY 1997 – FY 2016,* http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm (last visited March 20, 2017).

[4] *See EEOC All Charges Alleging Harassment FY 2010 – FY 2016,*

http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm (last visited March 20, 2017).

[5] The parameters of this affirmative defense were first set forth by the Supreme Court in the cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

Employers can also be liable for "severe and pervasive" harassment by non-supervisory employees.[6] In order to establish vicarious liability for harassment by a non-supervisory co-worker based on a hostile work environment theory, the plaintiff must establish the employer knew or should have known of the harassment and failed to take prompt remedial action.

With the EEOC's renewed focus on harassment in the workplace, employers must focus on the ever changing work environment to ensure compliance. For years, employers have known that policies prohibiting harassment apply to employee interactions around the water cooler. With the rise in popularity of smartphone apps that allow employees to communicate around virtual water coolers, it has become ever more important for employers to be vigilant in maintaining workplace cultures that prohibit harassment. Notably, Snapchat has become very popular among millennial workers, creating certain problems in the workplace. Snapchat can be very tempting to use for inappropriate conduct because of its perceived self-destruct features. With such rapidly changing technology affecting our work environments, it is critical that employers take steps to prevent sexual harassment in the workplace and protect themselves from claims of sexual harassment.

## I. BEST PRACTICES TO PREVENT SEXUAL HARASSMENT IN THE WORKPLACE

### A. Set the Proper Tone in the Workplace

Employers must send the message that harassment will not be tolerated in their workplaces. Upper management and front-line supervisors and managers set the tone for how seriously the organization takes harassment. Accordingly, management must establish clear rules and boundaries of appropriate behavior among employees and managers. When the appropriate tone has not been set by upper management, employees often believe harassing behavior is tolerated and even encouraged.[7]

There can be significant legal consequences when management fails to set the proper tone in the workplace.[8] Courts routinely award significant verdicts where the evidence indicates management contributed to sexual harassment. In one case, the plaintiff, a former Police Administrative Aid, sued her former employer, the New York Police Department, as well as four

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[6] *See, e.g., Engel v. Rapid City Sch. Dist.*, 506 F.3d 118, 1123 (8th Cir. 2007).

[7] *See, e.g., Ellis v. Houston*, 742 F.3d 307, 321-22 (8th Cir. 2014) (stating that "[p]articipation by a supervisor can magnify the impact of harassment. Sergeant Miles took the lead in delivering racist jokes directed at the black officers . . . Such behavior by a supervisor tacitly endorses racist remarks by subordinates and indicates to other officers that this type of joke or remark is acceptable and has no negative consequence."); *Flanagan v. Ashcroft*, 316 F.3d 728, 730 (7th Cir. 2003) (stating "employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment" (quoting *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996)); *Hare v. H&R Indus., Inc.*, 67 F. App'x 114, 119 (3d Cir. 2003) (owner and general manager, as well as plaintiff's supervisor, knowingly permitted hostile work environment); *Harris v. Mayor and City Council of Baltimore*, 797 F. Supp. 2d 671, 676, 684 (D. Md. 2011) (sexually hostile work environment perpetuated, for example, by supervisors who openly referred to women as "bitches" and permitted other employees to do the same, supervisors' and co-workers' sexually explicit comments about male anatomy, and a supervisor allowing a coworker to repeatedly call plaintiff a "bitch" during a meeting to address such conduct); *Marquis v. Tecumseh Prods. Co.*, 206 F.R.D. 132, 174-79 (E.D. Mich. 2002) (pervasive harassment by supervisors and co-workers included rubbing up against plaintiffs, making crude sexual remarks and sexual jokes, inappropriately touching plaintiffs, and leaving sexually explicit photos and notes on plaintiffs' cleaning carts).

[8] *Katt v. City of N.Y.*, 151 F. Supp. 2d 313 (S.D.N.Y. 2001).

individual police officers, alleging, among other things, sexual harassment.[9] The plaintiff testified that she was subjected to a sexually hostile work environment over the course of her employment, which "grew worse as time went on."[10] She described the working environment as a "rowdy atmosphere with a lot of sexual innuendos, sexual comments, questions, [and] intrusive questions regarding her personal life and personal sexual habits."[11] Significantly, the plaintiff identified the chief of police as the "chief perpetrator of the precinct's sexually hostile environment," and noted that he "was generally in charge of all the employees at the Seventh Precinct during her shift."[12] Finding the plaintiff was subjected to a sexually hostile working environment, the district court affirmed a $400,000 jury award to the plaintiff.

Allowing a corporate culture that encourages or tolerates harassing conduct can increase the number of sexual harassment claims filed and the likelihood of a plaintiff's success by fostering a hostile work environment. Conversely, promoting a culture that does not tolerate harassing conduct can help decrease the number of legal claims asserted by employees and former employees and can help the company defeat claims if brought.

### B. Maintain a Workable Harassment Policy that Provides At Least Two Avenues of Complaint

As explained above, an employer may defeat a claim for harassment through the *Faragher/Ellerth* affirmative defense if it can show: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[13] An employer may show it has exercised reasonable care to prevent harassing behavior by showing it has adopted an effective and comprehensive anti-harassment policy.[14]

Although adoption and distribution of a valid anti-harassment policy can provide "compelling proof" that an employer exercised reasonable care in preventing and promptly correcting harassment, it is not dispositive.[15] "To be deemed sufficiently preventative, an anti-harassment policy must be comprehensive, well-known to employees, vigorously enforced, and provide alternate avenues of redress."[16] Importantly, an "effective policy must provide avenues for complaint that do not require the plaintiff to bring his or her complaint to the offending supervisor first."[17] A policy that requires an employee to first report harassment to her supervisor, or that fails to provide at least two avenues of complaint, may interfere with an employer's ability to assert the *Faragher/Ellerth* affirmative defense.

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[9] *Id.* at 319.

[10] *Id.* at 320.

[11] *Id.*

[12] *Id.* at 320-21.

[13] *Faragher*, 524 U.S. at 807.

[14] *Minix v. Jeld-Wen, Inc.*, 237 F. App'x 578, 583 (11th Cir. 2007); *Edwards v. Hyundai Mfg. Ala., L.L.C.*, 603 F. Supp. 2d 1336, 1349 (M.D. Ala. 2009).

[15] *Weger v. City of Ladue*, 500 F.2d 710, 719 (8th Cir. 2007).

[16] *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1091 (M.D. Ala. 2005) (internal quotations omitted).

[17] *Edwards*, 603 F. Supp. 2d at 1349.

It is worth reviewing your company's harassment policy to ensure the reporting structure is clear and provides avenues to complainants other than just their direct supervisor.

### C. Train Employees, as well as Managers

Policies are good; however, training regarding the policies is much better. All too often, once a new handbook is rolled out, employees quickly forget the Company's policies prohibiting harassment. Routine training on the Company's policy prohibiting harassment will help remind employees so that employees can strive to behave appropriately. In addition, employees should be reminded that the Company expects them to adhere to its policies prohibiting harassment in all forms of communication, both in person and on-line.

Also, managers should receive additional training on these topics and on what they should do if they receive a complaint from an employee. Because there is no legal mandate that an employee use a specific term, for example, "sexual harassment" or "racial harassment" in order to inform his or her employer about a harasser in the workplace, and because harassing conduct is not always obvious, managers often fail to recognize a complaint when they see one.[18] For example, an employee's comment to her manager that another employee is bothering her, repeatedly touches her, or keeps staring at her might constitute a complaint or might be sufficient to put the manager on notice of unlawful conduct; however, managers often fail to recognize these types of complaints as anything more than just usual workplace gripes.[19] Training managers to recognize a complaint is especially important because in the case of co-worker harassment, "once an employer knows *or should know* of harassment, a remedial obligation kicks in."[20]

Lack of managerial training as to how to recognize harassment complaints can lead to disastrous results for an employer. For example, in *Gentry*, the plaintiff sued her former employer alleging she was sexually harassed by her supervisor.[21] Although the plaintiff admitted she never formally used the term sexual harassment when she complained, she did tell the company's benefits coordinator in the human resources department that she "was uncomfortable with some of the discussions in the office and there was a lot of shoulder rubbing, touching, and interoffice dating."[22] The Court of Appeals affirmed the jury verdict in favor of the plaintiff and stated that plaintiff's comments about feeling uncomfortable with touching and hugging in the office "should have raised suspicions."[23] The court further held that when an employee complains about this type of behavior, it "**should be sufficient to alert an employer about a potential harasser, assuming the proper sexual harassment policy and training are in place.**"[24]

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[18] *See, e.g., Gentry v. Export Packaging Co.*, 238 F.3d 842, 849 (7th Cir. 2001).

[19] *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 187-88 (4th Cir. 2001) (District Manager failed to recognize plaintiff's complaint of racial harassment; instead, he downplayed the complaint by responding that the harasser "did not mean anything" by his racial slurs.).

[20] *Dolman v. Willamette Univ.*, No. CV-00-61-HU, 2001 WL 34043744, at *13 (D. Or. April 18, 2001) (An employer is liable for a hostile work environment unless it takes "adequate remedial measures in order to avoid liability," and such actions should be "reasonably calculated to end the harassment.").

[21] *Gentry*, 238 F.3d at 845.

[22] *Id.* at 849.

[23] *Id.*

[24] *Id.*

Given the high levels of employee turnover in today's workplace, employers must remain constantly vigilant to ensure their managers are adequately trained on the dangers of harassment. Providing training to all new hires and annual harassment training for supervisors is an easy way to ensure managers recognize a potentially protected complaint when they see one and understand their obligations to act.

## II. RESPONDING TO COMPLAINTS OF WORKPLACE HARASSMENT: A SOUND INVESTIGATION IS CRITICAL

As explained above, both state and federal courts have emphasized the importance of establishing anti-harassment policies containing complaint procedures and effective enforcement mechanisms. The foundation for an effective enforcement mechanism is a carefully developed investigation process.

Failure to develop and follow a sound investigation process can negatively impact an employer in several important ways. First, where an employer responds to a complaint by conducting a poor investigation (or not conducting any investigation), the complainant may pursue litigation where they might not have if a proper investigation had been conducted. Second, the employer gives up possible affirmative defenses to claims of unlawful harassment that are available under state and federal law. Third, it is clear that a failure to properly investigate claims of harassment can expose employers to increased liability to the victims of such conduct. Moreover, an employer's failure to adequately investigate claims of harassment can negatively affect jurors' views of the employer, resulting in the jury punishing the employer with a large compensatory and/or punitive damage award to the victim.

In sum, carefully developed procedures for fairly and effectively investigating complaints of workplace harassment may limit the likelihood of a legal action being commenced, provide an affirmative defense in the event legal action is commenced, and help the employer avoid financial and public relations debacles.

The following is intended to provide a practical guide to conducting fair and effective workplace harassment investigations.

### A. The Key Features of an Effective Investigative Process

The most effective investigative practices are those that will ensure that the matters at issue are seriously addressed, that all relevant evidence is considered, and that a fair result is obtained. To achieve these objectives, an employer should develop a set of practices that provides for the timely, fair and thorough investigation of workplace harassment complaints.

#### 1. Timeliness

Investigations must be commenced promptly upon receipt of a complaint. This necessarily includes promptly addressing all complaints even if the complaining party does not follow company procedure in reporting the alleged harassment.[25] Indeed, failure to deal with

[25] *See, e.g., id.* at 1265-66 (employer could not assert affirmative defense where employer's human resources department did not investigate sexual harassment complaint when plaintiff orally reported the harassing conduct, waiting instead until she submitted the complaint in writing); *see also Porter v. Erie Foods Int'l*, 576 F.3d 629, 636 (7th Cir. 2009) ("[A] prompt investigation is the hallmark of a reasonable corrective action.") (internal quotation omitted).

complaints in a prompt manner often subjects the employee to more harassment, allows the harasser to harass new victims, and sends the message that the company does not take harassment seriously. This can lead to the foreclosure of any potential affirmative defense by the company.[26]

Employers should also understand that time is of the essence with respect to commencing investigations because memories fade and witnesses become unavailable as time passes. For these same reasons, delay in notifying an employee accused of discrimination or harassment can impair the employee's ability to respond. Measures that should be considered to expedite investigations include (1) establishing appropriate deadlines at the outset, (2) if possible, interviews should commence soon after the receipt of the complaint, and (3) the investigation should be completed as soon as possible; if the investigation cannot be promptly completed due to legitimate extenuating circumstances, the complainant should be advised of the delay.

Directly related to the issue of timeliness in responding to harassment complaints is tolerating managers who fail to report complaints of harassment, as this can delay, or altogether prevent, an employer from promptly responding to or investigating a complaint, exposing the company to additional liability.[27] Further, unaddressed complaints allow problems to fester, and before long what was originally just a vague comment can turn into something more serious.

2. **Fairness**

Workplace investigations must be conducted fairly. The investigator must be objective and unbiased. This means that the investigator cannot take the side of either the complainant or the accused – he/she cannot set out to "convict" the accused or "discredit" the complainant. Also, the investigator should not have a personal relationship with the complainant or the accused. Nor should the investigator have a personal or professional stake in the outcome of the investigation.

A fair investigation also contemplates that the accused will be fully informed of all of the charges made against him/her and will be given a meaningful opportunity to respond. The complainant, the accused and all witnesses should be given the opportunity to offer any and all relevant evidence. Fairness also requires that, during witness interviews, the investigator refrain from asking questions that suggest disapproval of the complainant or the accused. Finally, a fair investigation also contemplates that the evidence gathered during the investigation will be objectively evaluated and that credibility determinations will be based upon legitimate factors such as consistency, demeanor and bias.

3. **Thoroughness**

Workplace investigations must be thorough. All persons with knowledge of relevant facts must be interviewed and all relevant documents must be reviewed. The investigator should interview the complainant, the accused, and all persons with first-hand knowledge of the disputed

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[26] *See, e.g., White v. N.H. Dept. of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000) (employer vicariously liable for supervisor's sexual harassment because it failed to handle internal investigation properly or timely, allowing the harassing conduct to continue); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1097 (9th Cir. 2008) (employer failed to establish affirmative defense to vicarious liability of supervisors' harassment, in part because employer's only attempt to correct harassment came "after several months of plaintiff's alleged mistreatment by her supervisors").

[27] *See, e.g., Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (employer deemed to have constructive knowledge of harassment by plaintiff's supervisor when it was aware of past complaints and failed to adequately supervise him, and it "tolerated an attitude of fierce loyalty and protectiveness within the ranks to the point that officers refused to address or report each other's misconduct").

events. While time is of the essence in conducting workplace investigations, the need to conduct a thorough investigation should not be compromised.

### B. Events that Will Trigger an Investigation

An investigation should be commenced whenever a complaint of harassment is made. A complaint need not be written and the complainant does not have to use the words "discrimination," "harassment" or "unlawful." It is sufficient if the complainant provides notice to the employer that some unlawful conduct may have occurred.

Under certain circumstances, ***an investigation may be required even in the absence of a complaint.*** That is, an employer may be obligated to conduct an investigation if it becomes aware of information that creates a reasonable suspicion that some harassment may have occurred. For example, if a supervisor observes harassing conduct in the workplace, the employer will be obligated to conduct an investigation even though no one "complained" about the conduct as the employer has "constructive notice" of the potentially unlawful conduct. Similarly, if there is general office knowledge of inappropriate conduct, or if an employee confides in a supervisor regarding such conduct, an investigation must be commenced even though no one "complained."

Also, ignoring complaints of harassment because the alleged harasser is a senior manager, a top-producer for the company, or long-tenured employee can prove costly for an employer. Indeed, giving a manager the benefit of the doubt solely because of his or her position or tenure with the company or because he or she generates significant revenue puts the company at risk of committing other common mistakes, including not conducting an adequate investigation and failing to deal promptly with complaints. Further, an employer that retains a known harasser could be deemed as having acted with malice or reckless disregard for the truth, which can lead to an award for punitive damages.[28]

### C. Planning the Investigation

The foundation for an effective investigation is careful pre-investigation planning. Once the employer's obligation to conduct an investigation is triggered, those responsible for initiating the investigation should plan the investigation. Initial planning should include identifying the issues and preparing a preliminary list of persons who have relevant knowledge relating to the matter being investigated; determining who should be informed of the complaint and the investigation; deciding who should be appointed to conduct the investigation; and determining whether any temporary remedial measures should be implemented.

#### 1. Identification of the Issues

The complaint and all supporting materials that may be submitted by the complainant should be analyzed to determine the issues that must be investigated. Assessment of the issues

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[28] *See e.g., Cadena v. Pacesetter Corp.*, 30 F. Supp. 2d 1333, 1339-1341 (D. Kan. 1998) (awarding $300,000 in punitive damages, where plaintiff who complained about harassment was told "that's just Charlie for you . . . the company would never fire [him] because he made too much money for the company" and "that was just how he operated," indicating the employer knew about the harassing supervisor's conduct but failed to timely respond); *Gentry*, 238 F.3d at 849 (upholding jury award of punitive damages where plaintiff complained about her supervisor's sexual harassment and was told that "was just [the harasser's] personality, that was how he worked . . . He-had-been–there-for–years type thing . . . [t]here was really nothing that had ever been done about it and she didn't think that there ever was [going to be anything done"]).

will play a role in the selection of the investigator and ultimately will impact the effectiveness of the investigation. A preliminary list should be prepared of the witnesses who may have relevant knowledge.

### 2. Dissemination of Information

It is extremely important to limit disclosure of the complaint and the investigation to those with a legitimate "need to know." Dissemination of information about the complaint and/or the investigation too broadly could adversely affect the employer's qualified privilege protecting its communications, and it could jeopardize the integrity of the investigation itself. For example, if potential witnesses acquire advance knowledge of the complaint, some may collaborate to "get their stories straight." Limiting disclosure of the fact and substance of the complaint and details concerning the investigation to persons who have a legitimate "need to know" is the prudent course.

### 3. Appointment of the Investigator

In selecting an investigator, the employer should evaluate the nature of the issues to be investigated and the investigator's training, prior experience and demeanor. The investigator should have training in the law governing the issues to be investigated and should also have training with respect to conducting workplace investigations. The investigator should also possess good interviewing skills. Prior experience with the employer's business operations and prior experience investigating similar issues would also be helpful. It is also important to select an investigator who will be capable of testifying clearly and effectively where subsequent court proceedings are likely.

If a member of management or a representative of the employer's human resources department or law department is being considered, the individual should be outside of the chain of command of the organizational unit in which the complaint arose. Also, the individual should not have any personal or professional ties to the complainant, the accused, or any witness, and should not have any personal or business stake in the outcome of the investigation. Also, representatives of the human resources department who may have recently been involved in disciplining the complainant or the accused should not be considered as investigators in view of the potential argument that the individual was not unbiased. The non-attorney investigator may also find it helpful to consult with outside counsel regarding the investigation plan in order to obtain advice regarding the most effective way to conduct the investigation.

When the employer is contemplating appointing outside counsel to conduct an investigation, it should consider the pros and cons of using outside counsel. On the one hand, attorneys will be well-versed in the law, they will typically have excellent investigative skills and they will possess expertise in conducting investigative interviews. They may also lend an aura of enhanced credibility to the investigative process. On the other hand, retention of outside counsel to conduct a workplace investigation will likely involve significant cost to the employer. Such cost may be prohibitive, especially to small employers. Also, the outside counsel conducting the investigation will be ethically barred from representing the employer in subsequent litigation arising out of the matter investigated as the attorney would likely be a fact witness in the litigation. Finally, one of the benefits of retaining outside counsel, the protection against disclosure of communications afforded by the attorney-client privilege, will, as a practical matter, be deemed waived as to the investigation in the event that the investigation is relied upon by the employer as an affirmative defense in subsequent litigation.

### 4. Temporary Remedial Measures

Upon receipt of a harassment complaint, the employer should determine whether it is necessary to implement immediate measures to ensure that further unlawful conduct does not occur and that evidence is preserved. The determination as to whether and what form of temporary remedial measures should be implemented will depend upon the facts of each situation.

As a general rule, an employer should immediately remind the accused and the complainant of the employer's policy prohibiting retaliation against employees who present complaints as well as employees who participate in investigations as witnesses. The employer should also inform the complainant of avenues to report retaliation or further instances of harassment. Where the complaining party complains about harassment arising out of the circulation and/or display of offensive materials, the employer should take steps to remove such materials from the workplace and preserve them (or in the case of graffiti, preserve photographs of the offensive material) for use in the investigation and in subsequent litigation.

Another temporary remedial measure that may be appropriate is suspending the accused. This may be necessary and appropriate where there are allegations of egregious harassment or threats of violence. The employer may also consider transferring the accused to a different organizational unit or to a different shift to minimize contact between the accused and the complainant pending the outcome of the investigation.

In no event, however, should temporary remedial measures be implemented where they would in any way adversely affect the complainant. Finally, in those rare cases where the conduct complained about may violate criminal laws, the employer may need to notify law enforcement officials.

## D. Commencement of the Investigation

At the outset of an investigation, the investigator should promptly review all documents that are immediately available. This would include, at the very least, the complaint (if written) and any supporting materials submitted with the complaint. The investigator also should acquire and review:

1. Personnel files of the accused and/or the complainant.
2. Files relating to prior investigations of similar complaints made against the accused or made by the complainant.
3. Managers' files and notes concerning the complainant and the accused.
4. Relevant corporate policies.
5. Any relevant email communications.

The investigator then should identify the employees to be interviewed. In addition to the complainant and the accused, the investigator should interview anyone with first-hand knowledge of the events that gave rise to the complaint. Other witnesses may include the authors and recipients of relevant documents, the complainant's supervisor (including to determine whether complainant has ever previously complained of harassment by the accused), co-workers of the complainant and the accused and, in appropriate cases, others who have been subjected to the same harassing conduct that the complainant has complained about.

The investigator also should consider the order in which interviews should be conducted. Ordinarily, the complainant should be interviewed first. The order of the interviews of the accused and other witnesses will depend upon the circumstances in each case. Usually, the accused will be interviewed immediately after the complainant. However, in some cases it may be necessary to interview certain witnesses before interviewing the accused in order to be able to effectively interview the accused and test his/her credibility. Interviews should be conducted as soon as practicable so that witnesses do not have the opportunity to collaborate to "get their stories straight" or influence or intimidate other witnesses.

## E. Employee Interviews

### 1. Preparation

The investigator should prepare thoroughly for each interview. The investigator should have a thorough understanding of the relevant events and the issues to be addressed as well as the laws or policies that are implicated in the matter. The investigator also should have a detailed outline of the events to be addressed or a detailed list of questions to be asked of the interviewee. All relevant documents should be reviewed by the investigator prior to conducting interviews.

### 2. Who Should Be Present During Witness Interviews?

Generally, attendance at interviews should be limited to the investigator, the witness and, where appropriate, an individual to assist the investigator by taking notes of the matters discussed during the interview. The presence of other persons representing the employer can have a chilling or intimidating effect on witnesses.

Usually the interviewee is not entitled to have counsel present. Nor is the interviewee entitled to have non-employees, such as family members or friends, present. However, where the interviewee is a member of a union and the interview may lead to disciplinary action against the employee, then the employee is entitled to have a union representative or a co-worker present if he/she requests that such representative be present.

### 3. Where Should Interviews Be Conducted?

Generally, investigative interviews should be conducted away from the witnesses' regular work area. In some instances, it may be appropriate to conduct some interviews away from the employer's premises. Interviews should be conducted in a private, quiet setting, free of distractions.

### 4. Disclosures to Persons Being Interviewed

Prior to the commencement of each interview, certain matters should be disclosed to the witness, either orally or in writing. A record of the disclosures should be preserved. Generally, the investigator should disclose to the witness the following information:

a. The reason for the interview.
b. The role of the investigator. If the investigator is an attorney, the investigator should make it clear that he/she does not represent the witness.
c. The role of the witness.
d. The employer's expectation that the witness will be truthful and not withhold material information.
e. The need for confidentiality. The witness should also be informed that the information disclosed by the witness will be kept confidential to the extent possible, but that the employer cannot promise absolute confidentiality. It should be made clear that all or some of the information disclosed during the interview may be disclosed to members of management or staff members who have a need to know and also may be disclosed to third parties if litigation ensues.
f. The witness should be informed that he/she is protected against retaliation for participating in the investigation. The accused should be reminded that retaliation against the complainant or any witness participating in the investigation is absolutely prohibited.

### 5. Interview Techniques

Generally, when interviewing fact witnesses, the investigator should ask open-ended questions (e.g., Are they familiar with the employer's policy prohibiting sexual harassment? Have they ever observed any violations of the policy?). Then, the investigator should follow-up with more specific questions relating to the events at issue. As previously noted, the investigator should refrain from asking questions that suggest disapproval of the complainant or the accused or that suggest that the investigator is seeking a particular answer to a question.

Events should be covered in chronological order, if possible. When covering multiple events, the investigator should not leave an event and move to a new event without asking the witness, "Is that all?"

Other matters that should be explored, where appropriate, include the individual's current and past relationship to the complainant and the accused, whether there is a basis for any bias on the part of the witness, and whether the witness has any personal or professional stake in the outcome of the investigation (e.g., the supervisor of the accused may not be totally candid about the accused's conduct out of concern that it may reflect adversely on him in the eyes of his supervisors).

At the end of every interview the investigator should ask every witness, "Is there anything else you think we should know about?" or a similar "catch all" question. The investigator should also ask every interviewee "Are there any documents or photographs or other items of physical evidence relating to the events at issue that you are aware of?"

*With respect to interviewing the complainant:*

a. If the complaint has been presented in writing and the writing contains a detailed statement of the basis for the complaint, then during the interview process the complainant should be asked to sign and date the written complaint and indicate in writing that the document represents a complete and accurate statement of all his/her claims.

b. If the complaint is presented orally, or the written complaint is obviously incomplete, then during the interview of the complainant the investigator should have the complainant describe in detail each and every offensive act or statement.

c. The complainant should be assured that the complaint will be taken seriously and investigated thoroughly.

d. The investigator should focus on facts and remain objective.

e. The investigator should observe the complainant's demeanor and assess his/her credibility.

f. The investigator should determine when and where the alleged incident occurred, then obtain all specific details relating to the incident.

g. The complainant should be asked to identify all witnesses whom he/she is aware of and what the complainant believes each witness may know, as well as anyone the complainant has spoken to about the incident.

h. The investigator should inquire as to whether the complainant is aware of any other employees (or former employees) who have experienced the same discrimination/harassment that complainant has complained about.

i. The complainant should be asked to turn over or describe all documentary evidence relating to the complaint (e.g., notes, diaries, audio tapes, photographs, letters, greeting cards, gifts, etc.).

j. The complainant should be assured of protection against retaliation and directed to report any such conduct immediately.

k. The complainant should be assured that the complaint will be kept as confidential as possible, consistent with the company's obligation to conduct a thorough investigation.

l. The investigator should not conclude the interview before asking "Is there anything else?" The investigator should also inform the complainant that if he/she later recalls any other relevant information, he/she should provide that information to the investigator.

*With respect to interviewing the accused*:

a. It is very important that the accused clearly understand the reason for interview and the fact that the investigation is required by law and company policy. It is also very important that the accused be apprised of all of the claims made against him/her.

b. The investigator should assure the accused at the outset of the interview that the investigator's role is that of an impartial fact finder and that no final determination will be made as to the merits of the complaint until the investigation is concluded.

c. Once again, the investigator should focus on facts and remain objective.

d. The investigator should observe the accused's demeanor and assess his/her credibility.

e. The investigator should cover each and every allegation made by the complainant and record all information provided by the accused.

f. The investigator should obtain the identity of any witness who may support the accused's version of the events and obtain copies of any relevant documents or physical evidence.

g. The investigator should ask whether the accused and complainant have ever socialized together, and if there was any prior consensual relationship between the complainant and the accused.

h. The investigator should determine the accused's perception of his or her working relationship with the complainant, and determine if the accused knows of any reason why complainant would make the allegation.

i. At the end of the interview, the accused should be warned not to take any retaliatory action against the complainant or any witness and advised of the penalties for such conduct.

j. The investigator should ask the accused "Is there anything else?" The investigator should also inform the accused that if he/she later recalls any other relevant information, he/she should provide that information to the investigator.

**6. Dealing with Uncooperative Employees**

*Dealing with a reluctant complainant* - In the event that a complainant does not want an investigation to be conducted, the investigator should attempt to determine the reason for the complainant's reluctance. At the same time, the investigator should assure the complainant of the employer's policy against retaliation and remind the complainant of the employer's legal obligation to investigate the complaint. If the complainant continues to refuse, the investigator should inform him/her the employer will proceed with investigation and will reach its conclusions without the benefit of the complainant's input. The complainant's refusal to cooperate should be documented in a writing signed by the complainant. It is generally not prudent to take

disciplinary action against a complainant for refusing to cooperate in an investigation of his/her complaint, as such disciplinary action could give rise to a retaliation complaint.

If a complainant is represented by counsel and refuses to be interviewed without counsel present, the investigator should advise the complainant that attorneys are not permitted to participate in proceedings relating to internal employment matters. If the complainant still refuses to be interviewed without counsel present, it should be made clear that the interview is necessary to permit the Company to conduct a thorough investigation, that the investigation will proceed and that the outcome will be based on the evidence gathered from others and inferences which may be drawn from that evidence.

Of course, there may well be situations where the complaint's interview is so important that the employer should waive its policy against counsel being present. In such case, the complainant and the attorney should be informed at the outset of the interview that the attorney cannot participate in the interview and the interview will be terminated if the attorney becomes disruptive. A record of any such disruptive behavior should be maintained as part of the investigation file.

*Dealing with an uncooperative accused or witness* - If the accused or a witness refuses to cooperate with the investigation, the investigator should inquire as to the reasons for the employee's reluctance and consider whether there is some way to address those reasons. It should be explained that the employer has a legal duty to conduct the investigation, that it is attempting to conduct a fair investigation by gathering all relevant information, and that if the employee refuses to cooperate, the investigation will proceed and that the outcome will be based on the evidence gathered and inferences which may be drawn from that evidence without the benefit of the employee's input. The accused should also be reminded that adverse inferences could be drawn from his/her refusal to cooperate. If the employee still refuses to cooperate, the refusal to cooperate should be documented in a statement signed by the employee.

### 7. Documenting The Interviews

All interviews should be carefully documented by the investigator and/or the investigator's assistant. A court reporter may be used to record all significant in-person or telephonic interviews. A transcript created by a certified stenographer eliminates any questions later on as to who said what to whom and virtually eliminates protracted disputes as to what was said during an interview that often arise when interviews are recorded by hand by the interviewer or an assistant and a summary of the notes are sent to interviewees for review.

If stenographic transcripts of interviews are not utilized, then detailed notes should be taken during the interviews and later summarized in memorandum form. The handwritten notes should be preserved even after the summary is prepared. The interview summary should be presented to the interviewee for review and he/she should be invited to make any changes necessary so that the document represents a complete and accurate summary of all of all of the relevant information provided during his/her interview. The interviewee should then sign the summary stating that he/she has reviewed the document, that he/she had an opportunity to make changes, and that it is a complete and accurate statement of the matters discussed at the interview. This document is important because it "locks the interviewee in" to a version of the events that can be very helpful if the interviewee later attempts to change his/her story.

It is not recommended that a tape recorder be used to record interviews. While reasonable persons may differ, the use of a tape recorder can have a more intimidating or chilling effect on persons being interviewed than the use of a court reporter. Moreover, a tape recorder can easily malfunction and/or produce a poor quality audio recording.

### 8. Evaluating the Evidence

After the initial interviews are completed, the investigator should evaluate the evidence and establish a plan for completing the investigation. In this regard, the investigator should:

a. Review the information provided by the complainant and the accused to identify points of agreement and disagreement.
b. Review all witness interview summaries and all documentary evidence obtained since the commencement of the investigation.
c. Determine whether any other individuals should be interviewed or whether any witnesses should be re-interviewed.
d. Determine whether any other documents must be obtained.
e. Determine whether it is necessary to implement any interim remedial action.

At that point, the investigator should take such steps as are necessary to complete the fact-gathering portion of the investigatory process.

## F. Documenting the Results of the Investigation

The investigator should prepare an investigation report. In the report, the investigator should recite the complaint, the chronology of the investigation, a summary of the factual evidence, and a discussion of credibility issues, where necessary. In summarizing the results of the investigation, the investigator should avoid stating legal conclusions. Rather, the investigator should present the results of the investigation in the context of whether the conduct engaged in by the accused was inappropriate or violated company policies or standards of conduct. The investigator should avoid using terms like "unlawful." The conclusions should be presented utilizing terms such as "inappropriate" or "unprofessional." Finally, the report should not contain any references to privileged communications or recommendations as to disciplinary action. Determinations as to disciplinary actions are the responsibility of management.

## G. Assessing the Results of the Investigation and Determining Appropriate Discipline

An employer must not only exercise reasonable care to prevent harassment and to promptly investigate complaints, it must also exercise reasonable care in responding to harassment in order to avoid liability.[29] Failure to take prompt and adequate remedial action can, and often does, preclude an employer from asserting the *Faragher/Ellerth* affirmative defense.[30]

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[29] *Turner v. Saloon, Ltd.*, 715 F. Supp.2d 830, 836 (N.D. Ill. 2010).

[30] *See, e.g., Nicholas v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 876 (9th Cir. 2001) (employer failed to take prompt remedial action when it made no effort to investigate plaintiff's complaint, it did not demand the unwelcome harassment cease, and it did not threaten more serious discipline should the harassment continue, and employer "placed all of its remedial burden on the victimized employee by conditioning its response on [plaintiff's] reports of further harassment;" therefore, it was unable to assert an affirmative defense); *E.E.O.C. v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 177-78 (4th Cir. 2009).

Thus, when the investigation is completed, appropriate members of management, representatives from human resources and, where appropriate, legal counsel, should review the investigator's report. The reviewing group should determine whether to adopt the investigator's findings or whether further investigation should be conducted. It is critically important that during this review process each member of the review group review the report in its entirety. This careful review is important to allow the review group to defend the integrity of the review process and the legitimacy of the group's determination as to disciplinary and remedial action.

Where the findings are adopted and the complaint is found to have merit, the reviewing group must decide upon appropriate disciplinary/remedial action. In deciding upon appropriate disciplinary action in cases where a discrimination/harassment complaint is found to have merit, the following factors should be considered: (1) the severity of the conduct, (2) the frequency of the conduct, (3) the personal, professional and economic impact of the conduct upon the complainant, (4) whether other employees have complained about the accused, (5) the level of discipline imposed by the employer for similar/equivalent transgressions in the past, and (6) the level of discipline that will be necessary to prevent recurrence of the conduct complained about. Ultimately, remedial action taken by an employer in response to a harassment complaint should be prompt and effective so as to guard against further harassing conduct by the alleged harasser, and the remedial actions should be proportional to the severity of the conduct. While a write-up may be sufficient if only a few inappropriate comments are alleged, a suspension or termination is more likely called for if, for example, repeated inappropriate touching is involved.

### H. Communicating the Results of the Investigation

The results of the investigation must be communicated to both the complainant and the accused. When meeting with the complainant, the employer's representative should inform the complainant of the conclusion reached (i.e., the complaint was found to have merit, the complainant was found to be without merit, or no conclusion could be reached as to the merits of the complaint). Where the complaint was found to have merit, the complainant should be informed generally of the fact that disciplinary action was taken against the accused and of any remedial/preventative measures being implemented by the employer. The complainant should also be informed that the accused has been warned about retaliation and that the complainant should report any retaliatory conduct immediately. Where the complaint could not be substantiated or it was found that the complaint was without merit, the complainant should be advised of the employer's commitment to maintaining a workplace free of discrimination/harassment and to encouraging reports of such conduct.

When meeting with the accused, the employer's representative should emphasize the prohibition against retaliation. Where the complaint was found to have merit, the accused should be informed of disciplinary action that is being imposed. Where the accused is not terminated, documentation should be given to the accused and placed in his/her file reflecting the disciplinary action taken and a warning notice concerning any recurrence. The employer should also take steps to ensure that the disciplinary action against the accused is actually carried out.

Finally, in addition to taking disciplinary action against the accused, the employer should take appropriate remedial action to minimize the risk of recurrence. Such actions might include training programs for employees, re-distribution of the employer's EEO/sexual harassment policies, monitoring of the workplace and periodic contact with the complainant to insure that no retaliation or further harassment has occurred. The follow-up contact with the complainant should be documented.

## I. Do Not Retaliate Against the Complaining Party

Retaliating against an employee who has complained of harassment can subject an employer to increased liability for the separate legal wrong of retaliation.[31] It is important to remember that a plaintiff may recover for retaliation even if he or she is unable to prove the underlying claim of harassment. Additionally, an employer who retaliates against an employee runs the risk that the jury will sympathize with the plaintiff because, in many cases, jurors have experienced some form of retaliation themselves. Accordingly, employers should take extra caution to avoid any retaliation, such as reminding everyone involved, including witnesses, the alleged harasser, and the complaining party, that retaliation of any kind will not be tolerated.[32]

In sum, employers can greatly reduce their exposure to potential liability and costly litigation by taking a few preventative measures such as having a workable anti-harassment policy that is easy for employees to understand and provides multiple avenues for complaint, providing ongoing harassment training to all employees, promptly responding to all complaints which includes a thorough investigation, and taking quick and effective remedial measures once harassing conduct is discovered.

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[31] *See, e.g., Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1106 (9th Cir. 2000) (alleging separate claims for sexual harassment and retaliation).

[32] Because employees and management may be mistaken about what might be considered retaliatory conduct, specific examples may be necessary. *See, e.g., Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1003-04 (8th Cir. 2000) (retaliation found when plaintiff rejected her supervisor's advances, and responded by criticizing her work performance, screaming at her over work issues, conditioning her work evaluation on her "willingness to submit to his advances," and refusing her vacation request).

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 18-1206**

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EVANGELINE J. PARKER,

Plaintiff - Appellant,

v.

REEMA CONSULTING SERVICES, INC.,

Defendant - Appellee.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL WOMEN'S LAW CENTER; A BETTER BALANCE; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN SEXUAL HEALTH ASSOCIATION; BLACK WOMEN'S ROUNDTABLE; NATIONAL COALITION ON BLACK CIVIC PARTICIPATION; CALIFORNIA WOMEN LAWYERS; CHAMPION WOMEN; DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE; END RAPE ON CAMPUS; EQUAL RIGHTS ADVOCATES; FAMILY VALUES @ WORK; FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; GIRLS FOR GENDER EQUITY; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HARVARD LAW SCHOOL GENDER VIOLENCE PROGRAM; LAWYERS CLUB OF SAN DIEGO; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; LEGAL AID AT WORK; LEGAL MOMENTUM, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND; LEGAL VOICE; MAINE WOMEN'S LOBBY; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ALLIANCE TO END SEXUAL VIOLENCE; THE NATIONAL CRITTENTON FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S

POLITICAL CAUCUS; OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE; PEOPLE FOR AMERICAN WAY FOUNDATION; SERVICE EMPLOYEES INTERNATIONAL UNION; SISTERREACH; SOUTHWEST WOMEN'S LAW CENTER; STOP SEXUAL ASSAULT IN SCHOOLS; THE NATIONAL URBAN LEAGUE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK; WOMEN'S LAW PROJECT,

Amici Supporting Appellant.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, Senior District Judge. (8:17-cv-01648-RWT)

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Argued: October 31, 2018 Decided: February 8, 2019

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Before NIEMEYER, AGEE, and DIAZ, Circuit Judges.

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Affirmed in part, reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Agee joined in full and Judge Diaz joined except as to Part IV. Judge Diaz wrote a separate opinion concurring in part and dissenting in part.

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**ARGUED:** Dennis A. Corkery, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, D.C., for Appellant. Donald James Walsh, WRIGHT, CONSTABLE & SKEEN, LLP, Baltimore, Maryland, for Appellee. Julie Loraine Gantz, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus United States Equal Employment Opportunity Commission. **ON BRIEF:** Andrew R. Kopsidas, Daniel Tishman, Min Suk Huh, FISH & RICHARDSON, P.C., Washington, D.C.; Tiffany Yang, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, D.C., for Appellant. Gregory P. Currey, WRIGHT, CONSTABLE & SKEEN, LLP, Baltimore, Maryland, for Appellee. James L. Lee, Deputy General Counsel, Jennifer S. Goldstein, Associate General Counsel, Anne Noel Occhialino, Acting Assistant General Counsel, Office of General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus United States Equal Opportunity Commission. Kathleen R. Hartnett, Ann O'Leary, Palo Alto, California, Melissa Shube, Brent Nakamura, BOIES, SCHILLER, FLEXNER, LLP, Washington, D.C.; Fatima Goss Graves, Emily Martin,

Sunu Chandy, Sarah David Heydemann, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Amici National Women's Law Center, et al.

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NIEMEYER, Circuit Judge:

In this appeal, the central question presented is whether a false rumor that a female employee slept with her male boss to obtain promotion can ever give rise to her employer's liability under Title VII for discrimination "because of sex." We conclude that the allegations of the employee's complaint in this case, where the employer is charged with participating in the circulation of the rumor and acting on it by sanctioning the employee, do implicate such liability. Therefore, we reverse the district court's order dismissing Count I of the complaint, which makes a claim on that basis, as well as Count II, which alleges retaliation for complaining about such a workplace condition. We affirm, however, the court's dismissal of Count III because the employee failed to exhaust that claim before the Equal Employment Opportunity Commission.

I

The facts before us are those alleged in the complaint. And, in the present procedural posture where the district court granted the defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept those facts as true. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). They show the following.

From December 2014 until May 2016, Evangeline Parker worked for Reema Consulting Services, Inc., ("RCSI") at its warehouse facility in Sterling, Virginia. While she began as a low-level clerk, she was promoted six times, ultimately rising to Assistant Operations Manager of the Sterling facility in March 2016.

About two weeks after Parker assumed that position, she learned that "certain male employees were circulating within RCSI" "an unfounded, sexually-explicit rumor about her" that "falsely and maliciously portrayed her as having [had] a sexual relationship" with a higher-ranking manager, Demarcus Pickett, in order to obtain her management position. The rumor originated with Donte Jennings, another RCSI employee, who began working at RCSI at the same time as Parker and in the same position. Because of her promotions, however, Parker soon became Jennings' superior, making him jealous of and ultimately hostile to her achievement.

The highest-ranking manager at the warehouse facility, Larry Moppins, participated in spreading the rumor. In a conversation with Pickett, Moppins asked, "hey, you sure your wife ain't divorcing you because you're f--king [Parker]?" As the rumor spread, Parker "was treated with open resentment and disrespect" from many coworkers, including employees she was responsible for supervising. As she alleged, her "work environment became increasingly hostile."

In late April 2016, Moppins called a mandatory all-staff meeting. When Parker and Pickett arrived a few minutes late, Moppins let Pickett enter the room but "slammed the door in Ms. Parker's face and locked her out." This humiliated Parker in front of all her coworkers. Parker learned the next day that the false rumor was discussed at the meeting.

The following day, Parker arranged a meeting with Moppins to discuss the rumor, and at that meeting Moppins blamed Parker for "bringing the situation to the workplace." He stated that he had "great things" planned for Parker at RCSI but that "he could no

longer recommend her for promotions or higher-level tasks because of the rumor." He added that he "would not allow her to advance any further within the company."

Several days later, Parker and Moppins met again to discuss the rumor. Moppins again blamed Parker and said that he should have terminated her when she began "huffing and puffing about this BS rumor." During the meeting, Moppins "lost his temper and began screaming" at Parker.

Later that same day, Parker filed a sexual harassment complaint against Moppins and Jennings with RCSI's Human Resources Manager.

Several weeks later, in mid-May, Jennings submitted a complaint to the Human Resources Manager, alleging that Parker "was creating a hostile work environment against him through inappropriate conduct," and Parker was then instructed, based on Jennings' complaint, to have no contact with Jennings. While she asserts that Jennings' complaint was false, she followed the instruction. Supervisors, however, permitted Jennings to spend time in Parker's work area talking to and distracting employees she managed. On these occasions, Jennings stared at Parker at length and smirked and laughed at her. Parker raised this situation with her supervisor and the Human Resources Manager, but neither addressed it, allegedly exacerbating Parker's experience of a hostile work environment.

On May 18, 2016, Parker was called to a meeting with Moppins, the Human Resources Manager, and RCSI's in-house counsel, and at that meeting, Moppins simultaneously issued Parker two written warnings and then fired her. One warning was based on Jennings' complaint against Parker, and the other asserted that Parker had poor

management ability and was insubordinate to Moppins. In her complaint, Parker alleges that both warnings were unfounded. She also alleges that RCSI failed to follow its "three strikes" rule under which employees are subject to termination only "after receiving three written warnings." She had received no prior warnings. She alleges further that the rule "was disparately enforced such that male employees were generally not fired even after three or more warnings, while some female employees were terminated without three warnings or with all three warnings being issued at once."

Based on these facts, Parker alleges, in Count I, a hostile work environment claim for discrimination because of sex, in violation of 42 U.S.C. § 2000e-2; in Count II, a retaliatory termination claim under § 2000e-3; and in Count III, a discriminatory termination claim alleging that RCSI terminated her employment contrary to its three-warnings rule, in violation of § 2000e-2.

By order dated January 19, 2018, the district court granted RCSI's motion to dismiss Parker's complaint for failure to state a claim. The court explained its reasoning from the bench, stating with respect to Count I:

> [I]t would be truly offensive to me or anybody else to have someone spread a rumor that I or any other person received a promotion because of sexual favors or having sexual relations with the person who made the decision. That goes right to the core of somebody's merit as a human being to suggest that they were promoted and the promotion was not based upon merit, but rather was based upon the giving of sexual favors.
>
> * * *
>
> The problem for Ms. Parker is that her complaint as to the establishment and circulation of this rumor is not based upon her gender, but rather based upon her alleged conduct, which was defamed by, you know, statements of this nature. Clearly, this woman is entitled to the dignity of her merit-based

> promotion and not to have it sullied by somebody suggesting that it was because she had sexual relations with a supervisor who promoted her. But that is not a harassment based upon gender. It's based upon false allegations of conduct by her. And this same type of a rumor could be made in a variety of other context[s] involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor and the spreading of that kind of a rumor is based upon conduct, not gender.

The court also concluded that the alleged harassment was not severe or pervasive. In dismissing Count II, the retaliatory termination claim, the court stated that "because the complaint fail[ed] to establish that the matters alleged in Count [I] were discriminatory, [Parker] has failed to establish, therefore, that her belief was objectively reasonable and, therefore, she cannot establish a prima facie case of retaliation." Finally, in dismissing Count III, the discriminatory termination claim, the court gave as its reason that Parker had not exhausted the claim with the EEOC.

From the district court's order of dismissal, Parker filed this appeal.

II

The core reason given by the district court to dismiss Count I was that the harassment Parker suffered was "not . . . harassment based upon *gender*. It [was] based upon false allegations of *conduct* by her." (Emphasis added). In addition, the court concluded that the harassment was not sufficiently severe or pervasive to have altered the conditions of Parker's employment because "the temporal element here [was] very short in terms of how long this rumor was in circulation. Just a matter of a few weeks. And a few slights that she [has] referenced here do not rise up to the level that would suffice for

it being severe and pervasive." For these reasons, the court concluded that Count I failed to state a claim under Title VII for a hostile work environment based on sex.

Title VII provides that it is an unlawful employment practice "to discharge . . . or otherwise to discriminate" against an employee "with respect to . . . conditions . . . of employment, because of such individual's . . . sex . . .; or to limit, segregate, or classify [such] employee[] . . . in any way which would deprive or tend to deprive [the employee] of employment opportunities or otherwise adversely affect [the employee's] status as an employee, because of such [employee's] . . . sex." 42 U.S.C. § 2000e-2(a). An employee claiming a severe or pervasive hostile work environment because of her sex can obtain relief under Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To state a claim under Title VII for a hostile work environment because of sex, the plaintiff must allege workplace harassment that (1) was "unwelcome"; (2) was based on the employee's sex; (3) was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere"; and (4) was, on some basis, imputable to the employer. *Bass v. E.I. du Pont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313–14 (4th Cir. 2008).

In this appeal, only the requirements that the harassment be based on sex and that it be sufficiently severe or pervasive are at issue. We address each in order.

A

RCSI contends first, as the district court concluded, that its actions toward Parker were taken not because she was a female but rather because of her rumored conduct in

sleeping with her boss to obtain promotion. It argues that this rumor was not "gender specific" but rather was "solely about [Parker's] conduct and insufficient to support claims of an illegal hostile work environment for women." Because "[t]here is no dispute that Parker believes that the rumor was started 'by a co-worker who was jealous of her success at the company' and not because she was a woman," it thus contends that because "there is no doubt that his rumor was solely about her conduct" and could have been levelled against a man, it is insufficient to support a claim of discrimination based on sex.

We conclude, however, that RCSI's argument fails to take into account all of the allegations of the complaint, particularly those alleging the sex-based nature of the rumor and its effects, as well as the inferences reasonably taken from those allegations, which must be taken in Parker's favor, as required at this stage of the proceedings. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009).

As alleged, the rumor was that Parker, a female subordinate, had sex with her male superior to obtain promotion, implying that Parker used her womanhood, rather than her merit, to obtain from a man, so seduced, a promotion. She plausibly invokes a deeply rooted perception — one that unfortunately still persists — that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labelled as "sluts" or worse, prostitutes selling their bodies for gain. *See McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996) (concluding that rumors of a woman's "sleeping her way to the top" "could constitute a form of sexual harassment"); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994) (concluding that a rumor that a woman gained influence over the head of the office because she was

engaged in a sexual relationship with him was sufficient to allow a reasonable jury to conclude the a woman suffered the harassment alleged because she was a woman); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 258, 272–73 (1989) (plurality and concurring opinions) (noting that gender stereotypes can give rise to sex discrimination in violation of Title VII).

The complaint not only invokes by inference this sex stereotype, it also explicitly alleges that males in the RCSI workplace started and circulated the false rumor about Parker; that, despite Parker and Pickett's shared tardiness, Parker as a female, not Pickett as a male, was excluded from the all-staff meeting discussing the rumor; that Parker was instructed to have no contact with Jennings, her male antagonist, while Jennings was not removed from Parker's workplace, allowing him to jeer and mock her; that only Parker, who complained about the rumor, but not Jennings, who also complained of harassment, was sanctioned; and that Parker as the female member of the rumored sexual relationship was sanctioned, but Pickett as the male member was not.

In short, because "traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society," and "these stereotypes may cause superiors and coworkers to treat women in the workplace differently from men," it is plausibly alleged that Parker suffered harassment because she was a woman. *Spain*, 26 F.3d at 448; *see also Price Waterhouse*, 490 U.S. at 250–51, 258, 272–73 (plurality and concurring opinions); *McDonnell*, 84 F.3d at 259–60; *cf. Passananti v. Cook Cty.*, 689 F.3d 655, 665–66 (7th Cir. 2012) (noting that use of the word "bitch" to demean a female can

support a sexual discrimination claim even though the word may sometimes be directed at men); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) (same); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 47 (1st Cir. 2009) (finding actionable the denial of a promotion because the employee was a working *mother* with young children); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119–21 (2d Cir. 2004) (same).

Thus, the dichotomy that RCSI, as well as the district court, purports to create between harassment "based on gender" and harassment based on "conduct" is not meaningful in this case because the *conduct* is also alleged to be gender-based. We conclude that, in overlooking this, the district court erred.

B

RCSI also contends that the harassment Parker alleged in the complaint was not sufficiently severe or pervasive to create a hostile work environment. And the district court adopted this view, noting that the rumor circulated for only "a few weeks" and involved only "a few slights." Parker argues, on the other hand, that her complaint alleges harassment that was severe or pervasive, as it was "frequent," "maliciously designed," "humiliating," "permeated throughout her workplace," and caused "open resentment and disrespect" from her coworkers. Indeed, she maintains that her harassment even had a physical component.

In determining whether the harassment alleged was sufficiently severe or pervasive, we must "look[] at all the circumstances," including the "frequency of the

discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [the] employee's work performance." *Harris*, 510 U.S. at 23.

We conclude that the complaint's allegations and the inferences that may reasonably be drawn from them support Parker's claim that the harassment she experienced was severe or pervasive such that it altered the conditions of her employment and created an abusive atmosphere.

The complaint alleges that, over the period from Parker's promotion to Assistant Operations Manager in March 2016 until she was fired on May 18, 2016, the rumor and its adverse effects harmed Parker. The frequency alleged in the complaint was greater than what the district court characterized as "a few slights." Indeed, the harassment was continuous, preoccupying not only Parker, but also management and the employees at the Sterling facility for the entire time of Parker's employment after her final promotion.

The harassment began with the fabrication of the rumor by a jealous male workplace competitor and was then circulated by male employees. Management too contributed to the continuing circulation of the rumor. The highest-ranking manager asked another manager, who was rumored to be having the relationship with Parker, whether his wife was divorcing him because he was "f--king" Parker. The same manager called an all-staff meeting, at which the rumor was discussed, and excluded Parker. In another meeting, the manager blamed Parker for bringing the rumor into the workplace. And in yet another meeting, the manager harangued Parker about the rumor, stating he should have fired her when she began "huffing and puffing" about it. During this period,

Parker was also told that because of the rumor, she could receive no further promotions in the company. She then faced a false harassment complaint launched by the male employee who started the rumor and was sanctioned based on that complaint — first, with the instruction to stay away from the rumormonger and second, with the termination of her employment. If we are to take the allegations from the complaint and the reasonable inferences therefrom as true, as we must, the harassment related to the rumor was all-consuming from the time the rumor was initiated until the time Parker was fired.

The harassment emanating from the rumor also had physically threatening aspects, even though harassment need not be physically threatening to be actionable. At an all-staff meeting at which the rumor was discussed, the warehouse manager slammed the door in Parker's face, and at another meeting, he screamed at Parker as he lost his temper while blaming Parker for the rumor. That this harassment came from Parker's supervisor made it all the more threatening. *See Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) ("[A] supervisor's power and authority invests his or her harassing conduct with a particularly threatening character").

In addition, the harassment related to the rumor was humiliating. As the district court rightly noted, it "goes right to the core of somebody's merit as a human being" to suggest they were promoted not on worth but for sexual favors. The rumor and its consequences thus entailed "open resentment and disrespect from her coworkers," including those she was responsible for supervising.

Finally, the harassment interfered with Parker's work. She was blamed for bringing the controversy to the workplace; she was excluded from an all-staff meeting;

she was humiliated in front of coworkers; she was adversely affected in her ability to carry out management responsibility over her subordinates; she was restrained in where she could work, being told to stay away from the rumormonger; and she was told she had no future at RCSI because of the rumor. In addition, she alleges that her employment was terminated because of the rumor and, as stated by management, because of the rumormonger's complaint. In short, RCSI's management's entire relationship with Parker, as well as Parker's employment status, was changed substantially for the worse.

Thus, based on the allegations of Parker's complaint and the reasonable inferences flowing therefrom, we conclude that Parker adequately alleges the severe or pervasive element of illegal harassment. *See Harris*, 510 U.S. at 22.

Accordingly, because Parker's complaint plausibly alleges a hostile work environment claim under Title VII for discrimination because of sex, we reverse the district court's ruling dismissing Count I.

III

The district court also dismissed Parker's retaliatory termination claim alleged in Count II, holding that "because the complaint fails to establish that the matters alleged in [Count I] were discriminatory, [Parker] has failed to establish . . . that her belief [that she was subject to gender discrimination] was objectively reasonable and, therefore, she cannot establish a prima facie case of retaliation." Because we conclude that the complaint does indeed allege a plausible claim of a hostile work environment based on sex, in violation of Title VII, we reverse the dismissal of Count II alleging a retaliatory

termination claim. *See Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 285 (4th Cir. 2015) (en banc) (holding that because alleged harassment met elements of hostile work environment claim, complaining about such harassment was necessarily protected activity for purpose of retaliation claim).

IV

Finally, the district court dismissed the discriminatory termination claim alleged in Count III, concluding that Parker had not exhausted this claim with the EEOC. Specifically, the district court held that the allegations of RCSI's disparate enforcement of its three-strikes policy, as described in Parker's complaint, were absent in her EEOC charging document. We agree with the court.

Parker must exhaust her claims with the EEOC by including them in charges filed with the agency. In determining whether she exhausted her claims, we give her credit for charges stated in her administrative charging document, as well as "charges that would naturally have arisen from an investigation thereof." *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995). But when the claims in her court complaint are broader than "the allegation of a discrete act or acts in [the] administrative charge," they are procedurally barred. *Chacko v. Patuxent Inst.*, 429 F.3d 505, 508–10 (4th Cir. 2005).

In this case, Parker's EEOC charge made no reference to the need to receive warnings or a violation of RCSI's three-strikes policy. She did not refer to the policy or the allegation that RCSI treated men and women differently in applying the policy. She merely asserted sex-based termination based on the facts relating to the rumor and the

conduct that followed from it. Accordingly, RCSI was not "afforded ample notice of the allegations against it" with respect to Count III. *Sydnor v. Fairfax County*, 681 F.3d 591, 595 (4th Cir. 2012). We thus affirm the dismissal of the discriminatory termination claim alleged in Count III, as it alleges a broader pattern of misconduct than is stated in the administrative charging document.

* * *

In sum, we reverse the district court's order dismissing Counts I and II and affirm its order dismissing Count III.

AFFIRMED IN PART, REVERSED IN PART

DIAZ, Circuit Judge, concurring in part and dissenting in part:

After Evangeline Parker gained six promotions in just over a year, reaching a post few women at her company had ever occupied, a false rumor started that she owed her rise not to hard work and skill, but to a sexual affair. Adding injury to this insult, Parker's supervisor then disciplined her more harshly than the male coworker who spread the rumor and treated her less respectfully than the male manager she supposedly slept with. These facts in combination—the spreading of a rumor rooted in base stereotypes about female professionals, plus Parker's disparate treatment compared with members of the opposite sex—fairly permit the inference that Parker was treated with less dignity because she is a woman. I am therefore pleased to join the portions of Judge Niemeyer's opinion holding that Parker has alleged harassment based on her sex and reversing the dismissal of Parker's hostile work environment and retaliation claims.

I write separately, however, because I would also reverse the district court's dismissal of Parker's wrongful termination claim. Respectfully, I cannot agree that Parker's failure to mention a "three-strikes" policy in her EEOC paperwork bars her from asserting this claim. The majority's approach to exhaustion, in my view, demands more specificity and foresight from an EEOC claimant than our precedents or good sense require.

In enforcing the requirement that a Title VII plaintiff first file charges with the EEOC, our cases strike a careful balance between Title VII's administrative framework and judicial remedies. *See Stewart v. Iancu*, 912 F.3d 693, 707 (4th Cir. 2019). On the one hand, we want employers and the EEOC to know about alleged discrimination so that

they may, if possible, resolve matters before a slow and expensive lawsuit becomes necessary. *Sydnor v. Fairfax County*, 681 F.3d 591, 593 (4th Cir. 2012); *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005).* Allowing plaintiffs to conjure new claims and allegations in federal court would undermine this congressionally designed system.

Yet we've also been mindful that "laypersons, rather than lawyers," are expected to begin this remedial process. *Sydnor*, 681 F.3d at 594 (quoting *Fed. Express Corp. v. Holowecki*, 522 U.S. 389, 402–03 (2008)). Administrative charges typically aren't completed by lawyers. (Parker, for instance, filled hers out herself.) Courts thus "construe them liberally," *Chacko*, 429 F.3d at 509, lest exhaustion become a "tripwire for hapless plaintiffs" or erect "insurmountable barriers to litigation out of overly technical concerns." *Sydnor*, 681 F.3d at 594.

Accordingly, an EEOC charge outlines—but does not rigidly fix—the shape of litigation. As long as a plaintiff's claims in her judicial complaint "are reasonably related to her EEOC charge and can be expected to follow from a reasonable administrative investigation," she may advance them in court. *Id.* (quoting *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir. 2000)). This permissive approach reconciles competing concerns about employer notice, agency administration, and fairness to (often pro se) EEOC claimants. It also, not unimportantly, reflects the EEOC's considered

* *Sydnor* was an Americans with Disabilities Act case, but that statute incorporates Title VII's enforcement scheme. *See Sydnor*, 681 F.3d at 593.

policy that an adequate charge is one precise enough to "identify the parties" and "describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Our cases thus tolerate some discrepancy between the EEOC charge and the formal lawsuit. For instance, in *Smith*, we held that a Title VII complaint was reasonably related to the plaintiff's EEOC charge where the legal claim (retaliatory termination) didn't change though the form of alleged retaliation (threatened termination versus reassignment and withheld job opportunities) varied. 202 F.3d at 248; *accord Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004) ("[J]udicial claims are allowed if they amplify, clarify, or more clearly focus the allegations in the EEOC complaint." (quotation omitted)). Likewise, in *Chisholm v. U.S. Postal Service*, we said that an EEOC charge generally alleging discrimination in promotions notified the employer that "the entire promotional system was being challenged," not just aspects specifically noted in the charge. 665 F.2d 482, 491 (4th Cir. 1981). And in *Sydnor*, we again excused discrepancies between the EEOC document and lawsuit because both "involved the same place of work and the same actor" and "focused on the same type of discrimination." 681 F.3d at 594–96; *accord Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1118 (7th Cir. 2001) ("[T]he EEOC charge and the complaint must, at minimum, describe the *same conduct* and implicate the *same individuals*." (citation omitted)).

We should be similarly accommodating in this case. Although Parker's lawsuit differs from her EEOC charge in mentioning the three-strikes policy, our precedents suggest the two are similar enough to be reasonably related. As in *Sydnor*, Parker's charge and complaint involve the same place and actors (RCSI, Parker, Moppins, and the

rest) and the same type of discrimination (Moppins firing Parker allegedly because of her sex). And as in *Smith*, Parker's complaint alleges the same type of discrimination as her charge but adds greater detail: the charge alleges a firing based on the rumor and its aftermath, and the complaint says it also involved a disparately enforced three-strikes policy. Both involve the same parties, the same event, and the same type of discrimination.

In contrast, when we have previously dismissed Title VII claims, the plaintiff's EEOC papers "reference[d] different time frames, actors, and discriminatory conduct" than the judicial complaint. *Chacko*, 429 F.3d at 506. Parker, however, did not allege discrimination based on a different protected trait or assert a different category of unlawful conduct. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132–33 (4th Cir. 2002) (no exhaustion where charge mentioned only race discrimination, but lawsuit also alleged discrimination based on sex and skin tone); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009) (same when complaint alleged unlawful discrimination, but charge mentioned only retaliation). She didn't recast a single gripe about uneven discipline into a full-scale assault on her professional history with her employer. *Dennis v. County of Fairfax*, 55 F.3d 151, 153, 156 (4th Cir. 1995). Nor did her lawsuit allege a decades-long saga of discriminatory harassment when her EEOC charge described only three specific incidents. *Chacko*, 429 F.3d at 511.

Instead, Parker's EEOC charge described her termination by RCSI based on sex, and her formal complaint just provides a fuller factual story of how and why it came about. In my view, the charge gave RCSI ample notice that the circumstances of Parker's

termination were under scrutiny. Reasonable investigation of that firing would have uncovered the facts alleged in her complaint—including the fact that her firing allegedly involved two written warnings instead of three.

I would therefore let Parker seek judicial relief for her allegedly discriminatory termination. Accordingly, I join all but Part IV of Judge Niemeyer's opinion.