OCWR BROWN BAG LUNCH SERIES
HARASSMENT: WHO CAN BE HELD RESPONSIBLE UNDER THE CAA?
JULY 24, 2019

I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies thirteen federal labor and employment law statutes to all legislative branch employing offices and employees. Section 201 of the CAA, 2 U.S.C. § 1311, applies laws prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, and disability. The courts consider harassment based on membership in a protected class to be a type of discrimination under these laws.

1) *Hostile Work Environment*

In general, harassment is unlawful if it creates a hostile work environment based on an employee's membership in one or more protected classes. As the OCWR Board recently explained, to establish a hostile work environment, a claimant "must show that she was subjected 'to discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Williams v. Office of the Architect of the Capitol*, Nos. 14-AC-11 (CV, RP), 14-AC-48 (CV, RP), 15-AC-21 (CV, RP), 2017 WL 5635714, at *8 (OOC Board Nov. 21, 2017), *aff'd sub nom. Williams v. Office of Compliance*, 760 F. App'x 1022 (Fed. Cir. 2019) (quoting *Baloch v. Kempthorne,* 550 F.3d 1191, 1201 (D.C. Cir. 2008)).

Such claims are evaluated by looking at the totality of the circumstances, including frequency, severity, offensiveness, and interference with work performance. The conduct must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive. Title VII is not a general civility code, and to be actionable the conduct must consist of more than the ordinary tribulations of the workplace. *Id*. at *8 (citations omitted). Finally, "A necessary component of a hostile work environment claim is that the allegedly hostile behavior must be 'discriminatory' – that is, it must be tied to the complainant's membership in a protected class." *Id*. at *9.

2) *Sexual Harassment*

When an employee alleges hostile work environment sexual harassment (as opposed to *quid pro quo* sexual harassment)[1] the analysis is similar: a claimant must show that (1) the claimant belongs to a protected group; (2) the claimant was the subject of unwelcome sexual harassment; (3) the harassment complained of was based on sex; and (4) the harassment was sufficiently severe or pervasive to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-68 (1986); *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009).

"When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, [which] comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Harassment can create a legally actionable hostile work environment whether perpetrated by coworkers, supervisors, subordinates, or non-employees. When the harasser is a non-employee third party, however, the question of liability becomes more complicated. Who can be held responsible, and under what circumstances?

II. Third Parties

Courts have held that an employer can be liable for the hostile work environment created by a non-employee because employers are responsible for the type of work environment they provide for their employees. Employers are required to provide a work environment that is free from unlawful harassment, and if harassment occurs, the employer must take appropriate steps to address it. Thus, for liability purposes, the most relevant inquiry is not necessarily who caused the offending conduct, but how the employer handled the problem.

At least one circuit holds that it makes no difference at all whether an employer was able to control the actor since "employers have an arsenal of incentives and sanctions… that can be applied to effect conduct[, and] it is the use or failure to use these options that makes an employer responsible." *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005). EEOC guidance, on the other hand, suggests that the employer's ability to address third-party harassment should be measured "with a view to how much the employer controls the conditions of the work environment and could have expected to exert control over the nonemployee's

[1] *Quid pro quo* sexual harassment takes place when a supervisor conditions tangible employment actions upon the acceptance of sexual advances. *Lutkewitte v. Gonzales*, 436 F.3d 248, 250-51 (D.C. Cir. 2006). Although our discussion here focuses on the hostile work environment form of sexual harassment, which is more likely than *quid pro quo* sexual harassment to occur between employees of different employing offices, it is conceivable that a *quid pro quo* claim could be asserted in cases where either a third party had influence over the terms and conditions of the victim's employment or the victim's own employer conditioned the victim's employment on acquiescing to a third party's sexual advances.

conduct." *Rivera-Cruz v. Hewitt Assocs. Caribe, Inc.*, No. 15-1454 (PAD), 2018 WL 1704473, *4 (D.P.R. Apr. 6, 2018) (citing 29 C.F.R. § 1604.11(e)).

For purposes of CAA section 201, many different categories of individuals could potentially be third-party harassers if their actions create a hostile work environment for a covered employee. When considering the potential liability of legislative branch employing offices, third-party harassers fall into two main categories: those who are employees of other legislative branch employing offices and those who are not. In either case, because of the requirement that harassment must be "severe or pervasive" in order to be actionable, this type of harassment is most likely to happen when the harasser and victim encounter each other with some regularity.

Examples of common situations in which employees of multiple employing offices frequently work together or in close proximity to one another:

- Staff from multiple Members' offices and/or committees working together
- AOC staff carrying out their duties in other employing offices' spaces
- USCP officers performing security duty in legislative branch buildings
- LOC staff providing research services for Member offices
- Staff from oversight committees interacting with employing offices
- OCWR staff providing training or presentations to employing offices
- OCWR OSH specialists conducting inspections of other employing offices

Examples of non-legislative branch employees who may frequently or regularly encounter covered employees on the job:

- Reporters
- Researchers
- Delivery people
- Lobbyists
- Contractors

III. Special Elements of Third-Party Harassment Claims

To establish an actionable hostile work environment when the harasser is a third party, a plaintiff must not only satisfy the elements of a typical hostile work environment claim, but also establish that either (1) the employer knew or should have known about the harassment, but failed to take prompt and appropriate action, or (2) the employer should reasonably have anticipated that a plaintiff could become a victim, but failed to take action reasonably calculated to prevent the harassment.

1) Actual Knowledge

    a) *Freeman v. Dale-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014) – The employer had actual knowledge where a supervisor was present when a third party referred to an employee as a "black b****" and passed gas on an employee's phone, and where the employee

immediately complained to the supervisor that the third party had used the "n" word. Thus the supervisor was aware not only that specific incidents had occurred, but also that the harassment and other inappropriate behavior was offensive to the employee.

b) *Watson v. Blue Circle*, *Inc.*, 324 F.3d 1252 (11th Cir. 2003) –When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows those procedures, actual notice is established. Here, actual notice was established where the employee complained of harassment to the individual designated by employer to receive complaints of harassment pursuant to employer's anti-harassment policy.

2) Implied/Constructive Knowledge

a) *Watson v. Blue Circle*, *Inc.*, 324 F.3d 1252 (11th Cir. 2003) – The existence of a policy prohibiting sexual harassment will only preclude a finding of constructive notice when the policy is well-disseminated, valid, *and* effective. Here, the employer's policy was well-disseminated – the plaintiff had received the employee handbook describing the sexual harassment policy and there was no indication that other employees did not receive a copy of the policy. However, there was evidence that the policy was ineffective, as there was a genuine issue of material fact regarding whether the employer adequately investigated or responded to sexual harassment allegations. Consequently, the court held that the employer was not precluded from being placed on constructive notice about instances of alleged harassment, noting that "where there is an ineffective or incomplete policy, the employer remains liable for conduct that is so severe and pervasive as to confer constructive knowledge" (citing *Farley v. Am. Cast Iron Pipe Co.,* 115 F.3d 1548, 1554 (11th Cir. 1997)).

b) *Ocheltree v. Scollon Prods., Inc*., 335 F.3d 325 (4th Cir. 2003) – Knowledge of harassment can be imputed to an employer when the employer fails to provide reasonable procedures to register complaints. Here, procedures were deficient and warranted imputed employer knowledge because no company document mentioned sexual harassment, there was no evidence that the company conducted any sexual harassment prevention training, and the purported policy on sexual harassment failed to place any duty on supervisors to report incidents of sexual harassment to their superiors. Further, the "open door" policy noted in the employee handbook was illusory: The two senior officials designated to receive complaints turned the employee away on numerous occasions – one telling her he was busy or directing her to speak with the other official or go back to work, and the other being similarly unavailable – and an intermediary supervisor who knew the employee was trying to submit her complaints actively tried to prevent her from doing so.

c) *Rivera-Cruz v. Hewitt Assocs. Caribe, Inc.*, No. 15-1454 (PAD), 2018 WL 1704473 (D.P.R. Apr. 6, 2018) – Although the plaintiff did not make official complaints about harassing behavior by third parties, the court noted that information received directly from the employee is only one source of information that an employer may draw upon to determine the risk of prohibited harassment. In this case, a customer service representative at a call center in Puerto Rico alleged repeated harassment by callers on the basis of her accent. Evidence showed that other employees suffered similar

types of harassment from callers, and because the employer was aware that this type of conduct was occurring – even if the plaintiff herself had not registered an official complaint that she had been the victim of such conduct – the company could still potentially be liable for the harassment suffered by the plaintiff. Moreover, the court rejected the employer's argument that a series of one-time interactions with different customers would not be actionable because other third-party harassment cases involved continuous interactions with the same regular customers; the court found no support for the proposition that actionable harassment requires "a particular set of regular offenders."

d) *General v. Ctr. for Disability Rights*, 481 F. App'x 678 (2d Cir. 2012) – An in-home caregiver alleged that she was sexually harassed by her client's "self-directed other" – i.e., a man who lived with the client and whom the client had designated as her personal representative. The court affirmed summary judgment in favor of the employer, holding that the employee had failed to demonstrate that her employer had actual or constructive knowledge of the alleged harassment. The employee stated that she had called the employer and left a message, but there was no evidence to show with whom she left the message or what the contents of the message were. This was insufficient to demonstrate that the employer knew or should have known of the harassment. The employee also did not allege that the employer failed to provide a reasonable avenue of complaint, which might have excused the knowledge requirement.

e) *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) – Although this case involved coworker harassment rather than third-party harassment, the court's opinion includes a good analysis of factors that are germane to the question of whether an employer had constructive notice of harassment, which could apply with equal force to third-party harassment situations: "(1) the remoteness of the location of the harassment as compared to the location of management; (2) whether the harassment occurs intermittently over a long period of time; (3) whether the victims were employed on a part-time or full-time basis; and (4) whether there were only a few, discrete instances of harassment."

f) *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 765 F. Supp. 2d 1138 (D. Minn. 2010) – Evidence of harassment of other employees at different worksites is not probative of whether the employer had constructive notice that the plaintiffs were being harassed. The relevant inquiry is whether the harassment at plaintiffs' *own* worksites was so severe or pervasive that management should have known about it. (Note: this is a coworker harassment case, but the principle would apply in third-party harassment situations as well.)

3) Reasonable Anticipation

a) *Perry v. Maryland*, No. ELH-17-3619, 2019 WL 2177349 (D. Md. May 17, 2019) Employee received a single sexually harassing email at work from a person not employed by her employer. The employer "had no prior inkling" that the plaintiff would receive the sexually explicit email – this was the only such email the employee

received and there was no allegation that the employer or anyone else could have anticipated the email.

b) *Hylind v. Xerox Corp.,* 380 F. Supp. 2d 705 (D. Md. 2005) – Evidence that a repeat customer preferred female sales representatives, had previously harassed another female sales representative, and had made sexually suggestive comments to the female plaintiff when he first met with her and her supervisor, created a genuine issue of fact as to whether the employer should have reasonably anticipated that the plaintiff would become a victim if assigned to work with the customer. The plaintiff showed that her supervisor knew that the customer "liked dealing with women," "was like a dirty old man," and had made another female sales representative assigned to his account feel sexually harassed; also, the supervisor was present when, during an initial meeting with the plaintiff, the customer eyed her while commenting he would use "anyone, anytime" to be a model for his nude photography hobby. Notwithstanding this knowledge, the supervisor assigned the plaintiff to be the customer's new sales representative to oblige the customer's gender preference, and there was no evidence that the employer ever took any action to prevent possible harassment of the plaintiff, including issuing words of caution. These facts supported the plaintiff's *quid pro quo* sexual harassment claim that the employer had unlawfully assigned the plaintiff to a customer because she was a woman and because the supervisor determined the customer was attracted to her.

c) *Erickson v. Wis. Dep't of Corr.,* 469 F.3d 600 (7th Cir. 2006) – A female human resources officer worked at an HR facility that was adjacent to a minimum security prison. The prison allowed inmates who met certain requirements to participate in a work-release program, which included providing janitorial services to the HR facility. On one occasion the plaintiff observed a male inmate who was providing janitorial services standing near her and staring at her while she was working. She immediately left to attend an office holiday party, and she reported the incident to numerous coworkers at the party, including supervisors. After that party, she left on a pre-planned vacation. Despite a supervisor's promise that such an encounter would not be repeated, the employer did not take any action in response to the plaintiff's report while she was on vacation. Eight days later, upon her return to the office, she was approached by the same inmate and raped. The court affirmed the denial of the employer's motion for summary judgment, holding that a reasonable jury could have found that the employer was negligent in addressing the risk of sexual harassment to its employee. Specifically, a jury could find that the plaintiff's initial report was enough to make a reasonable employer think there was some probability of sexual harassment, and thus the employer had the ability and the opportunity to take some action but failed to do so.

Courts have held that, to avoid liability, employers must take prompt and appropriate action that is reasonably likely to prevent the misconduct from recurring. Courts look to the effectiveness of the action an employer takes in preventing the harassment an employer knew about. Additionally, employers must take prompt and corrective steps to provide an environment that is as safe and non-hostile to its employees as the job situation allows.

4) Prompt and Appropriate Response

a) *Whiting v. Labat-Anderson, Inc.*, 926 F. Supp. 2d 106 (D.D.C. 2013) – When considering whether an employer is liable for the hostile work environment created by a non-employee, the court must "consider the extent of the employer's control over the alleged harasser and any other legal responsibility which the employer may have with respect to the conduct of the non-employees." In this case the plaintiff, a contractor, accused a DOJ employee of two instances of sexual harassment. The court determined that the record clearly indicated that the contractor's employer took timely, appropriate, and reasonable action in response to her allegations of harassment. The supervisor took purposeful steps to determine what corrective actions were necessary, and investigated the allegations despite plaintiff's refusal to file a formal complaint. Moreover, the plaintiff's supervisor promptly notified the DOJ employee's supervisor about the allegations and physically visited the DOJ premises to investigate. The plaintiff's supervisor also changed office procedures to limit further contact between the plaintiff and the DOJ employee, and the plaintiff was offered a transfer to a new worksite. The court determined that these remedial steps were effective, because there was no evidence of additional incidents and the plaintiff did not allege further harassment.

b) *Curry v. Dist. of Columbia*, 195 F.3d 654 (D.C. Cir. 1999) – Although this case involved coworker harassment, it is a good illustration of the difference between adequate and inadequate responses, and has been cited by courts considering third-party harassment, including the *Whiting* case above. Plaintiff, a female police officer, alleged two separate instances of harassment by another police officer: One allegation involved sexual jokes occurring over a four-month period, and the second allegation involved that same officer "glaring" at her following her initial complaint of harassment, which continued for approximately 18 months. The court reversed the district court's denial of the employer's motion for judgment as a matter of law to the extent that it encompassed the allegations of sexual jokes. The court found that the employer acted quickly and reasonably with regard to the first allegation because, although the alleged harasser was not formally disciplined, the employer provided clear and prompt admonitions that were both appropriate to the conduct and effective. The court affirmed the district court's denial of the employer's motion for judgment as a matter of law with regard to the allegation regarding "glaring," because the employer simply warned the alleged harasser about his objectionable conduct – despite him being a repeat offender – and offered voluntary transfers to both employees. The court found that the evidence and all reasonable inferences that could be drawn from it were so one-sided that reasonable people could not disagree on the adequacy of the employer's response once it knew of the alleged glaring.

c) *Konah v. Dist. of Columbia*, 915 F. Supp. 2d 7 (D.D.C. 2013) – A female nurse employed by Unity Health Care to provide medication to male inmates at a detention facility alleged a hostile work environment regarding an incident perpetrated by inmates in the detention facility during the performance of her duties. The court found that at the time the harassment occurred, the nurse was deviating from the policies and procedures put in place by her employers, specifically the policy that

nurses be accompanied by an officer when entering the facility to distribute medication. The court concluded that the employer had taken reasonable and appropriate corrective steps to ensure that the environment for its employees would be as safe and non-hostile as a job situation in a jail requiring direct contact with inmates could be. The company was responsive to security concerns raised by its nurses and had developed its own policies to ensure their safety, and the court found that the plaintiff was aware of those policies prior to the incident. The court also described the employer's post-incident response as "comprehensive," including an immediate medical evaluation of the plaintiff, a meeting with the warden, an offer of criminal prosecution, and use of the internal inmate disciplinary system.

5) Reasonably Calculated to Prevent Future Harassment

   a) *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *rev'd en banc on other grounds*, 900 F.2d 27 (4th Cir. 1990) – Although not a third-party harassment case, this decision is cited by courts considering third-party harassment for the proposition that employers have a duty "to take adequate steps to try to prevent" the harassment of their employees, "not merely to act after the event." Employer knowledge about past harassment of other employees is relevant to whether the employer should have anticipated that the plaintiff would become a victim, and prior remedial actions may not be reasonably calculated to prevent future harassment if those actions have previously failed to deter the harasser. Here, a company received complaints that one of its supervisors was sexually harassing other employees. Although a senior official convened a meeting with male staff and also met privately with the supervisor to issue warnings about engaging in such behavior, the senior official and others later joked about the women's complaints. Later, the plaintiff interviewed for a job with the supervisor, with the senior official present; the supervisor asked the plaintiff how she would respond if she was subjected to sexual harassment at work, and although the senior official found the question inappropriate, he never criticized or reprimanded the supervisor. The supervisor encouraged the senior official to hire the plaintiff, and after she began working for the company, the supervisor sexually harassed and assaulted the plaintiff, both in the workplace and during an incident after work when the supervisor gave the employee a ride home during a snowstorm. She reported the snowstorm incident to the senior official the next day, and the company disciplined the supervisor by issuing a written warning that he would be fired if he sexually harassed anyone again or retaliated against the plaintiff, by instructing him to seek counseling and limit contact with female employees, and by revoking his access to a secure company facility. While the company argued that it could not be liable for the conduct of the supervisor because it took appropriate remedial action *after* the supervisor harassed the plaintiff, the court cast doubt on the adequacy of the employer's remedy, and further noted that liability may be imputed to an employer for its failure to *prevent* future harassment. The court rejected the company's argument that it had taken action reasonably calculated to prevent harassment, because a reasonable factfinder could infer that the employer's prior warnings to the supervisor in response to other complaints were "nothing but a sham" given the senior official's subsequent joking and failure to address inappropriate behavior.

b) *Curry v. Koch Foods, Inc.*, No. 2:16-cv-02008-SGC, 2019 WL 1281196 (N.D. Ala. Mar. 20, 2019) – The plaintiff, a female employee at a food processing plant, complained of ongoing sexual harassment by a male USDA inspector who frequently inspected the plant. The plaintiff argued that the harassment never should have happened in the first place because a female coworker had previously complained to management about sexual harassment by the same USDA inspector, so the company knew he had a penchant for sexually harassing female employees but still allowed the inspector into the facility to interact with other female workers. The court acknowledged that "under certain circumstances, an employer may be obligated to take adequate measures to try to prevent an employee's harassment, not merely to act after the harassment has occurred." However, in this case the court held that the employer's response to the previous complaint "was reasonably calculated to prevent future harassment": In addition to transferring the victim to another work group, the employer reported the inspector's behavior to a USDA representative with supervisory authority over the inspector. These steps were "reasonably designed to ensure [the] complaint was addressed"; the fact that the employer could have done more – escalating the complaint, following up, etc. – did not create a genuine issue of material fact, because "the availability of different, additional, or more aggressive corrective actions does not demonstrate the response was unreasonable for purposes of imposing Title VII liability on Koch Foods for [the inspector's] later harassment of the plaintiff. Title VII does not require an employer to take the most effective action to avoid liability."

IV. Illustrative Cases

Although the OCWR Board of Directors has never had occasion to decide a case involving allegations of third-party harassment, the Board typically looks to the federal courts for guidance. Many federal district and circuit courts have addressed cases involving third-party harassment in a wide variety of workplaces and circumstances. Below is a selection of case summaries involving many different fact patterns, which serve to illustrate how fact-intensive the inquiry must be: In each case the court must look at the nature of the conduct, the employer's knowledge of the conduct, and the employer's response in light of the harasser's connection to the employer and the level of control the employer has over the situation. These cases are grouped together based on the nature of the relationship between the alleged third-party harasser and the employer.

Cases in which the alleged harasser was a patron or customer:

1) *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018) – A female Costco employee was stalked by a male customer over a 13-month period. The employee experienced multiple different interactions with the customer, including the customer following the employee around the store, commenting on her appearance, bumping her with a shopping cart, touching her, and attempting to hug her. The employee reported the employee's behavior multiple times to management, as well as to local police. Management at one point told the employee to "be nice" to the customer, and did not intervene until after the employee secured a no-contact court order against the customer

and took medical leave from her position. The EEOC filed a suit on the employee's behalf, alleging that Costco discriminated against the employee on the basis of sex because it created and tolerated a sexually hostile environment of offensive comments, unwelcome advances, and stalking by a customer. A jury found that the customer's harassment was severe and pervasive, and that Costco's response to the employee's complaints about the customer was unreasonably weak. The district court denied Costco's post-verdict motion for judgment as a matter of law, and the Seventh Circuit affirmed, holding that Costco could be held liable for a hostile work environment resulting from the acts of non-employees, including customers, and that its liability depended not only on what the customer did, but also on how Costco responded.

2) *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998) – A waitress at a Pizza Hut franchise alleged she was subjected to a hostile work environment based on sexual harassment by two male customers. The customers, who had eaten at the restaurant on numerous prior occasions and were well known by the staff for making sexually suggestive comments to female employees, arrived together at the restaurant and were seated. The supervisor on duty instructed the plaintiff to wait on their table, despite her request that a male server wait on them instead, and even though she had previously informed the supervisor that these customers had made sexually suggestive comments that made her uncomfortable. When she brought the customers their drink orders, one of the men pulled her hair, grabbed her breast, and put it in his mouth. The employee reported this to the supervisor, and left her shift for the day. The court found that the harassing conduct by the two male customers was severe enough to create an abusive environment, and that the plaintiff's multiple reports to management had put the employer on notice and triggered its obligation to respond adequately and promptly, which it clearly did not do. The conduct was physically threatening and humiliating and unreasonably interfered with the plaintiff's ability to perform her duties as a waitress, thereby creating an actionable hostile work environment. The employer was liable because it was aware of the hostile work environment but failed to take adequate steps to remedy or prevent it.

3) *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754 (9th Cir. 1997) – A mime employed by a casino was fired after hitting a casino patron in the face, in response to what the mime alleged was sexual harassment by the patron. The mime alleged that the termination constituted unlawful retaliation, arguing that her striking of the patron was protected activity – i.e., opposition to sexual harassment. In order to succeed, the mime would have had to show that the patron's harassing behavior could be imputed to her employer. The court held that an employer may be held liable for sexual harassment on the part of a private individual where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective action when it knew or should have known of the conduct. However, the court held that the casino neither ratified nor acquiesced to the harassing behavior; on the contrary, the casino had taken reasonable steps to protect the mime against harassment of this nature, including providing a sign warning patrons not to touch her, assigning a large coworker in a clown costume to accompany her whenever she performed, and enlisting the help of other casino employees who would tell patrons not to touch the mime and call security if they saw she

was in trouble. Therefore, the patron's actions could not be imputed to the employer, and the mime could not establish a prima facie case of retaliation.

4) *Lopes v. Caffe Centrale LLC*, 548 F. Supp. 2d 47 (S.D.N.Y. 2008) – A restaurant bar-back alleged that he was subjected to repeated sexual harassment by a regular customer, but that when he reported the harassment to the restaurant's manager, the manager instructed him to go along with it because the harasser had a lot of influence with other customers. The employee further alleged that after he finally confronted the harasser, the manager told him to apologize and to do whatever it took to make sure the apology was accepted or else he would be fired. The employee ultimately resigned and filed a *pro se* suit against the restaurant. The court denied summary judgment for the restaurant, finding that "[Lopes's] version of the facts, more specifically the requirement that he submit to a customer's sexual demands in order to keep his job, if true, appear to set forth a claim of sexual harassment such that a reasonable fact-finder could conclude that Lopes was subject to a hostile working environment and constructive discharge."

Cases in which the alleged harasser was the employer's client or contractor, or had another type of working relationship with the employer:

5) *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848 (1st Cir. 1998) – An employee filed a claim for hostile work environment against her employer, Occidential International, alleging that she was forced to submit to the sexual demands of an executive at a high-profile customer of Occidental. At trial, the jury rendered a verdict in the plaintiff's favor on her sexual harassment claim. The First Circuit denied the employer's challenge to the jury verdict, determining that the record could reasonably support a finding of liability for either hostile work environment sexual harassment or *quid pro quo* sexual harassment. Under the *quid pro quo* theory, the record supported the jury's finding that the plaintiff's continued employment was conditioned on coerced sex, a condition inherently linked to her gender: Not only did the employer acquiesce to the high-profile customer's demands, but the employee was explicitly told to give into those demands and satisfy the customer, which was a clear example of *quid pro quo* sexual harassment. Under the hostile work environment theory of sex discrimination, the court determined that a jury could have reasonably found that the employer established a working environment hostile to women by refusing to do anything about the unwanted sexual advances of a high-profile customer towards a female employee, as well as by allowing other incidents to occur in which forms of sexually-related misconduct were severe or pervasive enough to unreasonably interfere with work performance or create an intimidating or offensive working environment.

6) *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014) – A tile company employee alleged three years' worth of ongoing race- and sex-based harassment by an independent sales representative of a kitchen and bath remodeling company, with whom she had to interact frequently as part of her job. She reported the harassment to her supervisor, who did not seem interested – despite having personally witnessed some of the egregious behavior – and then to human resources personnel. The court held that the evidence in the record could support a finding that the employer knew or should have known about the harassing behavior and that the plaintiff found the behavior to be offensive. Additionally, the plaintiff created an issue of triable fact as to whether the employer's

response to halt the harassment was adequate. Although she was initially told the harasser would be banned from the premises, that ban was then reversed; the plaintiff was no longer required to interact directly with the harasser, and he was not supposed to communicate with her, but she suffered depression and anxiety over the possibility of running into him, and eventually resigned her position. The district court granted summary judgment for the employer, but the Fourth Circuit reversed and remanded, holding that there was sufficient evidence for a jury to find a hostile work environment based on both sex and race, and that genuine issues of fact existed as to whether the employer knew or should have known about the harassment and whether its response was sufficient.

7) *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689 (7th Cir. 2005) – A nurse employed by a hospital alleged sexual harassment by one of the hospital's department heads, who was an independent contractor of the hospital rather than an employee. The district court analyzed the claim as if it were a tort lawsuit, and determined that even if the plaintiff had been sexually harassed, her employer could not be held vicariously liable. On appeal, the Seventh Circuit distinguished Title VII actions from tort suits, noting that employer liability under Title VII is direct rather than derivative, and therefore principles of *respondeat superior* do not apply: "Because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer. Ability to 'control' the actor plays no role. … The employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem." The appeals court remanded the case to the district court for further proceedings to decide "whether [the harasser's] conduct was severe enough (and the Hospital's response feeble enough) to justify liability."

8) *Hewitt v. BS Transp. of Ill., LLC*, 355 F. Supp. 3d 227 (E.D. Pa. 2019) – The plaintiff, a driver employed by BS Transportation, sued both his own employer and Sunoco, alleging that one of Sunoco's employees sexually harassed him on a weekly basis when he went to the Sunoco refinery to load fuel. The plaintiff brought the harassment to the attention of a Sunoco manager, who in turn spoke with the plaintiff's own supervisor, but despite assurances to the plaintiff, the managers never investigated his allegations. The court dismissed the claims against Sunoco because the plaintiff could not establish an employment relationship with Sunoco. However, the court allowed the Title VII claim to proceed against the plaintiff's own employer, BS Transportation, because he had pled facts sufficient to allege a hostile work environment and had also alleged that his supervisor knew about the harassment but failed to take investigative or remedial action.

9) *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005) – A local postmaster alleged that her employer failed to address harassment directed at her by customers and community members on the basis of her race, color, and national origin. A jury found in favor of the employer, but the Ninth Circuit reversed and remanded for a new trial, holding that the district court erred when it refused to instruct the jury on the Postal Service's duty to investigate and remedy the harassment. The district court had offered three rationales to support its refusal: 1) employer liability for failure to investigate and remedy third-party

racial or national origin harassment requires proof that the failure itself is motivated by discriminatory harassment; 2) the plaintiff, as a manager, had a duty to remedy her own harassment; and 3) the evidence did not support the instruction. The court rejected all three rationales, holding that "[a]n employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it[,]" regardless of whether discriminatory animus motivated the employer's failure to act, as liability for third-party hostile work environment is grounded in negligence and ratification rather than intentional discrimination. Further, an employer has a duty to investigate and prevent harassment even if the employee is a manager, as Title VII protections extend to both management and non-management employees. Lastly, the evidence supported a hostile work environment instruction: The plaintiff had received hostile comments based on her race, accent, and national origin from post office customers and other residents, including the mayor, almost immediately after starting her position; she had received threats to her life and safety, including an anonymous letter to "get rid of you foreigner" and warnings that the town was a "redneck town" and that everyone would join and "come and kill her" if she persisted in enforcing postal regulations; and her car had been vandalized.

10) *EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602 (4th Cir. 2011) – An employee of Cromer Food Services (CFS) alleged harassment in the form of a daily barrage of lewd comments and gestures by employees of CFS' biggest client. The employee reported the harassment to CFS on multiple occasions and even asked if there was a way for him to switch routes. Rather than intervene, CFS told the employee there was nothing that could be done because the harassers were not under its control. The court found that the employee articulated sufficient facts to support a finding that his employer had actual or constructive notice of the harassment and failed to take any corrective action. Specifically, the employee tried to communicate the nature and extent of the harassment, and those communications were effectively ignored by all levels of CFS management. The court also noted that, under Fourth Circuit precedent, knowledge can be imputed to an employer if a "reasonable [person], intent on complying with Title VII, would have known about the harassment." Further, the court addressed whether or not CFS acted promptly to protect the employee after it had sufficient information about the harassment: In reviewing the record, the court found that CFS did "too little too late" as the employee endured months of inaction following his first complaint until he was ultimately transferred, despite many potential alternatives. The court therefore vacated the lower court's grant of summary judgment in favor of CFS and remanded the case back for trial.

11) *Bodman v. Me. Dep't of Health & Human Servs.*, 787 F. Supp. 2d 89 (D. Me. 2011) – The female plaintiff and a male coworker began an intimate relationship that became abusive and ultimately ended. The male employee was later terminated for unrelated misconduct. Later, the plaintiff filed and was granted a restraining order against the now-terminated male employee following allegations of harassment, the majority of which took place outside of work. The plaintiff told her supervisor about the harassment, and a safety plan was put in place to protect the plaintiff from encountering or being contacted by the ex-employee in the workplace. The harassment continued outside of work, but the employer effectively blocked the ex-employee from contacting the plaintiff while she

was at work. Nonetheless, the plaintiff resigned and alleged constructive discharge, claiming that the department failed to adequately respond to her requests for protection from abuse in the workplace. The court found that employers are generally not responsible under Title VII for hostile acts resulting from non-work-related, off-duty interactions between coworkers, let alone non-work-related interactions with a non-employee. To the extent that the plaintiff based her hostile work environment claim on actions such as the ex-employee's "tire slashing, physical restraint/assault, threats, verbal tirades, or any other harassment occurring indisputably outside of the workplace," the employer was entitled to summary judgment. Moreover, there was nothing in the record to indicate that the employer knew or should have known of the harassing behavior prior to the plaintiff informing management of it, which happened on the same day she went to court to obtain the restraining order. The employer was not liable for events that occurred before it had knowledge of any circumstances potentially creating a hostile work environment. And as soon as the employer was informed of the plaintiff's concerns, it took immediate steps to protect the female employee from further contact with the male ex-employee.

Cases in which the alleged harasser is someone who resides in the employee's workplace, such as a health-care facility patient or a prison inmate:

12) *Crist v. Focus Homes, Inc.,* 122 F.3d 1107 (8th Cir. 1997) – The resident of a home for individuals with developmental disabilities repeatedly sexually harassed and assaulted employees, and those employees consistently complained and reported the assaults to management. The employer's response – or lack thereof – led the employees to believe that the employer would not do anything to stop the assaults, resulting in the employees filing a hostile work environment claim. The district court granted summary judgment in favor of the employer, but the Eighth Circuit reversed, finding that the employer created an intimidating, hostile, or offensive working environment that unreasonably interfered with the employees' work performance. In reaching that conclusion, the court found that the employer clearly was aware or should have been aware of the resident's behavior because of the numerous incident reports filed by the employees. The court also found that the employer clearly controlled the conditions of the environment in which the resident resided and had the ability to alter those conditions to a substantial degree, to include bringing in more male staff, providing more training, and implementing a state-regulated treatment and medication program for the resident. The matter was remanded to the lower court to address the factual disputes that remained as to whether the employer's response to the employees' reports of sexual assault was appropriate.

13) *Beckford v. Dep't of Corr.*, 605 F.3d 951 (11th Cir. 2010) – The Florida Department of Corrections was liable for the sexual harassment of female employees by male inmates. Although the court acknowledged that prison inmates present a unique challenge because they cannot be banned or removed from the workplace, it held that there were still logical steps that the Department could have taken in order to prevent future harassment of the female nurses. The court explained, "Title VII does not require, on the one hand, that prisons prevent all manner of harassment at all cost and without regard to important penological interests. We recognize that there are practical and constitutional limits on what prisons can do to protect staff. Prisons cannot, for example, eject unruly inmates

like businesses can eject rude customers." However, the Department could have ordered its employees to react in multiple ways to report or prevent the harassment, including adopting a specific policy to punish the inmates for their harassing actions.

V. Who Can Be Held Responsible?

The case law discussed above focuses on an employer's liability for its own employee's harassment at the hands of a third party, based on the employer's knowledge of and response to its employee's experiences. However, in the legislative branch – unlike in other settings – the *harasser's* employing office might be liable for the harassing conduct of its employee.

1) *Harasser's Employing Office* – The CAA as amended by the Congressional Accountability Act of 1995 Reform Act (CAARA) includes two provisions that suggest the harasser's employing office could potentially be liable for its employee's misconduct:

    a) Section 201(a), 2 U.S.C. § 1311(a), requires that "All personnel actions affecting covered employees shall be made free from any discrimination based on" the specified protected categories (race, color, religion, sex, or national origin under Title VII; age under the ADEA; or disability under the ADA and Rehabilitation Act). In contrast to the language prohibiting discrimination in the incorporated statutes themselves, the language in CAA section 201(a) could be construed broadly enough to encompass the creation of a hostile work environment resulting from harassing conduct by anyone, not just the claimant's own employing office.

    b) Section 402(a)(2), 2 U.S.C. § 1402(a)(2), provides that a claim filed with the OCWR "shall identify the employing office alleged to have committed the violation or in which the violation is alleged to have occurred[.]" This language suggests that a covered employee filing a claim for harassment could identify a different employing office from the one in which they work if the harassment was committed by an employee of that employing office and/or if it took place in that employing office.

    These provisions could provide legislative branch employees with an avenue of redress that is not usually available in other settings, because they would relieve a claimant of the requirement to establish an employment relationship with the respondent, as courts have required Title VII plaintiffs to do outside of the legislative branch. *Cf. Hewitt v. BS Transp. of Ill., LLC*, 355 F. Supp. 3d 227 (E.D. Pa. 2019) (dismissing sexual harassment claim against harasser's employer).

2) *Claimant's Employing Office* – Because the Board typically follows the lead of the federal courts, it would likely take into account the courts' analytical approach should a third-party harassment case ever come before it. However, it is worth noting that there is a new provision in the CAA that might require further consideration, although it is ambiguous and not clearly intended to address such claims. The CAARA added section 301(d), 2 U.S.C. § 1311(d), to extend the rights and protections of CAA section 201 to unpaid staff, which the statute now defines to include "any staff member of an employing

office who carries out official duties of the employing office but who is not paid by the employing office for carrying out such duties… including an intern, an individual detailed to an employing office, and an individual participating in a fellowship program[.]" Section 301(d)(2), entitled "Rule of Construction," cautions that "Nothing in paragraph (1) may be construed to extend liability for a violation of subsection (a) to an employing office on the basis of an action taken by any person who is not under the supervision or control of the employing office." This language could be interpreted in many different ways, and it is not clear whether it is limited to situations involving unpaid staff. There is no legislative history to shed light on Congress' intent, and the Board has not yet had occasion to interpret this provision. However, in light of the agreement among the Circuit Courts of Appeal that employers may be liable in some circumstances for third-party harassment of their own employees, and given that an inadequate or inappropriate response by an employing office that knew or should have known of such harassment could reasonably be construed as an action taken by the employing office itself, employing offices should not assume that this language would necessarily be taken to relieve them of liability in cases of third-party harassment.

3) *Members of Congress* – As a result of the CAARA there is now the potential for individual Members of Congress to be required to reimburse the Treasury account for awards and settlements in connection with allegations of harassment under section 201 of the CAA, or reprisal under section 207 of the CAA in response to an employee's allegations of harassment. *See* CAA section 415(d), 2 U.S.C. § 1415(d). Members could be subject to reimbursement requirements not only for harassing their own staff but also for harassing or retaliating against employees of other employing offices. This could conceivably extend to *quid pro quo* harassment – i.e., providing employment benefits to an employee in exchange for sexual favors, or subjecting an employee to an adverse employment action if the employee refuses sexual advances – even if the employee does not work for the Member, but the Member influences the employee's own employing office to take action with respect to the employee. The same could hold true in a retaliation claim, if a Member influences another employing office to take an adverse action against one of its employees after that employee alleges harassment by the Member.

VI. Best Practices

In the interest of protecting employees from third-party harassment, and responding promptly and effectively when harassment does occur, employing offices should evaluate their policies, practices, and office culture. In light of the factors considered by the courts in the cases discussed above – as well as the OCWR's experience in training covered employees and employing offices on preventing harassment – here are some (though certainly not all) suggestions for promoting a safe and harassment-free workplace.

1) *Have a clear policy and procedure in place for employees to report harassment*. Transparently discuss the options for your employees to report harassment and impress upon employees that they should be reporting instances of harassment, regardless of whether it is being committed by a coworker or a third party. Designate a specific person

or office to handle reports, and ensure employees know to whom they should report the harassment. Also make sure that supervisors understand their responsibilities for conveying complaints, including what information they need to collect and to whom they need to relay the report. Have a clear procedure in place for responding to such reports so that any issues can be resolved quickly and efficiently. *See*, *e.g.*, *Ocheltree v. Scollon Prods., Inc*., 335 F.3d 325 (4th Cir. 2003) (criticizing the employer's "ill designed" reporting process).

2) *Train employees about their rights*. Section 509 of the CAA requires that all covered employees be trained on their rights and protections under the CAA, which includes training on their right to a workplace that is free of harassment and other forms of discrimination. Regardless of who conducts the training (i.e., whether it is done in-house, by the OCWR, or by another party), each employing office should make sure that its own specific policies and procedures for reporting and addressing sexual harassment are conveyed clearly to employees.

3) *Maintain an employee code of conduct that prohibits harassment of coworkers or others*. Make it clear that your employees must refrain from all behavior that could be construed as harassment, including when working with employees of other employing offices and when traveling to other locations outside their own workplace in the course of their work. Reiterate that harassing behavior will have negative consequences no matter the target. Follow through by investigating reports of harassing behavior and ensuring that any response to substantiated allegations is prompt, appropriate, and reasonably likely to prevent the conduct from recurring, including imposing discipline and/or limiting contact between the harasser and victim when appropriate.

4) *Report harassing behavior to the harasser's employer*. If a covered employee reports harassment by a third party, make reasonable efforts to report the misconduct to the harasser's employer. Whenever possible, identify and follow that employer's own policies for reporting harassment, to increase the chances that the report will find its way to someone with the power to take responsive action. Follow up as necessary and appropriate.

5) *Protect employees from reprisal*. Section 207 of the CAA makes it unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against any covered employee because the covered employee has opposed any practice made unlawful by the CAA – which would include opposing or reporting alleged harassing behavior – or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under the CAA. Ensure that supervisors and coworkers do not treat an employee negatively as a result of such opposition or participation. Be particularly mindful when considering whether to move or reassign an employee; even if done with the positive intention of removing the employee from an uncomfortable situation, such an action could be construed as retaliatory if viewed as a demotion or an otherwise less desirable assignment.

6) *Document everything*. Keep all correspondence, notes, and other records related to reports of harassing behavior made by or against your employees, including all efforts made by your office to respond to such reports.

7) *Follow up with employees*. Maintain an open line of communication with employees after they report harassment. To the extent possible, let them know what steps have been taken to investigate and address their concerns. Consult with employees about possible solutions. Let them know whom to speak to if the harassing behavior continues.

8) *Involve the U.S. Capitol Police if appropriate*. Make sure employees know that they can contact the USCP if they ever feel that a harasser poses a potential threat to their safety.

VII. Resources

Please see the following OCWR resources for more information:

- Avoiding & Responding to Sexual Harassment Claims Brown Bag Lunch outline: https://www.ocwr.gov/blog/brown-bag-lunch-avoiding-and-responding-sexual-harassment-claims

- Hostile Work Environment Brown Bag Lunch outline: https://www.ocwr.gov/hostile-work-environment-brown-bag-outline

- Sexual harassment prevention training video: https://www.ocwr.gov/videos/sexual-harassment-training-intro

- March 2017 Compliance@Work: https://www.ocwr.gov/publications/compliancework/compliancework-sexual-harassment

- Other OCWR training courses and resources: https://www.ocwr.gov/resources-and-training