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EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BY SUPERVISORS AND CO-EMPLOYEES

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EXECUTIVE SUMMARY

The United States Supreme Court issued two parallel decisions on June 26, 1998 relating to a Corporation's liability for sexual harassment engaged in by its supervisors and managers.

Specifically, the Court ruled that an Employer can be held liable if one of its supervisors or managers creates a sexually hostile work environment even in the absence of knowledge or negligence by the Employer. However, the Court also held that an Employer can avoid this liability if it can prove, as an affirmative defense, that it has published, and effectively implemented and enforced, an anti-sexual harassment policy with an accessible complaint procedure which the employee unreasonably failed to utilize to rectify his or her complaint.

In addition, the Court set aside the distinction between "quid pro quo sexual harassment" and "hostile environment sexual harassment" which has created such confusion in the lower courts. In lieu of this distinction, the Court stated that an employer is strictly liable when its supervisor's sexual harassment culminates in a "tangible employment action, such as discharge, demotion, or undesirable reassignment". However, with regard to all other sexual harassment by a supervisor or manager, the complaining employee must prove that the harassment was "severe and pervasive", and that it was "unwelcome" and offensive from both an objective and subjective perspective. Furthermore, even if these standards are met, an Employer may avoid liability if it can prove the aforementioned affirmative defense based on the existence of an effective anti-sexual harassment policy.

This memorandum will describe how these two decisions impact upon a Corporation's potential liability for the sexually offensive actions of its supervisors and will provide specific recommendations on how the Corporation can develop an effective anti-sexual harassment policy which can provide a defense to such liability.

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If you have any questions about the issues raised in this memorandum, or with regard to employment law generally, please contact John W. Ohlweiler (212 455-2930), J. Scott Dyer (212 455-3845), Tonianne Florentino (212 455-3293) or any other attorney within our Labor and Employment Law Group.

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In two parallel decisions issued on June 26, 1998, the United States Supreme Court held that employers may be held liable under Title VII of the Civil Rights Act of 1964 ("Title VII") if one of its supervisors creates a sexually hostile work environment, even in the absence of knowledge or negligence by the employer. However, an employer may have an affirmative defense to this liability if it has promulgated, and effectively implemented and enforced, an anti-sexual harassment policy with an accessible complaint procedure which the complaining employee has unreasonably failed to utilize to rectify his or her complaint of sexual harassment. (*Burlington Indus., Inc. v. Ellerth*, No. 97-569, —- S. Ct. —-, 1998 WL 336326 (U.S. June 26, 1998); *Faragher v. City of Boca Raton*, No. 97-282, —- S. Ct. —-, 1998 WL 336322 (U.S. June 26, 1998)). Specifically, the Court adopted the following rule for determining employer liability where a supervisor creates an actionable hostile environment in the workplace:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense 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. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

*Burlington Indus., 1998 WL 336326, at *15; City of Boca Raton,* 1998 WL 336322, at *19.

These two decisions address important issues left open by the Court in its prior decisions addressing the subject of sexual harassment in the workplace. Specifically, these decisions resolve, at least in a general way, conflicting and contradictory decisions by lower courts regarding an employer's liability for the actions of its supervisors, some of which had held employers strictly liable for all forms of sexual harassment by its supervisors (or "high-level managers"), while others concluded that since sexual harassment is almost never within a supervisor's "scope of employment", an employer would only be liable for a sexually harassing environment created by one of its supervisors if the employer knew or should have known of

the harassment and failed to take prompt remedial action, but would be strictly liable for so-called *quid pro quo* sexual harassment by supervisors.

PRIOR SUPREME COURT DECISIONS

In its first decision regarding sexual harassment in the workplace, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual harassment was a form of discrimination prohibited by Title VII and recognized two categories of sexual harassment actionable under Title VII: "quid pro quo" harassment and "hostile environment" harassment, referring in that regard to the Guidelines On Discrimination Because Of Sex issued in 1980 by the Equal Employment Opportunity Commission ("EEOC") which defined sexual harassment as:

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [where] (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. §1604.11(a).

Following the *Meritor* decision, quid pro quo harassment was generally understood to occur when the retention or advancement of an employee's position was conditioned on the employee's compliance with sexual demands, whether or not such threats were actually carried out. *E.g., Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994); *Hirshfield v. New Mexico Corrections Dept.*, 916 F.2d 572 (10th Cir. 1990). Hostile environment sexual harassment, on the other hand, was deemed to occur when instances of harassment such as unwelcome sexual advances, innuendo, jokes, epithets, propositions, derogatory comments, or unwelcome touching were so severe and pervasive as to "alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor*, 477 U.S. at 67.

In its 1993 decision in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court further clarified the definition of "sexually hostile work environment" in a situation in which the plaintiff was unable to prove at trial that sexually offensive conduct affected her psychological well-being. The Court held that no showing of psychological harm is required for conduct to be actionable as hostile work environment sexual harassment. Instead, the Court held that:

- *the determination of whether a sexually hostile work environment exists must be based on the totality of the circumstances;*

- *to succeed in establishing a sexually hostile environment, no single factor will be determinative; and*

- *the sexual harassment plaintiff must establish that the environment was hostile from both an objective and subjective perspective.*

Finally, the *Harris* Court provided some guidance on what circumstances should be considered to determine if a hostile environment exists:

- *the frequency of the discriminatory conduct;*

- *its severity;*

- *whether it is physically threatening or humiliating or a mere offensive utterance; and*

- *whether it unreasonably interferes with an individual's work performance.*

While the majority opinion did not state whether any one factor was more important than another, separate concurring opinions by both Justices Scalia and Ginsberg suggested that the critical factor should be consideration of whether the discriminatory conduct interfered with a plaintiff's work performance.

Shortly after Harris was decided, the EEOC published its Enforcement Guidance ("EEOC Enforcement Guidelines") on the Harris decision.[1] These Guidelines provide, *inter alia*, that a hostile work environment plaintiff must show that the defendant's conduct was unwelcome[2] and offensive from both objective and subjective standards. The subjective element may be satisfied by the plaintiff's testimony that "s/he found the alleged conduct to be hostile or abusive at the time it occurred." As for the objective standard, "the conduct must . . . be sufficiently severe or pervasive objectively to offend a reasonable person." 1994 DLR 45 d32.

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1 EEOC Enforcement Guidance on *Harris v. Forklift Sys. Inc.*, 1994 DLR 45 d32 (Mar. 9, 1994).

2 With regard to the requirement that the conduct be "unwelcome", the Court in Meritor stated that Title VII liability would not exist where the conduct complained of was, in fact, welcome, emphasizing that in the sexual harassment context, the concept of "welcomeness" should not be confused with "voluntariness" or "consent". "[T]he fact that sex-related conduct was `voluntary', in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." *Meritor*, 477 U.S. at 68. However, the Supreme Court specifically recognized in *Meritor* that the gravamen of a sexual harassment claim is that the alleged conduct was unwelcome. As stated by the EEOC in its Guidelines On Discrimination, "since sexual attraction may often play a role in the daily social exchange between employees, `the distinction between invited, invited-but-welcome, offensive-but-tolerated and flatly rejected' sexual harassment may well be difficult to discern."

More recently in *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. —-, 118 S. Ct. 998 (1998), the Court further explained with regard to a sexually hostile work environment that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex" or "simple teasing", and that isolated instances (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." *Oncale,* 118 S. Ct. at 1003.[3] Finally, as stated by the Court in its recent *City of Boca Raton* decision:

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a `general civility code'. . . . Properly applied, they will filter out complaints attacking `the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'. . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts Of Appeals have heeded this view.

City of Boca Raton, 1998 WL 336322, at *9.

EMPLOYER LIABILITY

In *Meritor*, the Supreme Court declined to establish an employer liability standard in hostile environment cases and instead instructed lower courts to consider agency principles in developing employer liability standards, although it cautioned that "common-law principles may not be transferrable in all their particulars to Title VII."[4] However, the Court was clear that Title VII placed some limit on an employer's responsibility for the creation of a discriminatory environment by a supervisor, stating that Title VII does not make employers "always automatically liable for sexual harassment by their supervisors." Finally, the Court held that

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[3] In *Oncale*, the Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.

[4] The Court cited in this regard the Restatement of Torts §§ 219-237. Section 219(2) of the Restatement provides that:

> "(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> "(a) the master intended the conduct or the consequences, or
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> "(b) the master was negligent or reckless, or
>
> "(c) the conduct violated a non-delegable duty of the master, or
>
> "(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

neither the existence of a company grievance procedure nor the absence of actual notice of the harassment on the part of upper management would be dispositive of such a claim; while either might be relevant to the liability, neither would result automatically in employer immunity. *Meritor,* 477 U.S. at 69-72.

After *Meritor* most courts held that employers were strictly liable for *quid pro quo* harassment without necessarily distinguishing between those situations where a supervisor merely threatens to take adverse action against an employee and those circumstances involving actual discriminatory employment actions with tangible results like termination or a failure to promote. On the other hand, the courts split over the issue of what standard for employer liability applied to hostile environment claims, with the majority holding that an employer is generally only liable for acts of hostile environmental sexual harassment committed by its supervisors or co-employees if the employer knew or should have known of the harassment and failed to take prompt remedial action. Compare *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994) (finding the employer directly liable for hostile environment sexual harassment by high-level manager) with *Bouton v. B.M.W. of North America, Inc.*, 29 F.3d 103 (3d Cir. 1994) (explicitly declining to following the *Karibian* standard).

This dichotomy regarding employer liability, together with the fact that in the case of a quid pro quo harassment claim an employee was not generally required to carry the heavy burden required in connection with a hostile environment claim to prove that the supervisor's conduct was severe, pervasive, unwelcome and offensive from both objective and subjective standards, "encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition" of quid pro quo vs. hostile environment sexual harassment.[5] *Burlington Indus*., 1998 WL 336326 AT *8.

THE RECENT SUPREME COURT DECISIONS

Recognizing the confusion and conflict caused by its instruction that lower courts consider common law agency principles in developing employer liability standards and its distinction between quid pro quo and hostile environment sexual harassment (terms not found in the statute), the Supreme Court in its recent *City of Boca Raton and Burlington Industries* decisions concluded that a more uniform and predictable standard must be established as a matter of federal law. Therefore, acknowledging that agency law was not a useful guide, since, while sexual harassment is rarely authorized by an employer as within the scope of a supervisor's duties, supervisors are almost always aided in accomplishing their sexual

[5] Indeed, the question presented for certiorari in *Burlington Industries* asked:

> "Whether a claim of quid pro quo sexual harassment may be stated under Title VII.... where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?"

harassment by their position at least to the extent of being able to require subordinates to remain in their presence, the Court set aside agency principles in favor of more definitive rules of construction. Thus, in *City of Boca Raton,* the Court stated that:

> The proper analysis here, then, calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, see, *e.g.*, §§ 219, 228, 229, but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view. The Restatement itself points to such an approach, as in the commentary that the "ultimate question" in determining the scope of employment is "whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." Id., § 229, Comment a. See generally *Taber v. Maine*, 67 F.3d 1029, 1037 (C.A.2 1995) ("As the leading Torts treatise has put it, `the integrating principle' of respondent superior is `that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not'") (quoting 5 F. Harper, F. James & O. Gray, Law of Torts § 26.8, pp. 40-41 (2d ed. 1986).

City of Boca Raton, 1998 WL 336322, at *14.

Therefore, citing the fairness of requiring the employer to bear the burden of foreseeable social behavior and the fact that supervisors have special authority enhancing their capacity to harass, and that the employer can guard against their behavior more easily, the Court concluded that employers should, in all cases, be vicariously liable for all forms of actionable sexual harassment whether it be quid pro quo harassment or hostile environment harassment. On the other hand, by negative inference, employers will only be liable for acts of actionable sexual harassment by co-employees if the employer knew or should have known of the harassment and failed to take prompt remedial action.

This did not, however, complete the Court's inquiry since in *Meritor*, it had held that Title VII placed some limit on employer responsibility for a supervisor's creation of a discriminatory environment. Therefore, in order to provide some balance between an employer's obligation to maintain a workplace free of sexual harassment and the employee's responsibility to utilize procedures established by the employer to accomplish this goal, the Court distinguished between supervisory sexual harassment "*with tangible results*, like hiring, firing, promotion, compensation, and work assignment" (i.e., a narrowed category of quid pro quo harassment) and all other actionable sexual harassment by supervisors).

With regard to the first category—i.e., sexual harassment with "tangible results"—employer liability will result once the harassment is shown, such as is the case with traditional discrimination where the employer is liable on a respondent superior basis regardless of the existence of anti-discrimination policies or available complaint procedures. Also under this category of sexual harassment, there is no requirement for the employee to prove that the harassment was severe and pervasive, and that it was unwelcome and offensive from both an

objective and subjective perspective. Finally, with regard to this category, the Court, referring favorably to lower court decisions which have used the concept of tangible employment action for resolution of the vicarious liability issue, states that:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Compare *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (C.A.7 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"), with *Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (C.A.7 1994) (a "bruised ego" is not enough); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (C.A.6 1996) (demotion without change in pay, benefits, duties, or prestige insufficient) and *Harlston v. McDonnell Douglas Corp.,* 37 F.3d 379, 382 (C.A.8 1994) (reassignment to more inconvenient job insufficient).

Burlington Indus., 1998 WL 336326, at *13.

With regard to all other sexual harassment by supervisors, including harassment combined with unfulfilled threats of job actions,[6] plaintiffs will be required to demonstrate that the harassment was severe and pervasive, and unwelcome and offensive from both an objective and subjective perspective, and, in addition, the employer will be permitted to raise an affirmative defense comprised of 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 reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the court states that it may be possible for an employer to establish this affirmative defense in some way other than maintaining and vigorously enforcing an effective anti-harassment policy and complaint procedure, it is clear that the maintenance of such an

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[6] The Court in *Burlington Industries* held that:

> Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct. *See Oncale*, 118 S. Ct. at 1002-03; *Harris*, 510 U.S. at 21. For purposes of this case, we accept the District Court's finding that the alleged conduct was severe or pervasive. *See supra*, p. 3. The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.

effective procedure is what is intended by the Court. Similarly, while the Court states that the second element of the affirmative defense is not necessarily limited to showing an unreasonable failure to use an effective complaint procedure, the Court states that "a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."

Also, while the dissent authored by Justice Clarence Thomas claims that the majority provides no explanation of how employers can rely upon the affirmative defense, some such guidance is provided by the actual outcome of the two cases before the Court. Thus, after referring to EEOC Regulations promulgated in 1980 advising employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment" and the EEOC's 1990 Policy Statement encouraging employers to establish a complaint procedure "designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor," the Court remanded the *Burlington Industries* case to, *inter alia,* provide Burlington an opportunity to assert and prove this affirmative defense to liability where the record below only indicated, in general terms, that Burlington had a policy against sexual harassment but that the plaintiff had not informed her immediate supervisor (not the alleged harasser) about the alleged sexual harassment before resigning and filing her lawsuit, while not permitting such a remand in the *City of Boca Raton* case for the following reason:

> While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees [involved in the alleged harassment] and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. . . . Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.

City of Boca Raton, 1998 WL 336322, at *20.

COMPONENTS OF AN EFFECTIVE SEXUAL HARASSMENT POLICY.

The components of an effective sexual harassment policy referred to in the EEOC publications cited in the Court's opinions and the deficiencies in the City of Boca Raton policy alluded to by the Court in holding that the City could not make out the new affirmative defense

are consistent with those cited by lower courts in prior decisions as immunizing employers from liability for a supervisor-created sexually hostile work environment which includes unfulfilled threats. *See, e.g., Gary v. Long*, 59 F.3d 1391, cert. denied, 516 U.S. 1011 (1995). Based on these sources and our experience, and while each employer's sexual harassment policy and complaint procedure should be tailored to take into account each company's particular structure and culture, we recommend consideration of the following elements in drafting and implementing an effective sexual harassment policy:

1. A company should maintain a written sexual harassment policy as a separate, stated part of its non-discrimination policy. That policy should begin with a clear statement from senior management of the company's philosophy against sexual harassment.

2. The policy should be distributed to all employees in a reasonable manner, consistent with the method utilized by the employer for disseminating other important personnel policies, *e.g.*, in employee handbooks, newsletters, postings and collective bargaining contract booklets. For example, it is advisable to distribute and discuss the policy in orientation materials for new employees.

3. The policy should define sexual harassment for employees. While the definitions espoused in the EEOC Guidelines are satisfactory for this purpose, an employer may wish to consider also providing employees with a non-exclusive list of examples of behavior constituting verbal and physical sexual harassment. Indeed, the policy statement should provide examples of various levels (in terms of severity) of sexual harassment (*e.g.*, jokes, innuendos, offensive touching, physical assault) to dispel the common misunderstanding that harassing conduct needs to be physical in order to be inappropriate.

4. The policy must provide alternative avenues of complaint that allow the complaining employee to bypass her/his direct supervisor, who is more likely than not to be the alleged harasser. This component provides a complainant with the assurance that her/his complaint will be investigated by trained individuals who can exercise independent judgment and act in a manner that is free from inappropriate pressure from senior managers within the complainant's organization. In addition, in implementing a sexual harassment policy, an employer should provide sexual harassment prevention and investigation training to employees likely to be handling sexual harassment complaints. Indeed, it is becoming increasingly prudent to provide sexual harassment prevention training to all employees, and, in fact, such training is specifically required by some state and local laws.[7]

[7] *See, e.g.*, Conn. Gen. Stat. § 46a-54(15)(A)(1992).

5. It is recommended that the company maintain a confidential file of past complaints and incidents of sexual harassment and corrective action taken. The recent seven million dollar verdict against Baker & McKenzie illustrates the risk an employer faces by failing to implement a mechanism for documenting sexual harassment complaints, and the resolution of these complaints, on an ongoing basis. Indeed, a factor in the jury verdict against Baker & McKenzie was the fact that managing partners in several of the firm's offices failed to communicate with one another about prior complaints concerning their accused partner's allegedly harassing conduct. Maintaining a set of confidential files of sexual harassment complaints and corrective action enables senior managers to monitor the workplace environment and to administer corrective action on a fair and consistent basis.

6. The published sexual harassment policy should include a description of the procedures followed in response to receipt of sexual harassment complaints, including guidelines for investigations. In addition, a statement that sexual harassment investigations will be conducted on a confidential basis to the extent possible in light of the employer's affirmative obligation to maintain a harassment-free workplace, and a guarantee that participants in the investigation will not be retaliated against for submitting a sexual harassment complaint, should be an express part of a company's sexual harassment policy.

7. The policy should contain a statement that corrective action will be taken when an investigation warrants it. While it is unlikely that a policy will be deemed to be ineffective because the policy includes only a boilerplate statement of corrective action—*e.g.*, that anyone who violates the policy will be subject to discipline, up to and including termination, an employer may wish to consider including a broader schedule of corrective action in its policy to demonstrate that corrective action is taken on a fair and consistent basis in proportion to the level of harassment discovered through the employer's investigation. This is recommended not only to assure all staff of fair treatment in the process, but also because potential complainants may not come forward at an early stage if they believe that every event and type of harassment must result in "capital punishment."

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